Mwangi v Maina (Civil Appeal E039 of 2024)
[2024] KEHC 13416 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13416 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E039 OF 2024

DKN MAGARE, J

NOVEMBER 4, 2024

BETWEEN

SIMON MAINA MWANGI .... APPELLANT

AND

CAROL W MAINA .... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of the Honourable Ismael S.I. made on 3/6/2024 in Nyeri SCCCOMM E055 of 2024. The Appellant was the Respondent in the Small Claims Court.
2. In the Statement of Claim dated 20/2/2024, the Respondent herein prayed for judgment of Ksh. 60,000/- as against the Appellant with costs and interest on account of a contract relating to money had and received.
3. The Respondent pleaded that she gave the Appellant some work for a sum of money of Kshs. 200,000/- but the Appellant repaid only Kshs. 140,000/- leaving a balance of Kshs. 60,000/- which he had refused to pay hence the cause of action.
4. In his Statement of Defence, the Respondent denied the claim and averred that the Respondent was a manager at AA Kenya -Karatina Branch and that the Appellant was awarded a contract to partition and paint an office and was paid a final cheque of Ksh. 202,000. Further, the Appellant stated that he did not know the nature of work and the request for Ksh. 60,000/- from the Respondent.
5. In its judgment dated 3/6/2024, the lower court found that the Respondent had proved her case to the required standard and allowed the claim. Aggrieved, the Appellant lodged a Memorandum of Appeal dated 26/6/2024 on the following 3 grounds:
    a. The learned magistrate erred in law and fact in finding that the Respondent had proved her case under Section 107 and 109 of the *Evidence Act*.

b. The learned magistrate erred in law and fact in finding the existence of a contract.

c. The learned magistrate erred in law and fact in failing to find that the DPP concluded that there was no evidence to warrant charges against the Appellant.

6. At hearing, the Respondent adopted her witness statement and documents which she produced. She testified that she claimed a debt. That she gave the Appellant a job to partition the office at AA Kenya and she paid him Ksh. 200,000/- in cash. The Respondent then was to repay but he only repaid Ksh. 140,000/- leaving a balance of Ksh. 60,000/-.

7. On his part the Appellant adopted his witness statement and documents which he produced in court. It was his case that he did some job for her in Mukurweini in appreciation for her. That there was no agreement for 200,000/- as alleged. He denied the claim.

8. The Appellant submitted that the Respondent did not prove her case on a balance of probabilities and so the lower court was wrong in its finding. 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 she was bound by her pleadings. The Appellant maintained that there was no agreement between the parties.

9. The Respondent submitted that she had proved her case based on the evidence produced in court and the decision of the lower court was based on evidence and was not wrong.

Analysis

10. 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.

11. 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).”

12. Then what constitutes a point of law? Is an issue of law the same as a matter 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."

13. 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 matter 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."

14. 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 as follows:

> " 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.

15. In this case, the lower court found that the Respondent had proved her case to the required standard. The standards are set out in Section 32 of the *Small Claims Court Act* as thus: -

> " 32.
>
> (1) The Court shall not be bound wholly by the Exclusion of strict Rules of evidence. Rules of evidence
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> 2. Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.
>
> (2) Without prejudice to the generality of subsection (1), the Court may admit as evidence in any proceedings before it, any oral or written testimony, record or other material that the Court

considers credible or trustworthy even though the testimony, record or other material is not admissible as evidence in any other Court under the law of evidence.

(3) Evidence tendered to the Court by or on behalf of a party to any proceedings may not be given on oath but that Court may, at any stage of the proceedings, require that such evidence or any part thereof be given on oath whether orally or in writing.

(4) The Court may, on its own initiative, seek and receive such other evidence and make such other investigations and inquiries as it may require.

(5) All evidence and information received and ascertained by the Court under subsection (3) shall be disclosed to every party.

(6) For the purposes of subsection (2), an Adjudicator is empowered to administer an oath.

(7) An Adjudicator may require any written evidence given in the proceedings before the Court to be verified by statutory declaration.

16. The court is not concerned with evidence on the appeal under Section 38 of the *Small Claims Court Act*. Does it mean that evidence is irrelevant? Of course not. The evidence of decisive character must be based on the pleadings. Without being based on pleadings, such evidence is otiose and of no use.

17. 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."

18. 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....
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> 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."

19. 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......'"

20. The record in the court below was that the main contention is existence of a contract between the parties. It appears that the lower court inferred the existence of contract on the words on a photocopy of some document. It is not known who signed the same. The words read:

> " To pay Ksh. 60,000/- to Carol Maina ID 14419827 upon maturity of the cheque. 03/06/2019. Signed"

21. The same words were said to have been signed by the Appellant on 3/6/2019. It is not in my purview to deal with evidence in these kind of cases. The court's duty is limited to matters of law. Existence of a contract is a matter of law. Breach thereof is a question of fact or evidence. The 4 elements of a contract are:

    i. Offer

ii. Consideration

iii. Acceptance

iv. Legality.

22. In the House of Lord's decision in Brogden v Metropolitan Rly Co [1876-77] LR 2 APP CAS 66, Lord Blackburn held as follows:

> " I have always believed the law to be this, that when an offer is made to another party and in that offer, there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound."

23. In Abdul Jalil Yafai v Farid Jalil Mohammed [2015] eKLR the Court of Appeal (Makhandia, Ouko & M'inoti, JJ.A) posited as doth:

> A contract being a voluntary obligation the law places a high value on ensuring parties have truly consented to the terms that bind them. The law also grants parties broad freedom to agree on the content of the agreement whose terms are incorporated through express promises. Those terms, in case of a disagreement are interpreted by the courts to seek out the true intention of the parties, from the perspective of an objective observer and, in the context of the parties' bargaining environment. Where there is an obvious gap, courts typically imply terms to fill those gaps without, of course re-writing the agreement for the parties.

24. There is no doubt whatsoever that there is no offer, acceptance, and consideration for the 60,000/=. It is not indicated as a refund but when cheque matured. The said cheque was issued by the Respondent's employer. The nature of the works done for which the payment was requested was never stated in the pleadings. 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......'"

25. The Appellant on the other hand denied signing any agreement. Before I venture into the execution of the agreement as pleaded, I must then proceed to the question whether, the Ksh 60,000/= was given and received and in what consideration. The claim is for money had and received. It is incumbent of a party claiming such to plead and prove the same. The date of the cause of action is said to have been 23/6/2019. An agreement of 3/6/2019 cannot be of any use in respect thereof.

26. Appellant denied whether there is such agreement. However the Respondent departed from the pleadings and dealt with an amount of 202,000/= and various installments. This was not the pleaded case. Cheuqes relate to a payment on 3/6/2019. The money was paid to the Appellant by AA Kenya. For money had and received to be proved, the court must be satisfied that money left the Respondent's coffers to the Appellant. This is based on the principle of Nemo dat quod non habet. Though used

in relation of transfer of ownership, the term means that there needs to be proof 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.

27. The Respondent could not give that which she did do not have. The pleading that a cause of action arose on 23/6/2019 was clearly misplaced. Though pleaded as a debt, the Respondent's pleadings do not support the pleaded case. As at 03/06/2019, the Respondent was eyeing 60,000/= long before the alleged cause of action. No one can give a better title than she herself possesses as the Respondent attempted to do in this 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."

28. The Respondent in this case did not file in Court any evidence of payment and the court proceeded on wrong principles by finding a debt when there was no evidence. The court needs to confirm the actual amount given. Failing to disclose this means the case is not proved. Alternatively, an agreement can be given for illegal purposes, for example camouflaging a bribe or other illegal consideration. It was not stated why the Respondent as Manager of AA Kenya could give cash money to the Respondent on consideration of partitioning and painting works.

29. Consequently, I find no basis on which the lower court found that the Respondent had proved her case to the required standard. The appeal is thus merited. A court cannot infer a contract where none is shown to exist or re-write one which exists but on different terms. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR it was held as follows: -

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
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> As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):
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> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

30. Further for an agreement to be one, it must speak, nay shout for itself without reference to anything outside of the document, or extrinsic to it. In Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR, the Court of Appeal, (Ouko, Kiage and Murgor JJA) held as doth;-

> " In considering both the validity and tenure of the contract of guarantee, we find no better place to start than the Encyclopedia of Forms and Precedents, 4th Edn, Vol 9 page 761 para 25 where the principles of construction of guarantees were set out as follows;

"The ordinary rules of construction applicable to all contracts also govern the contracts of guarantee. The whole agreement must, in the usual way, be considered, and the natural meaning given to the words used unless such meaning involves obvious absurdity. The surrounding circumstances must also be taken into consideration, where the guarantee requires explanation. The surety will not be charged beyond the precise terms of his engagement, he being regarded in the light of a 'favoured debtor.'"

So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

31. The court cannot introduce an agreement where there is none. Parties must learn to plead their cases and support what they call agreements. The so-called document has only one signature making it not an agreement. In any case it relates to a date before the cause of action arose. The net effect is that the case in the court below was untenable in law and must as a corollary be dismissed. Accordingly, the Appeal is allowed.

32. 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.

33. 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.

234. It is my considered view that the Appellant is entitled to the costs of the appeal and the court below.

Determination

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

    a. Judgment and Decree of the Small Claims Court made on 3/6/2024 in Nyeri SCCCOMM E055 of 2024 is hereby set aside. In lieu thereof, I substitute with an order, dismissing the suit in the Small Claims Court.

    b. The Appellants shall have costs of this appeal of Kshs. 6,000/=.

    c. The Appellant shall have the cost of the Small Claims Court of Kshs. 6,000/=.

    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:

No Appearance for the Appellant

Pro se Respondent

Court Assistant – Jedidah