Wachira v Kariuki (Civil Appeal E021 of 2024)
[2024] KEHC 14032 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14032 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E021 OF 2024

DKN MAGARE, J

NOVEMBER 13, 2024

BETWEEN

PATRICK WANJOHI WACHIRA ..... APPELLANT

AND

ELIUD KIGOI KARIUKI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and Decree of the Honourable Ismael S.I. delivered on 22/4/2024 in Nyeri SCC Case No. E039 of 2024. The Appellant was the Claimant in the Small Claims Court for an accident involving the Respondent's motor vehicle Registration Number KCF 690 K and the Appellant's motor vehicle Registration Number KAG 729 Q.

2. The Claimant filed a claim for Ksh. 289,350/= in respect of material damages claim against the Respondent on 19/2/2024. The court dismissed the bulk of the claim and awarded only a sum of Ksh. 21,550/= as proved.

    a. This was motor vehicle search Ksh. 550/=

    b. Towing charges Ksh. 15,000/=

    c. Assessment receipt 6,000/=

    d. Cost of repair – dismissed

    e. Loss of user – dismissed.

    Total Ksh. 21,550/=

3. Appellant was aggrieved by the said judgment in respect of the balance of the special damages, that is cost of repair and loss of user, and set forth the following grounds of appeal.

a. That the learned trial magistrate erred in law and fact by denying the Appellant special damages of Ksh. 289,350/=.

b. That the learned trial magistrate misdirected himself and based his findings of special damages on wrong considerations.

c. That the learned trial magistrate erred and misdirected himself in fact and law by awarding general damages to the Appellant that were manifestly lower than what was pleaded for in the circumstances and thus failed to appreciate the principles applicable in the award of damages.

d. That the learned trial magistrate erred in law and in fact by failing to consider the Appellant's submissions and judicial authorities on special damages in material damages claim thereby arriving at an erroneous figure on quantum.

4. I shall dismiss grounds (a) (c) and (d) pronto as these are questions of evidence. The only valid appeal is 'That the learned trial magistrate misdirected himself and based his findings of special damages on wrong considerations.'

Analysis

5. This is a single-issue appeal; that is whether assessment report can be a basis for award of damages. The Memorandum of Appeal is not a classic memorandum expected in these matters. It covers questions of law and fact. Further, it is inconcise and argumentative. Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -

> " 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."

6. The Court of Appeal had this to say about compliance with Rule 88 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:
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> > "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 anyway 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..."

7. I shall dismiss questions of fact, pronto. I shall not concern myself with any conclusion of fact. However, an appeal of this nature is on matters of law. It can be pure matters of law or mixed matters of law but matter of law it is.

8. An appeal on matters 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)."

9. Then what constitutes 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."

10. 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: -

> " The exercise of judicial discretion is a matter 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."

11. The main issue for determination in this case is whether the trial court erred in law in award of special damages. A matter 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 matter 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 matter.

12. The court proceeded by way of documents under Section 30 of the *Small Claims Court Act*. The said section provides as follows: -

> Subject to agreement of all parties to the proceedings, the Court may determine any claim and give such orders as it considers fit and just on the basis of documents and written submissions, statements or other submissions presented to the Court.

13. Relying on documents, essentially means there is no dispute as to the documents save only the meaning assigned to the documents. 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 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.
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> In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;
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> > "It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."

14. The meaning or interpretation is gotten from the document itself. There was no question of authenticity or veracity of the documents. The issue the court dealt with was that though a valuation report was produced, he was not satisfied that there were receipts.

15. The question whether in a small claim court an assessment report is enough is provided in Rule 5(1) of the Small Claims Courts Rules, 2019 which provide as follows:

> 1. A person claiming compensation under section 12 (1) (c) of the Act in respect of a motor vehicle which has been damaged in a road traffic accident or other accident shall attach to the Statement of Claim-
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> (a) an itemized estimate of the cost of repair prepared by a licensed mechanic or certified motor vehicle assessor; or
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> (b) an itemized receipt issued in acknowledgement of money paid by the claimant to a licensed mechanic on account of repairs already carried out on the motor vehicle in question.

16. The two limbs are disjunctive. The use of or in Rule 5(1) means that the parties need only to comply with one limb. In the case of *Badawi v Kenya School of Law (Constitutional Petition E033 of 2019*)

[2021] KEHC 306 (KLR) (23 November 2021) (Judgment), Mativo J, as he was then, stated as follows: -

> As the Apex Court held in Raila Amolo Odinga v Independent Electoral and boundaries Commission and 42 Others,10 the word "or" as used in a statutory provision clearly makes the two limbs disjunctive. A similar position was held in Bernard Ndeda & 6 Others v Magistrates and Judges Vetting Board & 2 Others,11 Wilson Kaberia Nkuja v Magistrates and Judges Vetting Board & another12 and Edward Njoroge Mwangi v Francis Muriuki Muraguri & Another13 among other cases all of which held that the word "or" is normally disjunctive and it is used to introduce another alternative.

17. Therefore, production of an itemized estimate of the cost of repair prepared by a licensed mechanic or certified motor vehicle assessor is sufficient for purposes of Section 12 (1) (c) of the Act, which, provides as follows: -

> 1. Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to-
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> (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property.

18. It must be recalled that the nature of damages caused are special damages. In addressing the degree, certainty of proof, the Court of Appeal [Kneller, Nyarangi, JJA and Chesoni, Ag JA] in Hahn V Singh [1985] eKLR, posited that:

> " Special damages must not only be specifically claimed but also strictly proved. For they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree and certainty and particularly of proof required depends on the circumstances and nature of the acts themselves."

19. Special damages in addition to being pleaded, must be strictly proved as posited by the Court of Appeal in the case of David Bagine Vs Martin Bundi [1997] eKLR,

> " 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"

20. In this case, the Appellant followed the dictates of Rule 5(1) of the Small Claims Courts Rules, 2019. Unfortunately the court followed other standards. Even in civil cases under the Civil Procedure Rules the assessment report is enough.

21. In the circumstances the court was plainly wrong in declining to award amounts in the assessment report for repairs of Ksh. 237,800/=. The same is therefore liable for setting aside.

22. The question of loss of user, is a question of fact. In the circumstances, I decline the invitation to deal with loss of user as the same is a question of evidence.

23. I set aside the award of Ksh. 21,550/= and in lieu thereof enter judgment for Ksh. 259,350/= being the amounts pleaded excluding loss of user.

24. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

    (1) 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.

13. 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.

25. The Appellant is successful. He deserves the costs both in this court and the court below. Section 33 of the *Small Claims Court Act* provides for costs as doth:

    (1) The Court may award costs to the successful party in any proceedings.

    (2) In any other case parties shall bear their respective costs of the proceedings.

    (3) Without prejudice to subsections (1) and (2), the Court may award to a successful party disbursements incurred on account of the proceedings.

    (4) Except as provided in subsection (2), costs other than disbursements, shall not be granted to or awarded against any party to any proceedings before a Court.

26. In the circumstances, the Appellant shall have costs of Kshs. 45,000/= for this appeal and also shall have costs in the Small Claims Court to be assessed.

Determination

27. I therefore make the following orders: -

    a. I set aside the judgment on special damages of Kshs. 21,550/= and in lieu thereof enter judgment for Kshs. 259,350/=, plus costs and interest from the date of filing in the court below, being the amounts pleaded and proved excluding loss of user.

    a. I dismiss the appeal for loss of user.

    b. Costs of Kshs. 45,000/= to the Appellant for this appeal.

    c. The Appellant to have costs in the court below.

    d. 30 days stay of execution.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13TH DAY OF NOVEMBER, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Ateka for the Appellant

Ms. Stacy Jayo for the Respondent

Court Assistant – Jedidah