Richu (Suing as the Administrator of the Estate of Simon Momanyi Onchwati) v Achachi (Civil Appeal E715 of 2021) [2024] KEHC 6639 (KLR) (27 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E715 OF 2021

DKN MAGARE, J

MAY 27, 2024

BETWEEN

MARY NYAMBURA RICHU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SIMON MOMANYI ONCHWATI) ..... APPELLANT

AND

DINAH MORAA ACHACHI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree entered by (Oblusa and order given on 14/2/2020 and Ruling dated 6/10/2021 in Nairobi CMCC 5229 of 2014. The Appellant filed an appeal pursuant to leave granted on 22/5/2022.

2. The appeal is strange as it relates to three orders given in a span of 7, 2 and 1 years respectively. The memorandum of Appeal dated 22/10/2021. The memorandum of Appeal is a classic study of how not to write an appeal. It is words, convoluted and hyperbolic. Order 42 Rule 1 of the *Civil Procedure Rules* provides are doth: -

> " 1. Form of appeal –
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> 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.

3. 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:
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> "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..."

4. 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:
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> "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."

5. 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.

6. 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."

7. 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 Vs 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. The Court is to bear in 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.

9. 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..."

Background

10. In order to demystify the Appeal and resolve the trial of an appeal, background is important. It will also be important to set out the concis' of the order granting leave in order to break down, contextualise, problematise and conceptualise the appeal in its empirical form. This is because the Appeal appear to be an appeal from: -

    a. Judgment given on 23/10/2014.

    b. Ruling of C. Obulutsa on 14/2/2020

    c. Ruling dated 6/10/2021 by P. Muhori.

11. By dint of Section 79G of the *Civil Procedure Act*, Appeals ought to have been filed on 6/11/2021, 16/3/2020 and 23/11/2014. This was filed on 22/10/21. This means that the appeal against the decision made on 6/11/2021 was within time. It is for the court then to contextualise the leave to appeal.

12. Before doing so, it is important to have a chronology of events and filings a can be discerned from the humongous filings in the file. The Respondent Dinah Moraa Achachi filed suit on 9 /9/2014 as CMCC 5229 of 2014. She was claiming a sum of Kshs. 3,500,000/=. The said money was given in 2019 and over a period of 6 months. An agreement was entered on 27/1/7/2009 for the monies advanced. My understanding is that the money had been advanced in some unknown dates later than 31/12/2008 and earlier than 28/7//2009.

13. The said amount was said to be a business loan which secularly been Nairobi Block 134/382. This was before 2012 hence the concept of informal changes did not exist. The said defendant was said to have breached the agreement. The date of breach is not given.

14. From the agreement, what was said to be a loan agreement was in fact a consolidation of alleged debts for 6 months.

15. Though documents were filed there does not appear to be a hearing. The Appellant filed an Application on behalf of the estate of the late Simon Momanyi Onchwati. The application is dated 22/11/2018. The application sought several orders. Unfortunately, the application is long and wordy. A survey could have done. Grant of letters had been given on 4/8/2011 and confirmation concluded on 16/5/2017.

16. Hitherto the Appellant had filed another application dated 26/11/2018 seeking to set aside the orders of ex parte judgment. This was through Mary Nyambura Richu who stated that she was a widow of the late Simon Momanyi Onchwati. A relying affidavit to the application dated 11/7/2018 was filed on 11/7/2019. It is equally lengthy.

17. A further affidavit was filed on 13/8/2019. Parties filed submissions I shall not regurgitate the submission as they all missed the point.

18. The one question, that is in the paint relates to: -

    a. A Sum of 3,500,000/=

    b. The title deed.

19. There was no hearing over the suit. this was a claim based on breach of contract. It is not a claim for money had and received. Whether or not the Deceased was served is irrelevant. This is because every proceeding after the request for judgment was a fruit of a poisoned tree. Without formal proof, there is no valid judgment. The judgment entered was irregular as no formal proof was carried out. In the case of *Samson S. Maitai & Another -vs- African Safari Club Ltd & Another* [2010] eKLR, the High Court in trying to defining Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to *Halsbury's Laws of England*, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

20. No formal prof was held. It could be a different thing if it is money had and received. The alleged money was in a different agreement that are not annexed. In the case of *David Bagine Vs Martin Bundi* [1997] eKLR, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:
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> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the

head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

21. The agreement of 27/7/2009 is an amalgim of agreements. There need to be formal proof. In such the absence, of formal proof, everything else in between is a nullity. 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."

22. The court can set aside judgment in three ways: -

    a. *Suo moto*

    b. When there is an irregular judgment.

    c. When there is a regular judgment but there is a triable defence.

23. In this matter the proceedings were null and void ab initio. The request for judgment was made as if this was unliquidated claim but entered as a liquidated claim. The court effectively skipped formal proof.

24. The second aspect is the attachment of Nairobi Block 134/383 phase 3A. The appellant approached the same from Matrimonial property perspective. The high court had made a decision from the perspective of section 37 of the *civil procedure Act*. The section provides as follows: -

    1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.

    (2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit

25. However, I note that the property is owned by three persons pursuant to succession orders given on 16/5/2017. The succession cause became faiti accompli. It was done and dusted. The property cannot be subject to the claim herein having lawfully devolved to the deceased defendant.

26. Thirdly there was no charge over the said property. The title was not deposited as it is clear that their were applications for a duplicate title. If it was security, a hearing ought to be undertaken.

27. If on the other hand they claim though an agreement, I have not seen the proceedings awarding the said parcel as security to be realised. I have not also seen statutory power of sale documentation. No charge is registered.

28. Contrary to the allegation that there was an agreement, there appears to be a darker and sinister motive behind the alleged agreement. This came into fore after 9/3/2009 when the deceased was notified of a caution lodged by his widow Mary Nyambura Richu. The notice was issued on 9/3/2009.

29. The purported payments were not evidenced in writing. It is doubtful that the agreement is genuine. It appears to have been geared towards stealing a match on the soon to be widow. I will not be surprised if the "borrower" and lender are related parties.

30. I find no reason to go into the other aspects of the case having found that the judgment is illegal and ought ex debito justiciae be set aside.

31. Sadly, I note that the Respondent had attempted to be joined to the succession proceedings and the court directed her to use the route under Section 37 of the *Civil Procedure Act*.

32. I find and hold and find that the entry of judgment on 23/10/2015 is irregular., null and void. Further I note that the defence raised serious triable issues which the court ignored in dismissing the Application for review and setting aside. The court did not address itself on the draft defence that was annexed. On review, the jurisdiction of the court is limited. Section 80 of the *Civil Procedure Act* states that:

> " Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".
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> Section 63 (e) of the *Civil Procedure Act* states that:
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> "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient

33. Order 45 of the *Civil Procedure Rules* provides for Review and it states as follows:

> " (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
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> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

34. I associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the *Civil Procedure Rules*. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

35. There is an error apparent on the face of the record. Though defence was not attached, the supporting affidavit had more than a copious amount of the defence offered by the Appellant.

36. Though no defence was annexed, the question of matrimonial property overt the property sought to be executed is a sufficient defence. This is more important when the property is not part of the claim sought in the suit directly. This is akin to a statutory claim by an objector under order 22 Rule 54 of the *Civil Procedure Rules* I allow the application dated 9/7/2020

37. In the circumstances I allow the Appeal set aside all ex-parte proceedings and grant unconditional leave to defendant to the appellant. The appellant shall have cost of the appeal.

38. The court was plainly wrong in holding that the only way the court could set aside is if there is a draft defence. I do not see the legal basis for requiring a draft defene, what the law requires is not a draft defence but I have a defence to the claim. For example. If party in an affidavit raises a defence, then there is no need or a draft defence.

39. In this case the court record was clear that there was an illegality in the orders granted. The Magistrate centred judgment as follows: -

> " Judgment is entered as prayed."

40. There is no provision under order 8 to enter such a judgment. The three levels are: -

    i. Non liquidate requiring formal proof

    ii. Liquidated requiring no formal proof

    iii. A mixture of both requiring proof of the non liquidated claim.

41. Breach of contract is not a liquidated claim. The breach must be proved. In the circumstances the Appela wholly succeeds.

Determination

42. The upshot of the foregoing I make the following orders: -

    a. The Administrators of the estate of the late Simon Momanyi Onchwati (Deceased) be allowed to defend the suit.

    b. The Ruling delivered on 6/10/2021 and 14/2/2020 are hereby set aside in toto.in lieu thereof I issued the following orders: -

        i. I allow the application dated 9/7/2020. There is an error apparent on the face of the record.

        ii. The application dated 22/11/2018 is allowed.

    a. The appeal is allowed. The exparte judgment entered on 23/10/2015 is set aside together with all consecutive orders aside. In lieu thereof I grant leave to the administrators to enter appearance unconditionally within 15 days and file defence within 15 days of filing the memorandum of appearance.

    b. The appellant shall have costs of Kshs. 175,000/= for the Appeal.

    c. The Appellant shall have costs of Kshs. 75,000/= each for the Applications dated 9/7/2020 and 22/11/2018.

    d. The order be served upon Hon S G Gitonga and Hon. P. Muholi by the Deputy Registrar of the court.

    e. The lower court file shall be fixed for directions before that the Chief magistrate court on 25/7/2024 for taking pre trial directions and hearing on a priority basis.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27TH DAY OF MAY, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Ondieki & Ondieki Advocates for the Appellant

Nyaguthie Njuguna & Company Advocates for Respondent.

Court Assistant- Brian