Mwaura v Wambua (Commercial Appeal E003 of 2024)
[2024] KEHC 13897 (KLR) (11 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13897 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

COMMERCIAL APPEAL E003 OF 2024

DKN MAGARE, J

NOVEMBER 11, 2024

BETWEEN

SAMUEL KAMANDE MWAURA ..... APPELLANT

AND

JOHN MUTINDA WAMBUA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable Evelyn Gaithuma delivered on 25/07/2024 in Nyeri SCCCOMM E039 of 2024. The Appellant was the Respondent in the Small Claims Court.

2. The Respondent herein filed a claim dated 1/2/2024 against the Appellant claiming a sum of Kshs. 370,000/= and interest from the date of filing. The said amount was for money had and received on 13/10/2023. The Appellant is said to have repossessed the vehicle in January 2024. At the time of sale the Appellant had charged the said vehicle to Simple Pay Capital Ltd.

3. There was an elaborately written agreement dated 13/10/2023. The Appellant filed response on 26/02/2024 alleging default on part of the Respondent. He indicated that the vehicle was making a minimum of Kshs. 5,000/=. However, he did not disclose that he had not released the vehicle from his Sacco as complained about in a letter dated 17/1/2024. They also filed a strange document, christened a memorandum of appearance. Such a document has no place in Small Claims Court.

4. The Appellant indicated that he lost faith in the agreement of 13/10/2023 and is entitled to rescind the agreement. He prayed that he be allowed to rescind the agreement. No particulars of breach or fraud were pleaded.

5. Parties agreed to proceed by way of documents as per Section 30 of the *Small Claims Act*. The court perused the documents and submissions and delivered her judgment on 25/07/2024. The court found that: -

a. The Respondent breached the agreement when he failed to pay Kshs. 100,000/= as at 25/10/2023.

b. A sum of Kshs. 380,000/= only is refundable. The vehicle was not in possession of the Respondent hence it will be double compensation to be allowed to retain the same.

c. Each party to bear own costs.

6. The Appellant was aggrieved and as a result filed the following grounds: -

a. That the learned magistrate erred in law and in fact by finding that the Respondent breached the agreement on 25th October, 2023 only.

b. That the learned magistrate erred in law and fact by ignoring the evidence adduced by the Appellant and failing to find that the Respondent continued to be in breach until 9th January, 2024.

c. That the learned magistrate erred in law and fact by failing to consider evidence that the Respondent was in possession of the motor vehicle from October 2023 to 9th January, 2024 during which period the Respondent used the vehicle for matatu business.

d. The learned magistrate erred in law by entering judgment for the Respondent whom she found to have been in default from 25th October, 2023 to 9th January, 2024, a period of three months.

e. The learned magistrate erred by ignoring the evidence of the Appellant that the vehicle matatu earns an approximate of Kshs. 4,500/= to Kshs. 5,000/= daily and therefore the Respondent earned substantial amounts from it during the three months that he was possession.

f. That the learned magistrate erred in law by failing to find the deposit of Kshs. 370,000/= (three hundred and seventy thousand only) paid to the Appellant was reasonable compensation for the three months period which the Appellant did not have possession and therefore lost income.

g. That the learned magistrate erred in law by finding that the Appellant had failed to prove that the Respondent was earning income from the 25 seater minibus matatu, or that the vehicle was used for transport business at all.

h. That the learned magistrate erred in law by failing to find that the motor vehicle had been charged by U & I Microfinance Bank and therefore it is the bank that repossessed the vehicle and not the Applicant. The bank only requested the Appellant to avail the vehicle at their motor yard.

i. That the learned magistrate erred by failing to find that the Respondent would not have protested the repossession if the vehicle was not earning income for him and also if the motor vehicle had not been repossessed by the bank, the Respondent would still be possession all this time at the expense of the Appellant.

j. That the court basically unjustly enriched the Respondent who now would retain all the profits he made with the vehicle for three months and also get back Kshs. 370,000/=. Meanwhile, the Appellant bears the losses of the three months the Respondent was in possession and does not get the three months back.

7. 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.

8. 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."

9. However, an appeal of this nature is on points of law. It can be pure points of law or mixed points of law but point 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)."

10. 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."

11. 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."

12. 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.

13. 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."

14. 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.....'"

15. The court was duty bound to read the relationship and interpret it as such. 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..."

13. The main issue for determination in this case is whether the trial court erred in law in allowing the Respondent's case. All the issues raised are questions of fact. This is whether, the court erred in not retaining the Kshs. 370,000/=. There was no counterclaim filed for the retention of the money. The only request made was to be allowed to rescind the agreement. This was unnecessary as the agreement was already rescinded by way of repossession. The retention of the money, though pleaded as a defence was not one of the questions left to the court for determination.

14. The repossession, as the Appellant correctly alluded to was by the micro finance. This is crucial in that the Appellant is stating that they did enforce their default. The repossession by the microfinance is due to default, not of the Respondent but of the Appellant.

15. Further, damages is a question of evidence. Such damages must be pleaded and proved. Parties must understand that if they bring actions for damages it is for them to prove damage. They must first plead and then prove. Without pleading, the court cannot award. 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."

13. The Respondent's case was not in the court below. It was neither pleaded, prayed for as a counterclaim, nor proved. Loss is never an estimation but one which must be proved.

14. The long and short of the foregoing is that the appeal raises questions of fact that were not in the court below. This court is only interested in questions of law. None has been raised. In the circumstances, this is a proper appeal for dismissing.

15. Award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. They are discretionary. 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.

16. Since costs follow the event, the Respondent is entitled to costs of the appeal. A sum of Kshs. 45,000/= will suffice. Accordingly, the appeal is dismissed with costs of Kshs. 45,000/=.

Determination

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

    a. The appeal is dismissed with costs of Kshs. 45,000/=.

    b. 30 days stay of execution.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF NOVEMBER 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Appellant

Mr. Karanja for the Respondent

Court Assistant – Jedidah