Varsani v Pindoria; Patel (Interested Party) (Commercial Appeal E211 of 2023) [2024] KEHC 8587 (KLR) (Commercial and Tax) (8 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8587 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E211 OF 2023

DKN MAGARE, J

JULY 8, 2024

BETWEEN

RAVJI JADVA VARSANI ..... APPELLANT

AND

NARAN S. PINDORIA ..... RESPONDENT

AND

KURJI LALJI PATEL ..... INTERESTED PARTY

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. Hosea Mwangi Nganga, PM dated 15/8/2021 arising from Milimani COMMSU No. E1133 of 2021.

2. The memorandum of appeal, however, is a classical study on how not to write a Memorandum of Appeal. The Appellant filed a prolixious 8-paragraph argumentative memorandum of appeal filed on 4th April 2023. The grounds are argumentative, unseemly and do not please the eye.

3. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as doth: -

> " 1. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or

order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

4. The Court of Appeal had this to say in regard to rule 86 (which is pari mateira with order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

5. In Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR , the court of appeal observed that : -

> "Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

6. The memorandum of appeal raises only one issue, that is: -

   a. Whether the finding of the learned magistrate was supported by evidence.

7. The Respondent instituted Commercial Suit No. E1133 of 2021 seeking judgement for Kshs. 1,930,000/- with interest at commercial rates.

8. The claim was instituted vide the Plaint dated 16/8/2021 in which it was pleaded that the defendant approached the plaintiff for a loan facility of Kshs. 1,930,000 which plaintiff extended to the defendant.

9. It was a term of the oral agreement that the loan would be repaid within 2 months. The Respondent was also to charge interest at the prevailing commercial rates.

10. The plaintiff remitted Kshs. 980,000/- and Kshs. 950,000/- vide respective cheques dated 6/4/2017 and 7/4/2017. The defendant however declined to pay back the amount.

11. The Appellant filed defence dated 29/9/2021 denying the claim.

12. During trial, the Respondent relied on his witness statement and documents filed in court and testified that the Appellant had duly received the loan but declined to repay as agreed.

13. On his part, the Interested Party reiterated his witness statement dated 21/8/21 and testified that he was aware the plaintiff advanced the loan of Kshs. 1,930,000/- but the defendant had failed to pay back.

14. The defendant relied on his witness statement dated 12/5/2023. It was his case that he never borrowed the alleged loan amount or at all from the plaintiff.

Submissions

15. The Plaintiff filed submissions dated 10/1/2024. It was submitted that the learned magistrate erred in law and fact by ignoring the evidence presented by the Appellant before court on whether the Respondent had a loan contract with the Appellant. They relied on Section 107 of the *Evidence Act* to submit that whoever alleges must prove.

16. It was further submitted for the Appellant that the lower court took upon itself to rewrite the contract and which was improper. Reliance was placed on the case of National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR where the Court of Appeal at page 507 stated as follows:-

    A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.

17. It was also submitted that the electronic evidence produced by the Respondent and the Interested Party did not meet the threshold in Section 78A (1), 106A as read with 106B of the *Evidence Act*. They also cited Jackline Vusevya Selenge v Olivier Guiguemde (2021) eKLR. They urged me to allow the Appeal.

18. The Respondent filed submissions dated 15/2/2024. It was submitted that the Appellant failed to avail evidence in terms of the quotation, invoices or payment receipts and relied on Sections 109 and 112 of the *Evidence Act*.

19. It was further submitted in this regard that the Appellant failed to discharge the burden of proof. They cited Mbuthia Macharia v Ann Mutua & Another (2017) eKLR.

20. On this it was submitted that there was no requirement that contracts must be in writing. They relied on Abdulkadir Shariff Abdurahim & Another v Shariff Mohammed (2014) eKLR. I was urged to dismiss the appeal.

Analysis

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

22. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

23. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

24. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

25. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

26. I now proceed to establish whether the Respondent was entitled to the reliefs awarded. In David Bagine v Martin Bundi [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in Bonham Carter v Hyde Park Hotel Limited (1948) 64 TLR 177), where he that:

> [The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it.
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> in Attorney General of Jamaica v Clerke (Tanya) (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

27. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

28. Therefore, it follows that the 1st Respondent herein had the duty to prove his claim against the Appellant and the 2nd Respondent. Courts have belaboured the burden and standard of proof in civil cases which I find necessary to lay down as below.

29. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

30. It follows that the initial burden of proof lies on the plaintiff, but the same may shift to the defendant, depending on the circumstances of the case. This was the position in Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

31. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

32. Similarly, Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

33. Furthermore in Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
>
> This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."

34. It is common ground that the Appellant did not dispute that he received the amount of Kshs. 1,930,000/- from the Respondent. What the Appellant disputed was whether the amount was as a result of the loan facility or for carrying out some unknown clandestine activities at the respondent's unknown land.

35. Having admitted the receipt of the amount, it was incumbent upon the appellant to prove the allegation that the amount was not received pursuant to a loan facility. The appellant failed to do so. This was money he had received.

36. The allegation that the amount was in pursuance of the Respondent's instruction to the Appellant to evict an individual from land premises was not supported. It is the duty of the party pleading to have its case done and evidence gathered. What the appellant used the money for is within his special knowledge. The duty to prove that he had another purpose than to refund was not discharged.

37. In Samuel Kamau Macharia Vs Kenya Commercial Bank Limited [2003] eKLR, Justice R. Kuloba stated as follows: -

> " Forming the foundation of quasi-contractual claims, such as actions for money had and received, and for money paid to a third party from which the defendant has derived a benefit, and equitable relief from undue influence and catching bargains, amongst other restitutionary claims, the idea of unjust enrichment or unjust benefit is intended to prevent a person from retaining money or some benefit derived from another which it is against conscience that he should keep it, and he should, in justice, restore it to the plaintiff. The gist is that a defendant, upon the circumstances of the case is obliged by the ties of natural justice and equity to make restitution. As Lord Goff of Chivalry and Professor Gareth Jones state in their monumental treatise, The Law of Restitution , 5th edn (1998), at pp 11-12:
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> "Most mature systems of law have found it necessary to provide, outside the fields of contract and civil wrongs, for the restoration of benefits on grounds of unjust enrichment."

38. This statement is founded on the observation of Lord Wright in the English case of Fibrosa Spolka Akeyjna v Fairbairn Lawson Combe Barbour Ltd, [1943] AC 32, at p 61 where he said:

> " It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust e nrichment or unjust benefit ..... Such remedies ..... are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi - contract or restitution."

39. And, indeed, as a remedy attracting wrong, unjust enrichment was well-known in our courts fairly early. Thus, as far back as 1957, we see it spoken of by the then Court of Appeal for Eastern Africa comprising of Judges of eminence, namely, Sir Newnham Worley, P, Sir Ronald Sinclair, V-P, and

Briggs, J A, in the case of Saleh bin Ghaleb v Hussein al Qu'aiti , [1957] EA 55, at p 73, where one finds this passage, vis,

> " so far as the allowances are concerned, this was a clear case of unjust enrichment" leading to a suffering of wrongful loss of which equity would provide a remedy."

40. The issuance of cheques and encashment of the same which is evidenced by bank statements is bound to be explained. Failure to explain must attract an adverse inference. In Kinji Ltd & Another v Kogo & Another [1992] eKLR, Omolo, J stated as hereunder: -

> " the position taken in the defence is correct, then the 1st Defendant was duty bound to explain why they refunded the money to the 2nd Defendant. There is absolutely no attempt at such an explanation. I am satisfied that the 1st Defendant is obviously lying on these points. There would be no reason why the 2nd Defendant would issue a cheque if he received cash from the 1st Defendant, the natural thing for the 2nd Defendant to have done would be to issue a receipt. Counsel who appeared on behalf of the 1st Defendant found it hard to support the position taken by the 1st Defendant. I am certain she was right.I have no doubt that the 1st Defendant owes the Plaintiffs Shs.542,552/= as claimed in plaint, and that the 1st Defendant has no valid defence to the claim."

41. Further in Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

> " Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
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> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

42. I also note that the dispute was on a liquidated claim of Kshs. 1,930,000/-. In such claims, there must be a cogent defence. It is either the debt was never due or it is paid. The court is thus not involved in evidence gathering. This is in line with the court of Appeal case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and Rule 14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible",
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> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then

the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

43. The role of the court in fact finding in adversarial system is severely limited to what parties bring before the court. Indeed Order 2 Rule 4 (1), tells defendants what to do when there are issues of payment or satisfaction. It states: -

> " 4. Matters which must be specifically pleaded
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
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> (a) which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.

44. Consequently, the lower court correctly held that the Respondent proved his case to the required standard.

45. There are no parameters upon which the Appellant's case can be anchored. The purported purpose is not in writing. There is no evidence of part or full performance of the eviction. It is not clear on which basis the eviction was to be carried out from the unknown land, using unknown orders by a person who has no capacity to plead on behalf of the Respondent.

13. The appeal is thus not merited and is accordingly dismissed. The Appellant has no reason not to pay costs. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging

consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

46. The appeal is dismissed with costs of Kshs. 125,000/=

Determination

47. The upshot of the foregoing is that I make the following orders: -

    a. The Appeal is dismissed in limine for lack of merit.

    b. The Respondent will have the costs of the appeal assessed at Kshs. 125,000/=.

    c. The amount deposited as security of Kshs. 1,000,000/= in A/C No. 1321516142 at KCB Ltd be released to Ms. Maranga Nyang'ute & Co. Advocates.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Appellant

Maranga for the Respondent

Court Assistant – Jedidah