



**Kassam & another v Kotecha (Civil Appeal E111 of 2021)
[2022] KEHC 12750 (KLR) (Commercial and Tax) (30 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E111 OF 2021
DAS MAJANJA, J
AUGUST 30, 2022**

BETWEEN

RAIHAAN AMIRALI KASSAM 1ST APPELLANT

ELITE RIDERS LIMITED 2ND APPELLANT

AND

HEMAL KISHOR KOTECHA RESPONDENT

(Being an appeal from the Ruling and Order of Hon. L.L. Gicheha, CM dated 29th October 2021 at the Magistrates Court at Nairobi, Milimani in Civil Case No. E5683 of 2020)

JUDGMENT

Introduction and Background

1. This is an appeal by the against the ruling of the Subordinate Court dated 29th October 2021 (“the Ruling”) dismissing the Appellants’ application dated 1st December 2020 seeking to strike out the Respondent’s Statement of Defence dated 31st October 2020 and for judgment as prayed in the Plaint under the provisions of Order 2 rule 15(1) of the *Civil Procedure Rules* (“the Rules”).
2. From the material on record, it is common ground that the parties developed a credit relationship where the Appellants would advance the Respondent money from time to time. By a plaint dated 29th September 2020, the Appellants stated that between April 2017 and December 2017 and at the request of the Respondent, they advanced the Respondent KES. 26,300,000.00 secured, in part, by post-dated cheques amounting to KES. 13,815,000.00. In due course, the cheques were dishonoured but the Appellants paid KES. 7,355,000.00 leaving a balance of KES. 18,945,000.00 which they claim with interest and costs.



3. In response, the Respondent filed a Statement of Defence dated 31st October 2020. The Respondent denied that the Appellant denied it Appellants advanced him any money and demanded strict proof. It also stated that the Post dated cheques were issued on strict instructions that they were not to be banked except with his concurrence. He further denies that he owes that the Appellants the amount claims and contends that he has paid an substantial amount and shall at the appropriate time file an application for taking accounts.
4. After the close of pleading, the Appellants filed the application dated 1st December 2020 seeking to strike out the defence on the grounds *inter alia* that it does not disclose any cognizable defence in law and that the Respondent had admitted the existence of the debt.
5. The considered the application and determined whether the Respondent's defence raised triable issues. It held that even though the Appellants advanced the Respondent money and was issued with postdated cheques, the Respondent's defence raised other issues of the loans advanced as it appeared that there were other parties involved in the transactions and that there were attached documents alleging that the amounts advanced had been paid in full. The trial corut dismissed the Appellants' application this precipitating this appeal.
6. This appeal was canvassed by written submissions and brief oral submissions by the respective counsel.

Analysis and Determination

7. The issue raised by the Appellants and which this court is required to determine is whether the Subordinate Court erred in not striking out the Respondent's Statement of Defence.
8. The power and jurisdiction of the court to strike out a pleading is discretionary under Order 2 rule 15 of the Rules. In an appeal against the exercise of discretion by the trial court, the appellate court will not interfere with the decision of the trial court unless it is satisfied that the trial court, in exercising such discretion has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the trial court has been clearly wrong in the exercise of the discretion and that as a result there has been an injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd* NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR).
9. As to whether the court should strike out a pleading, our courts are guided by the general principle clearly explained by the Court of Appeal in *D.T. Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1 as follows:

No suit ought to 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 by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.
10. Although the Statement of Defence is somewhat evasive, the Respondent in substance agrees that he was advanced money by the Plaintiff. By stating that he has paid a substantial amount, he effectively admits his indebtedness. The issue for trial is to what extent it he indebted. On this issue Plaintiff produced evidence of part payment by the Respondent thus leaving the amount claimed. The Respondent, in its part, claimed that it had made some payment through third parties for onward transmissions to the Appellants.



11. I am therefore in agreement with the trial court that the issue of how much is due to the Appellant is a matter from trial. The Respondent's documents and correspondence to support its case cannot be wished away or termed as a sham meant to delay the finalization of the case particularly given the informal nature of the subject transaction. If anything, it invites the trial court to get delve into the evidence and determine the true position as advanced by the parties.
12. It is for the aforesaid reason that I cannot find fault in the trial court's discretion in dismissing the Appellants' application.

Disposition

13. The Appellants' appeal is dismissed. The Appellants shall pay the Respondent's costs assessed at KES. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms instructed by Maingi Musyimi and Associates Advocates for the Appellant.

Mr instructed by Lloyd and Partners Advocates LLP for the Respondent.

