



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 252 OF 2014**

**KENYA RAILWAYS CORPORATION.....APPELLANT**

**VERSUS**

**SOSPETER KAMAU GITHENDU.....RESPONDENT**

*(Being an appeal arising from the ruling and/ or order to the principal magistrate Hon. D. Ole Keiwua in the Chief Magistrate Court Civil Case No. 4169 of 2007 delivered on 13<sup>th</sup> June, 2014)*

**JUDGMENT**

The respondent filed a case against the appellant seeking judgment for the sum of Kshs. 1 Million together with interest at 18% per month from the date of payment until payment in full which was allegedly paid to acquire interest in land reference No. 209 /9534. There was said to be an agreement to the said effect. The appellant filed the defence denying the respondent's claim and in particular stating that if there was any agreement, which was denied, the same was cancelled as a result of the respondent's failure to perform his obligation under the contract.

Further, the respondent's suit was said to be time barred and in any case no notice of claim was served upon the appellant. This was followed by an application by the respondent under Order VI Rule 13 (1) (a) and (c) of the Civil Procedure Rules seeking an order that the defence filed by the appellant be struck out and judgment entered as prayed in the plaint. The trial court gave an order in favour of the respondent and struck out the said defence leading to the present appeal.

The appeal was argued by way of written submissions and both parties complied citing several authorities. I have also taken time to read the record of the lower court, the said submissions and the authorities cited. I have also considered the Memorandum of Appeal. I observe at this stage that some of the submissions delve into what the parties would have told the court by way of evidence had the trial taken place.

It is established that striking out of the pleading is a drastic measure which should be applied cautiously and only in the clearest of cases. Indeed, in the case of **Majanja Luseno and Company Advocates vs. NIC Bank Limited (2015) (e KLR)** the court had this to say,

**“The rules of natural justice require that a court must not drive away any litigant from the seat of justice. The objective of a court of justice should always be aimed at sustaining a suit rather than terminating it by summary dismissal and that “it is better to allow a weak case to go to trial than to invoke the guillotine process” – see Kisii Farmers’ Co-operative Union Limited vs. Sanjay Natwarlalshaunhan t/d as Oriental Motors (2006) e KLR.**

**In the case of Mpaka Road Development Limited vs. Kana (2004) EA 160 and DT Dobie vs. Muchina (supra), it was held that a pleading should only be struck out if it is manifestly hopeless that it amounts to an abuse of the court process. Indeed, a pleading should only be struck out if it is so hopeless that no amount of amendment could sustain it to set out a case.”**

In the ruling of the lower court which is subject to this appeal, the lower court referred to some documents relating to the pleadings. The lower court based its ruling on affidavit evidence that had not been tested by way of cross-examination. That approach, to say the least, was unsatisfactory and in most cases likely to lead to prejudice and denial of justice on the part of the offended litigant.

I have looked at the defence filed and related it to the plaint. It cannot be said that the appellant did not raise any triable issues to warrant a full trial. The agreement relied upon is not part of the record. Whether or not there was default by either party required to be tested by way of a trial. Validity of the transaction was also a serious triable issue. Since the substratum of the entire case was based on the said sale agreement, its interrogation by way of trial was a serious triable issue. With respect, the lower court misdirected itself in allowing the application to strike out the appellant's defence without a hearing.

I have already observed that the submissions delve into the province of the main hearing and any further observations thereof may prejudice the trial that must now follow.

The appeal hereby succeeds and the ruling of the trial of the lower court set aside in its entirety. The lower court file shall now be remitted for the trial to take place on merit by hearing both parties based on their pleadings. The appellant will have the costs of this appeal.

***Dated, signed and delivered at Nairobi this 18<sup>TH</sup> Day of April, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**