Mwariri v Superintendent Karatina District Hospital & 2 others (Civil Appeal 43 of 2019) [2024] KEHC 2804 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 43 OF 2019

DKN MAGARE, J

MARCH 15, 2024

BETWEEN

SAMUEL MWANGI MWARIRI ..... APPELLANT

AND

SUPERINTENDENT KARATINA DISTRICT HOSPITAL ..... 1ST RESPONDENT

DR. MWENDE ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

(Being an appeal from the Judgment of Hon. K. M. Njalale in Karatina SPMCC. No. 69 of 2014, delivered on 20th June, 2014)

JUDGMENT

1. This is the appeal from the judgment and order of the Hon. K. M. Njalale SRM, delivered in Karatina CMCC 69 of 2014 on 20/6/2019.
2. The Appellant raised the following grounds of appeal:
    i. That the learned trial magistrate erred in law and in fact in failing to appreciate that there was a substantial breakdown in communication between the appellant and his advocates on record which caused the delay of this matter which was not intentional by either party.
    ii. That the learned magistrate erred in law and in fact in failing to appreciate that the delay was not intentional on the part of the Appellant and/or his counsel.
    iii. That the learned magistrate erred in law and in fact in failing to acknowledge that the said Ruling greatly prejudiced the appellant as opposed to the Respondent who were unable to raise points to show substantial prejudice on their party.

iv. That the magistrate erred in fact and in law in failing to appreciate that by dismissing the matter, a great injustice was occasioned against the appellant who has been condemned to suffer twice.

v. That the learned magistrate erred in fact and in law in failing to appreciate that the age of the matter was not solely the fault of the appellant but was occasioned by other factors out of the hands of the appellant.

vi. That the learned magistrate erred in stating that the appellant was not serious in prosecuting the matter yet the appellant had indicated that he was ready to prosecute and finalize the matter within any reasonable period given by the court.

vii. That the learned magistrate erred in law and in fact by applying extraneous matters that were not genuine to the application before court and thus arriving at a wrong decision.

3. The appeal raises several issues instead of concise grounds as provided under Order 42 Rule 1 as 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."

4. 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... "

5. 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."

6. 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.

7. The duty of the first appellate Court was discussed 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."

8. 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...."

9. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite

apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different."

10. Other than special damages of Kshs.27,300/=, there is no other damage shown. The suit was filed. There are no particulars of general damages provided. In effect there is no claim for general damages properly pleaded. There is no irreparable loss that could be suffered. The suit was filed way back in 2014 and remained unprosecuted to the date of dismissal. There was no serious action taken other than amending the plaint to add specials to Kshs.171,100/=. There is no explanation for the delay from 2014 to the date the suit was dismissed. The Appellant's suit was dismissed under an application dated 11/12/2018. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1960] EA 696;

> " In cases falling outside the specific provisions quoted above. Farrel, J., adopted this view. Dalton, J., in *Saldanha's* case purported to follow the decision of Windham m C.J. in *Mulji v Jadavji,* [1963] EA. 217, but all that case decided was that the courts inherent jurisdiction could not be invoked where an alternative remedy had been available. In the instant case, it is clear that none of the specific provisions for dismissing suits applied to the suit the subject of this appeal. That being so, I do not see how the courts inherent jurisdiction can be said to be fettered, as no alternative remedy existed."

11. The application was opposed through the affidavit of Kuria Mwangi. The court considered the arguments and exercised discretion. The discretion could have been either way. The aspect of discretion was settled in *Mbogo & Another v. Shah* [1968] EA 93 at page 96, where the legendary Sir Charles Newbold P. elucidated the point in the most poignant way as hereunder: -

> " .....a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...."

12. The court exercised its discretion. The discretion was judicious. This court cannot substitute the court's discretion with my discretion. The court was right in dismissing the suit.

13. On 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."

14. Therefore, I dismiss the application with costs of 50,000/= to each of the 1st and 2nd defendants. The file is closed.

Determination

15. The upshot of the foregoing is that I make the following orders;

    a. The appeal is dismissed with costs of 50,000/= to the 1st and 2nd Respondents.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF MARCH, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Appellant

Irungu for the Respondent

Court Assistant – Millicent Thaithi