



**Kevian Kenya Limited v Retail Synergy Limited (Civil Appeal E170 of 2023)
[2025] KEHC 5881 (KLR) (Commercial and Tax) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5881 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E170 OF 2023**

PM MULWA, J

MAY 8, 2025

BETWEEN

KEVIAN KENYA LIMITED APPELLANT

AND

RETAIL SYNERGY LIMITED RESPONDENT

(Being an Appeal from the Decision of Hon. J.P Omollo delivered on 10th July, 2023)

JUDGMENT

1. The Respondent, by a Statement of Claim dated 15th May 2023, instituted proceedings against the Appellant seeking judgment in the sum of Kshs. 708,887.60, allegedly arising from the activation and promotion of the Appellant's product, Afia Malt Energy, at various Carrefour supermarkets.
2. In response, the Appellant filed a Statement of Defence dated 2nd October 2020, denying the Respondent's claim. The trial court initially struck out the defence on the ground that it constituted a mere denial and failed to disclose an arguable case. Aggrieved, the Appellant appealed, and by a judgment of the late Hon. Justice Majanja, the ruling of the subordinate court dated 18th February 2021 was set aside. Consequently, the Respondent's Notice of Motion seeking entry of judgment was dismissed, and the matter was remitted to the subordinate court for hearing and determination on the merits. as the Small Claims Court had been constituted the matter was referred to the Small Claims Court.
3. On 16th May 2023, when the matter came up for directions, the Appellant was granted seven days to file and serve its documents. However, when the matter came up for hearing on 10th July 2023, the Appellant filed its defence that morning, which was opposed by the Respondent. The Respondent sought judgment to be entered against the Appellant, citing the delay in filing. The Appellant explained that the delay was due to difficulties in identifying witnesses. Despite this, the trial court held that the



explanation was unsatisfactory, referencing the strict timelines applicable in the Small Claims Court. The court found that the Appellant had more than two months to comply with the 14-day filing requirement and proceeded to strike out the defence, entering judgment in favor of the Respondent in the sum of Kshs. 708,887.60.

4. The Appellant, aggrieved by this decision, brought the present appeal through an Amended Memorandum of Appeal dated 3rd October 2024, raising seventeen (17) grounds of appeal. The appeal primarily challenges the trial court's decision to strike out the defence and enter judgment in favor of the Respondent.
5. Upon a careful review of the issues raised in the appeal, I find that the that the principal question to be addressed is whether the trial court erred in striking out the Appellant's defence and entering judgment against the Appellant.
6. While the importance of adhering to procedural timelines, especially in the Small Claims Court, cannot be overstated, the court must also consider the constitutional right to a fair trial under Article 50 of the *Constitution*. It is well-established that a party should not be automatically penalized for delays unless the delay is so egregious as to undermine the fairness of the proceedings. In the case of *Kenya Commercial Bank Ltd v Homa Bay County Government* [2018] eKLR, the Court of Appeal emphasized the need to balance procedural rules with the right to a fair trial.
7. In this case, the Appellant explained the delay in filing the defence, citing challenges in identifying its witnesses. While the trial court found this explanation unsatisfactory, it is evident that the Appellant was not acting in willful disregard of the timelines. Given the circumstances and the fact that the Appellant was granted a reasonable period to comply, the court believes that a more lenient approach should have been taken. A strict adherence to timelines should be tempered by the need for justice and fairness.
8. I am mindful that striking out a defence is a drastic measure that should only be applied when it is clear that no arguable case is disclosed. In this matter, the Appellant filed a defence and counterclaim that raised substantive issues concerning the performance of services and the amount due. The Appellant also filed a preliminary objection. These were issues that could have been properly adjudicated at trial. The trial court's decision to strike out the defence prematurely denied the Appellant the opportunity to present its case on the merits.
9. The prior ruling by the late Hon. Justice Majanja, which found that the Appellant's defence raised triable issues, is also crucial in evaluating the fairness of the trial court's decision. The Appellant's right to present its defence on the merits, as established in the prior judgment, was not given due consideration. The trial court's failure to allow this constitutes a failure to adhere to the principles established in the earlier ruling.
10. In light of the above considerations, it is clear that the trial court erred in law by striking out the Appellant's defence and entering judgment prematurely. The court finds that the decision of the trial court did not adequately take into account the reasons for the delay, the nature of the defence, and the prior judicial determination.
11. While the importance of strict timelines is acknowledged, justice demands that parties should not be deprived of their right to be heard without a fair opportunity to present their case. The Appellant's right to a fair trial ought to be upheld, and the trial court's failure to allow this constitutes a denial of that right.



12. In the circumstances, I find that the appeal is merited. I allow the same and set aside the learned adjudicator's judgment entered on July 10, 2023. The matter is remitted to the trial court for hearing and determination on the merits.

13. Owing to the circumstances of the case, each party shall bear its own costs.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MAY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Mureithi h/b for Mr. Marete for Appellant

Ms. Nyambura for Respondent

Court Assistant: *Carlos*

