Board of Management Highridge Primary School v Inter Security Services Limited (Commercial Appeal E069 of 2023) [2024] KEHC 17074 (KLR) (Commercial and Tax) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 17074 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E069 OF 2023

DKN MAGARE, J

MARCH 22, 2024

BETWEEN

BOARD OF MANAGEMENT HIGHRIDGE PRIMARY SCHOOL .. APPELLANT

AND

INTER SECURITY SERVICES LIMITED ..... RESPONDENT

JUDGMENT

1. This an appeal from the Judgment and decree delivered on 13/32023 by Hon.M. Mutua Adjudicator at the Small Claims Court at Nairobi, SCCC/568/2021).

2. The appellant was dissatisfied with the judgment and decree of the Small Claims Courts at Nairobi by and filed an appeal with humongous 11 grounds as follows:

    a. That the learned Magistrate erred in law and in fact by disregarding the mandatory provisions of Section 3(2) of the *Public Authorities Limitation Act* as was expressly pleaded in the statement of defence.

    b. That the learned Magistrate erred in law and fact by failing to appreciate the provisions of Section 3 (2) of the *Public Authorities Limitation Act* and that any proceedings intended should have been brought within the period prescribed.

    c. That the learned magistrate erred in law and in fact by failing to appreciate the conduct of the Appellant herein at all times material to this suit was sanctioned by All applicable laws, including but not limited to statute of Public Authority Limitations Act Cap 39 Laws of Kenya and also that the Defendant is a public entity and is under obligation to comply with all Public Procurement laws.

d. That the Honourable magistrate erred in law and in fact in finding the Respondent liable for the payment when it is clear that the claim is both illegal and statutorily time barred.

e. That the learned magistrate erred in law and in fact in failing to hold that enforcing the said contract agreement amounts to transgression of a positive law of this country including Article 227 of *the Constitution* as well as Public Procurement Disposal Act PPD Act, 2005

f. That the learned magistrate erred in law and in fact in failing to hold and or understand / appreciate that Since the agreement between the parties was subject to the provisions of Article 227 of *the Constitution* as well as Public Procurement Disposal Act PPD Act, 2005 and in the absence of such compliance the agreement becomes null and void ab initio and cannot therefore be enforced by this Court.

g. That the trial court wrongly failed to give due weight to the submissions of the appellant

h. That the Learned Trial Magistrate erred in law and in fact by failing to consider Respondent's written submissions and the authorities cited in support and in respect of the matters in question.

i. That the learned magistrate erred in law and in fact by ignoring binding precedent without any cogent reason.

j. That consequently the Learned Magistrate's decision occasioned a miscarriage of justice.

k. The judgment of the Magistrate is bad in law and fact

3. The appeal raises only 2 grounds. That is limitation under the Public Authority Limitations Act Cap 39 Laws of Kenya under grounds a-d. the second ground is compliance with Article 227 of *the Constitution* and Public Procurement Disposal Act PPD Act, 2005, under grounds e-f.

4. Grounds g-i, are hyperbole, conjecture and rhetoric raising no ground at all. They waste judicial time and are thus dismissed in limine.

5. Such a long winded memorandum is anathema to good pleadings and an unnecessary affront to grammar and legal writing. It is a classic study on how not to write a memorandum of Appeal. Order 42 Rule 1 of the Civil Procedure Rules 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.

6. The Court of Appeal had this to say about compliance with Rule 86 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:

> "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. 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."

8. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

9. This being the last appeal, the court only deals with issues of law. The adjudicator is king when it comes to facts and evidence. The court cannot fault the adjudicator on questions of fact or evidence. It does not mean that the court will be blind to the evidence but it cannot deal with the same.

10. Evidence is basically exercise of discretion on which evidence to believe. In the case of Mbogo and Another vs. 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 is 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."

11. The duty of the court in a small claims court is circumscribed under section 38 of the *Small Claims Court Act*. Ipso facto, there is only one chance of Appeal to this court. It is an Appeal on points of law. In view of the provisions of section 38 of the *Small Claims Court Act*, which posits as doth: -

> " 38. Appeals
>
> (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final.

12. In the case of Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR, the Court of Appeal addressed the duty of a court considering points of law as doth: -

> " 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).

13. In the case of Mwita v Woodventure (K) Limited & another (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal while referring to a second Appeal, which is essentially on points of law and thus similar to the duty of the court under section 38 of the Small Claims Court, stated as doth: -

> " This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR in which it was held that: "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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."

14. The two issues raised must as a matter of law arise from the pleadings. The duty of the court is therefore to consider whether the issues could have arisen or did indeed arise in the small claims court.

15. A point of law is the same whether preliminary or arising during the Appeal. While succinctly addressed the issue of preliminary objection in the case of Justice prof J.B. Ojwang J (as he then was) 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 point 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 point.

16. If the court will have to find which facts are true, then it is not a point of law. On the other hand, where the court decides a case by ignoring pleadings or admissions made, the ipso facto, that is a question of law. The court also cannot decide on whims or arbitrarily or in fact manufacture facts. This court will deal with that as making a decision on no evidence, which is a point of law.

17. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, A C Mrima stated as follows: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > ".....it is now trite principle in 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.....
> >
> > ...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."
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> 12. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -
>
> > "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party.

Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

18. The claimant pleaded that there was a balance of 413,792 as at 28/3/2019. However, they tabulated in evidence that a total sum of 473,792 was invoiced and a sum of Ksh 60,000/= paid. The last payment was for a sum of Ksh. 20,000/= on 19/1/2018. Section 3(2) of the *Public Authorities Limitation Act* which provides;-

> " No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action occurred.

19. It is important to note that the date of contracting is irrelevant when reckoning time for purpose of the act. It is the date the cause of action accrued. Section 6 of the *Public Authorities Limitation Act* provides as follows; -

> " Application of Cap. 22 Notwithstanding the provisions of section 31 of the *Limitation of Actions Act*, section 22 of that Act shall not apply in respect of the provisions of this Act; and in section 27 of the *Limitation of Actions Act* the reference to section 4(2) of that Act shall be read and construed as a reference to section 3(1) of this Act, but subject thereto and notwithstanding section 42 of the *Limitation of Actions Act*, Part III of that Act shall apply to this Act."

20. Part III of the *limitation of actions act* covers three distinct areas for extension of time.

Part III – Extension Of Periods of Limitation

a. Disability

b. Acknowledgement and Part Payment

c. Fraud and Mistake and Ignorance of Material Facts

21. The aspect of part payment was shown by dint of payment made on 19/1/2018. Ipso facto the limitation period was lapsing on 19/1/2021. Section 23 of the *limitation of Actions act*, which applied by dint of section 6 of *Public Authorities Limitation Act* provides for Fresh accrual of right of action on acknowledgement or part payment as doth: -

> " 3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:
>
> Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt."

22. The part payment was made on 19/1/2018. The fresh right of action accrued on that day and not before. Consequently, I find and hold that the claim was not time barred, a fresh right of action having arisen by dint of part payment.

23. Regarding article 227, the court notes that the same is not pleaded. It provides that: -

> "Article 227 (1) of *the Constitution* of Kenya 2010 which commands that: ——227 (1). Where a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective."

24. This case did not have a counter claim for this declaration. The court cannot determine such an issue in vacuo. The fraud and other circumstances vitiating the contract were not pleaded. Such particulars must be pleaded. Throwing fraud or illegality does not fly. In any case there was no dispute presented to the public procurement review board within the requisite period to set aside the award of the contract.

25. In any case, compliance with internal rules is the province of the procuring entity. The Respondent cannot be privy to such. All letters were signed by the head teacher and cheques issued and paid. She had ostensible authority to contract. I will dismiss this ground upfront on that the legal actions are entirely within the internal affairs of the companies and on the basis of the rule. In the Royal British Bank =vs= Turquand (1856) 6E & B 327. In that case Hervis CJ while giving the judgment of the court: -

> "We may now take for granted that the dealing with this companies are not like other partnerships, and the parties dealing with them are bound to read the statute and deed of settlement and the party here, on reading the deed of settlement will find not a prohibition from borrowing but permission to do so on certain conditions."

26. To require a business man to snoop into compliance of internal affairs is an affront to commerce. Part payment was evidence of getting internal approvals the Respondent had a right to infer that the head teacher had ostensible authority. This is not a claim done by some janitor. The letters were from the secretary of the board. In William Augustus Mahony, public officer of the National Bank of Dublin versus the liquidator of East Hollyford Mining company limited LR 7 HL 869 (sir Fitzroy Kelly) lord Cairns, lord Hatherly lord Penzance), where Lord William Page Wood Hatherley set out the law as thus"

> "When there are person conducting the affairs of the company in a manner which appears to be perfectly consonant with the Articles of Association, those so dealing with them, externally are not to be affected by irregularities which may take place in the internal management of the company."

27. The grounds relating to procurement are thus otiose. The court was right in dismissing the evidence as mere denials. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> "...This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible.
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the Respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious

pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence ..."

28. The end result I find that the adjudicator's finding was a proper one. His judgment was brief and to the point. It is the proper way of writing small claims judgments.

29. I have read submissions filed but cannot regurgitate the same herein as they deal with the same questions. I wish parties could be brief in their submissions and to the point.

30. Consequently, the appeal lacks merit. Who then pays costs. 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.
>
> 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.

31. The event is the dismissal of the Appeal. The Respondent deserves costs, consequently, the Appeal is dismissed with costs of ksh 65,000/=.

Determination

32. In the circumstances I make the following orders: -

    a. The Appeal is dismissed with costs of ksh 65,000/= payable within 30 days.

    b. This file is closed.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 22ND DAY OF MARCH ,2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent