Ayub v Ngure & another (Civil Appeal 274 of 2017)
[2024] KEHC 812 (KLR) (Civ) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 812 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 274 OF 2017

CW MEOLI, J

JANUARY 31, 2024

BETWEEN

DANIEL MUTEMBEI AYUB ..... APPELLANT

AND

PETER GACHOGO NGURE ..... 1ST RESPONDENT

KARIUKI GICHA ..... 2ND RESPONDENT

(Being an appeal from the judgment of M. Murage (Mrs.) (RM). delivered on 5th May 2017 in Nairobi Milimani CMCC No. 3533 of 2013)

JUDGMENT

1. This appeal emanates from the judgment delivered on 05.05.2017 in Nairobi Milimani CMCC No. 3533 of 2013. The suit was commenced by a plaint filed on 20.06.2013 by Daniel Mutembei Ayub, the plaintiff in the lower court (hereafter the Appellant) against Peter Gachogo Ngure and Kariuki Gicha, the defendants in the lower court (hereafter the 1st & 2nd Respondent/Respondents). The claim was for special damages in respect of an accident that occurred on 26.10.2012 (the material date). It was averred that at all material times to the suit, the Appellant was the registered owner and driver of the motor vehicle registration number KBK 118B while the 1st Respondent was the driver of motor vehicle registration number KAL 840L being the employee, agent or servant of the 2nd Respondent who was the owner of the latter vehicle.

2. It was further averred that on the material date, the Appellant was driving motor vehicle registration number KBK 118B along the Eastern Bypass near the Coca Cola Depot within Nairobi County when the 1st Respondent drover motor vehicle number KAL 840L so carelessly, recklessly, and negligently that it hit the rear of the Appellant's motor vehicle causing it to hit the car ahead of hit. That as a result

of the said accident the Appellant's motor vehicle was extensively damaged on both the rear and front, occasioning the Appellant loss and damage.

3. The Respondents filed a joint statement of defence denying the key averments in the plaint and liability. Alternatively, and without prejudice to the denials in the statement of defence, the Respondents averred that if any accident as alleged (which fact was denied) and if the Appellant' vehicle sustained any damage (which fact was also denied) then the same occurred solely or substantially as a result of the negligence of the part of the Appellant.

4. The suit proceeded for hearing exparte, during which the Appellant, who was the sole witness, adduced evidence in support of the averments in his pleadings. In its judgment, the trial court having considered the pleadings and the evidence in support thereof, dismissed the Appellant's suit with costs to the Respondents. Aggrieved with the outcome, the Appellant filed the present appeal which is based on the following grounds in the Amended Memorandum of Appeal dated 18.04.2018: -

    1. "The learned trial magistrate erred in law by dismissing the plaintiff's claim notwithstanding that she found as a fact that an accident had occurred involving the plaintiff's motor vehicle on 16/10/2012 merely because paragraph six in the Plaint stated that the accident occurred on or about 26/10/2012 and not on or about 16/10/2012.

    2. The learned trial magistrate erred in fact and law and reached a verdict that is wholly against the weight of the law and the evidence presented before the court.

    3. The learned trial magistrate erred in law and in fact in failing to give meaning and purpose to the phrase on or about in the interpretation of paragraph 6 of the plaint.

    4. The learned trial magistrate erred in law and in fact in her interpretation of the law common custom and usage of phrase on or about as used in paragraph 6 of the plaint.

    5. The learned trial magistrate erred in law and in fact in interpreting the meaning of the phrase on or about as used in the plaint so narrowly as to exclude other dates in the vicinity of the actual date of the accident as drafted in the plaint.

    6. The learned trial magistrate erred in law and in fact in dismissing the suit on a technicality by failure to give meaning and effect to the phrase on or about.

    7. The learned trial magistrate erred in law in failing to uphold the *Constitution* and dismissing the suit on a technicality." (sic)

5. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the of-cited decision in *Selle –vs- Associated Motor Boat Co.* [1968] EA 123 concerning the principles and this court's mandate as a first appellate court. Addressing the court on whether the trial court erred in dismissing the Appellant' s suit, counsel relied on Section 100 of the *Civil Procedure Act* and the decisions in *Ali Okata Watako v Mumias Sugar Co. Ltd* [2012] eKLR to argue that the Appellant's use of the phrase "on or about" in his plaint regarding the date of the accident included other dates proximate to the actual date of accident. That despite pleaded that the material date was 26.10.2012 and not 16.10.2012, the evidence presented by the Appellant confirmed that the accident occurred on 16.10.2012. He asserted that the dismissal of the suit on such technicality amounted to an error arising from the trial court's failure to give meaning to the phrase "on or about" as employed in the plaint.

6. It was further submitted that the discrepancy concerning the material date was not fatal but curable suo motu by dint of Section 1A & 1B of the *Civil Procedure Act* which empowers the court to amend any pleadings to rectify a minor defect or error in any proceedings in order to determine the real issues in

controversy. Article 159 of the *Constitution* was also invoked in that regard, and the trial court faulted for dismissing the suit on a technicality instead of upholding the said provision of the *Constitution*. Counsel pointing out that despite the trial court dismissing the suit on a technicality, it had found that the Appellant has strictly proved special damages pleaded. The court was therefore urged to allow the appeal and to set aside the trial court's decision and award damages as pleaded and proved.

7. Despite being accorded ample opportunity, the Respondents failed and or opted not to file submissions in respect of the instant appeal.

8. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the Appellant's submissions. This is a first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in *Selle* (*supra*) in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> An appeal to this court from a trial by the High 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.
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> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

9. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278.

10. Pertinent to the determination of issues before this court are the pleadings, which form the basis of the parties' respective cases before the trial court. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in the foregoing regard that: -

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

11. Upon a review of the amended memorandum of appeal and arguments, it is evident that the appeal turns on a singular issue whether the trial court's findings touching on the primary issue of liability

were well founded. In that regard it is apposite to quote in extenso the relevant parts of the impugned judgment. The trial court after restating the evidence tendered before it addressed itself as follows; -

> " I have considered the evidence adduced against the pleadings herein. I have also considered the submissions filed. According to the police abstract, the statement by the plaintiff, the accident occurred on 16/10/2012. The plaintiff filed an application dated 1/10/2015 to amend the date of the accident to read 16/10/2012 instead of 26/10/2012. This application was never prosecuted. It was dismissed on 11/11/2015 for non-attendance.
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> Parties are bound by their pleadings. It is clear that the evidence adduced as to the date of the occurrence at the evidence is contrary to the date pleaded which is 26/10/2012. As such, this suit is dismissed with costs to the defendants. Had the plaintiff succeeded, I would have allowed the claim as proved by way of receipts. It is so ordered." (sic)

12. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. See Court of Appeal in Mumbi *M'Nabea v David M.Wachira* [2016] eKLR. The duty of proving the averments contained in the plaint lay squarely on the Appellant. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

13. From the record of proceedings before the trial court, the hearing proceeded exparte in the absence of the Respondents and or their counsel, upon the trial court upon being satisfied that there was proper notice. Consequently, there was no rebuttal to the Appellant's evidence adduced at the hearing of the suit. Nevertheless, the trial court proceeded to dismiss the suit on grounds that the Appellant failed to prove his case with regard to the averments in his pleadings. The foregoing disposition was informed by the fact that the date of the accident as pleaded in the plaint differed from the documentary evidence adduced in support of the averments therein. Particularly, it was pleaded that the accident occurred on 26.10.2012 while the Appellant's statement and pertinent claim supporting documents related to a different date, namely, 16.10.2012.

14. The Appellant was the sole witness and testified as PW1. He identified himself an employee of the Kenya Police and thereafter proceeded to adopt his witness statement dated 19.06.2013. The gist of his evidence was that he was driving his motor vehicle registration number KBK 118B along Eastern Bypass near Coca-Cola Ltd when it was hit from behind by the Respondents' motor vehicle registration number KAL 840L. He produced the Police Abstract as PExh.1, Examination and Test Report on his motor vehicle as PExh.2, Copy of Records for the Respondents motor vehicle as PExh.3, Assessment & Investigation Report as PExh.4(a) and Receipt thereof as PExh.4(b), Photographs of his motor vehicle as PExh.5, Receipts for Repairs as PExh.6 and Demand letter as PExh.7(a)&(b). In conclusion, he urged the court to compensate him for his loss.

15. The Appellant's evidence was not controverted. Nevertheless, the trial court proceeded to dismiss the Appellant's suit on grounds that the date of the accident as pleaded in the plaint differed from the evidence tendered in support of the averments in the plaint. As held in the cases of *Wareham* (*supra*) and *Karugi* (*supra*), the onus was on the Appellant to adduce evidence consistent with his pleadings before the trial court could make a finding that the Appellant had discharged his burden of proof on a balance of probabilities. The gist of the Appellant's contention from his grounds of appeal is that the trial court essentially dismissed the suit on a technicality without regard to the fact that the Appellant had impleaded the phrase "on or about" in relation to the date of the accident in his plaint, which would include dates proximate to the pleaded date of accident.

16. It cannot be gainsaid that pleadings are the basis of any suit. Equally, it is trite that parties are bound by their pleadings. In the case of *Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* [2014] eKLR, the Court of Appeal whilst addressing itself to the issue stated that:

> " First, *Adetoun Oladeji (NIG) Ltd vs. Nigeria Breweries PLC* SC. 91/2002, Judge Pius Aderemi JSC. expressed himself, and we would readily agree, as follows;
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> > " ....it is now a very trite principle of 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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> Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell JSC. rendering himself thus;
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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."

17. The same Court in *Dakianga Distributors vs Kenya Seed Company Ltd* [2015] eKLR observed that;-

> " A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5)* where the learned authors declare:-
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> > " The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."
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> See also *Galaxy Paints Company Ltd v. Falcon Guards Ltd* [2000] eKLR.

18. In this case, it was pleaded that the purported accident in question occurred on 26.10.2012. The material evidence relied upon in support of the foregoing averment including PExh.1 and

PExh.7(a)&(b) all indicate the date of the accident as 16.10.2012. Interestingly, the official search in respect of ownership of the Respondent's motor vehicle KAL 840L per the Copy of Record PExh.3 related to 16.10.2012. The foregoing suggesting that at all material times, the Appellant's contention was that the cause of action accrued on 16.10.2012. Contrary to the averment at Paragraph 6 of the Plaint that the accident occurred on or about 26.10.2012.

19. Further, as the trial court observed, the Appellant filed an application dated 01.10.2015 seeking to amend the date of the accident to read 16.12.2012 instead of 26.10.2012, but the application was dismissed on 11.11.2015 for non-attendance and no effort was made towards its reinstatement. Evidently therefore, prior to hearing of the suit, the Appellant was alive to the discrepancy in his pleadings in relation to the date of the accident. Despite the discretion given to courts under Section 100 of the *CPA* as read with Order 8 Rule 5 of the *CPR*, (which provisions in any event are inapplicable here), parties who approach the court are responsible for the accuracy of their pleadings. The facts of this case reveal negligence on the part of the Appellant, and for which no plea of mea culpa was heard. He cannot properly blame the trial court for his own default.

20. Besides, the court is primarily an impartial arbiter adjudicating on claims as pleaded and proved by the respective parties. Litigants, especially indolent litigants, cannot expect the court to ruminate on the intended purport of their faulty pleadings, let alone aid them by amending their pleadings *suo moto* on their behalf in order to salvage their claims. The Appellant's invocation of Section 1A & 1B of the *CPA* and Article 159 of the *Constitution* cannot not cure his demonstrated ineptitude. In *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR the Supreme rejected the notion that that Article 159 of the *Constitution* is a panacea for any and every shortfall in litigation. It would be a misdirection in the circumstances of this case to dismiss the pleading defect in this case as a technicality. The defect went to the core of the Appellant's total case and impacted upon the substance thereof.

21. This court cannot rescue the Appellant from the karma resulting from his own missteps, without interfering with the balance of the scales of justice which ought to be maintained between the parties herein in accordance with the substantive and procedural law. For all these reasons, the court finds that the Appellant's suit was properly dismissed. The appeal is without merit and is hereby dismissed.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY, 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Kairaria

For the Respondent: N/A

C/A: Carol