



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v SmeP Microfinance Bank Limited (Civil Appeal 124 of 2019)
[2024] KEHC 7615 (KLR) (Civ) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 124 OF 2019

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

CALVINCE KAMAU NJOROGE APPELLANT

AND

SMEP MICROFINANCE BANK LIMITED RESPONDENT

JUDGMENT

1. This is an Appeal from the Ruling and order of the Hon. I. Orange SRM delivered on 4/2/2019 in Milimani CMCC No.4766 of 2018.
2. The Appellant was the Plaintiff in the suit in the court below. The ruling allowed a preliminary objection.
3. The Memorandum of Appeal is a study of how not to write a memorandum of appeal. It has 17 odd grounds of appeal.
4. Order 42 Rule 1 that requires that the memorandum of Appeal be concise. The same provides 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.”



5. The Court of Appeal had this to say in regard to Rule 86 (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...”

6. Further 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.”

7. The appeal raises only one issue – whether the court erred in allowing the Preliminary Objection dated 11/10/2018.

Pleadings

8. The Appellant filed suit on 21/5/2018 stating that a loan agreement was to be repaid in 24 months with security being motor vehicle Registration No. KCA 761R where original logbooks and transfer were signed. The said loan was repaid on 3/2/2018 before June, 2018 when it was due. The respondent failed to release the original log book.
9. The respondent raised a Preliminary Objection that general damages for breach of contract are incapable of being granted. The sought ought to be dismissed.



10. The court said that the respondent did all he could including preparing land control board forms. The Preliminary Objection was thus merited.

11. What constitutes a Preliminary Objection as was set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696*, thus:

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.

12. This court finds that the Preliminary Objection was not on a point of law but merit of the case. The case can and may even be hopeless. That is not a Preliminary Objection. There were (iv) prayers sought. One was on breach of contract. The case as pleaded cannot be disposed of by the purported Preliminary Objection. It is not a Preliminary Objection. It is not even a point of law. Whether a prayer can or cannot be granted is not a question of law but of fact. I do not find it necessary to repeal the same.

13. Consequently, I find that the court proceeded on frolics of its own. There were no admitted facts. The objection related to a suit over a car being the decision was on land control board. The court could have stopped itself when it realized that the issue that general damages for breach of contract is a general principle. There will always be exceptions. I do not want to re-argue the dispute for parties. The prayer the court relied on was a twin prayer for breach of contract and negligence.

14. In the circumstance the appeal is merited. The ruling and order of Hon. I. Orenge, SRM is set aside and in lieu thereof, substitute with an order dismissing the Preliminary Objection with costs.

15. On costs, it is in the discretion of the court. Under Section 27 (1) of the *Civil Procedure Act*, it is provided doth:

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.

16. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others Petition No. 4 of 2012*; [2014] eKLR the court stated 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, prior-to, during, and subsequent-to the actual process of litigation.”

“[22] 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. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.

17. In the circumstance I allow the appeal dismiss the preliminary objection with cost. The appellant shall have costs of Kshs.135,000/- for the appeal.

Determination

18. The upshot of the foregoing I make the following orders:-
- a. The appeal is allowed, the ruling given on 4/2/2019 is set aside and in lieu thereof, the preliminary objection dated 20/5/2019 is dismissed.
 - b. The Appellant’s suit, be reinstated for hearing before a court other than Hon. I, Orange.
 - c. The Deputy Registrar of the court to serve a copy of this judgement on the said magistrate.
 - d. The Appellant shall have cost of Kshs.135,000/- payable within 30 days in default execution to issue.
 - e. 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

Instructed By:-

F. Karanja & Co. Advocates for the Appellant

Karanu Kanai & Co. Advocates for the Respondent

Court Assistant - Jedidah

