



**Kirwa v Kesio & another (Civil Appeal 9 of 2021)
[2022] KEHC 13329 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL APPEAL 9 OF 2021
EKO OGOLA, J
SEPTEMBER 28, 2022**

BETWEEN

NICHOLAS KIRWA APPELLANT

AND

ANNAH CHEPTANUI KESIO 1ST RESPONDENT

EVANS KIPROP 2ND RESPONDENT

*(Being an appeal from the Ruling of Hon MC Kesse (SRM)
dated 14th March 2020 in Kapsabet SPMCC No. 184 of 2017)*

JUDGMENT

1. By a plaint dated October 23, 2017, the respondents sued the appellant for a sum of Kshs 900,000/= being the sum advanced to him by way of a partnership agreement dated June 1, 2014 whose intent was to operate a chemist business. The appellant filed his defence dated November 27, 2017 in which he admitted being in a partnership agreement with the respondents but denied the amounting owing to them.
2. By a notice of motion dated December 6, 2017, the respondents moved the court praying for summary judgment against the appellant for reasons that; the appellant admits the debt, the appellant undertook to repay the debt in instalments but failed to honour the undertaking, the defence does not raise any triable issues and a waste of judicial time.
3. By a ruling dated March 14, 2018 and the subject matter of this appeal, the court allowed the said application on merit and entered summary judgment against the appellant as prayed for in the plaint.
4. Being aggrieved with the said ruling, the appellant filed this appeal and raised the following grounds: -



- 1) That the honourable magistrate erred in law and fact in allowing summary judgment through ruling on application dated December 6, 2017 yet there was a defence on record.
 - 2) That the trial magistrate erred in law by disregarding express provisions of Order 36 rule 1 of the CPR by entering summary judgment despite the defence.
 - 3) That the trial magistrate erred in law and fact by disregarding the cardinal principle of law that a party should not be condemned unheard.
 - 4) That the trial magistrate erred in law and fact as she failed to appreciate that there was a partnership deed that its contents should have canvassed at full trial.
 - 5) That the trial magistrate erred in law and fact by failing to appreciate the appellant's submissions in response to the application for summary judgment.
 - 6) That the trial magistrate erred in law by failing to find that summary judgment should and must not be entered under Order 36 where a defence has been filed.
 - 7) That the trial magistrate erred in law and fact by concluding a serious matter with serious triable issues at an interlocutory stage therefore locking out the appellant from canvassing those triable issues at full trial.
5. Directions were issued that the appeal be heard by way of written submissions which were duly filed.

Appellant's Submissions

6. The gist of the appellant's submissions is that the learned trial magistrate failed to appreciate the governing principles in granting summary judgment as provided for under Order 36 rule 1 of the Civil Procedure Rules. The appellant contends that the trial court denied him a chance to prove his case on merits through evidence. The appellant argues that issues of breach of repayment could only have been determined after the court had examined all the evidence before it. The appellant maintains that a triable issue is not one that must succeed upon trial but one that warrants further production of evidence so that it may be determined on merit.

Respondents' Submissions

7. The respondents submitted that the trial magistrate adhered to the provisions of Order 36 rule 1 and was within the tenets of the said provision which requires that the court should interrogate the defence whether it raises triable issues.
8. On whether the defence raises any triable issues, the respondents submitted that the appellant in his defence admitted that Kshs 900,000/= was advanced to him by the Appellants and that he was in receipt of the same. The respondents further submitted that, save for mentioning that he has been repaying them colossal amounts in light of the said amount, he does not provide any evidence whatsoever as proof of the said allegations. Finally, the respondents submitted that, although the appellant claimed that parties had resorted to Alternative Dispute Resolution, he does not provide details of the same.

Determination

9. The only issue for determination in the appeal is whether the trial magistrate was right in entering summary judgment against the appellant. The gist of summary judgment is clearly stated under Order 36 of the Civil Procedure Rules.



10. 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 *DT Dobie & Company (Kenya) Ltd vs Joseph Mbaria Muchina & Another* CA No 37 of 1978 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.”
11. In *Harit Sheth T/a Harit Sheth Advocates vs 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”
12. The key consideration in determining an application to strike out a defence is the consideration as to whether the said defence 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.”
13. 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.
14. In the application dated December 6, 2017, the respondents termed the appellant’s defence as a sham as it raises no triable issues. I have keenly perused the statement of defence dated November 27, 2017 filed by the appellant and from its contents it is evident that the appellant does not deny that there was a partnership agreement between him and the respondents and that the respondents had contributed the sum of Kshs 900,000/= towards setting up a chemist and or a pharmacy business. He however argues that there were terms and conditions guiding the said partnership deed. It is also evident that although the appellant admits that the partnership business had collapsed, he blames the respondent’s son for the mismanagement of the said business. The appellant also alleges to have been repaying the respondents colossal amounts regularly. The appellant also deposes that parties had resorted to alternative dispute resolution which resulted to a letter of acceptance by the respondents dated September 28, 2017.
15. In summary judgment motions premised on affidavits, the function of the court is to determine whether or not a bonafide issue has been presented for trial. If none is found, an order is made granting the motion for summary judgment. In essence the defendant must set up a *bonafide* defense, supported by affidavits, in order to bar the motion and expressed to be brought under Order 36 rule 1 of the



Civil Procedure Rules. In the present case, I find that the statement of defence raises triable issues which warrant a variation or setting aside of the orders by the trial court.

16. For the foregoing reasons the appeal herein succeeds.

17. Costs shall be in the trial suit.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE

