



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Sapani v Bank of Africa Kenya Limited (Civil Appeal E1013 of 2022)
[2025] KEHC 1664 (KLR) (Civ) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 1664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1013 OF 2022

JN NJAGI, J

JANUARY 23, 2025

BETWEEN

BRENDA ELIZABETH WAKA SAPANI APPELLANT

AND

BANK OF AFRICA KENYA LIMITED RESPONDENT

*(Being an appeal from the ruling of Hon. E. M. Kagoni, Principal
Magistrate, in Milimani CMMOM No. 938 of 2019 delivered on 31/8/2021)*

JUDGMENT

1. The Respondent who was the plaintiff at the lower court instituted a suit against the appellant through a plaint dated 21st November 2019 seeking for a liquidated sum of Ksh.9,966,867/= plus interest at the rate of 13% per annum plus costs. The appellant was served with summons to enter appearance together with other documents on 17th August 2020. The respondent in response filed a memorandum to enter appearance on 31st August 2020 without filing a defence. The memorandum of appearance was accompanied by a Notice of Preliminary Objection seeking that the suit be dismissed for being time barred. The respondent in turn filed an application dated 19th January 2021 seeking summary judgment against the appellant in default of filing a defence within the statutory timelines. The appellant thereafter on the 4th February 2021 filed a statement of defence without seeking leave of the court to file the same out of time.
2. The trial court in a ruling delivered on 31st August 2021 held that the belated defence was filed on 19th February 2021 out of time and without leave of the court. That there was no defence on record when the Preliminary Objection was filed and as such the Preliminary Objection was incompetently before the court and could not stand in the absence of a defence. The trial court agreed with that submission



and dismissed the Appellant's Notice of Preliminary Objection and entered summary judgment in favour of the respondent.

3. The Appellant being dissatisfied with the said decision, instituted this appeal vide a Memorandum of Appeal dated 13th December 2022 based on the following grounds: -
 1. The Court erred in law and fact by finding that a Preliminary Objection cannot stand without a defence.
 2. The court erred in law and fact in failing to apply the overriding objective.
 3. The Court erred in law by entering default judgment while there was a defence on record.
 4. The Court erred in law and fact in failing to appreciate provisions of Article 159 (2) of the Constitution.
4. The Appellant proposes that the judgment of the subordinate Court be set aside and the application dated 19th January 2021 be dismissed with costs.
5. The parties canvassed the appeal by way of written submissions.

Appellant's submissions

6. The appellant filed her submissions dated 11th November 2024. On whether the trial court erred in law and fact in finding that the Notice of Preliminary Objection cannot stand without a defence, the appellant submitted that a preliminary objection is a point of law which if upheld can dispose of the matter without need for a full defence. That the Preliminary Objection of the appellant pre-supposed that the facts pleaded in the plaint were correct.
7. The appellant relied on the definition of a Preliminary Objection as stated in the case of Mukisa Biscuits Manufacturing Limited v West End Distributors Limited [1969] EA 696 and submitted that a Preliminary Objection focuses on whether the case should proceed based on legal grounds on points of law rather than the merits of the case. Therefore, that a Preliminary Objection does not require a defence for it to be filed and in the premises the trial court erred in law in so holding.
8. Counsel for the appellant submitted that the trial court erred in failing to apply overriding objectives as set out in section 1A and B of the Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.
9. It was further submitted that the trial court erred in entering summary judgment for the respondent in that a summary judgment can only be entered in the clearest of the cases where the defence does not raise any triable issues or where the same is a sham. The appellant in this respect referred the court to the cases of Crown Health Care v Jamu Imaging Centre Limited [2021] eKLR, Lucy Momanyi T/A L.N Momanyi & Company v Nurein M.A Hatimany & another [2003] eKLR, Osodo v Barclays Bank International Limited [1981] KLR 21 and Industrial and Commercial Development Corporation v Daber Enterprise Limited [2000] eKLR. The appellant faulted the trial court in failing to recognize the trial issues raised by the appellant in its defence as well as in the appellant's witness statement dated 11th September 2020, the Replying Affidavit dated 6th July 2021 and in the application dated 6th August 2021.
10. It was submitted that the trial court failed to appreciate Article 159(2) of the Constitution which provides for a focus on substantive justice rather than procedural technicalities.



Respondent's submissions

11. The respondent submitted that the statement of defense was filed 6 months later after being served with summons to enter appearance and the same was filed without leave or any explanation whatsoever. Therefore, that there was no proper defence on record.
 11. He respondent submitted that the above illegality could not be rectified ex-post-facto. Reliance was placed in the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR where it was held that:
 1. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.
 2. To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.
12. Also cited was the case of County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR where similarly it was held that:
 1. We are in total agreement with the respondent that an appeal filed in this Court out of time without leave of this Court is irregular and this Court will not invoke such 'novel' principles as urged by applicant so as to validate that petition and deem it as properly filed.
13. Counsel for the respondent submitted that the defect could be cured by the Overriding Objectives or Article 159(2) of *the Constitution*. Counsel referred this court to the case of Abdul Aziz Juma v Nikisuhi Investment & 2 others (2013) eKLR
 1. Article 159 of *the Constitution* was never intended to override clear provisions of any statute unless such provisions of a statute are found and held to be unconstitutional..... In my view Article 159 of *the Constitution* cannot be resorted to where there are clear an express provision of the law as is the case with section 9 of the *Advocates Act*. In the cases of Peter O. Ngonge t/a O. P. Ngoge & Associates vs. Ammu Investment Co. Ltd [2012] eKLR and the case of China Sichuan Corporation for international techno Economic Cooperative (Sietco) vs. Kigwe Complex Ltd [2013] eKLR the courts have had to consider the application of Article 159 (2) (d) and the courts have held that Article 159 (2) (d) cannot be applied to do away with all rules of procedure but it is intended to ensure that adherence to strict rules of procedure do not lead to a miscarriage of justice.
14. The same was held in the case of Jeremiah Nyangwara Matoke v IEBC & 2 others [2017] eKLR.
15. It was submitted that the trial Court properly dismissed the Notice of Preliminary Objection for being inadmissible for want of a proper defence. It was submitted that a preliminary objection must stem from pleadings and as such any preliminary objection raised before the filing of a defense is premature, incompetent as the court cannot without proper facts decide on a point of law. Reliance in this proposition was placed in the case of George Waweru Njuguna v Pauline Chesang Gitau Kamuyu [2017] eKLR where it was held that:



1. I am in agreement with the plaintiff that the issues raised by the defendant have been wrongly brought before the court by way of a preliminary objection. First, as I have stated earlier in this ruling, the defendant is yet to file a statement of defence to the plaintiff's claim herein. It is clear from the cases cited above that a preliminary objection must arise expressly or by implication from the pleadings. I am of the view that in the absence of a defence on record by the defendant, the defendant's preliminary objection has no basis. Due to the foregoing, it is my finding that the defendant's preliminary objection is premature and has no merit.
16. Similarly, in the case of *Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 others* [2020] eKLR, it was held that:
 1. I have considered the objection, rival submissions, and the pleadings already on record. From a procedural perspective, I think the 1st – 4th defendants made a tactical blunder in the manner they raised the objection. They have not filed a defence to the suit yet. The usual procedure when one is raising a point of law that may conclude a suit before trial is to file a defence first. In that defence, the point that forms the basis of the intended preliminary objection is raised. The intimation of intention to raise the point as a preliminary objection is expressed in the same defence. When the notice to raise the objection comes in later stage, it is not a surprise. The approach is good because it removes the element of surprise. It also serves to contextualize the objection within the defence.

See also *TEJ Darshan Investment & another v Luma Stores & Suppliers Enterprises Limited* 7 another [2022] eKLR.
17. It was submitted that the trial court properly dismissed the appellant's Preliminary Objection for being incompetent and inadmissible for want of proper statement of defence on record.
18. It was submitted that the respondent was seeking for a liquidated claim as provided under Order 36 Rule 1 of the Civil Procedure Rules which rules requires the claimant to demonstrate that the claim was for liquidated sum, that there was no defence filed on record within the required statutory time and that the claim is plain and obvious. The respondent in this respect relied on the case of *Harit Seth T/A Harit Sheth Advocates v Shamas Charania* [2014] eKLR where it was held that:
 1. The principles which guide our courts in determining applications for summary judgment are not in dispute. In *Industrial & Commercial Development Corporation V Daber Enterprises Ltd*, [2000] 1 EA 75 this Court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment 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).
19. The respondent submitted that it had in the first place demonstrated that it was seeking a liquidated sum of Kshs. 9, 666, 867/= plus interest at the rate of 13% from 22nd August until payment in full. Secondly, it had shown that the appellant had failed to file a defence despite entering appearance and lastly it was clear from the pleadings that the claim was plain and obvious.
20. The respondent for the reasons stated above urged this court to dismiss the appeal and uphold the trial court's ruling.



Analysis and determination

21. This being a first appeal, this court is obliged to re-assess, re-evaluate and re-examine the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified and therefore giving allowance to that- see *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
22. I have considered the pleadings, the evidence adduced before the trial court and the submissions in this appeal. The issues that fall for determination in the appeal are:
 1. Whether the trial court erred in dismissing the appellant's Notice of Preliminary Objection.
 2. Whether the trial court erred in entering summary judgment against the appellant.

Whether the trial court erred in dismissing the Notice of Preliminary Objection

23. A defendant in a suit is required to file his/her defence within 14 days after entering appearance. This is provided in Order 7 Rule 1 that states that:

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”
24. It is clear from the pleadings that the appellant herein filed a memorandum of appearance and a Notice of Preliminary Objection on the 31st August 2020. The statement of defence was filed and paid for on the 4th February 2021. The defence was thus filed six months after filing of memorandum of appearance. The statement of defence was therefore filed out of time and without leave of the court. The question then is whether a Preliminary Objection filed when there is no defence on record is valid.
25. The law is that pleadings filed without leave of the court where leave is required are a nullity, see *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* (supra) and *County Executive of Kisumu v County Government of Kisumu & 8 others* (supra). The defence of the appellant that was filed out of time and without leave of the court was therefore of no consequence.
26. A Preliminary Objection was defined in the case of *Mukisa Biscuits Manufacturing Limited v West End Distributors Limited* [1969] EA 696 as follows:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
27. At page 701 paragraph B-C Sir Charles Newbold, P. added the following:
28. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....



29. In the case of Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

30. The trial magistrate in dismissing the appellant’s application stated that there was no defence on record when the Preliminary Objection was filed and that being the case, the absence of a defence made the Preliminary Objection incompetent. The magistrate in reaching this conclusion was guided by the holding in the case of George Waweru Njuguna v Pauline Chesang Gitau Kamuyu (supra) where the defendant had not yet filed a statement of defence when the Preliminary Objection was considered and the court held that the Preliminary Objection had no basis in the absence of a defence.

31. I find the trial magistrate’s holding to have been the correct interpretation of the law in a Preliminary Objection not backed by a defence on record. The decision in George Waweru Njuguna v Pauline Chesang Gitau Kamuyu (supra) was applied by Okong’o J. in TEJ Darshan Investment & another v Luma Stores & Supplies Enterprises Limited & another (Environment and Land Appeal 39 of 2018) [2022] KEELC 13330 (KLR) (29 September 2022) where the court cited the Court of Appeal decision in Achola & Another v Hongo & Another [2004] I KLR 462 where the court confirmed that legal position. In the premises a Preliminary Objection not backed by a defence on record has no legal basis. The same had to be pleaded to be a foundation of the Preliminary Objection. In the absence of a defence, there was no foundation on which a Preliminary Objection could lay on. The holding of the trial court on that issue is therefore upheld.

Whether the trial court erred in entering summary judgment against the appellant

32. The question is whether the trial Court misdirected itself and as a result arrived at a wrong decision by entering summary judgment in favour of the respondent.

33. Order 36 rules 1 (a) provides that in a suit where a plaintiff seeks judgment for a liquidated demand with or without interest and where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest. Under sub rule (2), the application should be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and the amount claimed.

34. The law is settled that summary judgment may be entered where there is no plausible defence to save on court’s precious time. However, summary judgment should only be entered in very clear cases. In Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR the Court of Appeal held that:

“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.



35. In *Continental Butchery Limited v Samson Musila Ndura*, (Civil Appeal No. 35 of 1997), the Court of Appeal stated:

“With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a Defendant leave to defend.”

36. Indeed, the appellant entered appearance but did not file a defence which entitled the respondent to invoke Order 36 rule 1 for summary judgment. The respondent was making a liquidated demand. There was no defence filed in the matter. This was in my view, a clear case where a summary judgment could be entered. The provisions of Article 159 of *the Constitution* and Sections 1A and B of the *Civil Procedure Act* did not apply in face of clear provisions of Order 36 Rules 1 (a) of the Civil Procedure Rules, 2010 on summary judgments. I find no fault in the trial magistrate entering judgment against the appellant. The entry of summary judgment is therefore upheld.

37. The upshot is that I find no merit in the appeal and the same is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 23RD DAY OF JANUARY 2025

.....

J. N. NJAGI

JUDGE

In the presence of:

Miss Wangechi for Appellant

Miss Wetunga HB for Mr. Rotich Respondent

Court Assistant – N/A

