



REPUBLIC OF KENYA



KENYA LAW
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**Njuguna v Nation Media Group Limited (Civil Appeal 37 of 2022)
[2023] KEHC 2226 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 37 OF 2022
LM NJUGUNA, J
MARCH 15, 2023**

BETWEEN

WINNIE KARIMI NJUGUNA APPELLANT

AND

THE NATION MEDIA GROUP LIMITED RESPONDENT

JUDGMENT

1. The appellant herein being aggrieved by the decision of the lower court filed an appeal vide a memorandum of appeal dated July 14, 2022 setting out the grounds as enumerated on the face of the memorandum.
2. The appellant prayed that the appeal be allowed and the order of the Learned Senior Principal Magistrate dated July 12, 2022 be set aside.
3. The court directed that the appeal be canvassed by way of written submissions but the parties failed to comply with the said directions.
4. It is now well settled that the role of this court, as a first appellate court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano v Associated Motor Boat Co Ltd* [1968] EA 123). However, this court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings {See *Mwanasokoni v Kenya Bus Service Ltd* [1982-88] 1 KAR 278 and *Kiruga v Kiruga & another* [1988] KLR 348)}. In the re-evaluation of the trial court's evidence, there is no set format to which this court ought to conform to, but the evaluation should be done depending on the circumstances of each case and the style used by the first appellate court and that what matters in the analysis is the substance and not its length. [See Supreme Court of Uganda's decision in *Uganda Breweries Ltd v Uganda Railways*



Corporation [2002] 2 EA 634 and Odongo and another v Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR)].

5. I have definitely analyzed the grounds of appeal herein, and the arguments advanced by the parties before the trial court and it is my considered view that the main issue for determination is whether the appeal herein has merits.
6. Order 11 rule 3(1) (a) of the Civil Procedure Rules provides that with a view to furthering expeditious disposal of cases and case management, the court is required to convene a case conference to, among other things, consider compliance with order 3 rule 2 and order 7 rule 5 of the Civil Procedure Rules.
7. From the record herein, when the matter came up for pretrial, the appellant confirmed that she had complied and that the defence required 30 days to comply and that the appellant had no objection to the same.
8. It is trite that the appellant ought to have filed all her witnesses statements together with her plaint and in failing to do so, she went against the Oxygen Principles which call for efficient, timely and cost effective disposal of suits. It has, however, not been shown that the appellant's failure to comply with the rules was deliberate and/or was motivated by bad faith. Consequently, the appellant's failure to comply with the rules on time should not bar her from having her case heard and determined on merits. [Article 50 of the Constitution].
9. This position finds support in the case of CMC Holdings Ltd v James Mumo Nzioki Civil Appeal No 329 of 2001 [2004] eKLR where the Court of Appeal held;

“It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle... the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned magistrate did here. In our view, in doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

10. Similarly, Apaloo, JA in the case of Philip Keipto Chemwolo & another v Augustine Kubende Civil Appeal 103 of 1984 [1986] eKLR held;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

11. The trial court was required to balance the respondent's right to timely disposal of the appellant' suit against her right to be heard. In civil trials the spirit of pretrial disclosure is captured in order 7 of the Civil Procedure Rules.
12. The court, in Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR, had the following to say on article 50 with respect to fair trial principles in civil cases:

“While the wording of article 50 of the Constitution on the right to a fair hearing *prima facie* seems to focus on criminal trials it's not lost that fair trial in civil cases includes: the right of



access to a court, the right to be heard by a competent, independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time.”

13. The court went on to say:

“... it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.

Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their counsels during pretrial or in the course of trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing....”

14. That notwithstanding, costs could have adequately compensated the respondent for any prejudice he may have suffered. He would also have had the opportunity to challenge the evidence tendered by the appellant as held in the persuasive case of *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong’ Parish & another* [2019] eKLR where the court expressed itself thus;

“It seems to me that a reading of the above cases the principles elaborated upon is that the discretion of the court is not fettered on admission of additional evidence after the trial has commenced and the plaintiff case has been heard fully.

When considering the additional evidence in my view a careful inquiry by the court ought to be made into the nature of the evidence as to its relevance, materiality facts in issue, admissibility and the strength of the evidence sought to be introduced within the trial. Merely because the witness statement was not served during pre-trial conference and discovery period does not prevent the trial court to allow such further additional evidence to be taken on record and allowed to be challenged in accordance with law.”

15. I also concur with the finding of the court in *Chairman, Secretary & Treasurer suing as the officials/on behalf of House of Hope v Wotta – House Limited* [2018] eKLR where it was held;

“Even after the Pre-trial conference, the court has the power to allow the parties to call further witnesses or produce further documents. This power, encapsulated in the provisions of order 18 rule 10 of the Rules and section 146 of the *Evidence Act*, is intended to ensure that each party is afforded a fair trial guaranteed under Article 50 (1) of the *Constitution*. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. What these rules must not do is to become an end in themselves and impede a fair trial and that is why article 159(2) (b) of the *Constitution* provides that justice shall be administered without undue regard to technicalities. The constitutional imperatives are further supplemented by the overriding objective enacted in sections 1A and 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya).

16. In my view, therefore, justice would be better served if the appellant is allowed an opportunity to present her case fully given that the respondent shall also have time to challenge the evidence presented by the appellant.



17. In the premises therefore, I order as follows:
- i. The appeal is hereby allowed.
 - ii. The ruling and order of the trial court dated July 12, 2022 is hereby set aside.
 - iii. The appellant's witness statements are deemed as filed on time and hereby admitted.
 - iv. The matter will be mentioned before the trial court for further directions within 21 days.
18. Each party to bear its own costs of the appeal.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF MARCH, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

