



**Kamau & another v Mauti (Civil Appeal 85 of 2022)  
[2024] KEHC 1835 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1835 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL 85 OF 2022  
DKN MAGARE, J  
FEBRUARY 26, 2024**

**BETWEEN**

**CHARED NYAKUNDI KAMAU ..... 1<sup>ST</sup> APPELLANT**

**PACIFICA KWAMBOKA KAMAU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RUTH KWAMBOKA MAUTI ..... RESPONDENT**

**JUDGMENT**

1. In common law, if you found something, you announced. If the owner is not found then you keep. It is called so you don't announce, you are a thief. If you gain proprietary interest.
2. I recall the words of Justice Ogola in captain *J.N. Wafubwa v Housing Finance Co. of Kenya* (2012) eKLR stated as doth: -

“Banks in Kenya reign large. I am reminded of a predator who after killing the prey is not satisfied to leave the carcass to the vultures, but becomes both the predator and the vulture, killing the prey and gleaning the meat from the carcass to ensure the prey is really dead. I am also reminded of a robber killing his victim and not only attending his funeral, but insisting on carrying the casket to the grave to confirm that his victim is dead and buried. Else, how does one explain a situation or case at hand? Wasn't there no time when the Defendant in this matter could say “this is the case and time to close this account?” It is a sorry state of affairs in our country. As all sectors of our society are being reformed, banks should not be left behind. They need to look into the eye balls of their customers and answer the question: “Are banks Kenyans?”



3. I am not interested in the bank case but the last question in Justice Ogola’s quotation. This case is not about a windfall. It is about waking up a watchman to do her work. She appeals that the person who woke her ought not to wake her up.
4. It is such a shame that a person, who is represented, is sui juris and presumed to be compos mentis, can walk to the high court and file an appeal like the one we have.
5. The Appellant filed this appeal from the decision of Hon Sindani. She set out the following grounds of Appeal: -
  - a. That the Honourable Magistrate erred in law and fact as the court’s decision is contrary to law pursuant to section 51R (2) (d) of the Law of Succession CAP 160 of the laws of Kenya (Revised 2012).
  - b. The Trial Magistrate failed to take into consideration Section 39 (1) of the Law of Succession Act Cap 160 of laws of Kenya (as revised in 2012) which gives the order of priority.
  - c. The Trial Magistrate failed to discover that the Respondent was a stranger and had already intermeddled with the property of the deceased with the assistance of the Assistant County Commissioner against section 45 of the Laws of Succession Act CAP 160 of the laws of Kenya (as revised 2012)
  - d. The Honourable trial magistrate allowed the applicant for citation without the applicant’s clear identification as per R25 of Probate and Administration Rules revised 2012 in relation to Ogembo Misc. Civil application No 14 of 2021.
  - e. The Honourable Trial Magistrate’s decision having failed to determine some material issue of law when the chief made another letter dated 15th day of November, 2021 after a proper letter dated 10th day of May 2021, made the courts substantive error of default in the procedure.
  - f. The appellants crave leave to add, amend, alter or omit any ground or grounds of the appeal at or before the hearing of appeal.
6. This Appeal slipped through. It should have been summarily rejected. The grounds do not raise any issue of law or fact. They are full of hyperbole, conjecture, innuendo, and a hodgepodge of rules and legal phrases strewn all over. When reading the grounds of Appeal, I recalled, a poem I read last week by Rupi Kaur which stated as doth; -

“I think about the way my father pulled the family out of poverty coz no matter what this baby was coming.”

A father worried about jobs and rentone swollen belly with a baby inside.

one mother tongue that was broken now,

Two university degrees that meant nothing, No family no friends, just man and wife, Nwith hopes that left the bitter taste of rejection in their mouth.

A discombobulated couple that landed in the new world without being able to construct a perfect sentence in English my mother raised 4 children without knowing what a vowel was.

7. The Appeal does not attack the decision that was made and it is an Appeal without a purpose. Appeals are governed by Order 42 rule 1 of the Civil Procedure Rules. The said order provides are doth: -

“ 1. Form of appeal –



1. 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.
8. The court of Appeal had this to say regarding Rule 86 of the [Court of Appeal Rules](#) (which is pari materia with order 42 Rule 1) 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:

“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...”

9. In the case of [Kenya Ports Authority v Threeways Shipping Services \(K\) Limited](#) [2019] eKLR, the Court of Appeal observed that: -

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the [Kenya Ports Authority Act](#) ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross v Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No 223 of 2013, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise, and brief is wiser and better.”

10. The grounds raised are ancillary, repetitive, propitious, and a waste of judicial time. There is no single question raised for the court to deal with.



11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
12. In the case of *Mbogo and another v Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
13. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

“ .. 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 re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
14. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
15. 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 overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”
16. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document.
17. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.
18. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“ It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
19. The Appellants are arguing that the Respondent is intermeddling with the estate and as such they are not taking letters of administration. To compound the misery of a hopeless appeal, the Appellant filed



3 pages of what they christened as submissions. The same are not intelligible to read. After reading two paragraphs, I came to the inevitable conclusion that it would be a waste of judicial time to continue reading.

20. The respondent submitted that this is an academic appeal as there is a succession cause filed before this appeal. This is an appeal from a decision of the court below, while handling a citation, to order the filing of a succession cause. For the un-schooled, citation is a process where a person, who is of equal, lesser priority, or no priority moves the court to compel persons who are of equal; or greater priority to petition for letters of administration. There are only three answers to the citation
  - i. We have already petitioned
  - ii. We will petition
  - iii. We are not interested.
21. The last ground allows a person to of less priority to the petition. This person can be: -
  - a. of a Lesser priority
  - b. stranger/creditor
  - c. Opponent in a suit
22. For creditors and strangers their interest is limited to the property they are interested.
23. Rule 22 of the *Probate and Administration Rules* provides as follows: -
  - a. A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto
  - b. Where power to make a grant to an executor has been reserved, a citation calling on him to accept or refuse a grant may be issued at the instance of the executors who have proved the will or of the last survivor of such executors or of any beneficiary under the will
  - c. A citation in Form 35 calling on an executor who has intermeddled in the estate of the deceased to show cause why he should not be ordered to take a grant may be issued at the instance of any person interested in the estate at any time after the expiration of three months from the death of the deceased.

Provided that no citation to take a grant shall issue while proceedings as to the validity of the will are pending
  - d. A person cited who is willing to accept or take a grant may petition the court for a grant on filing an affidavit showing that he has entered an appearance and that he has not been served by the citor with notice of any application for a grant to himself
  - e. If the time limited for appearance has expired and the person cited has not entered an appearance in either the principal registry or the Mombasa registry, the citor may
    - a. in the case of a citation under sub rule (1), petition the court (if he has not already done so) for a grant to himself;
    - b. the case of a citation under subrule (2), apply to the court by summons for an order that a note be made on the grant that the executor in respect of whom power was reserved has been duly cited and has not appeared and that all his rights in respect of the executorship have wholly ceased;



- c. in the case of a citation under subrule (3), apply to the court by summons on notice to the person cited for an order requiring such person to take a grant within a specified time or for a grant to himself or to some other person specified in the application
  - f. An application under subrule (5) shall be supported by an affidavit showing that the citation was duly served and that the person cited has not entered an appearance
  - g. If the person cited has entered an appearance but has not within 30 days after his appearance applied for a grant under subrule (4), or has failed to prosecute his application with reasonable diligence, the citor may—
13. For persons of lesser priority, they are entitled to petition. The Respondent claimed as a daughter in law. She has a right to petition whether or not the husband is alive. She only has an equal or lesser priority. In any case, the three issues the succession court will deal with. I do not see any merit on any of the grounds. In the case of *In re Estate of John v Bosse (Deceased)* [2022] eKLR, Justice Farah S. Amin, as she then was stated as doth: -

- “ 10. Before that, the Appeal was before the Court on 2<sup>nd</sup> February 2021 in accordance with the overriding objective the appeal was dismissed for the following reasons (1) The Citation was superseded by events, namely the filing of a petition (in Nairobi), (2) The Family Division in Nairobi was seized of the matter, (3) The record of appeal had not been filed more than 2 years after the Memorandum without explanation. In the circumstances, there was nothing to which the jurisdiction of the Court could attach.
- 11. Notwithstanding that the file was closed, the Applicant filed the above-state application on 11<sup>th</sup> May 2021. There is no application for reinstatement of the file.
- 12. The matter was placed before this Court for directions. The Respondent filed the above Grounds of Opposition. The oral submissions on behalf of the Applicant made amount to an assertion that since his citation provoked the succession cause, his interest in the matter should be allowed to continue in this litigation. Unfortunately, that demonstrates a misunderstanding of the law and procedure in succession matters. There is a succession file for the Estate subject matter of these proceedings. That Succession Cause 509 of is as a result of a petition filed in Nairobi. The Petitioner is the Widow, in other words the person with the highest priority. The Court in Nairobi is seized of the matter.”

Once an order of citation is made, it is subsumed by the subsequent probate and administration matter. It is irrelevant how succession was initiated. Once initiated it becomes the anchor proceedings.”



14. To make matters worse, I cannot see the order granting leave to appeal. Under there is nothing raised in the Appeal. An order to allow citation is not Appealable.
15. The appeal therefore is for dismissal. The next question is what to do with costs. The matter involves family members. However, the appellant has been placing obstacles on the Respondent in the lower court. It is not that they are strangers to each other. I also note that the sisters or daughters of the deceased have not been lobbied in.
16. The appellants do not deserve the mercy of this court. Surely how can they file such an incompetent appeal that serves absolutely nothing in meeting the 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, prior-to, 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.

17. To be able to ameliorate the pain of being dragged through a baseless appeal, costs of 120,000/= to the Respondent will suffice.

### **Determination**

24. The upshot of the foregoing is that I made the following determinations: -
  - a. The Appeal herein is baseless and unmerited and is consequently, dismissed with costs of Kshs 120,000/= to the Respondent payable within 30 days failing which leave is hereby given for the Respondent to execute.
  - b. This file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26<sup>TH</sup> DAY OF FEBRUARY 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**



## **JUDGE**

In the presence of: -

S.M. Sagwe & Co. Advocates for the Appellant

Bwondika & Co. Advocates for the Respondent

Court Assistant - Brian

