



Charles & another v Company; Feliben International Limited (Interested Party) (Civil Appeal E654 of 2021) [2023] KEHC 18803 (KLR) (Civ) (12 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E654 OF 2021

CW MEOLI, J

JUNE 12, 2023

BETWEEN

NYANGERI NGALA CHARLES 1ST APPELLANT

LEONIDAH KEMUNTO ONDIEKI 2ND APPELLANT

AND

SIMKA TRADING COMPANY RESPONDENT

AND

FELIBEN INTERNATIONAL LIMITED INTERESTED PARTY

(Being an appeal from the judgment of J. Omollo (Adjudicator) Small Claims Court delivered on 14th September 2021 in Nairobi Milimani SCCC No. 288 of 2021)

JUDGMENT

1. This appeal emanates from the judgment delivered on 14.09.2021 in Nairobi Milimani SCCC No. 288 of 2021 (hereafter the lower court claim).
2. It is useful at the outset to set out some pertinent matters relating to the parties herein. Anna Wangui Kamau and John Mburu (being the current directors of the Interested Party) moved this court vide a motion dated 03.02.2023 seeking that pending hearing and determination of the appeal Nyangeri Ngala Charles and Leonidah Kemunto Ondieki be enjoined as the proper appellants (hereafter the Appellants) being former directors of Feliben International Limited, hitherto the appellant, and now the Interested Party, sold by the said directors to the said two applicants. On 01.03.2023 this court allowed the latter motion with the effect that Nyangeri Ngala Charles and Leonidah Kemunto Ondieki were enjoined as and/or substituted as the Appellants herein while Feliben International Ltd became an Interested Party.



3. An earlier motion dated 25.01.2023 filed in this court by Simka Trading Company Ltd, the claimant in the lower court (hereinafter the Respondent) regarding monies being proceeds of the sale of the Interested Party deposited in an escrow account was marked as withdrawn.
4. The claim before the Small Claim Court that gave rise to this appeal was commenced by the Respondent by way of a statement of claim dated 11.06.2021, against Appellants (then directors of Feliben International Ltd). The Respondent's claim before the lower court was for judgment in the sum of Kshs 166,500/-. It was averred that the Respondent and Appellants executed an agreement for the shipment and delivery of goods from Jordan; that the agreement was rescinded due to Covid-19 restrictions and the applicable requisite standards prior to inspection of the goods. By that date, the Respondent had allegedly already paid USD 3,500 (Kshs. 388,500.00) to the Appellants who then transferred USD 2,000 (Kshs. 222,000.00) to the supplier in Jordan. Hence the outstanding sum claimed by the Respondent was USD 1,500 (Kshs. 166,500.00) held by the Appellants.
5. The Appellants filed a statement of defence dated 03.08.2021 partly admitting the key averments in the statement of claim but denying that the Respondent was entitled to the sums sought. They averred to willingness to pay the Respondent USD 670 less attendant costs.
6. The claim proceeded to hearing. In its judgment, the trial court found in favour of the Respondent, entering judgment against the Appellant for the sum of Kshs. 166,500.00 and costs. Aggrieved with the outcome, the Appellants filed an appeal challenging the judgment based on the following grounds:-
 - “ 1. The honorable trial magistrate erred both in law and in fact in making a finding that the Appellants herein was fully liable to pay Kshs. 166,500/- (one hundred and sixty six thousand five hundred) to the Respondent without supportive evidence on record.
 2. The honorable trial magistrate erred both in law and in fact in failing to make a finding that the Appellant incurred a lot of money in making other statutory payments when he was transferring USD 2000 (two thousand Dollars) to the Respondent's agent.
 3. The honorable learned trial magistrate erred in fact and in law in failing to appreciate the fact that the Appellant's main employment was clearing and forwarding and once his services were retained, the Appellant was entitled to remuneration thereof.
 4. The honorable learned trial magistrate erred in law and in fact in arriving at the conclusion that the Appellant had not proved his case by way of documentary evidence when the Appellant clearly demonstrated the same by way of list documents and exhibits which were filed and were on record.” (sic)
7. The appeal was canvassed by way of written submissions. As evidenced by the Appellants' memorandum of appeal, counsel's submissions were riveted on both matters of fact and law. While restating the events leading to the filing of the claim before the Small Claims Court, counsel for the Appellants contended that during trial, the Respondent conceded to having instructed the Appellants to transfer USD 2000 to his agent based in Somalia and that that the transfer attracted bank charges. That the Respondent also agreed to the fact that the parties had executed an agreement for transportation of the goods once they were imported, which term had cost implications.
8. It was therefore argued that the Appellants, having partly fulfilled the contract, were entitled to some payment hence offered to refund USD 650 to the Respondent which sum was urged as reasonable in



final settlement of accounts. Counsel citing the Respondent's evidence at the trial contended that the court erred in law and fact in holding that the Appellants had not made out their case. In conclusion the court was urged to allow the appeal by making an order directing the Appellants to deduct their dues from sums paid by the Respondent and to remit the balance to the Respondent.

9. The Respondent naturally defended the trial court's findings. Counsel restated the events leading to the claim before the Small Claims Court. His view was that all issues canvassed here were effectively and adequately addressed by the trial court and the appeal is frivolous and intended to prevent the Respondent from enjoying the fruits of its judgment. Contemporaneously addressing the Appellants' grounds of appeal, counsel called to aid several decisions including *Jackson Mwabili v Peterson Mateli* [2020] eKLR, *David Bageine v Martin Bundi* [1997] eKLR and *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR.
10. He attacked the Appellants' documentary evidence (IDF form) which he said was prepared after the filing of the suit and indicated that no processing fee was required; that legal fees on the main agreement were solely borne by the Respondent whereas the agreement did not make provision for any subsequent agreement. Hence the Respondent was a stranger to the subsequent agreement relied on by the Appellants; that the Appellants did not adduce proof of the bank transaction charges of USD 80, and the alleged IDF cancellation, loss of business and miscellaneous expenses constituted a fabricated setoff raised by the Appellants to intimidate the Respondent; and that the agreement was frustrated by force majeure with notice being duly served on the Appellants. Consequently, the trial court's findings cannot be faulted. The court was thus urged to dismiss the appeal with costs.
11. The court has considered the memorandum of appeal, the record of appeal as well as the submissions by the respective parties. This is a first appeal. Section 38 of the *Small Claims Court Act* prescribes the nature of appeals lying from the Small Claims Court to the High Court. It provides that;-
 - “(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
 - (2) An appeal from any decision or order referred to in subsection (1) shall be final.”
12. Ordinarily on a first appeal, the appellate court ought not to interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278. However, by dint of Section 38 of the *Small Claims Court Act* this is no ordinary first appeal and the Court must satisfy itself that the appeal before it satisfies the prescription in Section 38 of the *Small Claims Court Act*.
13. The Court of Appeal in *Kenya Breweries Ltd v Godfrey Oduyo* [2010] eKLR, discussed its mandate on a second appeal that is on points of law only. Equally, in this appeal, albeit being a first appeal, the *Small Claims Court Act* requires the Court to only concern itself with matters of law. In the foregoing case, the Court of Appeal stated that: -

“I have anxiously considered the pleadings, the evidence on record, the judgment of the learned Senior Resident Magistrate and the judgment of the superior court, the grounds of appeal, the submissions of the learned counsel as well as the authorities to which we were referred. First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words a first appeal is by way of a retrial and



facts must be revisited and analysed a fresh, - see *Selle and Another vs. Associated Motor Boat Company Ltd and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

14. Black’s Law Dictionary defines the two concepts as follows; -

“Matter of fact as: A matter involving a judicial inquiry into the truth of alleged facts and
Matter of law: A matter involving a judicial inquiry into the applicable law.”

15. The Court of Appeal in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR, while addressing the question whether the memorandum of appeal on a second appeal raised factual issues, stated as follows;-

“A perusal of the memorandum of appeal filed herein immediately shows that there is merit in the objections by the 1st and 2nd respondents, in which they were joined by the 3rd and 4th respondents as well. In no less than eleven grounds of appeal, the appellant charges that “the learned judge erred in law and fact” in some respect or other. We must respectfully state that it is rather mind-boggling that counsel preparing a memorandum of appeal in a matter such as is before us, would add that trouble-inviting pair of words “and fact” in the face of a plain and straight-forward statutory exclusion of matters of fact from this Court’s consideration.”

16. Making a distinction between a matter of fact and matter of law, the Court proceeded to observe that;-
...“One of the best expositions on the distinction between the two is to be found in the judgment of Denning J in the English case of *Bracegirdle v Oxley* (2) [1947] 1 ALL E.R. 126 at p 130;

“The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road *Traffic Act*, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them.”

17. The Court of Appeal then observed as follows regarding the above reasoning: -

“That reasoning has been adopted in this jurisdiction. In *A.G. v David Murakaru* [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where that lower court arrives at a



conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also *Patel v Uganda* [1966] EA 311 and *Shah v Aguto* [1970] EA 263.

There is no denying from the cases we have referred to, that in not a few cases the determination of whether a particular complaint on appeal a question of law is or of fact is not always a very straight-forward one, not least because the determination of whether a lower court drew the correct legal conclusions inevitably entails an examination of the factual basis of the decision. That reality has with it the inherent danger that legal ingenuity may attempt to dress-up and camouflage purely factual issues with the borrowed garb of “legalness.” This is what the majority of this Court had in mind in *M’riungu And Others Vs. R* [1982-88] 1 KAR 360 when it stated, (per Chesoni AJA) at p366;

“We would agree with the views expressed in the English case of *Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)* [1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law.”

18. This court earlier in this judgment set out the entirety of the Appellants’ memorandum of appeal. Guided by the decision in *Bashir Haji Abdullahi* (supra), and while recognizing that the said decision related to an appeal in respect of an election dispute, this court is equally perplexed that counsel for the Appellants herein elected to add to the grounds of appeal the “trouble-inviting pair of words “and fact” in the face of a plain and straight-forward statutory exclusion of matters of fact” pursuant to Section 38 of the *Small Claims Court Act*. Even if the inclusion of the pair of words “and fact” in the four (4) grounds presented in the memorandum of appeal was erroneous, a purposeful review of the grounds and arguments raised in support undoubtedly reveals the Appellants’ intent.

19. The issues raised challenge the trial court’s inferences and decision on facts and not exclusively on “law”. The gist of the Appellants’ case being premised on a partial acknowledgment of indebtedness to the Respondent of net amounts after deduction of the Appellants’ expenses allegedly incurred in the performance of the said Appellants’ part of the agreement. In essence the Appellants were seeking to set-off alleged expenses incurred from the Respondent’s claim. This is patently a factual issue dependent on evidence. Indeed, the trial court in its judgment observed that; -

“.....it was incumbent upon the Respondent to prove how USD 1500 was spent by way of receipts or any other way for the court to decide on what is owing to the claimant...

Under the *Evidence Act*, it is not sufficient to allege but not prove. The Respondent has not provided proof of the expenses incurred as alleged and the court cannot infer the same. Therefore, I find that the Claimant is entitled to USD 1500 in full.

Consequently, I enter judgment for the Claimant as against the Respondent...” (sic)

20. The foregoing determination was arrived at upon analysis of the factual material presented before the trial court. By their appeal, the Appellants are inviting this court to re-evaluate the trial evidence, contrary to the provisions of Section 38 of the *Small Claims Court Act* and to make findings thereon. As held in *Bashir Haji Abdullahi* (supra) an appellate court faced with a situation of this kind is at liberty to strike out any grounds of appeal that offend the above provision, while retaining those that are compliant. In this case, the entire grounds of appeal are offensive in one way or another, and the



appeal is therefore incompetent. Consequently, the Court will strike out the memorandum of appeal herein in its entirety with costs awarded to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 12TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellants: N/A

For the Respondent: Ms. Gathoni

C/A: Carol

