



Kenya Power & Lightining Company & 5 others v Kwanza Estates Limited (Civil Appeal E087 of 2022) [2024] KEHC 3597 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3597 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E087 OF 2022
DKN MAGARE, J
MARCH 20, 2024**

BETWEEN

**KENYA POWER & LIGHTINING COMPANY 1ST APPELLANT
ENG DAN OBIERO 2ND APPELLANT
MARTIN MUTHINI 3RD APPELLANT
HILLARY KITUR 4TH APPELLANT
HELLEN CHERONO 5TH APPELLANT
EVERLINE ASHILUND 6TH APPELLANT**

AND

KWANZA ESTATES LIMITED RESPONDENT

JUDGMENT

1. In a very short stint in Kisii High Court during Service week, I concluded a preliminary objection and set the matter down for hearing of the Appeal. The preliminary objection was dismissed in limine by dint of the established in the locus classicus Ugandan case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696.
2. This matter is an Appeal from the decision of the Court in Kisii CMCC No. E075 of 2022 Kwanza Estates Ltd. versus Kenya Power and Lighting Co. Ltd. Vide a plaint dated 16/2/2022.
3. The building was supplied power under a contract for supply account No. 681xxxx between Mocha Place ltd and the Appellant. The Respondent is not and has never has a contract for supply of power with the Appellant in respect of land parcel number Kisii/Municipality Block III/195
4. Proceedings indicate that land parcel No. Kisii/Municipality Block III/195 was reportedly bought vide a Public auction from HFC Ltd. There is an outstanding sum of Ksh. 2,003,808.51 arising from the



contract between the Appellant and the former owner. I am using these words Carefully lest I offend a related suit the court handled and is still pending before the court.

5. It appears that upon purchase of the said Parcel, the respondent applied to the Appellant for an alternative account. However, the Respondent did not enter into a new contract with the Appellant. The respondent stated that the Appellant failed to connect electricity or threatened to disconnect unless the Respondent paid the outstanding bill of Ksh. 2,003,808.51.
6. On 15/2/2022 the respondent disconnected power. An interim mandatory injunction was issued on 18/2/2022. It appears the order was not obeyed. Defendant filed a defence denying that the application was made and that there was any contract between the parties herein. The Appellant denied the privity of contract with the Respondent.
7. The Respondent appears to have been aggrieved by the failure to connect electricity and as such moved for contempt in the lower court. I shall not deal with the propriety of dealing with an order for contempt in the lower court. It must be remembered that an injunction under order 40 is quite different from a mandatory injunction. Only Order 40 allows a window where disobedience of a prohibitory injunction attracts Sanctions from the issuing court.
8. It was the Appellant's case that the orders were obtained fraudulently and are incapable of being obeyed. The court subsequently issued an order dated 25/10/2023 finding the officers in contempt. The alleged contemnors and the appellant filed this appeal and set forth 13 grounds of Appeal. They contended that court had no jurisdiction to handle the matter.
9. It is neither necessary nor prudent to set the grounds verbatim. They are prolixious, unseemly and the best example on how not to file an appeal. Order 42 Rule OF THE Civil Procedure Rules 1 provide 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.

10. The Court of Appeal had this to say in regard to 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...”

11. In *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.”

12. 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.

13. 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 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.”

14. In the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [196EA 123, the Law Lords posited 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.”

15. 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.



16. In *Sahel Carriers Limited v A.O. Bayusuf & Sons Limited* (Civil Appeal E066 of 2022) [2023] KEHC 17438 (KLR) (15 May 2023) (Judgment), this court advised that: --

“The Court is to bear in now that if need her seen the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, the 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.

4. 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 document meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed...”

17. In the case of *Peters vs 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...”

18. The grounds are prolixious. I have perused the court file and have not seen the said 3rd, 4th, 5th and 6th Appellant being parties to the suit. The Appellant was ordered to restore power to the Appellant. They are alleged to have not obeyed. There was nowhere to restore power.

19. For an order to be obeyed, the same must be capable of obedience. It must also be directed in the name of the party ordered. It cannot be directed to busybodies.

20. The order given is a mandatory order to restore the power of the plaintiff's premises. The premises may belong, for all that matters belong to the Appellant. The Respondent admits that the contract is between Mocha Place Ltd and Kenya Power. The appellant Respondent is thus a busybody in that contract. A party cannot enforce a contract to which it is not party.

21. In *Philmark Systems Co. Ltd v Andermore Enterprises* [2018] eKLR, Justice T. W. Cherere held as doth:

“

- “18. The next issue for determination is whether respondent can enforce the contract between appellant and Andmore Timber Yard. Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 110 which was quoted extensively in *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] Eklr states as follows:

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom



the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

22. In the case of Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others [1998] eKLR, the court stated as doth: -

“It is a mandatory requirement of the rule that unless the court is satisfied for reasons to be recorded that the application should not be heard *ex parte*, notice of the application must be give to the opposite party before it can be heard. Court of Appeal for Eastern Africa said in Noormohamed Janmohamed vs Kassamali Virji Madhani (1953) 20 EACA “the onus of proving good cause for dispensing with notice of an application for temporary injunction rested upon the applicant.”

In Uhuru Highway Development Ltd vs. Central Bank of Kenya and 2 others Civil Appeal NO 126 of 1995 none other than the Hon. Akiwumi J.A. said:

“To my mind the recording of reasons by the learned Judge why he should hear the application *ex parte* is mandatory and the learned Judge having failed to record his reasons as required by O.39 r 3 (1) could not and should not have gone on to hear the application *ex parte* and to grant the temporary injunction. This order was invalid, had no legal basis and therefore of no legal effect.”

In the same judgment in the concluding paragraph Akiwumi J.A. said that:

“The *ex parte* order was without any legal basis and null and void.”

In the same appeal Tunoi J.A. said:

“Although the court had jurisdiction to grant *ex parte* interim injunction even though it is ultimately discovered that the application may not be meritorious. Such grant is mandated by O.39 r 3(1) to be based on reasons to be recorded.....”

Also Order 39 rule 3(2) mandates that no *ex parte* injunction in any case shall be for more than 14 days. I agree with Mr. Gautama that the learned Judge granted the said *ex parte* injunction for 16 days clearly in defiance of the mandatory provisions of this subrule. I agree with Mr. Gautama that an order granted in defiance of order 39 rule 3 is invalid, and null and void. It cannot have any legal effect.

23. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

24. The order being enforced by strangers is a nullity. The respondents are not entitled to obey a nullity. It is not a blank cheque to disobey a void court order. In this case, the Respondents had no power supply contract. To be ordered to restore power to an account whose owner is no longer an owner is null and void. The power supply must be supplied through meters. The respondents had no meters of their own. There was a practical impossibility to supply power to nonexistent meters.



25. The bill burdening the land is already over Ksh. 2,003,808.51. The said land cannot be supplied with power without clearing the bills. However, even where a bill is cleared, there has to be an enforceable contract. There has to be a contract. A third party cannot enforce a contract, they are not parties to, even where they are beneficiaries.

26. In the case of *Mark Otanga Otiende v Dennis Oduor Aduol* [2021] eKLR, Justice R.E. Aburili J held as doth: -

“

“60. In its classical adaptation, the doctrine of privity of contract hypothesizes that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party, except in certain cases only. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

61. In the *Agricultural Finance Corporation v Lengetia Ltd* (supra), quoting with approval from *Halsbury’s Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, reiterated that:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

27. However, as worded the same is not capable of obedience. A party cannot enforce a decision where they are not the parties to the contract. This fraud was conceded to by the Respondent as doth: -

- i. They are not the owners of the power supply contract.
- ii. There are other consumers/tenants are being supplied with power
- iii. There were arrears of Ksh. 2,003,808.51

28. An order, mandatory in nature was issued in the following terms: -

“Mandatory injunction do issue directing the defendant to reconnect power supply to land parcel No. Kisii/ Municipality Block III/ 198.

29. The injunction as worded is incapable of compliance. Each supply is to a contract. There is no contract in situ with the Respondent. Had the then it could be clear that the Respondent were busy bodies in so far as power supply was concerned. Reconnection presupposes prior connection. This is not the case.

30. Secondly, they purport to have purchased land in an auction. The same must proceed with all burdens and rights. I am unable to agree with the court that the appellants were at fault. In the *locus classicus* case of *Kamau Mucuha vs. The Ripples Ltd*. Civil Application No. Nai. 186 of 1992 [1990-1994] EA 388; [1993] KLR 35 the Court of Appeal expressed itself as hereunder:



...A court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the Court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and that is a higher standard than is required for a prohibitory injunction.”

31. What is it that the first appellate breached? Electricity is connected to a metre for supply. The Respondent have no metres. The metres on the suit land relate to a contract with Mocha limited. There was no gadget to connect to without incurring expenses on behalf of Mocha Place Limited.
32. Looking at the Appeal, in all circumstances the Appeal is for allowing. Who is to bear 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 after 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.

33. The order commending itself is that the Appeal be allowed with costs. Section 27 of the Civil Procedure Act provides for indication of costs. It provides as doth: -

“27. Costs

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

34. In the circumstances the appeal is merited and for allowing. It is thus allowed with costs of Ksh. 350,000/=.



35. For avoidance of doubt the application dated 7/10/2022 in the lower is dismissed with costs.

Determination

36. In a nutshell, I make the following orders: -

- a. The appeal is allowed in its entirety costs of Ksh. 350,000/= to the Appellants.
- b. For the avoidance of doubt the application dated 7/10/2022 in the lower Court is dismissed with costs
- c. The mandatory orders are vacated.
- d. In view of the admission, that a sum of Kshs. 2,003,808,51/=, the 1st appellant is at liberty to disconnect electric supply to all contracts, in arrears situate on land parcel numbers Kisii Municipality block III/195 till the payments are made.
- e. The warrants of arrest against the Appellant are hereby lifted.
- f. The matter shall be listed for the directions in the lower court on the locus of the Respondent to save this 1st Respondent.
- g. The 2nd to 6th respondents are struck out of the suit in the lower court with costs
- h. The matter shall be listed for a decision of the locus of the respondent to sue the 1st Appellant.
- i. This file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF MARCH, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Kimitei Nthenge & Company Advocates LLP for the Appellant

Konosu & Company Advocates for the Respondent

Court Assistant - Brian

