Madara & 2 others v Chite & another (Civil Appeal 111 of 2022)
[2023] KEHC 24270 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24270 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 111 OF 2022

DKN MAGARE, J

OCTOBER 24, 2023

BETWEEN

JAMES NYAMWATA MADARA ..... 1ST APPELLANT

JANMA GROUP OF COMPANIES ..... 2ND APPELLANT

JJANMA LIMITED ..... 3RD APPELLANT

AND

GEORGE STEPHEN CHITE ..... 1ST RESPONDENT

AZAN MOTORS LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The three Appellants filed appeal from the decision of the Resident Magistrate Hon. E. Muchoki given in Mombasa RMCC 888 of 2020, on 7/7/2022. The Appellants set forth 8 grounds of Appeal as doth: -

    a. That the Learned Magistrate erred in law and in fact by failing to appreciate that the agreement relied on by the 1st respondent was between the 1st respondent and the 2nd appellant hence the 1st and 3rd appellants are not liable.

    b. That the learned Magistrate erred in law and in fact by failing to appreciate that the 2nd appellant is a limited company hence a separate legal entity.

    c. That the Learned magistrate erred in law and in fact by relying on an agreement by the 1st respondent which was a forged document and its authenticity was ins question.

    d. That the Learned Magistrate erred in law and in fact by awarding the 2nd respondent costs and interest against the 1st appellant.

e. That the learned magistrate erred in law and in fact by failing to consider the default clause in the agreement.

f. That that the learned Magistrate erred in law and in fact by failing to appreciate the fact that the agreement between the 1st appellant and the 2nd respondent did not stop him from selling the vehicle as he was the beneficial owner.

g. That the Learned Magistrate erred in law and in fact by failing to appreciate that the bill of lading was clear on the registered owner of the vehicle and hence the 1st respondent was well aware.

h. That the learned Magistrate erred in law and in fact by failing to appreciate that the 1st respondent did not prove the sum claimed.

i. That the learned magistrate erred in law and in fact by failing to consider both the evidence and submissions of the Appellants.

2. The grounds are prolixious repetitive and argumentative ad nausium. The memorandum of Appeal is drawn in a way to make reading both impossible and clumsy. I shall endeavour to decipher what the issues are. The ones I can discern is that:-

a. The Court erred in relying on forged documents.

b. The court erred in disregarding corporate identity of the 2nd and 3rd Defendant.

3. The Court red in finding the Appellant liable.

4. The duty of the Appellate court.

Duty of the first Appellate court

5. 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, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

6. 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."

7. The duty of the first appellate 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; -

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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."

8. The Court is to bear in in mind that it had 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.

9. In the case of Peters vs Sunday Post Limited [1958] EA 424, 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..."

10. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth; -

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed

Pleadings

11. In a plaint dated 18/8/2020 the 1st Respondent filed suit against the 2nd Respondent and the Appellants. The 2nd and 3rd companies are said to be sister companies with a file directorship of the 1st defendant represented himself as importing cars in his capacity and all the 2nd and 3rd Respondents.

12. They executed the agreement between the Appellants and the plaintiff for purchase of Toyota KCS 629B Toyota Axio saloon at a total consideration of 1,380,000/=. The plaintiff was to take possession upon paying 550,000/= which was paid and the Appellants acknowledged receipt. The log book was to be handed on payment of the last instalment. The 1st Respondent honoured his obligation and deposited money in the 1st Appellants Account No. 0045935001.

13. The appellant paid together with a hooping Ksh. 150,000/= as transfer fees. The fees was astronomical, and I had to recheck. This is sufficient for one player transfer in the nationwide league.

14. On 5/2/2023 the 1st Respondent paid but did not secure a log book. The 1st Respondent was served with auctioneer's letter for repossession for non-payment on part of the 1st Defendant.

15. The 1st Respondent indicated that he was a stranger in the 4th Respondent and did not know why he repossessed the said motor vehicle. He was of the view that the 2nd Respondent and the Appellants were colluding. He set out particulars of collusion and fraud on the defendants.

16. The plaintiff claimed for a sum of Ksh. 1,498,5000/= being the total paid.

17. He prayed for restitution of the motor vehicle and General damages. In strange twist of fate, the 1st and 3rd defendant purported that the 2nd defendant is the holder of the contract. However, in his witness statement the 1st defendant indicated that he was paid only Ksh. 647,000/=.

18. In a rather bizarre turn firm of Marende Necheza & Co. Advocates entered appearance for all the defendants on 25/8/2020. There is dispute the 4th defendant clearly had a different claim. The defence is a classic case of mere denials.

19. There were specific claims in the plaint. The defence had mere denials and did not answer the case before the court. This is contrary to the edict in The case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " 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)."

20. The agreement annexed was a sale agreement between the 1st defendant and the 2nd defendant. However, Janma Group of Companies Exhibited a statement. In the statement, though 647,000/ = are said to be due, there is a deduction of 138,000/=, 13280,00 and 120,000/= making a total of Ksh. 392,000. The same added back coming to Ksh. 1,048,000. This means that even by their own admission the 1st Respondent had already paid Ksh. 1,040,000/=.

21. I have perused proceedings, all I can see are several Rulings. The parties did not appear keen to proceed. The first respondent testified for 2/11/2021 and produced his documents as exhibit 1- 9. He showed how he made payments. DW1 – the 1st appellant gave evidence. He was cross examined he reiterated his statement. The court gave its judgment on 7/7/2022. The court found the appellants liable and ordered the 1st, 2nd and 3rd respondents to pay Ksh. 1,530,000/= plus interest and costs. The 4th defendant was to have cost and interest paid by the 1st defendant. This triggered this appeal.

22. The Court found as a fact that the 1st Respondent paid a sum of Ksh. 1,350,00/= and a further sum of Ksh. 150,000. The Appellants did not refund the said money. They also had not paid the 4th defendant. They filed submission in the lower court. 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."

23. The court cannot therefore interfere with the discretion of the lower court unless it was clearly wrong or took into consideration irrelevant facts. In other words, the court below has to leave other some relevant factor or rely on some irrelevant one. When it comes to fats, the trial court is king, since they saw the witnesses and determined the demeanour of the witnesses and heard them.

24. There is a written contract between the 1st appellant and the 1st Respondent. The monies were deposited in an account held at Diamond Trust Bank Limited. in the name of the second Appellant by the 1st Respondent.

25. There were admission of Mpesa payment. I have also stated earlier that there was an admission that a sum Ksh. 1,040,000/= was already paid. I note that by the times the Appellant were selling a Motor vehicle they had not obtained title to it. The Appellant was thus able to proof fraud on part of the Defendants jointly and severally.

26. What the Appellants were doing, is to shift all liability to the second defendant, which is a shell and escape liability. This cannot be. This is a court of law and a court of equity. There was nothing like corporate identity. In the dealings the Appellants never separated their affairs as they were carrying out fraud.

27. The 2nd respondent separated itself from the other defendant. They posited that the 1st - 3rd defendant were not actual owners but had contracted the same vehicle under hire purchase. The vehicle belonged to the 4th Defendant. This was established as a fact.

28. The motor vehicle was fraudulently sold to the 1st Respondent. The 4th Defendant thus had a right to seize the suit motor vehicle. The title did not pass to the Appellants. The appellant this fraudulently received proceeds of sale of that which they did not own.

29. In Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina (2019) eKLR the Court pronounced itself as follows:

> " The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the property in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the property is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the property with the permission of the co-owner or sale by a person in possession of goods or property under a voidable contract. This principle was applied in the case of Haul Mart Kenya limited vs Tata Africa Kenya limited (2017) eKLR and Katana Kalume vs Municipal Council of Mombasa (2019) eKLR."

30. It is irrelevant that the Appellants could impose penalties. They are the ones at default by selling that which they have no title. The 1st Respondent is entitled to refund of his money. The Appellants could not pass a better title that they had.

31. The Court was thus right, not to issue any orders against the 2nd Respondent. This is in line with the case of Aineah Lluyani Njirah =vs= Agakhan Health Services [2013] Civil Application No. 194 of 2009 where it was stated thus:-

> " The general rule: the destine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose strangers to it. That is persons who are not parties to it."

The Court further held that;

> " Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscont Haldane LC as one of the fundamental principles of the English Contract Law. See Dunlop Pneumonic Tyre v. Selfridge and Co. Ltd. [1] The essence of the privity rule is that only the people who actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him."

32. The duty of the Court is not to substitute its own decision. The Court below heard instructions and observed their demeanour. I have a so noted that the 1st Respondents evidence was cogent. It was not shaken on cross examination.

33. From the documents it is clear that the 1st Respondent made the payment sought. It was the Appellants who did not do their part of the bar gain. There as a reason they have no title to what they were selling.

34. The issues raised herein were not raised in the court below. Though pleadings. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth; -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
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> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
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> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

35. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

36. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held in respect to the essence of pleadings in an election petition as follows: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

37. In this matter none of the issues is raised. The transfers were fraud committed by the Appellants not the Respondent. There is no merit in the issues raised. The court was entitled to enter judgment as he did.

38. The Appellants cannot purport to rely on an agreement wherein they were defrauding the Respondents as one where they were imposing penalties. They are not entitled to impose penalties as they are not owners. Being hirers, they are not entitled to sell. By selling a vehicle whose tiled the do not have, the 1st Respondent was able to proof fraud on part of all the 3 Appellants.

39. The consequence of the foregoing is that the appeal is not merited. Before I depart, I need to deal with one issue, that is the liability of the Appellants inter se. They did not file a notice of claim against each other the court is precluded from separating them. It is also clear from the payment and schedules. It was from the Appellants they appear to be shells, fronts or shelf companies meant to confuse members of the public.

40. I see absolutely no merit in the appeal. Consequently, it is dismissed Ksh. 185,750 to the 1st Respondent and costs and of Ksh. 95,000/= to the 2nd Respondent. The same shall be paid within 30 days, in default execution to issue.

41. Execution in the lower court may proceed by first recovery the security and therefore executing forthwith the balance for.

42. For avoidance of document the sum of 1,530,000/= ordered by the court below shall attract interest at 14% per annual from the date of filing.

43. Cost shall attract interest after 30 days.

Determination

44. The upshot of the foregoing is that the appeal is not merited and I therefore dismiss the same with costs.

    a. The 1st Respondent to have cost of Ksh. 185,750/= with interest at 14% and Ksh. 95,000/= as the costs of the 4th Respondent.

    b. The amount awarded in the lower court to attract interest from the date of filing.

    c. Execution in the lower court may proceed by first recovery the security and executing forthwith for the balance.

    d. Costs in both costs shall attract interest 30 days from being assessed.

    e. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF OCTOBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Ganzalla for the Respondent

No appearance for the Appellant

Court Assistant - Brian