Mburu v Services (Civil Appeal E254 of 2023)
[2024] KEHC 12945 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12945 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E254 OF 2023

SM MOHOCHI, J

OCTOBER 25, 2024

BETWEEN

MARY MUTHONI MBURU ..... APPELLANT

AND

SAMSON OCHIENG OPAP T/A BOMBA SERVOPAP T/A BOMBA SERVICESICES ..... RESPONDENT

(Being an Appeal from the judgment of the Hon Edward Oboge dated 17th August 2023 in SMCCOM/E431/2023)

JUDGMENT

Introduction

1. The Appellant was the Claimant in Nakuru Chief Magistrate's Court Small Claims Case E431of 2024 Mary Muthoni Mburu Vs Samson Ochieng Opap T/A Bomba Services. The Appellant brought the initial suit, as a suit of breach of a loan contract with a resultant loss and damage of loss/damage of Kshs. 728,000/- and special damages of Kshs 198,139/-.

2. By judgment of the trial court dated 17th August, 2023, the entire claim was dismissed for want of merit.

The Appeal

3. The Appellant being aggrieved by the findings of the trial court filed this Appeal vide his memorandum of appeal dated and filed on 12th September, 2023, the Appellant impugned the trial court's decision on the following Seven (7) grounds:

    i. That the learned magistrate erred in fact and law, in finding the claimant did not prove her case on a balance of probability.

ii. The learned magistrate erred in law and fact, by failing to consider the Respondent's partial admissions to the claim of Ksh.300,000/-.

iii. That, the learned magistrate erred in law, by failing to consider and determine the issue of specific damages.

iv. That, the learned magistrate erred in law and fact, by finding that the Claimant did not plead and concealed the repudiated agreement dated 22nd October 2021.

v. That, the learned magistrate, erred in law by failing to consider the all evidence and testimonies of all parties.

vi. The learned magistrate erred in law and in fact in considering irrelevant matter and failing to consider relevant matters while making a decision as to whether or not the claimant was owed money.

vii. The trial Magistrate erred in law and fact. in dismissing the claim purely on technicalities contrary to the provisions of 159 (d) of *the Constitution*, 2010.

viii. The learned magistrate erred in law and fact. making a biased finding in favour of respondents' testimony without any valid reason.

4. In light of the foregoing, the Appellant prayed that the Appeal be allowed by order setting aside the Learned Adjudicator's Judgment and Decree dated 17th August 2023 and allowing the claim. He also prayed for costs of the appeal.

Hearing of Appeal

5. The appeal was disposed of by way of written submissions. The Appellant's submissions dated and filed on 12th June, 2024 lay a background abridgment of the facts at trial to argue that, based on the evidence adduced before the trial court, the only inescapable conclusion that ought to have been arrived at was a finding that the Appellant did prove her case on a balance of probability and that the Claim ought to have been allowed.

6. This court is alive of its duty as the 1st Appellate Court, 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.

Appellants Case

7. The Appellant averred before the learned adjudicator that, in the year 2019 he entered into a joint agreement with the Respondent to purchase motor vehicle registration number KCX 415N for Kshs 550,000/-where she paid Kshs 300,000/- which was to earn interest of Kshs 50,000/-. That the Respondent paid the balance and upon the purchase of the said motor vehicle, parties executed a lease agreement that would earn the claimant Kshs 18,000/-monthly.

8. The Appellant joined issue with the fact that, despite jointly purchasing the motor vehicle the same was registered in the name of the Respondent alone. She also alleged that the said motor vehicle was involved in an accident while in the possession of the Respondent which caused her Kshs 160,000/- in repairs Further, she averred that the Respondent never remitted her monthly remittance of Kshs 18,000/-as dictated by the contract.

9. It was the Appellant's testimony that she paid for the Insurance of the subject motor vehicle and also the car tracking which she sought to recover from the Respondent. During her testimony she adopted her undated witness statement. She also produced her bundle of documents dated 30th May, 2023. She prayed that, the court assists her recover a total of Kshs 728.000/-.

Appellants Submissions on Appeal

10. That, the Appellant humbly submit that, the trial court failed to analyze the facts of the case relating to the agreements that bound the parties, the pleadings and testimonies of the parties, applied the wrong principles and inevitably arrived at a decision that was not supported by the evidence from the parties.

11. That, the pleadings of the parties reveal that they entered into 3 agreements. The first agreement related to the purchase of the suit motor vehicle at a price of Ksh.550,000/-where the parties agreed that the Appellant would contribute Ksh.300,000/- and the Respondent would contribute the balance of 250,000/-. It was a joint asset that was to be registered in their joint names.

12. That, the second agreement is a lease agreement between the parties where the Appellant leased the vehicle to the Respondent through his business Bomba Services at a lease premium of Ksh. 18,000/- per month, while the Respondent would draw Kshs. 12,000/- per month until the parties recouped their initial investment particularized in the first agreement (see page 43-45 of the Record).

13. That, the third agreement is dated 22nd October 2022. The Respondent, after wasting the motor vehicle by taking a loan with Sumac Micro-Credit and failing to pay the loan leading to the vehicle being auctioned, in the said agreement admitted to part debt of Kah.300,000/- and undertook to make partial payments, which he failed to honor see page 46 of the Record).

14. That, the Appellant through the oral and documentary evidence proved that the Respondent not only fraudulently failed to register the motor vehicle in their joint names as agreed, but he also failed to pay the agreed lease premiums for 21 months the vehicle was in operation as a taxi, he also caused an accident to which the claimant suffered costs of repairs, and that without her consent took a loan and defaulted leading to the loss of the motor vehicle. She also proved that the Respondent did not honor the agreement to make partial payments in the agreement dated 22nd October 2022.

15. That, the Respondent's case corroborates the Appellant's case to the extent that he owed some money, which according to him was Ksh.300,000 less part payments which is his own assessment amounted to Kah.262,000/-which he did not dispute owing, but which evidence the trial court disregarded without justification (See the Respondent's statement at para 11 and 13 on Page 57 and 58 of the Record).

16. That, the despite the clear admission of part of the debt, the trial court departed from the pleadings filed and testimonies given to focus on whether the amount was a loan, failing to address the real dispute between the parties entirely.

17. As to Whether the Magistrate erred in law and fact in dismissing the claim purely on technicalities contrary to the provisions of 159 (d) of *the Constitution*, 2010 (Ground 7 of the Memorandum of Appeal).

18. That, on the reliance of the trial court on technicalities that limited the direction of pleadings leading to a decision that was not supported by the evidence on record, the Appellant relies on the case of James Mangeli Musco v Ezeetec Limited [2014] eKLR which defines technicalities as follows:

> "...A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to

technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing determination or conclusion of the issues in dispute."

19. That, this is a matter where the court relied on the technicality of the legal principle that "parties are bound by pleadings" to limit the direction of the pleadings to the question of whether the debt was a loan or not.

20. That, the trial court did not determine the real issue of whether the amounts due from the agreements as tabulated in the Statement of Claim were dur, or set off the Respondent's acknowledgment of debt from the pleadings. Instead, the ascertainable and quantifiable; it is in the nature of special damages which must be specifically pleaded and proved.

21. That, in fact, the Appellant did plead special damages of Ksh.198,139/- as particularized under paragraph 13 of the in the Statement of Claim (page 28 of the Record), and proven in evidence of receipts totaling to the said Ksh.198,139/-(pages 48 to 51 of the Record). There was no evidence produced to controvert the evidence of receipts produced. Consequently, we humbly pray for the special damages of Ksh. 198,139/- as pleaded and proven.

22. As to whether the learned magistrate erred in law and fact by finding that the Claimant did not plead and concealed the repudiated agreement dated 22nd October 2021; The Appellant submits that, the learned magistrate erred in law and in fact in considering irrelevant matter and failing to consider relevant matters while making a decision as to whether or not the claimant was owed money (Ground 4 and 6 of the Memorandum of Appeal).

23. That, the trial court in assessing whether any amounts were due from the lease agreement, and how much was owed or paid misdirected itself by making a conclusion that is approbative and reprobative in nature, therefore against the principles of natural.

24. That, Specifically, the decision abandoned the issues of amounts due from the lease agreement, instead it found that the Appellant was being mischievous, since according to the court, "the Appellant drew the attention of the court away from the Agreement dated 22nd October 2021 and did not plead the same", yet in the same breath the court also found that "it was the Appellant who produced the said Agreement in their bundle", and therefore a double-speak and failure to consider relevant matters (See paragraph 23 of the Judgment).

25. That the Appellant in the statement of claim did plead the issue relating to the Agreement dated 22nd October 2021 in paragraph 13 of the statement of claim, produced the same as exhibit 6 and in her written statement and oral testimony. The court's finding that the Appellant concealed any information or fact of the agreement dated 22nd October 2021 is speculative and uncorroborated by the facts on record and unjust (see page 27 and 35 of the Record).

26. That the learned magistrate erred in law, by failing to consider the all evidence and testimonies of all parties; The learned magistrate erred in law and fact making a biased finding in favour of respondents' testimony without any valid reason.

27. That, the learned court did not consider the evidence of the parties or their testimonies that revealed the issues for determination, and instead made a decision that departed from the parties' pleadings, thereby infirm.

28. That, the apparent incoherence of the court proceedings vis a vis the filed pleadings, statements and decision of the court is further indicative of the apparent bias by the court against the Appellant, which undermines the independence of the judiciary.

29. That, there was no legal justification to defeat the Appellant justly accrued debt as pleaded and proven, and supported by evidence emanated from the various agreements binding the parties.

30. The Appellant thus prays that the Appeal is allowed and the impugned judgment be set and that the Respondent bears the cost of the Appeal.

Respondents' Case

31. The Respondent on his part opposed the claim and testified that, he is in the business of taxi and importation of motor vehicles. That in the year 2020 the Appellant approached his firm with instructions to import a car. The car was to cost Kshs 550,000/- where the Appellant was to pay Kshs 250,000/- while he would pay Kshs 300,000/- The agreement was executed and the motor vehicle purchased.

32. That, the said Motor vehicle was to be operated by his firm for a period of 24 months until the recovery of part of the funds he had contributed together with interest of Kshs 50,000/-. He averred that, in their business arrangement the firm was to get a monthly return of Kshs 12,000/- while the claimant was to be paid Kshs 18,000/-

33. That upon the purchase of the motor vehicle, the Appellant took possession of the same and returned it on the 26th January, 2020. It was his averment that, he paid the claimant her monthly return to the tune of Kshs 69,000/- to the Appellants' account number 0151237070500 held at Standard Chartered Bank. He admitted that, the vehicle was involved in an accident and repaired by GA Insurance having been comprehensively insured. That the vehicle was returned to them on the 12th April, 2021 as such the Appellant wasnot entitled to any monthly returns during the period the vehicle was being repaired.

34. He further stated that upon repair, the motor vehicle was taken by the Appellant during which period she was not entitled to any returns. That later the said motor vehicle was repossessed by Sumac Micro Finance and as a result he entered into an agreement to refund the claimant her contribution of Kshs 300,000/-. That he has already paid the Appellant Kshs 38,000/- To secure the balance of Kshs 262,000/-, he handed over his title to land parcel number KJD/Loodariak/28985. He adopted his witness statement and further produced his bundle of documents as evidence. He prays that the claim be dismissed with costs.

Respondent's Submissions on Appeal

35. The Respondent submits on the issue as to Whether there was a Breach of Contract, that the Appellant denied the amount pleaded having been a loan. The document upon which the claim was premised is a vehicle lease agreement dated 13th January, 2020. Thus, the Learned Adjudicator held that, the claimant failed to establish the burden of proof and incidence burden.

36. The Appellant failed to present sufficient evidence to the lower court on the existence of the of the alleged contract entered between the Appellant and the Respondent on a loan of Ksh. 728,000 thus there is no legal basis to conclude that the Respondent owes the Appellant the amount in question. Reference is made to the Case of Kenya Commercial Bank Ltd v. Kenya Alliance Insurance Co. Ltd [2003] 1 EA 385. In this case, the court emphasized the importance of the burden of proof in civil cases, stating that the party making a claim must provide sufficient evidence to prove the claim on a balance of probabilities.

37. That, three key principles were key in this case that we wish to put forward in support of the Honorable Magistrate from the lower court: The Respondent urges that the court be guided by the three principles of:

    i. First, Burden of proof the burden of proof lies with Appellant which burden has not been met.

    ii. Secondly, Balance of probability, in civil cases, such as this one, the standard of proof is on a balance of probabilities. This means that the Appellant must prove their claim is more likely than not to be true. And

    iii. Lastly, Insufficiency of Evidence, the Appellant failed to provide sufficient evidence to meet the burden of proof. Without clear and convincing evidence of the alleged loan, there is no clear evidence to hold the respondent liable.

38. That, as is evidenced by the Loan Repayment Agreement (Exhibit 79) dated 7th January, 2020 and signed by the Appellant on 13th January, 2020 and stamped by the Respondent on the same date. The Appellant promised to pay back within 25 Months of equal continuous monthly instalments of Ksh. 12,000 each on the 10th Day of each month to Bomba Services Ksh. 300,000 which comprised of a loan of Ksh.250,000 and an Annual Interest Rate of Ksh.50,000.

39. That the adjudicator further held that: The initial agreement dated 13 January, 2020 was voided by the agreement dated 22nd October, 2021.

40. The Respondent seeks to support the Learned Adjudicator's view that, the initial agreement had been voided by the subsequent agreement entered into by both parties. The initial agreement between the Appellant and the Respondent whereby the Respondent was to pay A Ksh. 18,000 per month for 24 months, was effectively voided by the subsequent agreement entered into by both parties on 22nd October, 2021. That, the second agreement dated 22nd October, 2021 superseded and replaced the terms of the initial agreement, dated 13th January, 2020 rendering it null and void.

41. That, on 22nd October, 2021 the Appellant and the Respondent entered in an arrangement whereby the Respondent was to repay the Appellant her contribution totaling to Ksh. 300,000, which constituted a new contractual arrangement that replaced the previous agreement. By making subsequent payments in accordance with the terms of the second agreement, the Respondent fulfilled their obligations under the new agreement, thereby fulfilling their legal obligations to the Appellant.

42. The court is urged to be guided by the principle of novation, which is a legal concept that involves the substitution of a new contract for an existing one.

43. Reference is made to the case of Kenya General Assarunce Society Lad V Africa Seed Ca. Lal (1978) EA 319. Where the court held that where parties to a consent agree to a new arrangement that supersedes and replaces the terms of the original contract, the original contract is said to have been voided or discharged by mutual agreement. The Respondent wish to highlight the following principles from this case, the principle of Novation: The subsequent agreement between the Appellant and the Respondent constituted novation, whereby the original agreement was replaced by a new contract with different terms. Also, the case outlined the principle of discharge by mutual agreement that the original agreement was voided or discharged by mutual agreement between the parties, as evidenced by their entry into a subsequent agreement with different temps.

44. Thirdly, fulfillment of obligation the Respondent fulfilled their obligation under the subsequent agreement by making payments in accordance with its terms thereby extinguishing any remaining obligations under the initial agreement as in the present case. Further, your Honor the Appellant is

on record during the bearing before Hon. Emily Jerop while under oath she swore that she was the one in possession of the motor vehicle between 12th April, 2021 and 6th August 2021 as evidenced on exhibit 57.

45. That the Appellant failed to plead a filed document in court. The learned Adjudicator Held that:

> " that is a sign of mischief of the Appellant to draw the courts attention from the agreement which had the effect of voiding the said agreement. Your Honor, the Appellant deliberate failure to plead a filed document in court is indicative of an attempt to mislead the court and divert attention away from the existence and terms of the agreement that had the effect of voiding the disputed agreement".

46. The Respondent contends that, such behavior amounts to misconduct and undermines the integrity of the legal process, by intentionally withholding relevant information or documents from the court, the Appellant actions demonstrate a lack of clean hands and may warrant judicial scrutiny and skepticism regarding the validity of their claim. reference is made to the case of Republic v Mbaika [1982] KLR, where the court held that;

> " parties seeking relief from the court must approach it with clean hands and must not engage in any misconduct or fraudulent behavior that undermines the administration of justice".

47. That, the Appellant deliberate failure to plead a filed document in court constitutes misconduct and violates the clean hands doctrine, which requires parties to approach the court with honesty, integrity, and good faith. The Respondent expounded the following principles highlighted in the case:

    a. Misleading the Court: The Appellant actions are indicative of an attempt to mislead the court and divert attention away from the relevant evidence that would support the Respondents defense. Integrity of the Legal Process: It is of importance to both parties to uphold the integrity of the legal process and ensuring that parties act in accordance with ethical and legal standards when presenting their case before the court. The Respondent thus support the Learned Adjudicator 's view that the Appellant deliberate failure to plead a filed document in court is a sign of mischief and may warrant skepticism regarding the validity of their claim.

    b. Mere Denial Is Not A Defense; That, the Appellant merely denied being Mary Mburu as indicated in the Respondents' account Statement. She also denied being the owner of the phone number +254725656129.The Appellant denial of receiving monthly returns, despite evidence through a bank statement, and denying being Mary Mburu as indicated in the Respondents' account statements, are insufficient to refute the evidence presented against her, the Appellant has not met this burden and therefore has not provided convincing evidence to counter the evidence presented by the Respondent. In the case of Republic v Karunja 2006] KLR the court held that, a mere denial by a defendant, without supporting evidence, is insufficient to refute the plaintiff's claim. In this case, the court emphasized the importance of providing substantive evidence to support one's defense in legal proceedings. Your Honor, from this case law we wish to highlight the following principles: Burden of Proof: Burden of proof lies with the Appellant to provide credible evidence to support her denial of receiving monthly returns and her denial of being Mary Mburu as indicated in the Respondents' account statements.

    c. Insufficiency of Denial: That the Appellant denial without any substantive evidence or explanation, is insufficient to refute the evidence presented against her. Mere denial is not a valid defense in legal proceedings.

d. Requirement for Substantive Evidence: The Appellant failed to provide to the lower court substantive evidence to support her defense but merely denied receiving the monies thus failure to provide such evidence before the Learned Adjudicator undermined her defense and strengthened the Respondents case. Your honor, I thus support the Learned Adjudicator 's judgment that a mere denial is not a defense in legal proceedings and that the Appellant has not provided sufficient evidence to refute the claims made against her. That, the Appellant confirmed receiving the monies through a text message dated 6th April 2022confirming that as on 28th April 2022 the amount in arrears as per the agreement dated 22nd October,2021 was Ksh.42,000.

48. That the Learned Adjudicator refused to award Damages for a Contract that had been voided by another agreement dated 22nd October,2621 duly executed by the claimant with a clear repayment plan.

49. That, the insurance company's repair of the motor vehicle following the accident discharged any obligations arising from the partnership agreement regarding the vehicle's repair or replacement. Additionally, the Appellant acceptance of the repaired vehicle through her appointed proxy whom she referred to as 0704923160 Jazz (Exhibit 69) in her text message she sent to pick the motor vehicle further demonstrates that any potential breach of contract has been remedied.

50. That, the principle of accord and satisfaction as established in the case of Equity Bank Limited v Central Bank of Kenya& 5 others (2019) eKLR. the court affirmed the principle that an accord and satisfaction arises when parties agree on a resolution to a dispute, thereby extinguishing any further claims related to the same matter. The Respondent prays that this honorable court adopt the other two principles highlighted in this case law that include; Acceptance of Repaired Motor Vehicle: the Appellant acceptance of the repaired motor vehicle, handed over by the Respondent, constitutes a waiver of any claim for damages arising from the Respondents alleged breach of contract., Secondly, the principles of Fulfillment of Contractual Obligations holds that the insurance company's comprehensive coverage of the motor vehicle and subsequent repair fulfilled any contractual obligations between the Appellant and the Respondent regarding the vehicle's maintenance or repair in the event of an accident. The Insurance policy effectively transferred the responsibility for repairing the vehicle to the insurance company, absolving both the Appellant and the Respondent of any further obligations in this regard. The Respondent thus support the Adjudicator's decision to refuse to award damages to the Appellant for the Respondents alleged breach of contract.

51. The Respondent thus urges the Court to uphold the previous judgment rendered by the lower court as it accurately and justly applied the law to the facts presented, and the reasoning therein is sound and legally defensible.

Analysis and Determination

52. It follows that the general rule is that, the initial burden of proof lies on the plaintiff, the Respondent in this appeal, but the same may shift to the Appellant in this appeal depending on the circumstances of the case.

53. It is imperative at this early time to point out that parties are bound by their pleadings in this instance the Appellant was bound by her Statement of Claim dated 30th May 2023. Evidence that is the Appellant and Respondent entered into joint agreement to purchase a motor vehicle KCN 415N for Kshs 550,000/- of which the Appellant contributed Kshs 300,000 which was to earn interest of Kshs 50,000. The Balance on the consideration was paid through a loan obtained by the Respondent from a third party and upon acquisition of the asset the parties further went into a car lease agreement for 24

months which arrangement ran into headwinds when the car was involved in an accident and grounded and subsequently repossessed by a third party.

54. Parties must plead their case before proceeding to proof them. In Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth:

> " It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must align with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> ".....it is now(settled) principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

55. In Raila Amolo Odinga & Another vs IEBC & 2 Others (2017) eKLR the court said: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."

56. See also David Sironga Ole Tukai v Francis Arap Muge & 2 Others (20140eKLR: -

> " In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the at the trial as each knows the other's case is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expediate the litigation through diminution of delay and expense.
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> the court, on its part, is itself bound by the pleadings of the parties. the duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or

defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

57. In the Case of *Ndishu & another v Muriungi (Civil Appeal 3 of 2020)* [2022] KEHC 2 (KLR) (21 January 2022) (Judgment) Mativo J had an occasion to consider the import of and effect of pleadings as follows;

> " The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness), and, further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action. A pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.
>
> It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made".

58. To determine the exercise of discretion the court will consider the pleaded claim, the evidence presented, and relevant authorities. A cursory look at the Record of Appeal dated 4th September 2023 reveals that, the Appellant was unable to prove there was existence of outstanding loan of Kshs 728,000/-, breach of contract with resultant loss/damage of Kshs 728,000 and outstanding loan of Kshs 728,000/-

59. This aspect of pleadings was addressed by a Tanzanian court in the case of Salim Said Mtomekela Versus Mohamed Abdallah Mohamed, Dar-Es-Salaam Court of Appeal Civil Appeal No. 149 Of 2019 (Mugasha. J.A. Kihwelq. J.A. Rumanyika. J.A p where it was held as doth: -

> " Pleading in law means, written presentation by a litigant in a law suit setting forth the facts upon which he/she claims legal relief or challenges the claims of his opponent. It includes claims and counterclaim but not the evidence by which the litigant intends to prove his case ... That said, since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored. See Barclays Bank (Ltd) Vs Jacob Muro, Civil Appeal No. 357 of 2018 [where] the Court cited with approval a passage in an article by Sir Jack I.H. Jacob bearing the title,
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> "The Present Importance of Pleadings", first published in Current Legal Problems (1960) at p. 174 whereby the author among other things said: "As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he as to meet and cannot be taken by surprise at the trial. The court itself is as well bound by the pleadings of the parties as they are themselves.

It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings..."

60. Furthermore, in the case of Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182, the Court held that:

> " Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."

61. The Matter in controversy between the Appellant and the Respondent before the Adjudicator and that the Applicant had the opportunity to amend her statement of claim to include any un-pleaded issue(s).

62. I find and hold that upon conclusion of the matter the Learned Adjudicator exercised his discretion judiciously and rightfully found as follows:

    i. The Appellant was unable to prove there was outstanding loan of Kshs 728,000/-

    ii. The Appellant was unable to prove breach of contract with resultant loss/damage of Kshs 728,000/-

    iii. The Appellant was unable to prove Special damages of Kshs 198,139/-.

63. This court is unable to be drawn on Appeal in further re-litigation between the parties on issues or aspects with regards to their relationship(s) and the import of the contracts/agreements entered into between them.

64. Consequently, this court makes the following orders:

    i. The Appeal is disallowed for want of merit and is dismissed.

    ii. The judgment of the trial court dated 17th August 2023 be and is hereby confirmed and upheld.

    iii. The Respondent shall have costs of the Appeal and those at Trial Court;

    It is So Ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 25TH DAY OF OCTOBER 2024.

MOHOCHI S.M.

JUDGE.