Board of Management Kagumo High School v Weaverbird Garment Manufacturers (Civil Appeal E004 of 2022) [2024] KEHC 8614 (KLR) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8614 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E004 OF 2022

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

BOARD OF MANAGEMENT KAGUMO HIGH SCHOOL .... APPELLANT

AND

WEAVERBIRD GARMENT MANUFACTURERS .... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree given by Hon James Macharia Muriuki SPM delivered on 7/12/2021 in Nyeri CMCC 132 of 2019. The Appellant was the defendant in the lower court.
2. The appellant filed an appeal on 25/1/2022 and set out 5 grounds of appeal, namely:-
    a. That the learned trial magistrate erred in law and in fact in finding that the respondent had not proved his case on issue of liability on a balance of probability.
    b. That the learned trial magistrate erred in law and in fact by failing to appreciate the evidence tabled by the defendant therefore occasioning a mistrial and miscarriage of justice.
    c. That the learned trial magistrate erred in law and in fact by clearly belittling the procedure indicated in the *Public Procurement and Asset Disposal Act* and sanctifying unlawful handling of supply chain issues.
    d. That the learned trial magistrate erred in law and in fact in failing to appreciate that the appellant's case on the issue of having a payment system in place was not controverted and challenged by the respondents.
    e. That the learned trial magistrate erred in law and in fact in giving a judgement against the weight of evidence thereby occasioning a miscarriage of justice.

Pleadings

3. The respondent filed suit by a plaint dated 9/4/2019. The respondent averred that garments were supplied for Ksh.1,395,414 together with interest thereon.

4. The defendant filed a short defence stating the appellant supplied either excess stocks or substandard merchandise which were returned. The appellant was stated to have full knowledge of the same.

5. After several false statements the matter started on 25/2/2020. Kelvin Wanyoike Maina testified and produced his statement as an exhibit and documents as exhibits for a sum of Ksh. 1,395,419. He was cross-examined. He stated that he did not have an LPO. He stated he issued a credit note to offset amounts owed. They stated that they gave a credit note for Ksh. 75,000.

6. DW1 Stephen Kariuki Ngugi Mwangi stated that he was the school Bursar. They stated that they did not have a tender. They stated that they had a school clearance system with the appellant. The respondent was paid by parents and goods were brought. The excess clothes were returned.

7. He was cross examined and stated that Mrs. Kariuki was the copy typist who receives goods while the bursar paid. He stated that payment to the school are for fees. The store keeper signed a letter returning the goods. He stated the excess goods were returned. He stated that invoices were not signed by the school.

8. The court heard the case, analyzed evidence and entered judgement for the plaintiff as prayed. Entering judgment as prayed is an unusual way of deciding. The court must find the exact amount due. If it is a claim for money had and received, the court must make a specific finding on the defence sum due.

9. The respondent filed submissions that they proved their case. They urged the court to dismiss the appellant's case. The appellant on the other hand was of the view that the respondent was under duty to proof:-

   a. Procurement in terms of quantity and costs

   b. Sums paid

   c. Sums due

Analysis

10. 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.

11. 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."

12. 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.”

13. 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.

14. 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...”

15. The nature of the claim is not for money received. It is a nature of special loss. Special loss and special damages must be specifically pleaded and proved. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> “In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> “Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

16. 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"

17. The respondent pleaded that a sum of Ksh.1,395,414 was due and owing. They raised the following questions:-

    i. How much was due

    ii. How much was paid

    iii. As in this case, how much was credit

18. The defendant made a response that:-

    a. Excess stock and substandard materials were returned.

19. The transaction is said to have been done between 2017 and 2018. The Respondent talks only on a balance. This kind of plaint does not help anyone. It is lazy to generalize that there were some money and a balance is 1.5m. Now that the defence of returning has been pleaded, how do we calculate how much was refunded and how much is due?

20. There are no specific pleadings by the plaintiff setting out the claim as follows:-

    Year - Value supplied

    Value returned

    Value paid

    Sum due

21. On the contrary what the Respondent placed on record is a series of:-

    a. An incomplete statement

    b. Invoices – unsigned by either party

    c. Signed delivery notes with quantities only, but

    d. Unsigned delivery notes, including others indicated by hand to be sent by matatu

22. It is clear that there was a kind of agreement related to delivery but there is no local purchase order for the goods. A demand letter dated 4/2/2019 does not indicate that there were terms agreed upon and I have not seen the said terms.

23. The respondent stated that the board does not receive money for uniforms. It is paid directly by purchaser to the supplier. They stated that their purchases are through a local purchase order. This is contrary to the Public Procurement and Disposal Act. I have not seen any waiver of the requirements of the Act.

24. Some of the documents relate to workers security guards' apparels. One of the invoices relate to a student who paid into the school account for a sum of Ksh.33,660.

25. This invoice is the main evidence that payment was not to the school account. It was to some account, and that was the basis for demanding a refund for Ksh.33,660 for a student who paid money to the school account. This could not be made if students were all paying to the school. Otherwise all students should be paying to the school account.

26. Some of the delivery notes were never received. There are no invoices dealing with uniforms for security guards and other workers. A sum of Ksh.16,830 vide cheque on 06/1/2018 is not issued to the appellant but to the Respondent. It is not a cheque issued by the respondent.

27. There is no pleadings related to that cheque. The goods that were returned were signed out by Kelvin Wanyoike. Some of the stock returned related to a period for form 1 – 2016 and form 3 – 2018.

28. In one of the statements there appears to be payments made. The school bursar indicated that the school never receives monies but they are channeled directly to the respondent by the parents. The school takes deliveries only of items that are paid up. If the school was taking deliveries to pay, evidence even of a single payment for the prior stock should have been produced.

29. Sections 107 to 109 of the *evidence act* provides for the burden of proof.

   107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

   (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

   108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

   109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

30. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

31. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the Judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

32. The claim is thus fictitious. The students are on pay as you get uniform account. The claim as pleaded was not proved. There was no evidence that the school was paying for the uniforms. If the respondent gave credit to students, it is up to them.

33. -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......
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> ...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."

34. 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 "The 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....
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> 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."

12. In respect to the essence of pleadings, 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......'"

35. The claim was insufficiently pleaded and not proved. One of the things I find conspicuously missing is the money. There is no evidence of payment by the school for any sort of items. The indications on the statement are M-pesa payments.

36. Secondly an amount exceeding 13 million appears to have been paid. No evidence was tendered on who made the payments. A party cannot throw facts to the court without tendering tangible evidence.

37. Thirdly the supply is specific in sizes. This means a specific request was made. There is no evidence of such a request by the school. The school did not procure any material nor pay for any material.

38. Lastly, one of the complaints was that some money was inadvertently paid to school accounts for two students. I fathom from the foregoing that, the school was the collector of paid up uniforms. It collected uniforms for those who paid and hopefully for new students. The student will then go to school and be fitted. That explains why the returns were for specific years.

39. There was no evidence that the appellant was involved in the deal. They helped in identifying the students who paid and were fitted. Otherwise if the school was informally procuring both parties are engaged in an illegality. The court cannot sanction an illegality.

40. 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."

41. In the circumstances, I find and hold that the respondent did not prove the case pleaded as parties cannot procure for such a big contract without reducing it in writing or having a paper trail.

42. I find there was no contract between the parties. In the circumstances I find that the court erred in entering judgment for respondent. In the circumstances I allow the appeal, set aside the judgment in the lower court and in lieu thereof I substitute with an order dismissing the claim in the court below with costs. The appellant shall have costs of the appeal of Kshs. 125,000/-.

Determination

In the circumstances, I make the following orders:-

a. The appeal herein is merited. I allow the same, set aside the judgment delivered on 7/12/2021. In lieu thereof I dismiss the suit in limine with costs of Kshs. 125,000/-.

b. The appellant shall have costs in the lower court.

c. The file is closed

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Appellant

Otieno for the Respondent

Court Assistant – Jedidah