



REPUBLIC OF KENYA



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Skytrade International Limited v Roy Transmotors Limited (Civil Appeal E182 of 2023) [2024] KEHC 8530 (KLR) (Civ) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8530 (KLR)

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

**CIVIL
CIVIL APPEAL E182 OF 2023**

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

SKYTRADE INTERNATIONAL LIMITED APPELLANT

AND

ROY TRANSMOTORS LIMITED RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. B. M. Cheloti (PM)
in Nairobi MCOMMSU No. 91 of 2020, delivered on 3rd March, 2023)*

JUDGMENT

1. This is an appeal from the judgment and decree of the Hon. B. M. Cheloti delivered on 3/3/2023 in MCOMMSU No. 91 of 2020. The Appellant was the defendant in the lower court.
2. The Appellant filed a humongous 12 paragraph memorandum of appeal. The humongous memorandum of appeal raises only one issue; whether the special damages were specifically pleaded and proved. This is contrary to Order 42 Rule 1, which provides as follows:-
 - “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:

“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:

“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.”

Pleadings

5. The Respondent filed a plaint dated 12/2/2020 claiming for a sum of Ksh. 829,400/= being an amount that they refused to settle. The Respondent averred that they had the lowest transportation. They claimed for a sum of Ksh. 829,400/=, damages and costs.
6. The defendant filed defence on 17/8/2020. They denied that the defendant received any transportation services. They stated that even if the services were rendered, it is not for a sum of Ksh.829,400/=. They made a general denial of the claim. More importantly they did not set a defence of their own. They stated that rates are exaggerated. They did not set up any specific defence. This was a classic evasive defence.



Issues

7. The only issue raised in the lower court was whether there was a contract of transportation and that rates were exaggerated. The extent of exaggeration was not provided.

Evidence

8. After several false starts the matter started on 10/3/2023 where Win Joy Kagendo testified and admitted the documents as exhibits 1-12 and adopted a statement dated 12/2/220. She stated that she attended all the meetings that led to the agreement. She stated that the empty containers were carried at 35,000/= while transport at 50,000/=.
9. It was her case that they did not send someone to pick cheque but containers were picked and dropped. The invoices were also dropped by the Respondent.
10. The Appellant's witness, Taghi Hossein Zadedeh, testified that they were willing to pay Ksh. 313,720/=. On cross examination, they pointed out that Ksh. 685,000/= was due though he did not have computation on how it was arrived at.
11. After filing detailed submissions, the court analyzed evidence and entered judgment for Ksh. 829,400/= together with interest from the date of delivery until payment in full. The Appellant was aggrieved hence this appeal.

Analysis

12. 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.
13. 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 it 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.”
14. 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.”
15. The Court is to bear 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.



16. 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...”

17. In civil litigation trial is never through ambush, hyperbole, conjecture or surmise. Pleadings must concretize a dispute. A dispute cannot be handled unless pleaded. A party cannot be halfhearted in its pleadings. Pleadings are an art of seduction. A party must set out what it is seeking and to what extent. Having evasive pleadings is anathema to good order and should be frowned upon. The plaintiff sought an exact amount, that is Ksh. 829,400/=. The purpose of the money was given – transport of containers. To defeat this claim Order 2 Rule 4 must be complied with. It states:-

- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —
 - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
 - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
 - (c) which raises issues of fact not arising out of the preceding pleading.
- (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”

18. It is not enough to say that an amount is not due. A party must state that:-

- a. The amount has never been due, or
- b. The amount was paid on such dates, or
- c. The claimed goods and services were not rendered.

19. If the services were not rendered then there must be specific pleadings on the extent of the non-delivery and the payments for parts that were delivered. 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 & Anor. 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: -

“.....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.”

20. In the case of *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, Malawi 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 pleadingsfor 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.”

21. 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.....”

22. In the case of *Adetoun Oladeji (NIG) Ltd vs. Nigeria Breweries PLC* SC 91/2002, Judge Pius Aderemi JSC expressed himself, and we would readily agree, as follows;

“ it is now a very trite principle of 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.”

23. *Ipsa facto*, the amount could not be in dispute, if there was no contract. The amounts due as admitted are irrelevant unless the Appellant raises a cogent defence how it arose.

24. In The case of [Ragbir Singh Chatte v National Bank of Kenya Limited](#) [1996] eKLR, the Court of Appeal stated as doth: -

“The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel MR in *Thorp v Holdworth* (1876) 3 ChD 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant’s defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a).”

25. There were no particulars of breach. Even where the exaggeration is pleaded, the pleadings must be:-

- a. Total amount cleared.
- b. Correct amount due or paid.
- c. Extra amount not due and not payable.

26. The *raison d’être* for exaggeration must be set out in extensio. It could be that parties agreed on price at x, for y quantity of goods or services but only 20% was supplied or the price was changed to y + (h). It is an abuse of the court process to allege exaggeration without setting out parameters.

27. The court was never invited to determine the actual price. Further, it is madness to admit that an agreement exists but deny the same at appellate court. The witness for the Appellant testified that they were willing to pay Ksh. 313,720/=. He did not indicate how he arrived at that figure. The Appellant admitted that an email of 30/10/2018 agreed that the Respondent were owed Ksh. 685,000/=. After an admission, the court’s duty is only to deal with un-admitted amounts. This will be Ksh. 144,400/= . However the court will not waste time splitting amounts when the admission does not split the amount. The invoice which was to be credited was for Ksh. 371,280/=. This was neither pleaded nor counterclaimed.

28. The amount they stated to be willing to pay was Ksh.685,000/= less Ksh. 371,280/= making 313,720/=. However, the court was not invited to solve the dispute related to and extending to the delay in 17 containers. Further, an issue of whether the containers were to be charged 50,000/= or 35,000/= was not pleaded.

29. However, it is noted that 7 containers were admitted and at some stage a sum of Ksh. 876,000/= was being claimed. The dispute appears from documents to be plus or less VAT. That may mean that the



sum of Ksh.685,000/= is exclusive of VAT charged so that VAT is included in the principal. All this scenarios tell us one thing and one thing only, the defence was speculative. They did not raise any issue for the court to deal with.

30. From pages 108-109, there is a breakdown. The Appellant indicates Ksh. 829,400/= is payable but less 371,280/=. Unfortunately this deduction was not pleaded. They state the sum payable to be 829,400/=.
31. I therefore do not find anything to show that the sum of Ksh.829,400/= was paid. The court did not err in failing to offset, as offset or set off was neither pleaded nor proved. It is not true that invoices proved were for Kshs. 464,000/=. They were for Ksh. 829,400/=.
32. Section 107-109 of the *Evidence Act* provides as follows:-
 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.
 3. 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.
33. 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.”
34. 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; -

“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.”
35. In the circumstances the Appellant was unable to prove that the debt was paid. It is thus due and owing.
36. The last aspect is the legality of the order of interest. Interest is provided for under Section 26 of the *CPA* as follows:-

“26. Interests



- (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
- (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.”

37. In that respect interest on special damages run from the date of filing suit. In that connection I shall set aside the order on interest and direct that the same shall be payable from the date of filing suit in the lower court on 21/2/2020. In the circumstances, other than the order on interest, the Appeal is dismissed with cost of Ksh. 105,000/=.

Determination

38. The net effect of the foregoing is that I make the following orders:-

- a. The Appeal lacks merit, and except on the order of interest, it is dismissed with costs of Ksh. 105,000/-.
- b. The order on interest is set aside. In lieu thereof I direct that there shall be interest on the amount decreed from 21/2/2020, the date of filing suit.
- c. 30 days stay of execution.
- d. 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:

Mr. Momanyi for Nyabuto for the Respondent

No appearance for the Appellant

Court Assistant – Jedidah

