



**Verjee v Attorney General & 3 others (Civil Appeal E097 of 2021)
[2024] KECA 728 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 728 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E097 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JUNE 21, 2024**

BETWEEN

SALIM VERJEE APPELLANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

RONALD DE MELLO 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE 3RD RESPONDENT

HAMISI BAKARI KODZA 4TH RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa
(D. O. Chepkwony, J.) delivered on 11th August 2021 In HCCA No. E012 of 2020)*

JUDGMENT

1. By a plaint dated 18th August 2014 and amended on 15th November 2016, the appellant, Salim Verjee, sued the respondents jointly and severally in the Chief Magistrate's Court at Mombasa in Civil Case No. 1621 of 2014 claiming: special damages of Kshs. 245,000; general damages; costs of the suit; interest at 14% on the special and general damages from the date of filing suit until payment in full; and any other orders that the court deemed fit to grant.
2. The appellant's case was that, on 10th March 2009, the 2nd respondent, Ronald De Mello, reported at Bamburi Police Station that the appellant had pushed him and threatened to beat him up; that the 4th respondent, Hamisi Bakari Kodza, a servant of the 2nd respondent, also made a report at the same station that the appellant had pushed him and threatened to beat him up; that the appellant likewise reported that the 4th respondent and one Mr. Nzyoka had assaulted him, and that the 4th respondent had threatened to cut him with a Panga; that the police arrested the appellant and had him charged in the Chief Magistrate's Court in Criminal Case No. 849 of 2009 with the offence of creating a



- disturbance in a manner likely to cause a breach of peace; that he was convicted and sentenced to a fine of Kshs. 7,000 or 3 months imprisonment in default; that he appealed to the High Court of Kenya at Mombasa in Criminal Appeal No. 326 of 2010 where the court upheld his conviction and sentence; and that he was eventually acquitted on appeal to this Court in Criminal Appeal No. 373 of 2012.
3. With an acquittal in his hands, the appellant filed suit claiming compensation in the Chief Magistrate's Court at Mombasa in Civil Case No. 1621 of 2014 as aforesaid.
 4. In his defence and counterclaim dated 15th September 2014 and amended on 30th January 2017, the 2nd respondent essentially denied the appellant's claim contending that the appellant's plaint did not disclose any reasonable cause of action against him; and that his (the appellant's) suit was an abuse of the court process. He urged the trial court to dismiss it with costs to him.
 5. In his counterclaim, the 2nd respondent averred that the appellant was incessantly harassing him demanding compensation for costs incurred in the criminal case aforesaid; that the appellant was stalking him; and that he deliberately parked his motor vehicle in such a way as to prevent the 2nd respondent from utilising his parking space. He prayed for: a permanent injunction to restrain the appellant from trespassing into his maisonette, from harassing him, and from obstructing or blocking his parking space; general damages; costs and incidentals to the suit; interest on general damages and costs of the suit; and such other or further relief as the court deemed fit and just to grant.
 6. Prior to the 2nd respondent's amendment of his defence on 30th January 2017, the appellant filed his reply to defence dated 25th September 2015 essentially relating the events leading to the criminal prosecution, denying the offence and the alleged trespass. He further averred that he was the victim of the 2nd respondent's assault and prayed that his counterclaim be dismissed with costs.
 7. In his subsequent reply to the 2nd respondent's amended defence and defence to counterclaim dated 16th February 2017, the appellant merely reiterated the contents of his reply to the 2nd respondent's defence dated 25th September 2014 and denied the averments pleaded in the 2nd respondent's amended defence and counterclaim.
 8. We also need to point out that, from the record as put to us, there is no indication of the 1st, 3rd and 4th respondents having filed their defence to the appellant's suit.
 9. By a Notice of Motion dated 3rd March 2020 made under Order 51 rule 1 of the *Civil Procedure Rules*, the 2nd respondent sought orders to stay proceedings and leave to file and serve on the appellant his affidavit verifying the facts pleaded in his counterclaim. He also prayed that the costs of the Motion be in the cause, and that the court do grant such other orders as it deemed fit.
 10. The 2nd respondent's Motion was supported by the affidavit of Anne Wamithi, learned counsel for the 2nd respondent, sworn on 3rd March 2020 essentially deposing to the grounds on which the Motion was anchored, namely: that hearing of the appellant's suit had been heard and closed; that the 1st and 3rd respondents had already closed their respective cases; that the verifying affidavit was merely intended to verify the truth of the facts pleaded in the 2nd respondent's counterclaim; that, all along, counsel was in the mistaken belief that the 2nd respondent's verifying affidavit was on record; that, unless the verifying affidavit was admitted on record, the 2nd respondent's counterclaim stood to be dismissed on a technicality of procedure; that none of the parties stood to suffer any prejudice by grant of the orders sought; and that it was in the interest of justice that the court allowed the orders sought.
 11. In its reply to the 2nd respondent's Motion, the appellant filed his replying affidavit sworn on 17th March 2020 stating that counsel for the 2nd respondent failed to comply with the rules of procedure for a period spanning 3 years; that an oral application to file the verifying affidavit had been made



previously, and that he objected thereto in view of the fact that they had closed their cases; and that the 2nd respondent's Motion should be dismissed with costs. Notably, we find nothing on record to indicate the position (if any) taken by the other respondents with regard to the application.

12. Upon hearing the 2nd respondent's Motion, the trial court (G. Kiage, SRM) granted the 2nd respondent leave to file and serve his verifying affidavit in respect of his counterclaim with costs to the appellant.
13. Dissatisfied with the decision of the learned Magistrate, the appellant lodged an appeal to the High Court of Kenya at Mombasa in HCCA No. E012 of 2020 essentially faulting the trial court for what could be summed up as procedural infractions allegedly resulting in breach of the appellant's right to fair trial.
14. In its judgment dated 11th August 2021, the High Court (D.O. Chepkwony, J.) found no merit in and dismissed the appellant's appeal with costs to the 2nd respondent. The learned Judge also directed that the appellant's suit in the subordinate court do proceed on priority basis. As held by the learned Judge:

28. Therefore, the filing of the counterclaim without a verifying affidavit renders the counterclaim as being defective. However, it is my view, that the said defect is not fatal."
15. Aggrieved by the learned Judge's decision, the appellant moved to this Court on appeal on 10 grounds, four of which feature for the first time on the 2nd appeal before us. A cursory look at the appellant's memorandum of appeal dated 1st October 2021 and amended on 28th November 2022 clearly reveals that the 3rd, 4th, 7th and 11th grounds are raised for the first time before us. Be that as it may, they relate to formal and procedural infractions cured by grant of the impugned order of the trial court as affirmed by the learned Judge allowing the 2nd respondent to file and serve the verifying affidavit in support of his counterclaim.
16. The remaining 6 grounds advanced on the 2nd appeal to us are that the learned Judge erred in law: by failing to take into consideration that the appellant's constitutional right to fair trial enshrined under Article 50 would be violated when upholding the trial court's ruling that allowed the verifying affidavit to be filed after close of the respective cases; in failing to critically evaluate the appellant's submissions and authorities on record; by upholding the trial court's ruling without re-opening the 2nd respondent's case; in failing to appreciate that there was no counterclaim regularly before the trial court; by failing to appreciate that, as an arbiter, the trial court was bound to uphold the rules of procedure; and by upholding the trial court's decision which justified incompetently lodged documents.
17. Supporting the appeal, learned counsel for the appellant, M/s. Khaminwa & Khaminwa, filed written submissions and case digest dated 26th January 2023 citing 7 judicial authorities, which we have considered.
18. On their part, learned counsel for the 2nd respondent, Ms. Anne Wamithi & Company, filed their written submissions and case digest dated 29th February 2024 citing 6 judicial authorities, which we have also taken to mind.
19. From the record as put to us, it is apparent that the 1st, 3rd and 4th respondents did not make any submissions in the appeal.
20. This is a second appeal in respect of which our mandate is limited, and on which we purpose to confine ourselves to points of law (if any) as pleaded and raised for determination by the trial court and on 1st



appeal. With regard to the Court’s jurisdiction on a second appeal, this Court had this to say in the case of *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR:

“Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina v Mugiria* [1983] KLR 78, *Kenya Breweries Ltd v Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & another v Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to 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”

21. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, the only question deserving of our consideration is whether the formal and procedural infractions complained of constitute constitutional breaches or other points of law deserving of our consideration and determination.

22. We wish to observe right at the outset that the issues raised before us merely relate to matters of procedure in the subordinate court, and that such procedural issues cannot be elevated to such a level as to call for determination in the manner of a constitutional reference merely on claim of what the appellant views and terms as “breach of the constitutional right to fair hearing” even before hearing of the substantive suit on its merits. That said, we are conscious of the fact that this Court is not suitably placed to lend advise that such claims are more suitably pursued in constitutional petitions whatever their worth, but not on a 2nd appeal to this Court in matters relating to formal validity of pleadings and procedural rules governing pleadings and, in particular, Order 7 rule 5(a) (concerned with documents to accompany defence or counterclaim) read with Order 4 rule 1(2) (relating to particulars of plaint). We need not overemphasise the fact that such matters are tenaciously confined to the realm of judicial discretion to which courts hold dear and strive to maintain their loyalty to the settled tenets of practice and procedure without which the administration of justice would count for little more than a mirage whose attainment would be nothing but a distant dream.

23. *Black’s Law Dictionary* (Tenth Edition) defines judicial discretion as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”

24. Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] A 898 had this to say on the rare cases in which this Court may interfere with the judicial discretion of the court(s) below:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.” [Emphasis ours]



- 25. Having carefully considered the record of appeal, the impugned judgment, the rival submissions and the law, we find nothing to suggest that the learned Judge misdirected herself in law; misapprehended the facts; took account of considerations of which he should not have taken into account; failed to take account of considerations of which she should have taken account; or that her decision, albeit a discretionary one, was plainly wrong. We form this view cognisant of the provision of Article 159(2) (d) of the *Constitution* enjoins this Court to administer justice without undue regard to procedural technicalities.
- 26. This Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR had this to say with regard to deviations from the form of pleadings and procedural infractions:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical.... It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

- 27. In conclusion, we find nothing to suggest that the deviation from and lapse in form and procedure complained of goes to the jurisdiction of the Court or to the root of the dispute, which is yet to be heard and determined on merits. To our mind, the impugned decision does not at all occasion prejudice or miscarriage of justice to the appellant. Consequently, his appeal fails and is hereby dismissed with costs to the 2nd respondent. The Judgment and Decree of the High Court of Kenya at Mombasa (D. O. Chepkwony, J.) delivered on 11th August 2021 in HCCA No. E021 of 2020 is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

