Ichaura v Mathenge (Civil Appeal E050 of 2023)
[2024] KEHC 13415 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13415 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E050 OF 2023

DKN MAGARE, J

NOVEMBER 4, 2024

BETWEEN

KENNEDY KARANJA ICHAURA ..... APPELLANT

AND

DANIEL MIANO MATHENGE ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and Decree of the Honourable Evelyn Gaithuma made on 7/7/2023 in Nyeri SCC COMM E062 of 2023. The Appellant was the Respondent in the Small Claims Court. In his Statement of response dated 4/4/2023 and amended on 2/5/2023, the Appellant averred that he had entered a business deal with the Respondent herein but the business incurred losses and could not go on and that he signed the loan agreement by duress when the Respondent took him to the Karatina Police Station where he was forced to sign. He also denied the sum of Ksh. 286,000/-.

2. In its judgment dated 7/7/2023, the lower court found that the agreements were valid and the Respondent herein had proved to the required standard the debt of Ksh. 286,000/- and allowed the claim.

3. Aggrieved, the Appellant lodged a Memorandum of Appeal dated 7/4/2023 on the following 3 grounds:

    a. The learned magistrate erred in law and fact in finding that the Respondent had proved his case on the balance of probabilities.

    b. The learned magistrate erred in law and fact in departing from the principle that parties are bound by their pleadings.

    c. The learned magistrate erred in law and fact in finding that the agreements dated 20/6/2022 and 14/7/2022 were valid.

4. The appeal is a clear testament that parties do not read the statutes establishing the courts in which they operate. The parties are appealing to findings of fact. I shall only deal with the matters of law raised in the memorandum of appeal. In this connection, the court will only handle ground 2 – that the adjudicator erred in departing from the Respondent's pleadings against the clear principle that parties are bound by their pleadings. Whether the agreements were valid or not will not matter as can be seen shortly.

5. In the Statement of Claim dated 20/3/2023, the Respondent herein prayed for judgment of Ksh. 286,000/- as against the Appellant with costs and interest on account of a business loan lent to the Appellant on 2/6/2022 [contract date]. This amount was stated to be due by 16/6/2022. The Respondent pleaded that the Appellant fell in arrears.

6. In the submissions dated 8/10/2024, the Appellant submitted that the Respondent did not prove his case on a balance of probabilities and so the lower court was wrong in its finding.

7. It was also submitted that there was no evidence that the claimed amount was paid to the Appellant and the Respondent had to prove what was pleaded as he was bound by his pleadings. Reliance was placed on Elizabeth O. Odhiambo vs South Nyanza Sugar Co. Ltd (2019) eKLR.

8. The Respondent submitted that he had proved his case based on the evidence produced in court and the decision of the lower court was as such based on evidence and was not wrong. Further, he submitted that duress was alleged but not proved.

9. 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.

10. 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 appellate court 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)."

11. 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."

12. To this court, even where the matter involves application of judicial discretion, such discretion though unfettered must be exercised in accordance with the law. This Court therefore is persuaded that the exercise of judicial discretion is a point of law. 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."

13. 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 was then) 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.

14. What I understand 2/6/2022 to mean, is the period immediately after 2359.59 hours on 1/6/2022 to 0000hours on 3/6/2022. Any other period outside this period is not on 2/6/2022.

15. In order to determine whether the claim was valid, the court has to deal with the legal issues raised with more circumspection. The amount was said to be based on contract. Section 3(1) of the contracts act provide as follows: -

    a. No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

    b. No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.

16. The Respondent posits that there was an agreement of 2/6/2022 for lending of money. We cannot know the terms thereof. Suffice to say a claim cannot be brought for recovery of such amounts without a memorandum in writing.

17. There is no evidence of money lent on 2/6/2022. This was the claim in the suit and the claim in the witness statement.

18. The court however based its claim on amounts amounting to Kshs. 502,000/= lent many times and some sent to an unknown or undisclosed third party. The said third party was said to have received Kshs. 300,000/= in 2 tranches and refunding 226,000/=. The court was then taken down the garden path and hoodwinked to find that money due to the unknown third party was payable by the Appellant. These amounts were over and above 286,000/=.

19. The court was hoodwinked into dealing with agreements of 30/6/2022 and 14/7/ 2022. The number of figures dropped were jaw dropping. These relate to every date except 2/6/2022. The alleged arrears were not pleaded. The court had no jurisdiction in dealing with other debts for which no claim had been filed.

20. Having made an admission on the record, the money was sent to a third party and that amounts received are over and above amounts received, then the court was duty bound to dismiss the claim. There are no pleadings relating to money given to an agent or a friend of the Appellant as they are not their charges. The admission in law, cannot be ignored. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR) [2013] KECA 208 (KLR), the Court of Appeal [Githinji,Nambuye & Koome JJ.A)], as they were then, posited as follows regarding implied admission of facts inferred from pleadings in instances where one has specifically failed to deal with allegations of fact in the opposing party's pleadings:

> That the pleadings presented by a party against whom the relief is sought must be those that do not contain specific denials and no definite refusals to admit allegations; demonstration that there are allegations of facts made by one party and not traversed by the other which are deemed to be admitted; demonstration that there has been implied admission of facts inferred from pleadings in instances where the defendant has specifically failed to deal with allegations of fact in the plaint , the truth of which he does not admit or instances where a defendant has evasively denied an allegation in the plaint; demonstration that there is admission of facts discerned from correspondences or documents which are admitted or that there is an oral admission as the rules use the words "or otherwise"

21. The claim related to a relationship going to March 2022. This was not in court. Only the debt of 2/6/2022 was. The matter that was sought to be proved was outside the realm of the suit. Therefore, parties are bound to plead their cases fully. 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: -

"…..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……

…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."

22. 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."

23. In respect to the essence of pleadings, 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 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……'"

24. With respect to the court, had the Respondent intended to claim the entire gamut of debts, he should have filed suit over the same for parties to carry out accounts. It is trial by ambush to start releasing a

myriad of figures, all of which are not in the pleadings. Given the divergence, it is clear that there was no Kshs. 286,000/- lent on 2/6/2022 to be refunded on 16/6/2022. The evidence on record bears this position, though the court must leave evidence to the court below.

25. Pleadings which are contradicting evidence cannot form basis for award of judgment. The philosophy behind the preponderance of probabilities as a standard of proof in civil claims derives from the understanding that in percentage terms, a party, be it claiming or responding who is able to establish their 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. Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 stated 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."

26. The Respondent pleaded that there were two loan agreements with the Appellant and that he loaned the Appellant Ksh. 286,000/- but the Appellant fell in breach by defaulting in the payment even after an extension in good faith up to 14 days by the Respondent.

27. The Appellant on the other hand denied freely signing the agreements on the allegation that he signed under duress in the presence of commanding police officers at Karatina Police Station. Before I venture into the execution of the agreement as pleaded, I must then proceed to the question of whether, the Kshs. 286,000/= was loaned to the Appellant.

28. This court has the duty therefore, to triangulate on 2 aspects – evidence that the Respondent had the money and the money left the Respondent to the Appellant on or about 2/6/2022 as pleaded, and whether there is such loan agreement. This is based on the principle of Nemo dat quod non habet. Though used in relation to transfer of ownership, the term means that there needs to be evidence that the Respondent had money and capacity to transfer the money, did indeed transfer on the said date to the Appellant, since no one can give what they do not have.

29. The Respondent could not give that which he did do not have. There was no evidence that the amount pleaded was given. Though pleaded as a debt, the Respondent did not tender any evidence in support of her case. In Katana Kalume & another vs Municipal Council of Mombasa & another (2019) eKLR the court cited with approval the holding in Bishopsgate Motor Finance Corporation Ltd vs Transport Brakes Ltd (1949) 1 KB 322, at pp. 336-337 where it was held as follows:

> " In the development of our law, two principles have striven for masterly. The first is for the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."

30. The said money was dealt with by the Respondent and third parties, who were not sued. The claim in court departed from pleadings. The Appeal is consequently allowed. Judgment and decree of the Honourable Evelyn Gaithuma made on 7/7/2023 in Nyeri SCC COMM E062 of 2023 is set aside and in lieu thereof, an order is issued dismissing the Respondent's suit in the court below.

31. Costs follow the event. Section 27 (1) of the *Civil Procedure Act* provides as doth:

> Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

32. The determination of costs payable to the successful party is also a judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The Supreme Court 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.

33. In the circumstances, the Appellant is entitles to the costs of the appeal and in the court below.

Determination

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

a. Judgment and decree of the Honourable Evelyn Gaithuma made on 7/7/2023 in Nyeri SCC COMM E062 of 2023 is hereby set aside. In lieu thereof, I substitute with an order dismissing the suit in the Small Claims Court.

b. The Appellant shall have costs of this appeal of Kshs. 40,000/=.

c. The Appellant shall have the cost of the Small Claims Court to be assessed.

d. 30 days stay of execution.

e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 4TH DAY OF NOVEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Mutahi Muchiri for the Appellant

No appearance for the Respondent

Court Assistant – Jedidah