



REPUBLIC OF KENYA



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

**APA Insurance Company Limited v Nzioki (Civil Appeal E346 of 2023)
[2024] KEHC 16995 (KLR) (Civ) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 16995 (KLR)

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

**CIVIL
CIVIL APPEAL E346 OF 2023**

**AB MWAMUYE, J
OCTOBER 17, 2024**

BETWEEN

APA INSURANCE COMPANY LIMITED APPELLANT

AND

SIMON MASINDE NZIOKI RESPONDENT

*(Being an Appeal against the Ruling and Orders of the Hon. R.L Musiega
(SRM) delivered on 31st March, 2023 in Milimani MCCC No. E2484 of 2022)*

JUDGMENT

1. The Appellant is aggrieved with the Ruling and Orders of the Hon. R.L Musiega (SRM) delivered on 31st March, 2023 in Milimani MCCC No. E2484 of 2022, Simon Masinde Nzioki v APA Insurance Company Limited. The impugned Ruling was with respect to the Respondent’s Notice of Motion dated 6th September, 2022 which sought to strike out the Appellant’s Statement of Defence dated 14th June, 2022.
2. The Memorandum of Appeal dated 28th April, 2023 raises the following grounds, which I reproduce verbatim:
 - “i. The Learned Trial Magistrate erred in both fact and law by failing to appreciate that the Appellant’s Statement of Defence raised trial issues and was not frivolous, vexatious or scandalous.
 - ii. The Learned Trial Magistrate erred in both fact and law by failing to appreciate that the striking out of pleadings and in particular its Statement of Defence is a draconian act which infringed on the Appellant’s constitutionally guaranteed right of fair hearing.



- iii. The Learned Trial Magistrate erred in both fact and law by failing to appreciate that the Appellant’s Statement of Defence raised the issue of jurisdiction which issue is a triable issue and which issue could only be ventilated at trial.
 - iv. The Learned Trial Magistrate erred in both fact and law by failing to appreciate that there was no nexus between the Appellant and the Respondent and as such there was no basis for striking out the Appellant’s Statement of Defence.
 - v. The Learned Trial Magistrate erred in both fact and law by striking out the Appellant’s Statement of Defence.
 - vi. The Learned Trial Magistrate erred in both fact and law by basing her ruling on irrelevant considerations.”
3. The Appellant filed a Record of Appeal dated 12th July, 2024 containing all relevant documents from the Trial Court’s proceedings. Parties filed and exchanged their Written Submissions with the Appellant filing their Written Submissions dated 28th July, 2024 and the Respondent filing his Written Submissions dated 26th August, 2024.
 4. I have considered the Record of Appeal, the Trial Court’s Record and the Parties’ Written Submissions filed by respective counsels. The issue for determination is whether the Trial Court erred in striking out the Appellant’s Statement of Defence dated 14th June, 2022.
 5. The Motion is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 2 Rule 15 (1) (b), (c) & (d) of the Civil Procedure Rules, 2010 dealing with striking out pleadings. Order 2 Rule 15 (1) of the Civil Procedure Rules provides as follows;
 - “ 15. Striking out pleadings [Order 2, rule 15]
 - (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a)
 - (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. ”
 6. The Application was supported by an affidavit sworn by Musili Mbiti, Counsel for the Respondent herein. The affidavit adduced evidence to buttress the Respondent’s position that the Appellant’s Statement of Defence raised mere denials.
 7. It is trite law that a defence can only be struck out in the clearest of cases where the defence looks hopeless and no life can be breathed into it. Courts of law should endeavour to sustain suits rather than strike them out. In the case of Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016]



eKLR, the Court quoted with authority the celebrated case of Saudi Arabian Airlines Corporation v Premium Petroleum Company Ltd [2014] eKLR where it was held:

“I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. The power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is “demurer of something worse than a demurer” beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Shedridan] Test in Patel v E.A. Cargo Handling Services Ltd.[1974] E.A. 75 at p. 76 (Duffus P.) that “... a triable issue... is an issue which raises a prima facie defence and which should go to trial for adjudication.” Therefore, on applying the test, a defence which is a sham should be struck out straight away.”

8. Moreover, the Court of Appeal in the case of Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR, established that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. Is the Appellant’s Statement of Defence dated 14th June, 2022 therefore a complete sham raising no triable issues?
9. A look into the Statement of Defence dated 14th June, 2022 shows that the Appellant denies being the insurer to Stephen Mwangi Wachira and/or Samwel Kungu or the motor vehicle registration number KBZ 147R involved in an accident with the Respondent herein. The Appellant’s position in the Defence is that they are not bound to satisfy the judgment issued on the premise that they are not the insurers to Stephen Mwangi Wachira and/or Samwel Kungu, or motor vehicle registration KBZ 147R. It is this Court’s finding that the only way to determine whether the Appellant is duty bound to satisfy the judgment was through a trial. This Court also notes that the Appellant was yet to file their witness statement before the defence was struck out. In my view, the defence was wrongly struck out.
10. In the upshot, the Trial Court erred in finding that the Statement of Defence dated 14th 2022 was frivolous vexatious and failed to raise triable issues. The appeal is merited and the Trial Court’s ruling dated 17th January, 2023 is set aside. The Appellant’s Statement of Defence dated 14th June, 2022 is reinstated with an accompanying order that the lower court matter to proceed in the regular manner. Costs of the appeal to the Appellant.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 17TH DAY OF OCTOBER, 2024.

BAHATI MWAMUYE

JUDGE

