Canon Assurance Limited v Restoration Insurance Agency (Civil Case 145 of 2022) [2023] KEHC 21075 (KLR) (10 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 145 OF 2022

DKN MAGARE, J

JULY 10, 2023

BETWEEN

CANON ASSURANCE LIMITED ..... PLAINTIFF

AND

RESTORATION INSURANCE AGENCY ..... DEFENDANT

(Appeal arising from the Judgement of Hon JB Kalo, Chief Magistrate delivered on August 26, 2022 in Mombasa RMCC 315 of 2019.)

JUDGMENT

1. The Appellant filed a memorandum of Appeal dated September 7, 2023. It arises from Mombasa RMCC 315 of 2019. The judgment had been delivered by Hon JB Kalo, Chief Magistrate on August 26, 2022.- the Appellant was the Plaintiff in the lower court.

2. 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, has the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

3. 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."

4. The duty of the 1st Appellant 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; -

> " An appeal from the High 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."

5. The Court is to bear in in mind that it has 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.

6. In the case of *Peters vs Sunday Post Limited* [1985] EA 424, the 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..."

7. The Appellant filed suit on 28/2/2014 claiming for a sum of Kshs 744,965, costs and interest. The said amount arose out of agency agreement and was received as premium but not declared, accounted for or reimbursed to the Plaintiff. It was thus a claim for money had and received.

8. Unfortunately, the Appellant did not indicate where the agency arose and when the money was paid. There is a crucial element, in that and supplied further with better particulars, this agency was admitted. The Appellant annexed and produced in court account statements from 2011 to 2014.

9. He stated that the statement is through the certificates. On cross- examination he stated that the agency acts through individuals. He stated that they did not receive the money. He stated that he was not aware that the law prohibited the agencies from receiving money.

10. DW1 testified that he was the director of the Appellant, December 2010 to August, 2012. The total amount unremitted as per the statement is Ksh 744,965. There was a request for judgment filed on 29/5/2015 and endorsed on 7/10/2015. The said judgment was set aside.

11. On 2/3/2023 the appellant testified through Joseph Iburu Njame. He stated that the claim related to Nyalia. It is his statement that they did not owe the witnesses. He stated that he received 2 letters but did not respond as they did not owe the witnesses and admitted that he introduced clients for 3-5 years. He stated he had a data base.

Defence

12. The defendant filed defence on October 19, 2015.

13. In the defence, they did not disclose what their defence was. He stated at paragraph 5 of the Defence:

> "The Defendant states that it acted wholly in line with the agreement with the plaintiff and did not fail to remit all the moneys due to the plaintiff as its principal at any time."

14. The Court entered Judgment on 26/5/2022. The grounds were: -

a. The Defendants were wrongly sued.

b. If the contract existed it is incapable of being enforced by dint of Section 156 (2) of the *Insurance Act*.

c. The plaintiff committed an illegality by using claims before collecting premiums

d. The Plaintiff had a duty to prove allegations on the face of strong denial.

Analysis

15. Parties are strictly bound by their pleadings. It is tempting sometimes to flow with a new loophole that arises as the case progresses. It is instructive that in the defence, the Respondent is not to plead Section 156 (2) of the *Insurance Act*.

16. He also did not plead the particulars of the illegality. He stated in evidence that Section 156 of Cap 487 prohibits an intermediary from collecting premiums. Section 11 of Act No 11 of 2009, introduced an amendment to the *Insurance Act*, in particular Section 156 which states as doth; -

> " Advance Payment of premiums *No 11 of 2019* s.11
>
> (1) No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by the insurer.
>
> (2) An intermediary shall not receive any premiums on behalf of an insurer. (3) An intermediary who contravenes subsection
>
> (2) shall be liable to a penalty equivalent to twenty percent of the unremitted premium on each contravention, payable to the Policyholders Compensation Fund.
>
> (4) Any officer or director of an intermediary who contravenes subsection (2) shall be guilty of an offence, and upon conviction shall be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term of three months, or to both.
>
> (5) An insurer shall pay an intermediary insurance commission due within thirty days upon receipt of premium.
>
> (6) An insurer who contravenes subsection (5) shall be liable to a penalty of five million shillings on each contravention, payable to the Policyholders Compensation Fund.
>
> The trouble with such evidence is that it does not take cognizance of three aspects of the law that I will address shortly.

17. Order 2 Rule 4 (1) provides as follows: -

> " 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—

(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.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

(3) In this "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.

18. Consequently, any form of illegality, payment and other matters that may catch the other side by surprise must be specifically pleaded.

19. Further, though the Court indicates that the defendant threw as a strong defence, that is not so. What was on record was a sham defence and mere denials.

20. The only plausible defence was:-

That the Defendant had remitted money to the principal.

21. Under Order 2 Rule 4(1), payment must be proved specifically. Indeed, in the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, the Court of Appeal stated as doth regarding Rule 14(equivalent to order 2 Rule 4(1): -

> " The main object of this rule and r.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", (underling supplied).
>
> "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)."

22. Secondly, payment is within the special knowledge of the respondent. Under Section 112, the Appellant had the burden of proof in respect to matters within his special knowledge. The said Section 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."

23. The duty of the appellant was discharged when: -

a. they supplied particulars that were missing from the plaint.

b. Secondly, they provided a statement showing that the said amount were due. The statement was composite. The statement has premium, commission and balances. They show on the 4th column that certain payments were made, in reduction of the debt. The respondent who made the payment was mum on why he made premiums.

24. In fact, nothing could have been easier to show that clients X, Y and Z were introduced and the Appellant paid the premium. Instead we are seeing on a later day conversion where evidence *is introduced not in support of the pleadings.

25. The appellant proved that the Respondent was paid. The Respondent did not displace the uncontroverted evidence. 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 if no evidence at all were given as either side."

26. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

> " 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 than 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."

27. 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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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."

28. In the case of the court held that evidence that is not controverted stands as doth: -

> 17. Where evidence is adduced and not controverted, it stands the test. In Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR stated:
>
> > "I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not."
>
> 18. Similarly, in Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No 23 of 1997 held that:
>
> > "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

29. The Appellant tendered cogent evidence on collections done by the Respondent.

30. The defence related to Section 156(2) is a read hearing which rises to circumvent payment of due sums.

31. On the first instance the amendment to Section 156(2) to bar agencies from collecting funds was amended in 2019 vide *Insurance Amendment Act No 11 of 2019*. This was after this case was filed. It has no retroactive role. The same does not have retrospective effect.

32. Further, by dint of a case filed in court, that is, *Association of Insurance Brokers of Kenya v Cabinet Secretary for National Treasury & Planning & 4 others* (Petition 288 of 2019) [2021] KEHC 451

(KLR) (Constitutional and Human Rights) (29 July 2021) (Judgment), the court, J. A. Makau held as follows, regarding the said section on 29/7/2021: -

> " It is my finding that this petition is meritorious. I therefore proceed to grant the following orders:-
>
> a. A declaration be and is hereby issued that section 156 of the *Insurance Act* as amended by the *Insurance (Amendment) Act, 2019* is unconstitutional and therefore null and void.
>
> b. An order of Permanent injunction be and is hereby issued permanently restraining and staying the operation and implementation of Section 156 of the *Insurance Act* as amended by the *Insurance (Amendment) Act, 2019*.
>
> c. Costs to the petitioner to be met by the respondents on a full indemnity basis."

33. Therefore by the time the decision was made on 26/8/2022, the declaration had been made. It is the duty of the court to appraise itself of the law to avoid basing its decision on non existent law. It is equally the duty of the advocate to assist the court to so fulfil that mandate.

34. The court was therefore plainly wrong in relying on section 156 which was retroactive and had been declared unconstitutional.

35. Lastly, the illegality was not pleaded and as so it could not be the basis for a decision.

36. The issue of a limited liability company emerged in the court's judgment. It was neither pleaded nor left for the court's decision. The respondent, in their defense admitted paragraphs 1,2 and 3. Paragraph 2 described the defendant as registered under relevant law and licensed to carry out such agency business. At no time was the status of the defendant in dispute from the pleadings.

37. Even if the amendment had been carried out to state what the respondent purports, it cannot invalidate contracts already done. Regarding the issue of the proper person to sue, Respondent unconditionally entered appearance. Paragraphs 1, 2 and 3 of the plaint were admitted.

38. Regarding partnerships, the Appellant was perfectly in order to sue the partnership in its name. Order 30 Rule 1 of the *Civil Procedure Rules* provides as follows: -

> " Any two or more persons claiming of being liable as partners on business in Kenya may sue or be sued in the name of the firm (if any) in which such persons were partners at the time of ascertaining of the cause of action, and any party to the suit my apply to court for a statement of names and addresses of the persons who were, at the time of accruing of the cause of action, particulars in such firm, to be furnished and verified as the court may direct."

39. Consequently, a suit in the name of a partnership, whether registered or not is perfectly in order. Further, it was already admitted in paragraph 3 that the name was registered. There is no duty to prove an admitted fact.

40. Section 21 of the *Evidence Act* are Germaine in this case they provide as doth: -

> 21. Proof of admissions against persons making them, and by or on their behalf Subject to the provisions of this Act, an admission may be proved as against the person who makes it or his representative in interest; but an admission cannot be proved by or on behalf of the person who makes it or by his representative in interest, except in the following cases—

a. when it is of such a nature that, if the person making it were dead, it would be admissible as between third persons under section 33 of this act

b. when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable;

(c) if it is relevant otherwise than as an admission.

41. It is my finding that the court below proceeded on frolics of its own by veering off the case in Court and dealing with unpleaded issues. A court is not entitled to deal with unpleaded issues unless they have been left to the court for decision making. In the case of *Pacific Frontier Seas Ltd v Kyengo & another* (Civil Appeal 32 of 2018) [2022] KECA 396 (KLR) (4 March 2022) (Judgment), the court stated as doth: -

> " Even when it had jurisdiction, the court would not base its decision on unpleaded issues because the issues determined by the court had to flow from pleadings. It was the pleadings which guided the litigation and succinctly informed the parties and the court what was in dispute. However, where the parties led evidence and addressed the unpleaded issues and from the cause adopted at trial it appeared that the unpleaded issues had been left for the decision of the court, the court would validly determine the unpleaded issues. Nevertheless, parties could not validly leave unpleaded issues over which the court had no jurisdiction for it to decide, simply because parties could not by consent, confer jurisdiction to a court which in law it did not have."

42. The only time it will be necessary to know the names of partners is when execution starts and Order 30 Rule 1 of the *Civil Procedure Rules* is invoked. In the circumstances, the court was wrong in dismissing the Appellant's suit.

43. It is my finding that the appellant's case was uncontroverted. The issues raised in submissions and in the court's judgment were otiose and not flowing from the pleadings. I find as a fact that the Appellant proved on a balance of probabilities and that evidence was uncontroverted that the Respondent owed the appellant a good lawful sum of Kshs 744,965 being money had and received. I accordingly allow the appeal with costs.

Determination

44. I make the following orders, in the circumstances of the case: -

a. I allow the entire appeal, and set aside the judgment of the lower Court, dismiss the defence as an afterthought and as a result enter judgment for the appellant against the respondent for Kshs 744,965/= with interest at 14% court rate from 28/2/2014 till payment in full.

b. Costs of 95,000/= to the appellant.

c. 30 days stay of execution.

d. This file is closed.

e. The judgment be served on the trial court.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF JULY, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ajigo for Respondent

No appearance for the Appellant

Court Assistant - Brian