Directline Assurance Co. Ltd v Nyawa (Civil Appeal 158 of 2022)
[2023] KEHC 20202 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20202 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 158 OF 2022

DKN MAGARE, J

JUNE 22, 2023

BETWEEN

DIRECTLINE ASSURANCE CO. LTD ..... APPELLANT

AND

PHELLIX YAMA NYAWA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Adjudicator of the small claims court, Hon. Viola Muthoni given in Mombasa Small Claims Court claim number E034 of 2022 given on 8/9/2022.

2. These matters were disguised appeals under the civil procedure rules. On perusal I note that they are appeals from the Small Claims Court. These are series of files for which I am making a similar judgment.

3. The matters should not unduly be in Court beyond a period of 60 days. The same statute setting forth the Small Claims Court also sets the appeal procedure in Section 38 of the Small Claims Act provides as doth:-

> " 38.
>
> (1) A person aggrieved by the decision or an order Appeals. 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."

4. I note that the small claims Act has a limit for 60 days. These are aspirational and will be progressively achieved. Like all aspirational statutory they impress upon the parties to strive to conclude the matters within 60 days. If an appeal is not concluded within 60 days, it is still a valid Appeal the same with

the 60 days for hearing the matters. The Appeal remains live, save that it dents the original intention of the act.

5. In Manchester Outfitters Suiting Division Ltd & another v Standard Chartered Financial Services Ltd & another [2002] eKLR, the court of Appeal stated as doth; -

> "I agree that a delayed judgment prolongs and increases the stress and anxiety caused by litigation. It also weakens public confidence in the whole judicial process. With respect, a delay by itself does not vitiate a judgment. The vice in a delayed judgment is not the mere fact of delay but when the delay involved is not satisfactorily explained or it occasions failure of justice if, for example the trial judge denies himself the opportunity the impression a witness makes or loses the advantage of immediacy. This is borne out by the case in this Court of Elizabeth Barangaza -v- Tyson Habenga, Civil Appeal No 285 of 1997 (unreported) where Akiwumi, JA (as he then was) said:
>
> "The record of appeal and indeed, the file of the court below clearly show that it really did take, and without there being indicated my justification for it, nearly sixteen months for the learned judge to deliver her judgment" (emphasis supplied)
>
> Tunoi JA said:
>
> "He submitted that this long delay resulted in the learned judge making material findings which were not justified by the evidence on record". (emphasis supplied)"

6. Therefore, Delay in concluding a case, per se, is not a ground for setting aside a judgment or refusing an appeal. It is equally not a ground to dismiss or strike out the case from the small claims court. The consequences of delay by the Court cannot and must not befall the litigants. It is aspirational and goes towards setting performance standards and does not in any way, remove the jurisdiction of the court to do substantive justice.

7. I am satisfied that though the Appeal has been in Court in excess of 60 days it will be heard.

Analysis

8. I am alive to the fact that this is a final Appeal. Therefore, the duty on the court is enormous. This is because, whichever, this court decides, the parties have to find a way of living with it.

9. Appeals from Small Claims court to this court are on points of law only. However, what constitutes a point of law is not defined. Nevertheless, this court is bound by antecedent findings to settle what a point of law is. It also needs to settle what a point of law is not.

10. Starting on what a point of law is not, I am guided by section 32 of the *small claims court Act*. It provides as doth: -

> " 32. Exclusion of strict Rules of evidence
>
> (1) The Court shall not be bound wholly by the Rules of evidence.
>
> (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

(3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.

(4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.

(5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.

(6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.

(7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration."

11. This means that though the *evidence act*, is a law, noncompliance with that Act is not a point of law. Notwithstanding that, the *evidence act* is not excluded. There are certain presumptions that must be made. The status of sections 107 to 112 of the *evidence act* is different from other procedural sections.

12. The aspects like the burden of proof, are not real issues of just, *evidence act* but goes to the root of civil proceedings whether under the *civil procedure Act* or the *civil procedure act* and rules. Section 107,108 and 109 of the *evidence act* provide as follows: -

"

" 107. Burden of proof

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

13. In particular, Section 109 places the burden on whoever whishes the court to believe a fact. This thus means that whosoever asserts, proves. This is so when the particular facts are exclusively within the knowledge of the person asserting.

14. Under section 112 of the *evidence act*,

> " 112. Proof of special knowledge in civil proceedings In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

15. Ordinarily, duty of the first appellate court is re-evaluate and assess the evidence and make its own conclusions. At the back of the court's the appellate court keeps in 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. However, appeals from the small claims court are different. This is the first and last Appeal.

16. It is an appeal on points of law. This then takes the same turn as an appeal to the court of appeal, where the court gives defference to finding of fact. Only when the findings of fact are based on no evidence will that be seen as a point of law.

Pleadings

17. The Appellant filed 7 grounds of appeal that are highly repetitive. They raise only one issue, that is: - the court failed to find that the Appellant was not bound to satisfy the decree in the primary file.

18. The statement of claim was filed on 13/7/2022. They claimed for payment for personal injuries arising from accident involving motor vehicle registration number KBC 259D for which judgment had been entered for 174,105/=. The Respondent annexed the policy of insurance, showing the Appellant was the insurer. at the bottom there was an if=dictation that the policy holder was Badi Bakari. They also annexed the plaint in the primary suit, that is Mombasa SRMCC 901 of 2021. In that suit, Badi Bakari Faki is sued as the Defendant.

19. They also enclosed a police abstract dated 24/5/2021 wherein Badi Bakari is named as the owner and insurance is given. It is the same as in the certificate of insurance. The judgment of the Honourable J.M. Nyariki is also enclosed together with a demand.

20. The Appellant field a response dated 27/7/2022. In that response, they stated as follows: -

    a. The respondent does not owe the Claimant any money

    b. Badi Bakari Faki has never been its insured

    c. The insured and driver, Suleiman Ismail and Gedion Machanga were not sued. Badi Bakari Mandatory notices were not issued under section 10(2) of the insurance (Motor vehicle third party risks) Act, cap 405 was never issued.

21. The evidence tendered for the Respondent shows a paper trail that the Appellant was the insured. They admitted that fat. The only question was whether, a correct insured was sued. It tuns out that toy admitted getting statutory notices and summons.

22. The court found that the claimant produced enough evidence to that effect. The Appellant are the insurers. There is nothing stopping them from producing evidence that their insured is not Bakari. They asserted that their insured and driver were However, where the court makes decisions on no evidence, then it is a point of law.

23. An appeal from exercise of discretion is not a point of law. However, wrongful exercise of discretion is.

24. This is a case that turns simply on the pleadings of parties.

25. In Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR, stated as doth:

> " This Court adopted the interpretation above in the case of Securicor Kenya Ltd vs Kyumba Holdings Civil Appeal No. 73 of 2002 (Tunoi, O'Kubasu' Deverell JJ.A)
>
> and held that;
>
> "Our holding finds support in the decision in Osapil v Kaddy [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise."

26. The Court of Appeal quoted itself in Joel Muga Opinja v East Africa Sea Food Ltd. [203] eKLR as follows: -

> " We agree that the best way to prove ownership would be to produce the Court a document from the Registrar of motor vehicles showing who the registered owner is but when the abstract is not challenged and is produced in court without any objection the contents cannot later be denied."

27. The Court below is not bound by strict Rules of evidence. The jurisdiction of the Small Claims Court is set out in Section 12 as doth: -

1. Subject to this Act, the Rules and any other Nature of claims and pecuniary law, the Court has jurisdiction to determine any civil claim jurisdiction. relating to—
    a. a contract for sale and supply of goods or services;
    b. a contract relating to money held and received;
    c. liability in tort in respect of loss or
    d. damage caused to any property or for the delivery or recovery of movable property;
    e. compensation for personal injuries; and set-off and counterclaim under any contract.
2. Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.
3. The pecuniary jurisdiction of the Court shall be limited to two hundred thousand shillings.
4. Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit."

28. The claim in the suit below was a declaratory suit that the Appellant is bound to indemnify the Respondent in respect of compensation for personal injuries caused while traveling aboard motor vehicle Registration No. KBC 259D. The claim is for Ksh. 174,105/=.

29. I am satisfied that the Court has jurisdiction to by dint of Section 12 (1) (d) for compensation for personal injuries.

30. In the witness statement the Respondent stated that as a passenger he was injured and sued in SRMCC 901 of 2021 on 24/5/2021.

31. The Court ordered payment for Kshs. 120,000/= and special of Ksh. 2,550. The costs were assessed making a total of Kshs. 174,105. These are the amounts being sought.

32. The Adjudicator heard the matter and gave her judgment on 8/9/2022.

33. Documents produced included a statutory Notice and police abstract showing that the insurer of Radi Bakari was Direct line vide certificate No. A09675 C/No. 00125299.

34. The judgment in Mombasa SRMCCC 901 of 2021 was annexed.

35. The response was that the statutory notice was served. Further that the injured Suleiman Ismail and his driver Gideon Machanga were deliberately left out.

36. The Respondent indicate that they returned summons on 1/7/2021.

37. The Court found that the Appellant had admitted to insuring the said motor vehicle but stated that there was a different insurer.

38. The Court relied on decisions of this Court which were binding upon her that is;

    Ignatitus Makau

    Kenya Alliance

    Madison Insurance

39. What the Court did not say in her very few words is that Section 112 of the *Evidence Act* binds her to find for the Respondent.

40. The Appellant knew who the insured was. The Respondent produced Prima facie evidence that the owner or insured was the defendant in the primary suit.

41. Section 112 of the *Evidence Act* provides as doth: -

> " 112. Proof of special knowledge in civil proceedings in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

42. Further, any allegation asserted, the burden of proof is on the party so asserting. No evidence was produced to displace the records in the police file. The Appellant failed to discharge the burden of proof on them.

43. I find no legal issue raised by the Appellant in the circumstances, I hereby dismiss the Appeal in limine with costs of 52,000/= to the Respondent.

Determination

44. In the circumstances: -

    a. I find no merit in the Appeal and dismiss the same in *limine*.

    b. Costs of Kshs. 52,000/= to the Respondent.

    c. The Respondent be at liberty to encase the Bank guarantee given herein.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF JUNE,2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Ngure for the Respondent

Ndambuki for the Appellant

Court Assistant - Brian