Nairobi Flour Mills Limited v Kiambaa Dairy Farmers Co-operative Society Limited (Civil Appeal E1200 of 2023) [2025] KEHC 12760 (KLR) (Civ) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12760 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1200 OF 2023

DKN MAGARE, J

SEPTEMBER 18, 2025

BETWEEN

NAIROBI FLOUR MILLS LIMITED .... APPELLANT

AND

KIAMBAA DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED .... RESPONDENT

(Being an appeal from the Ruling and order of Hon. Cosmas Maundu, Chief Magistrate, delivered on 12.10.2023 in CMCOMMSU E036 of 202)

JUDGMENT

1. This is an appeal from the Ruling and order of Hon Cosmas Maundu, Chief Magistrate, delivered on 12.10.2023 in CMCOMMSU No. E036 of 2022. The appellant was the plaintiff in the lower court. The appellant filed an application to strike out a defence. The same was disallowed. This resulted in the appeal.
2. The Appellant filed 10 paragraph memorandum of appeal. The same is unseemly and an eyesore. They raise only one issue, that is, the court erred in dismissing the application dated 06.04.2022. The memorandum of appeal offends the tenets set out in Order 42 Rule 1 of the Civil Procedure Rules that provides as doth:
    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
    2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

3. The Court of Appeal had this to say about compliance with Rule 86 (now rule 88) of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> “ We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> “We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

4. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> “ Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:
>
> The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

5. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held as follows;-

> “ .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

6. Given that this was an application, the duty of the court is the same as the lower court. In the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

7. In the plaint, the Appellant alleged that there was sale of goods between 2014 and 2021, and that a balance of Ksh.3,987,856.94/= with bank charges of Ksh 7,500/= was outstanding.

8. The Respondent filed defence stating that:

   a. The amounts that were contracted were paid for and;

   b. The respondent has sought accounts, all in vain. They stated that all returned cheques were replaced and fully paid for.

   c. They also stated that some of the supplies were suspect and were supported by doubtful suspect invoices, and not supported by the LPOs which deviates from normal mode of business.

9. After filing the reply to defence the application dated 6.04.2022 was filed. The application stated that cheques were issues being number:

   a. 002080 for Ksh. 881,000/=.

   b. 002116 for Ksh. 887,500/=.

   c. 002115 for Ksh. 804,000/=.

10. The Respondent filed a replying affidavit. In it they stated that:

    a. There was no agreement on interest

    b. There was no credit period for 120 days.

    c. They stated that the debts over bounced cheques were fully paid, that is:

       i. A cheque for Ksh. 100,000/=.

       ii. A cheque for Ksh. 112,000/=.

11. A further affidavit was filed admitting payment of Ksh. 200.000/= leaving a sum of Ksh. 3,795,356.94/=. A sum of Ksh. 2,572,500/= was in cheques. A sum of Ksh. 7,500/= as bank charges remained

unpaid. A sum of Ksh. 2,580,000/= was admitted but only Ksh 200,000/= was explained leaving Ksh. 2,380,000/=. The total amount sought Ksh. 3,987,856.94 was shown to be due. The allegations that some forgery was on the LPOs is not enough. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, the Court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth [1876] 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

12. The Appellant filed submissions dated 4.11.2024. They relied on Section 55(1) of the Bill of Exchange Act in defence of the claim. It is their case that part payment, and dishonoured cheques, shows the respondent was indebted. The respondent did not offer any explanation for issuance of cheques. Reliance was placed on the case of Modern Distributors Limited V Ndungu Njeru T/A Ndungu Njeru Filling Station [2006] KEHC 1956 (KLR), where Kimaru J, psoted as follows:

> " The defendant cannot therefore deny that he owes the amount stated in the said cheques that he issued to the plaintiff. As was held by the Court of Appeal in the recent case of Paresh Bhimsi Bhatia –vs- Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported) at page 8;
>
> "A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken. In Hassanah Issa & Co –vs- Jeraj Produce Store [1967]EA 55, the president of the predecessor of this court when dealing with Section 30 of the *Bills of Exchange Act* (Tanzania) which is in pari materia with our Section 30(2) of the *Bills of Exchange Act*, Cap 27 said in part at page 500:

13. Further reliance was placed on the case of Equatorial Commercial Bank v Wilfred Nyasimi Oroko HCCC No. 224 of 2011 [2015] eKLR where the court held that:

> " A dishonoured cheque which was issued to the Applicant on a debt which is subject of the suit is also an admission of claim in the sense of the face of the above evidence, the court concludes that these cheques were issued by the Respondent to the predecessor of the Applicant and so they constitute an admission of the debt to the extent of the amount of the cheques.'

14. Further reliance was placed on the case of AAT Holdings Limited v Diamond Shields International Ltd [2014] KEHC 8651 (KLR), where F. Gikonyo, J stated as follows:

Should only decipher the principles which should guide the exercise of discretion in determining an application for summary judgment to be:

1. That Summary judgment is a draconian measure and should be given in only the clearest of cases.

2. That a trial must be ordered if a bona fide triable issue is found or one which is fairly arguable is found to exist. But a triable issue does not mean one that will succeed. It means an issue which raises a prima facie defence and which should go to trial for adjudication. See the opinion of Duffus P. and Sheridan, J, in Patelv E.A. Cargo Handling Services Ltd. [1974] E.A. 75.

3. But a trial should not be ordered in a case where the Court strongly feels it is justified in thinking that the defences raised are a sham.

   On the one hand, there is the Defendant who will be driven from the seat of justice without trial if summary judgment is entered, and on the other hand, you have the Plaintiff who is entitled to expeditious disposal of his case without delay especially where the Defendant has not any defence worth a trial. Which, then places the court in a situation where it has to engage in a novel and delicate balancing act of ensuring that; 1) the Defendant gets a fair trial by considering whether a bona fide triable issue exists; and 2) the Plaintiff equally gets fair trial by eliminating such delay in the administration of justice which would keep him away from his just dues or enjoyment of property; this is the basis for the entry of summary judgment under Order 36 of the CPR in appropriate cases. I admit, this balancing act of the rights and interests of parties is most useful in the adjudication of cases, yet quite delicate as well. But courts are experienced at carrying out the exercise by following the laid down principles of law enunciated above.

15. They stated that the court did not follow the procedure for application to strike where the defendant has to show they have a triable issue.

16. The Respondent filed submissions dated 31.12.2024. They said that the defence raised triable issues. Reliance was placed on the case of Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] KECA 846 (KLR) as doth:

> “ What then is a defence that raises no bona fide 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 or 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.
>
> In Gupta v Continental Builders Ltd [1976-80] 1 KLR 809, the court, dealing with an appeal from an award granted on a motion for summary judgment, and in considering the weight to be granted to the defendant’s defence, Madan JA stated that:
>
> “If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the Court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issues

ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily."

17. Further reliance was on the case of Kivanga Estates Limited v National Bank of Kenya Limited [2017] KECA 591 (KLR), where the Court of Appeal stated as follows:

> " For instance in Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court summarized the principles as follows:
>
> "The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

18. They also relied on the case of Saudi Arabia Airlines Corporations V Petroleum Company Limited.

19. The question the court will deal with is whether, the respondent had a defence or a triable issue.

20. Order 2 Rule 15 of the Civil Procedure Rules which deals with striking out of pleadings states as follows:

> " At any stage of the proceedings the court may order to be struck out or amended 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 judgment to be entered accordingly, as the case may be."

21. Striking out must however be treated with circumspection. It must be the clearest of all cases that it must be allowed. Where there is even one issue, the court must decline to strike out. In the case of D.T. Dobie & Company Kenya Limited V Joseph Mbaria Muchina & Another [1980] eKLR, Madan JA, stated as follows:

> " No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

22. Further, in the case of the Co-Operative Merchant Bank Ltd. V George Fredrick Wekesa (Civil Appeal No. 54 of 1999), the Court of Appeal stated as follows:

> " Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to

present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court."

23. In the case of Bruce Lule v Mulki A. Issa [2021] eKLR, A. Mbogholi Msagha, posited as follows:

> " In yet another case of Blue Shield Insurance Company Limited v Joseph Mboya Ogutu [2009] e KLR the court of appeal stated as follows,
>
> "The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina [1982] KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-
>
> "The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."
>
> We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-
>
> "The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."
>
> We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

24. In this case, I am unable to find one triable issue. The defence does not in any way answer the Appellant's case. The claim was supported by very meticulously filed and received documents, none of which was answered. The court was therefore wrong in finding that there was a triable issue.

25. I set aside the Ruling given on 12.10.2023. In lieu thereof, I substitute with an order allowing the application and striking out the defence. I enter judgment for a sum of Ksh. 3,795,356.94/= for the Appellant against the Respondent.

26. Interest is never an issue in special damages. It is a question for the court to determine. Section 26 of the *Civil Procedure Act* provides as follows:

    (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.

27. The interest on the judgment sum shall run from 17.1.2022, the date of filing suit. The next question is costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

28. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

29. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

30. In the circumstances the appeal is allowed with costs of Ksh. 185,000/=.

Determination

31. The upshot of the foregoing is that the court makes the following orders:

    a. The appeal herein is allowed. The application dated 6.04.2022 is allowed. The defence filed by the Respondent is struck out. I enter judgment for a sum of Ksh. 3,795,356.94/=, costs and interest.

    b. The Appellant shall have costs of this appeal of Ksh. 185,000/=.

    c. The Appellant shall have costs of the suit and application in the lower court.

    d. 30 days stay of execution.

    e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF SEPTEMBER, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Shah & Shah Advocates for the Appellant

Ngugi Mwaniki & Co. Advocates for the Respondent

Court Assistant – Michael

M. D. KIZITO, J.