Simba Drilling Company Ltd v Nyambura (Civil Appeal E007 of 2024)
[2024] KEHC 12571 (KLR) (7 October 2024) (Judgment) (with dissent)

Neutral citation: [2024] KEHC 12571 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E007 OF 2024

DKN MAGARE, J

OCTOBER 7, 2024

BETWEEN

SIMBA DRILLING COMPANY LTD ..... APPELLANT

AND

LUCY HILDAH NYAMBURA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable E. Gaithuma given on 25/1/2024 in Nyeri SCC Comm No. E390 of 2023. The Appellants were the Respondents. The Appellant filed a 13 paragraph memorandum of Appeal dated 22/2/2024. The Appeal is both on facts and on law.

2. The grounds of appeal are prolixious and unseemly. They offend the tenets of a proper memorandum of appeal as set out in Order 42 Rule 1 of the Civil Procedure Rules which provides as hereunder doth: -

> "1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

3. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds

of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:

> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in any way enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

4. The grounds shall not be repeated here as they are not raising pure points of law. This being an appeal from the Small Claims Court, the duty of the court is circumscribed under Section 38 of the *Small Claims Court Act* which provides as doth:

   (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.

5. There are 2 issues that are raised in this appeal: -

   a. The court erred in failing to deal with the counterclaim which was unopposed.

   b. The court erred in allowing the respondent's claim.

6. The rest of the issues are repetitive, and others based on questions of fact, which are outside the purview of this court.

Background

7. The claim by the Respondent was that she entered into agreement on 31/10/2022 for supply and installation of a borehole pump in her parcel of land within 30 days. They have not supplied the same and as such they claimed for Kshs. 520,000/= being money had and received. The agreement was drawn by the Appellant and was duly signed.

8. The works were to be carried out within 30 days, that is by 1/12/2022. A sum of 300,000/= was to be paid at the signing and 300,000/= per month starting November 2022. A demand was made for Ksh 520,000/=. The Appellant indicated that a refund was to be done by end of April to June 2023. The agreement provided for a 14-day notice for termination.

9. The Appellant filed a claim on 22/1/2024, way outside the statutory period. They stated they received Ksh. 520,000/= from the Respondent. They counter claimed for Ksh. 850,000/= for the equipment they bought. Dates are not indicated. They stated that the Respondent was aware by the letter dated 5/4/2023 that the equipment was bought. The said letter, was to the effect that the Appellant was unable to complete the said works. They annexed a proforma invoice dated 15/12/2022, that it would be available after 6 weeks. The date was 14 days after the date upon which the agreement should have been executed.

10. It is important to note that the response to claim was filed after parties had been fully heard. Appellant's submissions were filed on 19/1/2024. A proper response had been filed without a counterclaim in November 2023.

11. A reply to defence was filed on 11/12/2023. The defence replied to is not in the file.

12. The court heard the parties and delivered its judgment on 25/1/2024. This resulted in this appeal. The Respondent stated that the Appellant forged some agreement. Parties even forgot that November ends on 30th. Court considered evidence and pleadings on record as at the time of hearing of the suit. The purported counterclaim is bogus. It was still considered and dismissed for lack of merit. It was sneaked into the court file after the hearing closed on 16/1/2024.

13. The duty of the court is to defer to the findings of fact of the adjudicator and analyse the matter for issues of law. The issues of law are either due to the subject matter or the finding of law by the court. In the case of Mbogo and Another vs. Shah [1968] EA 93, the court of appeal stated as doth:

> "...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."

14. However, an appeal of this nature is on points of law. It can be pure points of law or mixed points of law but points of law it is. An appeal on points of law is akin to a second appeal to the Court of Appeal. The duty of a second appeal was set out in the case of Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR: -

> "This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the 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. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR)."

15. Then what constitutes a point of law? In Twaher Abdulkarim Mohamed v Independent Electoral and Boundaries Commission (IEBC) & 2 others, (2014) eKLR, the court stated as doth: -

> "4. Although the phrase 'a matter of law' has not been defined by the *Elections Act*, it has been held in Timamy Issa Abdalla Vs Swaleh Salim Swaleh Imu & 3 Others, Malindi Civil Appeal No. 39 Of 2013 (Court Of Appeal), (Okwengu, Makhandia & Sichale, JJA) of 13.01.2014 that a decision is erroneous in law if it is one to which no court could reasonably come to, citing Bracegirdle vs Oxney (1947) 1 All ER 126. See also *Khatib Abdalla Mwashetani Vs Gedion Mwangangi Wambua & 3 Others, Malindi Civil Appeal No. 39 of 2013* (Court Of Appeal), (Okwengu, M'inoti & Sichale, JJA) of 23.01.2014 following AG vs David Marakaru (1960) EA 484."

16. In Peter Gichuki King'ara Vs IEBC & 2 others, Nyeri Civil Appeal No. 31 Of 2013 (Court Of Appeal) (Visram, Koome & Odek, JJA) Of 13.02.2014, the Court of Appeal held as follows: -

> "It was held that it is trite law that the exercise of judicial discretion is a point of law and that the trial court in denying a prayer of scrutiny is exercising judicial discretion. The

Court concluded that it would not be feasible for the Court of Appeal to order for a recount and scrutiny as this would involve matters of fact that were within the jurisdiction of the trial court. The court further held that the question of whether the trial judge properly considered and evaluated the evidence and arrived at a correct determination that is supported by law and evidence – with the caveat that the appeal court did not see the witness demeanour – is an issue of law."

17. A point of law is similar to a preliminary point of law but has a broader meaning. Justice Prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

18. The timelines for small claims are punishing. It is therefore imperative that the case facing parties be clear and succinct. Mere allegations will not count. Parties must know that it is a court of law and not a kangaroo court or a baraza. Pleadings are therefore paramount. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A.C. Mrima stated as follows: -

> " 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."

19. 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 as follows in respect to the essence of pleadings in an election petition: -

> " 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.....'"

20. The counterclaim is not worth consideration. This was a claim for money had and received. There is no relevance of a machine bought by a drilling company. It is an answer to the question of work on the Appellant's land. There was no proof of damages. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the Court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: ".... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> > "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"
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> The respondent's main complaint was that they failed to make the tenancy habitable and fit for purpose. They accused the Appellants for failing to carry out house repairs and maintenance. This was repeated in her witness statement that she had a tenancy agreed, which she was forced to sign and backdated. It is this kind of plead that make me recall the words of Justice C B Madan as he then was) had in mind when in N vs. N [1991] KLR 685 when he expressed himself in the following terms:
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> > "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

21. Therefore, I find no merit in the appeal. There is no single issue raised in law. The Appellant is simply trying to steal a match on the Respondent. The claim for Kshs. 850,000/= has no basis in law.

22. Costs follow the event. In this case, the costs are due to the Respondent. Award of costs in this court are governed by section 27 of the *Civil Procedure Act*. They are discretionally. The Supreme Court has

set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

23. Since costs follow the event, the respondents are entitled to costs of the appeal. A sum of Ksh 105,000/=.

Determination

24. In the upshot, I make the following orders:

    a. The Appeal lacks merit and is accordingly dismissed with costs of Ksh. 105,000/=.

    b. 30 days stay of execution.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 7TH DAY OF OCTOBER, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss. Mwangi for the Appellant

Mbau for Mr. Ndiang'ui for the Respondent

Court Assistant – Jedidah