



**Kenya Orient Insurance Limited v Kagohu alias Kale (Civil Appeal  
93 of 2022) [2024] KEHC 10790 (KLR) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10790 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 93 OF 2022  
SM GITHINJI, J  
SEPTEMBER 17, 2024**

**BETWEEN**

**KENYA ORIENT INSURANCE LIMITED ..... APPELLANT**

**AND**

**CHENGO ALI KAGOHU ALIAS CHENGO KALE ..... RESPONDENT**

*(Being an Appeal from the Ruling of the Application dated 18th November, 2021 delivered  
by the Learned Chief Magistrate Honourable E.K.Usui in Malindi Civil Suit No.E305  
of 2021 in the Chief Magistrate's Court Malindi, delivered on 24th October, 2022)*

**JUDGMENT**

1. This appeal arises from the ruling delivered on 24<sup>th</sup> October 2022 by Honourable Chief Magistrate E.K Usui in Malindi CMCC No. E305 of 2021 in respect of the application dated 18<sup>th</sup> November 2021 wherein the trial court struck out the Defendant's statement of Defence. Dissatisfied with the ruling, the appellant herein lodged the instant appeal on the following grounds;
  1. That the learned magistrate erred in law and in fact in striking out the statement of defence filed by the defendant.
  2. The learned trial magistrate erred in law and in fact in failing to hold that the statement of defence as drawn disclosed various triable issues.
  3. That the trial magistrate exercised her discretion wrongly in failing to take into account the correct principles in applications for striking out pleadings hence arrived at a decision that was perversely wrong.
  4. That the trial magistrate erred in law in trying to try the issue of fraud through affidavits in an application.



5. That the learned trial magistrate erred in law and in fact in failing to appreciate that the judgment sought to be enforced having been set aside the substratum of the plaintiff's suit was eroded.

### **Brief facts of the Case**

2. The Respondent herein had filed a suit against the appellant in Malindi CMCC no. 173 of 2019 for recovery of general damages, special damages and costs as a result of a traffic accident. Judgment was awarded in his favour in the sum of Kshs. 352,550/=. Following delivery of the judgment, the Respondent filed a declaratory suit compelling the appellant to satisfy the judgment against its insured. In response to the declaratory suit, the appellant herein filed a statement of defence to which the respondent sought to have struck out vide the application dated 18<sup>th</sup> November 2021. A ruling was consequently delivered striking out the statement of defence.

### **Disposition**

3. The appeal was disposed of by way of written submissions. I have considered the grounds on the face of the memorandum of appeal, the submissions by the parties as well as the authorities relied upon. For determination is whether the striking out of the defendant's statement of defence was merited.
4. The respondent made an application to have the statement of defence filed by the appellant struck out for failure to raise any triable issues and subsequently made a prayer for summary judgment. The appellant in opposing this application argued that the statement of defence raised triable issues and that the matter ought to have been allowed to proceed to full hearing. The appellant in their replying affidavit to the application reiterated the grounds in their statement of defence and argued that a summary judgment would not issue in the circumstances.
5. The power of the trial court to strike out pleadings is enshrined under Order 2 Rule 15(1) of the [Civil Procedure Rules](#) which provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

  - B. it discloses no reasonable cause of action or defence in law; or
  - C. it is scandalous, frivolous or vexatious; or
  - D. it may prejudice, embarrass or delay the fair trial of the action; or
  - E. 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.”
6. This power is discretionary to the trial court. However, striking out of pleadings is a draconian tool which must be exercised judiciously. In my view, if a pleading raises a triable issue irrespective of whether it's likely to succeed or not, the suit ought to be allowed to proceed to trial. On the contrary, where a pleading is of no substance or ground, mere denial, fanciful and or is of some ulterior motive the court should not shy away from invoking its powers to strike out such a pleading. Invoking the power to strike out pleadings must be within the confines of the laid down principles. A pleading may only be struck out if the elements contained in Order 2 Rule 15(1) (a), (b), (c) and (d) of the [Civil](#)



Procedure Rules are in existence. In this regard, I rely; on the case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR where the court rendered itself as thus:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (*supra*)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. 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. On the other hand, if there is a point of law which merits a serious discussion the court should be asked to proceed under order XTV" rule 2.”

7. The power to strike out pleadings being a discretionary power, I am alive to the principle that as an appellate court, my interference with the exercise of judicial discretion is limited. For our intervention to be granted, I must be satisfied either that the lower court misdirected itself in some matter hence arrived at a wrong decision or that it is manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and that as a result there has been miscarriage of justice.
8. It is therefore trite that in considering whether a pleading raises triable issues, the court is mandated to stick to the pleadings and the attendant documents. In essence, pleadings should in themselves be capable of raising triable issues. This procedure is as well compatible with the rule that parties are bound by their pleadings. That which is not in the pleadings is not triable in the course of a case. The Court of Appeal in Ragbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR stated as follows:

“As regards the statement of the law as set out in Halsbury's Laws of England, the particular passage referred to is as follows: “General denial insufficient. It is not sufficient for a defendant in his defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim: each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages. When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party he must not do so evasively, but must answer the point of substance. However, it has become common practice to use in a defence a traverse in a general form, this merely puts the opponent to proof.” ... This rule enforces a cardinal principle of the system of pleadings, that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. It thus prescribes how the pleader should answer his opponent's pleading, by providing that the penalty for not specifically traversing an allegation of fact is that it will be



taken to be admitted, whether this was intended or not. The effect of a traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is treated as admitted is that the party who makes it need not prove it.”

9. Further, when dealing with a statement of defence, the Court of Appeal in *Provincial Insurance Company of East Africa Limited now known as UAP Provincial Insurance Company Limited v Lenny M Kivuti* [1997] eKLR stated as follows:

“In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend. See *Kundanlal Restaurant v Devshi & Company* [1952] 19 EACA 77. Also see *Hasmani v Banque du Congo Belge* [1938] 5 EACA 89.”

10. I have perused the trial record and considered the statement of defence as was filed by the defendant therein. In my view, the statement of defence contains nothing but mere denials. It does not raise a single triable issue that would entitle me consider reinstating the same. I do concur with the finding of the trial court and uphold its decision to strike out the said defence. As a result, the instant appeal fails for want of merit and the same is hereby dismissed with costs to the Respondent.

**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

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**S.M. GITHINJI**

**JUDGE**

In the presence of; -

Miss Wehe for the Respondent

Mr Jengo for the Appellant – absent

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**S.M. GITHINJI**

**JUDGE**

**17/9/2024**

