Mwavula v Waweru t/a Antique Auctioneers Agencies & another (Civil Appeal E374 of 2023) [2024] KEHC 5988 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5988 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E374 OF 2023

DKN MAGARE, J

MAY 24, 2024

BETWEEN

MICHAEL KASHA MWAVULA ..... APPELLANT

AND

ROBERT WAWERU T/A ANTIQUE AUCTIONEERS AGENCIES .... 1ST RESPONDENT

MOMENTUM CREDIT LIMITED ..... 2ND RESPONDENT

RULING

1. This is a Ruling on an Applications dated 20th December 2023, which sought the following: -
   i. Spent
   ii. Spent
   iii. Spent
   iv. The Honourable Court does order for inspection and valuation of the said motor vehicle.
2. The Application is premised on the Grounds stated inter alia as follows:
   i. The Applicant has filed an Appeal to this court.
   ii. It was not in the intend of the Applicant to have filed the suit out of time.
   iii. The Respondent was carrying out business illegally.
3. The 2nd Respondent opposed the Application materially on the ground that the Applicant never pleaded in the Application a prayer for extension of time to appeal.

4. It was also deposed that the Applicant had not satisfied any reason for the valuation to be carried out on the impugned motor vehicle.

5. Parties filed submissions. I have considered the submissions and authorities relied upon.

Analysis

6. The appeal is dead on arrival. It was filed out of time without leave. The Applicant is not a candid litigant. The prayer for leave to appeal out of time in the Applicant's submissions. The same was not pleaded or prayed in the Application. What the Applicant does not seem to appreciate is that submissions are not pleadings or evidence. As was held by Mwera, J (as he then was) in *Erastus Wade Opande vs. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007:

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

7. In the case of *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993, Mwera J, as he then was expressed himself as usual of the good judge as follows:

> " Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

8. The court, in *Ngang'a & Another vs. Owiti & Another* [2008] 1KLR (EP) 749, conceptualized contextualized and problematized the imbroglio, that is pleadings though submissions that:

> " As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

9. Submissions are neither pleading nor evidence. Beautiful pleadings are akin to watching warm fire in television. It will not remove any morning chilly weather. The court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.

10. A party is bound by their pleadings and the Applicant cannot expected this court to grant what they did not plead or pray for in this case. I also note the prayer for stay of the sale of the impugned motor vehicle was in the interim and the same lapses upon the determination of this Application. It does not go into the intended appeal. the Application for leave to appeal ought to be made properly and substantively. Even if it was made, there are no reasons for not filing in time.

11. Therefore, parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR, Justice A C Mrima stated as doth: -

> " 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: -
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> > ".....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."

12. In the case of *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "T*he Present Importance of Pleadings*" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision

given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

13. The essence of pleadings, was succinctly set out by 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 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.....'"

14. The Application makes attempt to implore this court to make findings on matters that are not pleaded but which are said to have been supported by the annextures to the Supporting Affidavit. The court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court, in *Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu &INEC & 3 others* consolidated with petitions no. 4 and 5 both of 2023, stated as doth: -

> " In *Belgore Versus Ahmed(*2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -
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> > "Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.

15. The Application is consequently devoid of merit. The appeal was filed out of time. It cannot be save. Luckily for the Appellant, nothing much has transpired. Costs incurred are minimal. I shall strike out the Appeal with costs of 30,000/- inclusive of the costs of the application which is dismissed herewith.

Determination

12. The upshot of the foregoing is as follows:

    i. The Application dated 20th December 2023 is dismissed.

    ii. The Appeal is struck out.

    iii. The 2nd Respondent shall have the costs which I assess at Ksh. 30,000/=.

DELIVERED, DATED AND AT MOMBASA ON THIS 24TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

N/A for the Applicant

N/A for the Respondents.

Court Assistant - Brian