Patel v Nthiga (Civil Appeal E431 of 2021)
[2023] KEHC 20549 (KLR) (Civ) (14 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20549 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E431 OF 2021

CW MEOLI, J

JULY 14, 2023

BETWEEN

ANI V PATEL ..... APPELLANT

AND

NEWTON NJUE NTHIGA ..... RESPONDENT

(Being an appeal from the ruling of J.P. Omollo (Adjudicator) (RM) Small Claims Court delivered on 9th July 2021 in Nairobi Milimani SCCC No. 289 of 2021)

JUDGMENT

1. This appeal emanates from the ruling delivered on 09.07.2021 in Nairobi Milimani SCCC No. 289 of 2021 (hereafter the lower court claim). The claim in the lower court was brought by GA Insurance Co. Ltd in the name of its insured Ani V. Patel, the claimant before the lower court (the Appellant herein) pursuant to its alleged right of subrogation, to recover damages in the sum of Kshs. 284,605/- from Netwon Njue Nthiga, the defendant before the lower court (the Respondent herein) in respect of an accident involving the Appellant's motor vehicle registration number KBR 405P and the Respondent's motor vehicle registration number KBV 807E which allegedly occurred on 10.05.2018.

2. It was averred that whilst the Appellant's motor vehicle registration number KBR 405P was lawfully being driven along Lower Kabete Road at Samar Heights within Nairobi City, the Respondent so negligently, carelessly and recklessly drove motor vehicle registration number KBV 807E that he caused it to lose control and ram into motor vehicle registration number KBR 405P and causing it extensive damage and consequently, the Appellant incurred costs, sustained loss and damage.

3. The Respondent entered appearance and contemporaneously filed a chamber summons dated 29.05.2021, pursuant to Section 6 of the *Arbitration Act* seeking inter alia that the claim be stayed

pending the hearing of the said application to refer the matter to Arbitration in accordance with Clause 17 of the Knock-for-Knock agreement between the insurers of the Appellant (GA Insurance Co. Ltd) and the Respondent (Intra Africa Assurance Co. Ltd); and that the matter in dispute be referred to a sole arbitrator to be agreed upon by the parties.

4. The summons was premised on the key grounds that the matter was an insurance claim for material damage, settled by GA Insurance, which claim can only be dealt with by the insurers of the respective motor vehicles under the terms of the Knock-for-Knock agreement between the two insurance companies; and that both insurers, for the parties to this suit, had a Knock-for-Knock agreement in force , Clause 17 therein providing that any dispute in respect of the said agreement should be referred to Arbitration.

5. The Appellant opposed the motion by filing a replying affidavit dated 16.06.2021. By a ruling delivered on 09.07.2021 the lower court allowed the Respondent's chamber summons. Aggrieved with the outcome, the Appellant filed an appeal challenging the ruling of the lower court based on the following grounds:-

> " 1. That the learned magistrate erred in law and in fact in finding that the knock for knock agreement is a contract capable of being enforced.
>
> 2. That the learned magistrate erred in law and in fact by finding that there was a valid arbitration agreement between parties to the suit hence the mater be referred to arbitration.
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> 3. That the learned magistrate erred in law in finding that there are disputes that are capable of being determined by an arbitrator.
>
> 4. That the learned magistrate erred in law and in fact in closing the matter at the Smalls Claims Court hence denying the Appellant his right to be heard contrary to the principles of natural justice." (sic)

6. The appeal was canvassed by way of written submissions. The Appellant's submissions were riveted on the sole issue of the application of the knock for knock agreement? While citing Halsbury's Laws of England on the doctrine of subrogation, the decision in Indemnity Insurance Co. of North America & Another v Kenya Airfreight Handling Ltd & Another [2004] 1 EA 52 and Thomas Muoka Muthoka & Another v Ernest Jacob Kisaka [2007] eKLR, counsel contended that the agreement is not binding upon the parties to the lower court claim as none of them were signatories to the knock for knock agreement. That the agreement did not extend to the insured of the insurance company hence the suit ought to have proceeded as filed. The decision in City Council of Nairobi v Wilfred Kamau Githua t/ a Githua Associates & Another [2018] eKLR was cited in the foregoing regard.

7. It was further submitted that the knock for knock agreement provided for resolution of claims within a maximum period of eighteen (18) months from the date of the accident and that despite the Appellant having sent a demand dated 30.04.2021 to the Respondent, his insurer failed to settle or respond to the claim within the said period. Hence the Respondent and his insurer could not seek refuge under the agreement in a bid to deny the Appellant justice. That in any event, the agreement did not curtail the Appellant's right to move the court and to seek redress against the insurer of the offending vehicle.

8. Relying on the decision in Hobbs v Marlowe [1978] AC 16, it was contended that by dint of the principle of privity of contract, the parties herein ought not to be subjected to arbitration on account of the knock for knock agreement to which they were not privy too. Counsel went on to argue that the claim was filed by the Appellant in the Small Claims Court to purposefully ensure that the suit

was prosecuted within the shortest time possible which would be ultimately be curtailed by referral of the matter to arbitration. In conclusion, it was submitted that the Appellant's insurer is entitled to pursue any legal and equitable rights by dint of the doctrine of subrogation and the court ought to allow the appeal as prayed.

9. The Respondent naturally defended the trial court's findings. Addressing the Appellant's grounds of appeal and submissions before this court, counsel condensed his submission into six (6) issues for the court's consideration. Concerning the import and validity of the agreement, it was argued that the knock for knock agreement is biding by dint of Section 34(1) of the *Companies Act* 2015 and the doctrine of subrogation as the Appellant's insurer assumed its insured rights despite the insured not participating in the knock for knock agreement. That on account of the foregoing the knock for knock agreement had a binding effect. The decision in Mercantile Life & General Assurance Co. Ltd & Another v Dilip M. Shah & 3 Others [2015] eKLR was relied on.

10. Submitting regarding the dispute resolution aspect of the knock for knock agreement, counsel called to aid the decision in John Mburu v Consolidated Bank of Kenya [2018] eKLR to argue that between the agreement and the insurance policies, the agreement was first in time and that in equity it ranks first in order of time and supersedes subrogation rights. It was further argued that the suit was wrongfully instituted in total disregard of the knock for knock agreement. Responding to the Appellant's submissions on time, counsel relied on the dicta in P.N. Gichoho Ngugi v County Government of Laikipia & Another [2017] eKLR to argue that despite Clause 14 of the Knock for Knock agreement, the Appellant did not act until 30.04.2021, which was 10 days shy of 3 years since the cause of action arose, indicative of the fact that the Appellant's insurer was intent of avoiding the agreement.

11. Lastly, while citing the decision in Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR and Article 159 (2) (c) of *the Constitution* of Kenya, counsel argued that there is an obligatory duty upon courts to promote alternative forms of dispute resolution in order to uphold the purpose and principles of *the Constitution*. The court was urged to dismiss the appeal with costs.

12. 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 that lie from the Small Claims Court to the High Court by providing 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."

13. 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 if it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982 – 1988) 1 KAR 278. Nonetheless, by dint of Section 38 of the *Small Claims Court Act* this is no ordinary first appeal and the court must first satisfy itself that the appeal before it satisfies the prescription in Section 38 of the *Small Claims Court Act*.

14. The Court of Appeal in Kenya Breweries Ltd v Godfrey Odoyo [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* prescribes that an appeal to this court from the Small Claims Court be on

matters of law. In the foregoing case, the Court of Appeal stated made a distinction between matters of law vis-à-vis maters of fact by stating 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."

15. 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."

16. The Court of Appeal in its subsequent decision in Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] eKLR, in 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."

17. Reiterating the 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 Vs. 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 deducted 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."

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

> " That reasoning has been adopted in this jurisdiction. In A.G. Vs. 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 Vs. UGANDA [1966] EA 311 and SHAH Vs. 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;
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> "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."

19. 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 Appellant herein in three out the four grounds of appeal elected to add 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 three (3) 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.

20. The issues raised challenge the lower court's inferences and decision on facts and not exclusively on "law" in respect of the knock for knock agreement. The gist of the Appellants' case being that there was no privity of contract by the parties herein as concerns the knock for knock agreement and that there was no dispute capable of referral to arbitration by dint of Section 6(1) of the *Arbitration Act*. In essence the Appellant disputed the validity and or applicability of the knock for knock agreement to the claim before the lower court.

21. This was patently a factual issue dependent on material evinced by way of and in addition to the knock for knock agreement. Indeed, the trial court after considering the respective parties' pleadings and material relied on in support of the pleadings, stated in its ruling that; -

> " Whether the knock for knock agreement is binding to the parties?
>
> .....the issues of privity of contract does not come in as submitted by the claimant because the suit is brought under the doctrine of subrogation to recover from the respondent's insurer. Indeed paragraph 4 of the statement of claim states that by virtue of the insurance cover aforesaid GA Insurance Ltd fully indemnified the claimant the loss suffered and the former is therefore entitled to recover the said loss from the respondent under the doctrine of subrogation.
>
> Whether there was arbitration clause in agreement?
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> Clause 17 of the agreement.....From the above, I find that there was an arbitration clause in the agreement.
>
> Whether the matter should be referred to arbitration?
>
> .....The fact that the claimant's insurer filed the suit is a dispute contemplated under clause 17 of the Agreement. Further the agreement is not time barred as it is still a dispute contemplated under the agreement.
>
> The clear intention of the parties in the agreement was that if any dispute arises they oust the jurisdiction of the court and have preference to have the dispute settled through arbitration.
>
> .....
>
> This court will therefore promote other forms of dispute resolution where the circumstances of the case so allows and the parties to an alternative mode of dispute resolution other than the court which is arbitration.
>
> In the upshot, this application is merited and is allowed..." (sic)

22. The foregoing determination was arrived at upon analysis of the factual material presented before the trial court. By his appeal, the Appellant is 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 contrary 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.

23. In this case, having reviewed the Appellant's grounds of appeal the court is inclined to strike out grounds 1, 2 and 4 for being offensive in one way or another, by the inviting the court to address factual issues which the court is exclusively barred from interrogating as an appellate court.

24. Therefore, the only ground with the semblance of an issue of law for this court's consideration is ground 3, which this court will proceed to consider as hereunder. The ground is to the effect that "the learned magistrate erred in law in finding that there are disputes that are capable of being determined by an arbitrator". (sic).

25. The Court of Appeal in UAP Provincial Insurance Company Ltd v Michael John Beckett [2013] eKLR (Nairobi CA No. 26 of 2007) while addressing itself on the import of Section 6(1)(b) of the *Arbitration Act* observed that; -

> " It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6 (1) (b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court."

26. As a matter of law, the trial court was obligated to interrogate whether there was a dispute between the parties and if so, whether such dispute was with regard to matters agreed to be referred to arbitration. The lower court appropriately applied itself to forgoing issue when it addressed Section 6(1)(b) of the *Arbitration Act* on the back drop of Clause 17 of the Knock for Knock Agreement which provided for arbitration in the event of a dispute in relation to the said agreement.

27. Clause 17 of the Knock for Knock Agreement provided that; -

> " Any dispute arising from the interpretation and implementation of the provisions of this Agreement, shall be settled amicably between the parties, and in case of disagreements, the disputes shall be referred to an arbitrator. The Members concerned shall agree on a single arbitrator. If they cannot agree upon a single arbitrator the decision shall be referred to two arbitrators one to be appointed in writing by each party. In case of a disagreement between the arbitrators the matter shall be referred to an umpire who shall be appointed in writing by the arbitrators before entering on the reference, and whose decision shall be binding on both parties" (sic)

28. Of particular relevance in the said clause, was the reference to "Any dispute arising from the interpretation and implementation of the provisions of this Agreement". Clause 17 is to be read with Clauses 6, 7, 9 & 11 of the Knock for Knock agreement. Reviewing the reasoning of the lower court, this court is of the view that the lower court appropriately applied itself to the law when it observed that "The fact that the claimant's insurer filed the suit is a dispute contemplated under Clause 17 of the Agreement" (sic). Evidently, it was the intention of the parties, as rightly observed by the trial court, that if a dispute arose in respect of the Knock for Knock agreement, the first port of call was arbitration and not litigation before the courts. To that end the lower court's finding on the issues was on point and cannot be faulted.

29. Consequently, nothing turns on ground 3 of the appeal. The entire appeal is without merit and is dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Ms. Gideon

For the Respondent: Mrs. Ngala

C/A: Carol