



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITUI

HIGH COURT CIVIL APPEAL CASE NO. 54 OF 2019

ZAKAYO MATENG'U NGUKU....APPELLANT

VERSUS

KATHEU MBONI.....RESPONDENT

Being an Appeal against the Ruling of Hon. S.N. Mbungi-(Chief Magistrate) delivered in Kitui Chief Magistrate Court on the 22nd of August, 2019.

J U D G E M E N T

1. This is an appeal arising from a ruling of the subordinate court in Kitui Chief Magistrate Court Case Number 129 of 2019, dated 22nd May, 2019 which ruling struck out the Appellant's defence and entered a summary judgement in favour of the Respondent herein.
2. The background of the case before the trial court reveals that the Respondent had sued the Appellant for breach of contract. The genesis of the breach was reported to be a friendly loan advanced to the Appellant amounting to Kshs, 908,609 (Nine hundred eight thousand six hundred and nine shillings) on 13th October, 2018 upon the agreed written agreement that the amount would be repaid on 13th November, 2018.
3. The Appellant was faulted for not honoring the agreement and hence the suit filed to compel him to pay. The proceedings from the lower court indicate that the appellant filed a defence denying the Respondent's claim. The Respondent then applied vide application dated 16th May, 2019 for the defence to be struck out and the trial court vide the above cited ruling agreed with the Respondent that the defence disclosed no triable issue and struck it out.
4. The Appellant was aggrieved and lodged this appeal raising the following 6 grounds namely: -
 - i. That the Learned Magistrate misdirected himself in law in striking out the defence and issuing summary judgement against the Defendant.
 - ii. That the Learned Magistrate erred in law and in fact in failing to appreciate that the Appellant's defence raised triable issues that warranted a full trial on merits.
 - iii. That more particularly, the Learned Magistrate erred in law and in fact when he failed to consider that the defence raised an issue whether or not any money was advanced or any formal agreement signed.
 - iv. That the Learned Magistrate erred in fact when he treated the amount of Kshs. 908,609 as an uncontested debt due owing to the Respondent while in fact the existence of such a debt was denied.
 - v. That the decision of the Learned Magistrate to summarily issue judgement against the Appellant without full trial was, oppressive and an abrogation of the right to a fair trial.
 - vi. That the decision of the Learned Magistrate to issue adverse orders against the Appellant was in breach of the Appellant's right to fair administrative action under **Section 4 of the Fair Administrative Action's Act and Article 47(1) and (2) of the Constitution.**
5. In his written submissions through Counsel, the Appellant insists that his defence disclosed triable issues which deserved trial. He avers that, he deserves a chance to challenge the Respondent's claim which he opines is only possible in a full trial rather than a summary procedure.

6. He avers that, he denied obtaining the money from the Respondent in the name and style of a friendly loan amounting to Kshs. 908,600. He says, he has no recollection of signing or entering into a loan agreement and there was no receipt of the loan amount. He alleges that, the witness to the agreement is a spouse to the Respondent raising suspicion.

7. He further contends that, it was not possible to determine the above issues at interlocutory stage. He avers that, the issue of security offered for the loan needed further interrogation adding that he ought to have been given a chance to defend the claim.

8. He submits that summary judgement is a draconian measure which should be given only in clearest of cases and in his view, the Respondent's claim did not fit into that category.

9. The Appellant relies on the decision of *Job Kilach versus Nation Media Group Limited Salaba Agencies and Michael Rono [2015] eKLR* where the court of Appeal held that, mere denials did not constitute a good defence where it is evident that the debt is due and owing.

10. He also relies on the case of *D.T. Dobie & Company Kenya Limited versus Muchira [1980] eKLR* where the Court of Appeal dismissed an appeal seeking to have a summary judgement set aside and reiterated the legal requirements for summary judgement as: -

- a. Where the pleadings do not disclose any reasonable cause of action or defence.
- b. Where the pleadings embarrass or delay the fair hearing of a suit.
- c. Where there is an abuse of court process.

He contends that, the Respondent claim against him was not evidently clear and plain stating that, the authenticity of the agreement needed interrogation.

11. The Respondent has opposed this appeal through written submissions dated 9th June, 2021. The Respondent avers that the defence filed by the Appellant in the lower court contained mere denials and contends that, the decision in *Job Kilach (Supra)* cited by the Appellant supports her contention.

12. The Respondent submits that; the Appellant has raised issues in this appeal which were not raised in his defence at the trial court. She contends that, a party is bound by his pleadings on that score he relies on the case of *Independent Electoral and Boundaries Commission and Another versus Stephen Mutinda Mule and Others [2014] eKLR*.

13. The Respondent supports the trial court for striking out the Appellant's defence contending that the defence filed, did not raise any triable issue and relies on the case of *Patel versus East Africa Cargo Services Limited* (citation not provided).

14. The Respondent submits that, her claim in the lower court was based on an agreement which clearly showed that the Respondent signed and offered *Plot No. 44 at Mbitini Market* as security. She further submits that, she could not have known about the Appellant's property without the participation of the Appellant in the agreement, adding that, the defence filed contained mere denials which were meant to frustrate the Respondent's claim.

15. This court has considered this appeal and the response filed. The only issue for determination in this appeal is whether the defence filed by the Appellant herein, raised a triable issue.

16. The application before the trial court was presented under *Order 2 Rule 15 of the Civil Procedure Rules Sub Rule (1)* of the provision provide as follows: -

“At any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that-

- a. It discloses no reasonable cause of action or defence in law; or**
- b. It is scandalous, frivolous or vexatious; or**
- c. It may prejudice, embarrass or delay the fair trial of the action; or**
- d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be....”**

From the above provisions, it is patently clear that summary procedure is provided for in the Rules of procedure to facilitate speedy trial and avoid a situation where a party just files a defence containing mere denials in the face of clear and obvious claim.

17. The power to strike out pleadings are discretionary which in the new constitutional dispensation is rarely used owing to its effect which is draconian as it blocks a party from the benefit of a full trial and access of justice. In *Madison Insurance Co. Ltd versus Augustine Kamanda Gitau [2020] eKLR*, the court was of the view that, the striking out of pleadings though provided for in the rules, should be done in clear cases.

18. The application by the Respondent at the lower court was based on the fact that the defence filed disclosed no triable issue and was only

meant to delay the matter but a look at paragraph 4 of the impugned defence shows that the Appellant denied obtaining money from the Respondent to the tune of Kshs. 908,609. That in my considered view, was a triable issue because the Appellant pleaded that he was a stranger to the agreement exhibited. It was incumbent upon the Respondent to demonstrate how the money which I find to be a huge amount (Kshs. 908, 609 by any standard is a huge amount) was channeled to the Appellant. Was it done through by cheque? or direct bank transfer? That in my view, is a triable issue which ought to go to full trial for purposes of giving a chance to both parties to put forward their cases and interrogate each other's position. It is unsafe to just rely on an agreement where a party has denied knowledge about the same. At the same time written agreements at times can be found to be unenforceable due to myriad of reasons for example duress, undue influence, misrepresentation and other reasons. It is necessary at times to consider all aspects of a transaction before resorting to a summary procedure through assumptions. In this instance the trial court fell into error by assuming that the written agreement was valid and enforceable without giving a chance to the Appellant to challenge it.

In the premises, this court finds merit in this appeal. The same is allowed. The ruling of the lower court dated and delivered on 22nd May, 2019, is set aside. In its place, this court dismisses the application dated 16th May, 2019. Besides that, I direct that the suit in the lower court be placed before another court with jurisdiction try the matter. Towards that end and for the interest of expediting trial, I direct the matter to be mentioned before the duty court tomorrow for further orders and directions.

DATED, SIGNED AND DELIVERED AT KITUI THIS 27TH DAY OF SEPTEMBER, 2021

HON. JUSTICE R. K. LIMO

JUDGE