REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI CIVIL APPEAL DIVISION

CIVIL APPEAL NO. 637 OF 2019

PREVIEW PROPERTY AGENCY.....1ST APPELLANT

MUGO KAMANDE.....2ND APPELLANT

= VERSUS =

TERRIE WANJIKU MIANO.....RESPONDENT

(An Appeal from the Judgement and Decree of Honourable G.A. MMASI (Mrs.)

Chief Magistrate delivered on 17/10/2019 in Milimani CMCC No. 695 of 2017)

JUDGMENT

This is an appeal by Preview Property Agency and Mugo Kamande against the ruling and orders of the Honourable G.A. MMASI (Mrs.) Chief Magistrate in Milimani Cmcc No. 695 of 2017 delivered on 17th October, 2019. The Appellants were the Defendants while the Respondent was the Plaintiff before the trial court. The firm of Wokabi Mathenge & Co. Advocates represents the Appellants whilst the firm of Nzamba Kitonga & Co. Advocates represents the Respondent.

The respondent instituted a suit against the appellants herein for damages arising from her eviction in breach of contract via a plaint dated 7th February 2017 filed before the Chief Magistrate's court. The respondent pleaded that sometime in September 2015, the 1st Appellant who is the proprietor of a Residential Flat known as Unit No. 19 situated along Lumumba Drive, Roysambu and the 2nd Appellant, his Property Agent, in breach of contract and the tenancy agreement broke into her house in her absence and without a court order took away all her household and personal items. That as a result of the illegal levy of distress for rent, the respondent was subjected to financial loss, mental agony, loss and damages.

The suit proceeded for hearing after pre-trial conference where the parties confirmed the witness statements for only one witness on each side. The respondent testified on 24th June, 2019 and closed her case while DW1(James Gacheru Macharia) a director of the 1st Appellant testified on 20th August, 2019 and sought to call another witness. However, the respondent objected to the evidence of the second witness on the ground that his witness statement was filed after the Respondent had already testified and was also filed without leave of court. In a ruling dated 17th October, 2019, the trial court upheld the objection and ordered that the intended witness be struck out and the Appellants to close their case.

Being dissatisfied with the said ruling and order of the subordinate court the Appellants have preferred this appeal by way of a Memorandum of Appeal dated 31st October, 2019 and filed in court on 1st November, 2019. The grounds of appeal are: -

1. The Learned Magistrate erred in law and fact in failing to consider that the witness the appellants intended to call had all along been referred in the proceedings and pleadings filed.

2. The Learned Magistrate erred in law and in failing to exercise judicial discretion judiciously by locking out the appellants from adducing evidence.

3. The Learned Magistrate erred in law in failing to balance the interests of justice more so whereas the appellants had already provided documents for crucial witness.

4. The Learned Magistrate erred in law in ruling that the pre-trial processes could lock out a party from presenting evidence which they had supplied.

5. The Learned Magistrate ererd in law in finding that the witness statements filed by the appellant's witness prejudiced the respondent.

6. The Learned Magistrate misdirected himself in failing to appreciate the contents of the witness by the appellant.

7. The Learned Magistrate erred in law and fact in failing to take into account the submission by the appellant on the interlocutory objection on the calling of the last witness by the appellant.

8. The Learned Magistrate erred in failing to take into account the available options for the respondent if she felt she required to challenge the statement of the witness the appellants intended to call.

9. The Learned Magistrate misconceived the legal position of calling of witnesses and place of witness statements leading to an erroneous decision.

10. The Learned Magistrate ignored the tenets of justice and equality of arms in failing to consider the evidence by the witness was of already supplied in both a statement and documents.

11. The Learned Magistrate was misguided when she pronounced the ruling on the objection which shut the appellants from calling the last witness thereby locking out the production of primary evidence that had been extensively referred by DW1.

12. The Learned Magistrate was wrong in failing to find the effect of locking out the appellant from adducing crucial evidence yet the nature of the claim filed had far reaching ramifications if the respondent was successful.

On 19th February, 2020 Lady Justice Njuguna admitted the appeal for hearing and directed the parties to file and exchange written submissions. The appellants filed their submissions dated 12th March, 2020 while the respondent's submissions are dated 20th May, 2020.

Appellant's Submissions:

The issue for determination as outlined by the appellants is whether they could introduce a witness (DW2) after the closure of the respondent's case. It is the Appellants submissions that this being an interlocutory appeal the court ought only to the evaluate the arguments by the parties and review the ruling thereof and not look into the merits or demerits of the parties case before the trial court.

Counsel for the appellants acknowledges that at the close of the respondent's case, there was only one witness statement filed on behalf of the appellants and that the second witness statement was filed on 14th August, 2019 and served on 16th August, 2019, four (4) days prior to the next hearing date. The appellants' argument is that the respondent, although denied knowledge of any instructions to the auctioneers, was aware of the involvement of the auctioneers in the levying of distress for rent as they were extensively mentioned in the pleadings and evidence filed in court.

The Appellants further submits that despite the late filing, the overriding principle of ensuring justice to all under Section 1A, 1B, 3A and 3B of the Civil Procedure Act ought to take precedence thus allowing the trial court to reopen the respondent's case for her to file additional evidence. It is the appellants argument that although Order 11 of the Civil Procedure Rules are meant to expediate the hearing of a case, they are not restrictive in nature so as to prevent a party from filing further documents or statements with or without leave. In support of their arguments, the appellants have relied on the case of **Major (Rtd) Andre Mkiire & 2 Others-vs- Stanley Njenga & Another [2017] eKLR** where Sergon. J had occasion to address a similar question and the Court emphasized the need to advance the overriding objective.

The appellants submit that this court should advance fair administrative of justice against a restrictive interpretation of the Civil Procedure Rules and relied on the case of **Pinnacle Projects Limited vs Africa & Another [2019] eKLR** where Nyakundi J. held that;

> **"When considering the additional evidence in my view a careful inquiry by the court ought to be made into the nature of the evidence as to its relevance, materiality facts in issue, admissibility and the strength of the evidence sought to be introduced within the trial. Merely because the witness statement was not served during pre-trial conference and discovery period does not prevent the trial court to allow such further additional evidence to be taken on record and allowed to be challenged in accordance with law."**

The appellants have also made reference to the case of **Ndathi Mwangi & 2 Others vs Benson Lumumba Ndolo[2017]eKLR** where Meoli J. held that "In order to give meaning to the overriding principle this court is not hamstrung and where circumstances so demand, can invoke its jurisdiction under Section 3A of the Civil Procedure Act. I am satisfied that this matter calls for such invocation." While in **David Kimani Gitau vs Francis Wanaina[2016]eKLR** where Ngugi J. held that "...pre-trial procedures, like all rules of procedures, are the handmaidens of justice and not its mistress. Hence, they are not formulaic or talismanic steps which must be rigidly followed regardless of their utility to the trial process. Indeed, Order 11 of the Civil Procedure Code exists to ensure that the trial process is more efficient. Hence, a Court may, where circumstances and context permit or dictate skip, abbreviate or bespoke the pre-trial processes and procedures."

The appellants further submission is that the appeal is merited and urge this court to find the orders upholding the objection erroneous and meant to subvert the cause of justice.

Respondent's submissions;

In opposition to the appeal, the respondent has raised two issues for determination;

i) Whether the appeal is properly before this court

ii) Whether the appeal has merit

On the first issue, the respondent submits that the appeal is not properly before this court since the appellants failed to seek leave of the court. It is the respondent's contention that the ruling being challenged was delivered on 17th October, 2019 and since an appeal against such ruling does not lie as of right under the provision of Order 43 Rule 1 of the Civil Procedure Rules and Section 75(i) (h) of the Civil Procedure Code, the appellant ought to sought leave before filing the present appeal on 1st November, 2019.

On the second issue, the respondent submits that the introduction of the disputed witness after the close of the respondent's case was not only mischievous but also an abuse of the court process. The respondent contention is that the right to fair hearing entrenched in the Constitution of Kenya dictates that all the parties to a suit ought to disclose all the documents and witnesses it intends to call in support of its claim or defence.

Analysis and Determination;

This being a first appeal, it is indeed the duty of the Court to review the evidence adduced and arguments made before the lower court and satisfy itself that the decision was well-founded. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

The only issue for determination in this appeal is whether the appeal is properly before this court and whether the same is merited. From the record, the respondent instituted the lower court suit on 7th February, 2017 and the appellants filed their defence on 21st April, 2017. On 4th December, 2017 the file was placed before Hon. P.N. Gesora (Mr.) Chief Magistrate for pre-trial directions and Mr. Mutemi in the absence of the appellants' counsel confirmed that the parties had complied with the provisions of Order 11 of the Civil Procedure Rules and the suit certified ready for hearing. The respondent testified on 24th June, 2019 and closed her case. The defence hearing was set for 20th August, 2019 when one defence witness (James Gacheru Macharia) testified and the case was adjourned to 24th September, 2019 for further defence hearing. On 24th September, 2019 Mr. Mutemi for the respondent objected to the evidence by the second defence witness on the ground that his witness statement was filed on 14th August, 2019 without leave of court and way after the respondent had testified and closed her case. He submitted before the trial court that the filing of the witness statement was an afterthought and that a party is bound by its own pleadings. Mr. Mathenge for the appellants opposed the objection on the ground that the provision of Order 11 does not limit the court on the issue of adducing evidence. Mr. Mathenge argument was that the Auctioneer is a principle party to the case as he is the one who distressed the rent. He further submitted that in the interest of fair hearing under Article 50 of the Constitution, the court should not uphold the objection. The Court delivered its ruling on 17th October, 2017 upholding the objection, this ruling is the subject of this appeal.

The provisions of Order 7 rule 5 of the Civil Procedure Rules provide as follows:-

> **"The defence and counter claim filed under rule 1 and 2 shall be accompanied by –**
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> **(a) An affidavit under Order 4 rule 1(2) where there is a counter claim;**
>
> **(b) A list of witnesses to be called at the trial.**
>
> **(c) Written statements signed by the witnesses except expert witness; and**
>
> **(d) Copies of documents to be relied on at the trial.**
>
> **Provided that statement under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under order 11."**

Order 11 Rule 5 states that;

> **"Where orders or directions are given at a case management conference -**
>
> **(a) The judge or deputy registrar or magistrate or case management officer shall record the orders or directions and inform the parties thereof; and**
>
> **(b) Where necessary, the judge or deputy registrar or magistrate or case management officer shall allocate time within which the orders or directions shall be complied with by the parties and fix a date at which the judge or deputy registrar or magistrate or case management officer shall record compliance by the parties or make such other orders as may be just or necessary including the striking out of the suit."**

The above provisions are clear on the requirement for parties to file documents within certain parameters. If documents are not available, as

at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. Similarly, any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the plaintiff's case. The purpose of case management conference is to facilitate the expeditious disposal of cases by ensuring proper management of cases before the courts. This was aptly put by H.P.G Waweru J. in the case of **P.H. Ogola Onyango t/a Pitts Consult Consulting Engineers vs Daniel Githegi t/a Quantalysis [2002]eKLR** when he stated as follows:-

> ***"Indeed, discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the trial has began, it is another thing for a party to seek to introduce documents once the opposing party has closed its case. The present suit was filed way back in 1999. The Defendant filed his defence in January 2000. He had more than ample time to make discovery before the trial commenced. To allow him to introduce documents after the Plaintiff has closed his case will occasion the Plaintiff serious prejudice that cannot be cured by cross-examination. In civil litigation there must be a level playing field. That field cannot be level were one party to be permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed."***

Perusal of the lower court record reveals that the appellants were not represented when the matter came up for pre-trial. However, Mr. Mutahi, Counsel for the respondent confirmed to the court that the parties had complied with order 11. There is however no indication on the court's record that the appellants raised any issue with regard to the court's directions during pre-trial. The hearing of the suit commenced one and a half years later after the pre-trial and it is only after the respondent had testified and closed her case that the appellants introduced another witness without leave of court. There is no reason given for the delay in introducing the intended witness. The appellants' argument is that the intended witness is a necessary party to the proceedings as he is the one who levied the distress for rent. This court is not convinced that the appellants have come to court with clean hands. They have been indolent and as aptly put by the respondent the introduction of the intended witness seems like an afterthought meant to prejudice the respondent.

Moreover, this court has a constitutional mandate to promote fair hearing under Article 50, hence, a court can disallow the tabling of evidence not provided to the other party as contemplated under the constitution and the Rules. The Supreme Court in the case of ***Raila Odinga & 5 Others vs IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3, 4 and 5 of 2013 (2013) eKLR,*** declined to allow additional evidence filed outside the contemplation of the rules and stated that;

> ***"The parties have a duty to ensure they comply with their respective time lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence."***

Although the court has a duty to ensure that justice is not delayed by ensuring procedures are followed to the letter, it must also endeavor to do justice to all parties and not to be too strictly bound by procedural technicalities as provided under Article 159 (2) (d). This principle was well emphasized in the case of **Attorney General vs Torino Enterprises Limited [2020] eKLR**, Muigai J. stated as follows;

> **"Two clear constitutional principles, articulated in Article 159 of the Constitution, are always in play in objections like the one raised before us, and calls for pragmatic balance rather than robotic adherence. The first principle, set out in Article 159 (2)(b), demands that justice shall not be delayed, and hence set timelines must be respected. The second principle, in Article 159 (2) (d) demands that justice shall be administered without undue regard to procedural technicalities, meaning that where the interests of justice so demand, the court may excuse non-compliance with the timelines it has set. It is also for that reason that the overriding objective demands of the court, when it is interpreting the law or exercising its powers, to act justly in every situation, to pay regard to the principle of proportionality, to create a level playing ground for all the parties and as much as possible, to dispose of disputes on merits rather than on technicalities."**

In the case of **Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another [2001]eKLR**, Ringera J. (as he was then) expressed his views regarding rules of procedure in the following words;

> **"….Rules of procedure are handmaidens and not mistress of justice and should not be elevated to a fetish. Theirs is to facilitate the administration of justice in a fair orderly and predictable manner, not fetter or choke it."**

In the case of **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others (2018) eKLR** the Supreme Court stated as follows at paragraph 79:-

> **"Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:**
>
> **(a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;**

(b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

(c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

(d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

(e) the evidence must be credible in the sense that it is capable of belief;

(f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;

(i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

Further, Justice Olao in **Joseph Mumero Wanyama v Jared Wanjala Lyani & another [2019] eKLR** laid down some factors that the court should take into consideration while determining an application to introduce new evidence and documents and stated as follows:-

"I find that an application to introduce new evidence and documents will be considered in light of the following; the state at which the trial has reached, the nature of the evidence sought to be adduced and the reasons why it was not availed at the proper stage, the prejudice that may be caused to the other party among other reasons."

From the foregoing, it is evident that the court may consider and allow an application for additional evidence to be adduced even after the lapse of the requisite period laid out in legislation so as to allow such party the opportunity to present his case in full. However, such consideration must not cause undue prejudice to the other party and this varies depending on the circumstances of each case. The court should however address its mind to questions such as reasons for late availability of the witness, the discovery of a new document, and importantly the stage of the proceedings at which the additional evidence is sought to be introduced. It is obvious that little prejudice will be occasioned where the trial has not started. The prejudice to the other party increases as the trial progresses.

In the present case, the appellants without leave of court, filed the witness statement on 14th August, 2019. This was way after the respondent had testified and even closed her case. This therefore means that the respondent, who had closed her case, would be prejudiced as she would not be able to adequately respond to the new witness or rebut his statement unless her case is re-opened and she is allowed to adduce additional evidence. Additionally, the appellants have not informed this court the reasons for filing and introducing this witness late in the day and without leave at that despite him being a 'major player'. The assertion that the witness is an auctioneer referred to by the respondent and instructed by the appellants is not sufficient reason to justify his late entrance into the matter. I have further perused the statement by DW1 and that of the intended witness, I see no new matter being introduced apart from reiterating what was already averred by DW1. DW1 actually confirms that he instructed the auctioneer and therefore the intended witness is in fact an agent of the appellants. The appellants knew that their line of defence involved the auctioneer. They could have listed him as a witness the moment they filed their list of witnesses. All along the auctioneer was available and the appellants cannot allege that they have now realized that the auctioneer's evidence is crucial.

In the end, I am in agreement with the submissions of the respondent that she would be greatly prejudiced if I am to allow the appeal by the appellants. The respondent has already closed her case and will not have an opportunity to rebut new evidence thus allowing the application will be unfair to the plaintiffs as it will violate the provisions of Article 50(1) of the Constitution. It would also be tedious to call upon the respondent to testify again so as to rebut the auctioneer's evidence, have her cross-examined and then close her case for the second time. I therefore find the appeal unmerited and I hereby dismiss the same with costs to the respondent.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2021.

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S. CHITEMBWE

JUDGE