



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CIVIL DIVISION**

**CIVIL APPEAL NO 57 OF 2016**

**NANCY WANJIKU MUKOMA.....APPELLANT**

**VERSUS**

**BERNARD NJOROGE NGUGI.....RESPONDENT**

**(Being an appeal from the judgement and ruling of the court**

**in Murang'a Chief Magistrate Civil suit no 100 of 2014)**

**JUDGEMENT**

1. By a plaint dated 24<sup>th</sup> day of march 2014, the respondent sued the appellant for a sum of Ksh. 160,000 being a refund of the purchase price from the intended sale of land parcel number LOC 5. KAGUNDUNI /639 by the respondent and by a defence dated 16<sup>th</sup> April 2014, the defendant respondent pleaded that the alleged sale agreement was unenforceable, time barred as the subject property was registered in the name of one NJOROGE MUKOMA deceased and stated further by way of counter claim, that it was the appellant who owed him Ksh. 60000 being land rent for one acre.
2. By a Notice of Motion dated 27<sup>th</sup> April 2014 under order 2 Rule 5, the Respondent moved the Court that the statement of defence be struck out for being scandalous, vexatious and an abuse of the court process and sought for judgement against the appellant as prayed for in the plaint.
3. By a ruling dated 29<sup>th</sup> June 2015 and the subject matter of this appeal, the court allowed the said application on merit based on an agreement signed between the parties herein and stated that the defence did not raise any triable issue.
4. Being dissatisfied with by the said ruling, the appellant filed this Appeal and raised the following grounds:-
  - A. That the trial court erred in law and fact in entering summary judgement in a contested matter in which there was a valid weighty and material defence meriting full trial.
  - B. The appellants constitutional right to be heard in her defence was denied.
  - C. The trial court erred in law and fact by her failure to properly construe the appellants defence that the sum in dispute had been paid to a third party and therefore no privity of contract.
5. Directions were issued that the appeal be heard by way of written submissions which were duly filed. On behalf of the appellant, it was submitted that the original sale agreement, the respondent had appointed an agent / proxy who represented her and that there was no reply or joinder on the part of the respondent to deny the said averment. It was submitted that by the later agreement the appellant had agreed to refund the pleaded sum to the person who actually paid for it and that was an issue which ought to have gone for trial.
6. On behalf of the respondent, it was submitted that the lower court did not enter summary judgement but struck out the appellant's defence and therefore the appeal should be dismissed.
7. The only issue for determination in the appeal is whether the lower court was right in entering summary judgment against the appellant put differently, whether the appellant has made up a case to enable the appellant court interfere with the finding of the trial court.

8. The grounds upon which a court may struck out a defence and enter summary judgement were stated by the court of appeal in the case of **D.T. Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & Another CA No. 37 of 1978** firmly held as follows:

*“No suit should be summarily dismissed unless, it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable amendment.”*

In **Coast projects v Mr. Shah Construction (K) Ltd [2004] 2 KLR 118;**

*“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.”*

In **Harit Sheth T/a Harit Sheth Advocates v Sharma Charania [2014] eKLR** the Court held as follows:

*“This court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgement where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination (see also **Continental Butchery Ltd v Ndhiwa (1989) KLR 573**”*

See also **Dhanjal Investment Ltd v Shabaha Investments Ltd Civil Appeal No. 232 of 1997**, the court had earlier stated as follows regarding summary judgment.

*“The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of **Kandial Restaurant vs Devshi & Company (1952) EACA 77** and followed by the court of Appeal for Eastern Africa in the case of **Souza Figuerido & Company Ltd Vs Mooring Hotel Ltd. (1959) EA 425** that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions....”*

9. In the case **MISORT AFRICA LTD vs PS NATIONAL TREASURY AND PLANNING & ANOTHER [2020] e KLR**, the court had this to say: (11) The key consideration in determining an application to strike out a Defense is the consideration as to whether the said Defense raises triable issues. In the case of **JOB KWACH –VS- NATION MEDIA GROUP LTD** it was held as follows: -

*“Before the grant of summary judgment the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as “subject to liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”[own emphasis]*

10. With the above stated legal principles, I now turn to the proceedings before the lower court as I am entitled to do, this being a first appeal, so as to come to my own conclusion thereon.

11. The appellant defence before the lower court was that she was not a party to the agreement entered by the respondent and that she was not the registered owner of the suit property and therefore the said agreement was unenforceable and time barred having been entered into on 20/6/2009 and by way of a counter claim stated that it was the respondent who owed her money.

12. The appellant defence when weighed against the an agreement signed by the appellant and the respondent , which was the subject matter of the ruling of the cannot stand as the agreement between the parties herein was not conditional upon the previous agreement between the appellant and any other party and therefore the trial court cannot be faulted in finding and holding that the defence did not raise any triable issues in the face of the written agreement which the appellant has not denied signing.

13. The claim before the trial court was not in respect of the land but the refund of the sums paid thereon and which was reduced into writing through an agreement dated 3/7/2013 the content of which the appellant did not deny.

14. I therefore find no merit on the appeal herein which I dismiss with cost to the respondent.

**DATED SIGNED AND DELIVERED AT MURANGA THIS 23<sup>rd</sup> Day of MARCH 2022.**

**J. WAKIAGA**

**JUDGE**

In the presence of;-

Court assistant: Mutahi

Mr. Muhoho holding brief for T.M. Njoroge for the Appellant:

Mr. Watira holding brief for Mr. Kirubi for Respondent