



**REPUBLIC OF KENYA**

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

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. 28 OF 2018**

**BETWEEN**

**STACY MWIKALI.....1<sup>ST</sup> APPELLANT**

**ISMAIL NYAKUNDI ONSINYO.....2<sup>ND</sup> APPELLANT**

**(Both t/a Lighthouse designs)**

**AND**

**ROSE OBAGA.....RESPONDENT**

***(An Appeal arising from the Ruling and Decree of Hon. N.S Lutta- SPM dated 14<sup>th</sup> March, 2018 at the Chief Magistrate's Court at Kisii in CMCC No. 113 of 2017)***

**JUDGMENT**

1. This is an appeal against judgment entered against the appellants for **Kshs. 635,000/-** following the striking out of the defence under **Order 2 rule 15(1) (a) (b) (c) and (d)** and **Order 13 rule 2** of the **Civil Procedure Rules**.

2. The respondent's claim against the appellants was, inter alia, for the refund of Kshs. 635,000/- being the contractual sum in an oral and written agreement to do interior design at the respondent's apartment at Nyamataro Bridge Camp in Kisii.

3. The trial magistrate struck out the defence on the ground that the appellants admitted having received payment as agreed, failed to give a reason why it had not done the work in their statement of defence. He stated that;

*At paragraph 5 of the defence, the 1<sup>st</sup> defendant admits having received from the plaintiff as agreed in the contract. There is no explanation given why the work was not completed as agreed.*

4. The trial magistrate relied on the dictum of Platt JA., in **Magunga General Stores v Pepco Distributors Ltd [1982] 2 KAR 89** where he stated that:

*First of all a mere denial is not sufficient defence. There must be some reason why the defendant does not owe money. Either there was no contract or it was carried out and failed. It is not sufficient therefore to simply deny liability without some given reason.*

5. Both sides have filed written submissions and cited various cases to support their respective positions. In this appeal, the appellant attacks the judgment on the ground that there was no basis to strike out the defence as the appellants had completed the works as demonstrated by the statement of defence and affidavits. The respondent contends that the defence was a mere denial and that the appellants did not deny receiving the money and they did not perform the contract.

6. As I am being called upon to review the exercise of discretion by the trial court, I am guided by the decision in **Mbogo and Another v Shah [1968] EA 15** where it was stated that:

*An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.*

7. From the decisions cited by the parties, it is common ground that the court should be slow to strike out a pleading except in the clearest of cases where there is no reasonable cause of action or defence. It has also been held that a mere denial or general traverse is not a defence and a triable issue must be disclosed (see generally *Ecobank Kenya Limited v Bobbin Limited and 2 Others* [2014]eKLR, *Margaret NjeriMbugua v Kirk MweyaNyaga* [2016]eKLR and *Vivo Energy Kenya Limited v George Karunji* [2014]eKLR).

8. In order to appreciate the respondent's case, the relevant part of the plaint stated as follows:

*[5] It was a term of the said written and oral agreements that the defendants were to source for furniture and furnishings, as per specific quotations, and for the plaintiff to pay for the purchases on condition that the defendants provided receipts of all the purchases, furnish her apartment and hand over the promises fully furnished.*

*[6] The defendants failed to carry out the works to the required standards and specifications, refused to complete the contract or deliver the specific quoted items and/or render the services contracted to deliver and are in breach of both the written and oral agreement.*

*[8] Particulars of breach of contract.*

*(a) Unilateral variations of the contract which variations, the plaintiff had rejected and never agreed to,*

*(b) Blatant failure in breach of the contract to deliver the goods and services to the plaintiff.*

*(c) Misrepresentation, misconstruction of the true tenor and import of the contract.*

*(d) Insatiable, orientation and design to unjustly enrich themselves from the plaintiff.*

*(e) Elasticity, manipulated accounting, distortion and gerrymandering.*

9. In response to the averments in the plaint, the statement of defence dated 11<sup>th</sup> April 2017 stated, in part, as follows:

*[3] In answer to paragraph 5 and 6 of the Plaint the same are admitted save that the 1<sup>st</sup> Defendant was to provide receipts for all purchases as the provision of the said services was conditioned on the particulars set out in the invoice No. 50 and 52 issued by the 1<sup>st</sup> Defendant to the Plaintiff at the time of entering the Agreement.*

*[4] Paragraph 7 and 8 of the Plaint are vehemently denied. The 1<sup>st</sup> Defendant executed her part of the aforesaid contract diligently and supplied high quality services to the Plaintiff within the time agreed upon. In this regard, the 1<sup>st</sup> Defendant completed her part of the bargain with the Plaintiff by the 23/6/2016.*

*[5] Indeed the payments made by the Plaintiff of Kshs. 285,000, Kshs. 120,000, Kshs. 100,000, Kshs. 50,000, Kshs 20,000, Kshs. 30,000 and Kshs. 5,000 on the 26/05/2016, 27/06/2016, 12/07/2016, 26/08/2016, 12/10/2016, 10/11/2016 and 09/11/2016 was clear confirmation that the Plaintiff was indeed satisfied and happy with the quality of work performed by the 1<sup>st</sup> Defendant as otherwise the Plaintiff would not have paid such payments if the quality of work done by the 1<sup>st</sup> Defendant was mediocre as alleged by the Plaintiff.*

10. From the extracts of the pleadings I have set out above, it is clear that the defence is not a mere denial and in fact raised several triable issue. For example, what were the terms of the contract which was admittedly both oral and in writing. From the plaint and defence, the whole issue of the nature and quality of works ought to be left for trial to determine whether the respondent is entitled to refund of the whole amount or part thereof particularly given the nature of services rendered.

11. The trial magistrate noted that paragraph 5 of the defence was a mere denial yet the appellant asserted that by paying instalments as the work proceeded, the respondent signaled that she approved of the work. This conclusion that paragraph 5 of the defence was a mere denial was therefore a misdirection. Apart from the statement of defence, the appellants' affidavit in response provided evidence which showed that the work had been done and that the respondent appreciated it. The trial magistrate did not consider this aspect of the case as an explanation why they appellants could not refund the money after having performed the contract.

12. Consequently, I find that the trial magistrate erred in failing to consider the nature of the defence and the evidential material before him in coming to the conclusion that the defence ought to be struck out.

13. I allow the appeal, set aside the judgment and dismiss the notice of motion dated 25<sup>th</sup> June 2017 with costs to the appellants. The appellants shall have costs of this appeal assessed at Kshs. 50,000/=.

**Dated and delivered at Kisii this 27<sup>th</sup> day of November 2018.**

**D.S. MAJANJA**

**JUDGE**

Mr. Oirere instructed by Mainga and Company Advocates for the appellant.

Mr. Kerosi instructed by Obaga and Company Advocates for the respondent.