



REPUBLIC OF KENYA



**Muje t/a Gamunje Limited & another v Mutie (Civil Appeal E815 of 2022)
[2024] KEHC 11786 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E815 OF 2022
AM MUTETI, J
SEPTEMBER 25, 2024**

BETWEEN

MUJE T/A GAMUNJE LIMITED 1ST APPELLANT

SAMSON NJOROGE KINYANJUI 2ND APPELLANT

AND

MARTIN MUTIE RESPONDENT

*(Being an Appeal against the ruling and order of Hon. P Wambugu
delivered at Nairobi on 18th January 2022 in MCCC E6863 OF 2020)*

JUDGMENT

1. The Appellant in this appeal is aggrieved by the decision of the learned Honourable P. WAMBUGU delivered on the 18th January 2022 in which the learned Honourable Magistrate struck out the Appellant's defence for it was filed out of time.
2. The Appellant pursuant to leave granted by the learned Honourable Lady Justice Mulwa on the 13th October 2022 filed the present Appeal.
3. The appellant raises five grounds of appeal in the memorandum of Appeal. The appellant contends: -
 - a. That the learned Honourable Magistrate erred in law by failing to hold that notwithstanding the fact that the Appellant had filed the defence out of time, the Court had discretion not to have the same struck out.
 - b. That the learned Honourable Magistrate erred by failing to hold that the rules are handmaidens of justice, and should not be elevated to a fetish and that the Court should have looked at the broader interests of justice in arriving at the decision to strike out the defence or not.



- c. That the learned Honourable Magistrate erred in law in failing to apply his mind to the merits of the Appellants defence while arriving at the decision to strike out the Appellants defence.
 - d. That the learned Magistrate erred in law by holding that interlocutory judgement entered on 13th April 2022.
 - e. That the learned Honourable Magistrate erred in law by failing to apply the rule of law that matters should as much as possible be determined on their merits.
4. The Appellant’s memorandum of appeal is faulty in ground 4 for it does not raise any question as the interlocutory judgement. It is not for the Court to venture into trying to figure out what the Appellant intended to raise in that ground.
- Consequently, this Court is left to deal with the other four grounds of Appeal.
4. The Appeal raises basically the following issues: -
- i. Whether the learned Honourable Magistrate exercised his discretion properly in law in ordering the striking out of the Appellant defence.
 - ii. Whether by failing to consider the merits of the Appellants defence before ordering its striking out, the learned Honourable Magistrate acted Judiciously.
 - iii. Whether the order of the learned Honourable Magistrate striking out the defence served to further the course of Justice.

Analysis

- 6. The basic principle in striking out proceedings is that it is a very drastic remedy and Courts must resort to it in the clearest of cases.
- 7. In *Coast Projects Vs Mshan Construction (k) Ltd (2004) 2 KLR 118* the Court held:

“Striking out a pleading is to be resorted to in very clear, plain and obvious cases. It is a summary procedure and by virtue of that, it is a radical remedy and a Court of Law should be slow in resorting to this procedure”
- 6. The principal function of a Court of Law is to deliver justice and in the endeavor to do so, Courts must guard against doing injustice to the parties.
- 7. The exercise of judicial discretion must be judicious and every measurable by- stander should be able, looking at the decision to say, yes, the Court has by its decision delivered justice.
- 8. It becomes even more pronounced, a duty, considering their constitutional dictate under Art 159 (2) (d) of *the Constitution* that justice must be done to all without undue regard to technicalities.
- 9. The fact of a party filing a pleading out of time is a matter that a Court should consider carefully more so addressing oneself to the reasons advanced by the party for their failure to comply with the timelines set out in the rules of procedure.
- 10. The Court should resist a casual approach to applications seeking to strike out pleadings since the effect of their actions could cause grave injustice to the parties.



11. The learned Honourable Magistrate in this matter paid very little attention to the defendant's case. He did not set out any reasons in the ruling why he resorted to the drastic action of ordering the defence to be struck out.
12. The learned Honourable Magistrate simply stated in his ruling: -

“The application is opposed by affidavits filed in Court. I have considered the same at length. Parties filed submissions and I have considered the same at length.”
13. The statement quoted above leaves the Court with many questions as to whether the Court actually considered the said affidavits and if so, what was the Court's finding on them.
14. Further, the Court did not also give reasons why it dismissed the affidavits and reasons advanced by the Appellant for the delay in filing. He needed to do more than just a sweeping statement.
15. The Court noted that the defence ought to have been filed on 27th January 2021 but the same was filed on 22nd July 2021 without leave of Court.
16. The learned Honourable Magistrate did not address himself to the issue of delay. It would have been absolutely necessary for the Court to pronounce itself on the question of whether or not the delay of 6 months in filing the defence was in-ordinate.
17. It would have guided this Court in determining whether the learned Honourable Magistrate exercised his discretion judiciously in arriving at the decision to strike out the defence.
18. The Appellant in his submissions makes reference to the issue of there not being an interlocutory judgement on record. According to the Appellant there was no judgement recorded on the 13th April 2022.
19. I have taken the trouble to look at the handwritten notes of the lower Court to establish whether the Lower Court entered judgement in default of defence.
20. The notes contain proceedings for 17th November 2021, 13th Dec 2021, 11th January 2022, 18th January 2022, and 7th April 2022. Indeed, there is no record for 13th April 2022. It was therefore important for Court to note that even though the defence was filed out of time, there was no entry of judgement in default.
21. The learned Honourable Magistrate's pronouncement in the ruling is not supported by the record.
22. The respondent vide their submissions dated 25th March 2024 however maintain that there was an interlocutory judgement entered on 13th April 2021 and according to them the only option open to the Appellant was to apply for setting aside of the same under Order 10 Rule 11 of the Civil Procedure Rules.
23. It is this Court's view that counsel for the Respondent made these submissions without verifying the correct position from the original record.
24. The Appellant could not move to set aside a non-existent interlocutory judgement. It is still unclear to me where the learned Honourable Magistrate got the date of 13th April 2021 as the date for the entry of the interlocutory judgement.
25. The High Court as a Court of record cannot rely on submissions of the Respondent's counsel backing the Courts position without a basis on the record.



26. The whole of the Respondent's submissions apparently dwelt on the issue of the interlocutory judgement only.
27. It is the finding of this Court that a delay in the filing of a defence for 6 months is not inordinate.
28. In the determination of inordinate delay, a Court is not minded only to look at the mathematical calculation of time but the Court should take into account the totality of the circumstances of a case.
29. Further, the trial ought to have addressed itself extensively to the issues raised by the Appellant in his affidavit sworn on 20th August 2021.
30. It would probably have led the Court at that time to examine the record and establish whether there was entry of an interlocutory judgement.
31. The Appellant in the affidavit did raise the issue of filing of a defence before entry of judgement. The Lower Court did not pay due attention to this fact. The failure to do so caused a failure of justice which must be remedied by this court.

Determination

32. It is this Court's finding that the Court below did not exercise its discretion properly in ordering the striking out of the defence.
33. The record does not contain any record of entry of an interlocutory judgement thus the Magistrate's finding is unsupported by the record and must be set aside.
34. The Appellant's appeal therefore succeeds and the matter is to be remitted to the Lower Court for hearing and final determination. The statement of defence stands reinstated.
35. The costs of the Appeal shall abide by the outcome of the suit below.
36. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2024.

HON. A.M MUTETI

JUDGE

In the presence of

Kiptoo: Court Assistant

Maina Makome Absent for the appellant

Jero for the Respondent

