



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bonito Hotels Limited v Kibisu (Civil Appeal 486 of 2021)  
[2023] KEHC 713 (KLR) (Civ) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 713 (KLR)

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

**CIVIL**

**CIVIL APPEAL 486 OF 2021**

**JN MULWA, J**

**FEBRUARY 9, 2023**

**BETWEEN**

**BONITO HOTELS LIMITED ..... APPELLANT**

**AND**

**DENISE KIBISU ..... RESPONDENT**

*(Being an appeal from the ruling and order of Honourable D. M. Kivuti  
(SRM) delivered on 10th February 2020 in Milimani CMCC No. 1770 of 2019)*

**RULING**

1. By a plaint dated March 14, 2019, the Respondent filed a suit against the Appellant in the lower court namely CMCC No 1770 of 2019 seeking judgment for:
  - a. The sum of Kshs 132,800/-.
  - b. Interest accrued on (a) at the prevailing commercial rates since due date in April 2017.
  - c. Costs of the suit plus interest at court rates.
2. Prior to the filing of the Appellant's Statement of Defence, the Respondent approached the trial court vide a Notice of Motion dated August 20, 2019 seeking an order for summary judgment pursuant to provisions of Order 36 Rule 1 of the *Civil Procedure Rules*. The basis of the application was that the Appellant had admitted to owing the sum of Kshs 132,800/- claimed in the Plaint through a letter dated November 21, 2018.
3. The Appellant responded to the application through the Replying Affidavit of its General Manager Alfred Agengo filed in court on October 4, 2019 alongside its Statement of Defence.



4. Upon hearing the application, the trial court struck out the Appellant's Statement of Defence and entered judgment on admission for the Respondent as prayed in the Plaint. Aggrieved by the said decision, the Appellant lodged the instant appeal vide a Memorandum of Appeal dated August 6, 2021. The appeal is based on the following grounds:-

1. That the learned magistrate erred in law and fact in holding that there was uncontroverted fact that on November 21, 2018 the Defendant through its representative wrote and admitted owing the plaintiff despite the fact that the same was done without the authority of the Defendant.
2. That the learned magistrate erred in law and fact in holding that the letter of November 21, 2018 captures a clear admission of debt negation by the incoming General Manager can only be viewed from the point of disowning earlier commitment by the Defendant.
3. That the learned magistrate erred in law and fact in holding that there was uncontroverted fact that on November 21, 2018 the Defendant through its representative wrote and admitted owing the Plaintiff despite the fact that the same was done without the authority of the Defendant.
4. That the learned magistrate erred in law and fact in striking out the Defendant's defence whilst it raised triable issues and by entering summary judgment against the Defendant.
5. That the learned magistrate's exercise of discretion in the subject ruling was manifestly erroneous in principle and legally untenable.
6. That the learned magistrate erred in law and fact by failing to appreciate the significance of the documentary evidence tendered in support of the Appellant's case.

5. Parties canvassed the appeal by way of written submissions.

The Appellant faulted the learned magistrate for entering summary judgment without considering the fact that it's defence raises triable issues, complaining that the learned magistrate failed to take note of the fact that it clearly stated in its Statement of Defence and response to the Application that the entire amount due to the respondent under the contract had been paid, and evidence placed before the trial court by a bundle of bank account statements showing how it paid for the goods delivered by the Respondent. Additionally, the Appellant decried the draconian nature of a summary judgment and contended that it was unfairly driven out of the seat of justice. Reliance was placed on decisions where courts set down the principles upon which a summary judgment may be entered: *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR, *Continental Butchery Limited v Nthiwa* [1978] KLR (Civil Appeal No 35 of 1977), and *Postal Corporation of Kenya v Inamdar & 2 Others* [2004] 1 KLR 359.

6. The Appellant further submitted that the letter dated November 21, 2018 did not amount to an admission or acknowledgement of debt as it was written by its former General Manager without authority and while he had been sent on compulsory leave. The Appellant noted that since the said former manager was listed as one of the Respondent's witnesses, there was need for him to be cross-examined to establish the circumstances under which he wrote the letter. In its view, that could only be done if the matter is allowed to proceed to full hearing where the Appellant will be able defend itself.



It relied on the case of *Mumias Sugar Co Ltd v Spectre International Limited* [2019] eKLR where the court stated that:-

“In this case the defendants defence is that they deny the claim and in particular that there was any admission for the claim or that the letter dated July 3, 2013 was an acknowledgment of the debt. The defence raised by the defendants particularly on interpretation of the letter said agreement is a matter that the court can resolve on affidavit of evidence. It is in my view a matter for the trial court. I am satisfied that the defence filed is not a sham but raises trial issues. I find the application for entry of summary Judgment without merit and is hereby dismissed. Parties to set the suit down for hearing”

7. On the other hand, the Respondent submitted that the trial court did not err in striking out the Appellant’s defence as it consists of mere denials and does not raise any triable issues. In her view, the Appellant’s defence was frivolous and thus a proper candidate for striking out. It was her further submission that the summary judgment was rightfully entered as she had a liquidated claim against the Appellant which the Appellant admitted to owing her in its letter dated November 21, 2018. She argued that the contents of the said letter captures a clear admission of the debt and leave no room for assumption, speculation or further interpretation. She also faulted the Appellant for purporting to disown the letter on the basis of purported internal company affairs which are not within the public’s knowledge nor supported by evidence.
8. The court has carefully considered the parties submissions alongside the grounds and record of appeal. The court finds that the issue for determination is whether the trial court erred in entering summary judgment on admission in favour of the Respondent.
9. Order 36 Rule 1(1) of the *Civil Procedure Rules* on which the Respondent’s prayer for summary judgment was anchored empowers a plaintiff to apply for a summary judgment for a liquidated amount in instances where the Defendant has entered appearance but not filed a defence. It provides thus:
  - “(1) In all suits where a plaintiff seeks judgment for --
    - (a) A liquidated demand with or without interest; or
    - (b) The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, 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, or for recovery of the land and rent or mesne profits.”
10. For summary judgment to be entered, the plaintiff must show that the defendant has no good defence and/or the defence does not raise triable issues. In *Zola and Another v Rathi Brothers limited and Another* [1969 EA 691] at P694, Newbold P set down the test as follows:

“Order XXXV (now Order 36) is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by delaying tactics of the defendant.”



11. This was the same position in *Swiss Deli Trade (Panama) Inc v Privamnuts EPZ Kenya Ltd* [2021] eKLR where Njuguna J stated:

“...it is clear that an application for summary judgment may be made where the sum claimed is a liquidated sum and where the defendant has entered appearance but has not filed a defence. Where the defendant has filed a defence, the court has the duty to interrogate the said defence and 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, before it can allow such an application (See *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR). All a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial and a defence which raises triable issues does not mean a defence that must succeed.”

12. The rationale for the summary procedure under Order 36 of the *Civil Procedure Rules* was explained by Madan JA in the case of *Continental Butchery Limited v Nthiwa* [1978] KLR thus:

“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 (now Order 36) subject to there being no triable issues which would entitle a defendant leave to defend.”

13. The question that arises at this point therefore is whether the Respondent’s case was an appropriate one for entry of summary judgment. The record shows that an interlocutory judgment was entered against the Appellant on June 18, 2019. The same was set aside in a ruling delivered on August 16, 2019 upon the trial court establishing that the Appellant had not been properly served with summons to enter appearance. By the same ruling, the trial court directed the Appellant to enter appearance and file its pleadings within seven days thereof. Four days later, before the Appellant entered appearance, the Respondent approached the trial court for summary judgment vide the Notice of Motion dated August 20, 2019. To that end, this court finds that the Respondent’s application was prematurely filed and could not fall within the purview of Order 36 Rule 1.

14. The next question is whether the Appellant has a reasonable defence which raises triable issues. In the case of *Olympic Escort International Co Ltd & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR, the Court of Appeal defined a triable issue as:

“...a triable issue is not necessarily one that the Defendant/Respondent would ultimately succeed on. It need only be bonafide.”

15. The court has perused the Appellant’s Statement of Defence and Replying Affidavit in opposition to the Respondent’s application for summary judgment. The Appellant’s defence was that the Respondent was paid the entire sum due to her under the contract hence there was no outstanding balance owed by the Appellant. The Appellant annexed to its Replying Affidavit delivery notes and copies of bank statements showing that the Respondent was paid a total of Kshs 230,500/- for her services. Its further defence as per the Affidavit is that the purported letter of admission dated November 21, 2018 was written without authority. In the court’s considered view, these issues could only be resolved in a full hearing of the case on merits and not via Affidavit evidence. In the premises, the court finds that the trial court erred by striking out the Appellant’s defence without proper interrogation.



16. Consequently, the court finds that the appeal is meritorious and is hereby allowed in the following terms:
- a. That the summary judgment entered against the Appellant by Hon D M Kivuti (SRM) on February 10, 2020 in Milimani CMCC No 1770 of 2019 is hereby set aside.
  - b. That the Appellant's Statement of Defence dated 2/10/2019 is hereby reinstated.
  - c. That the lower court file shall be remitted back to the trial court for a hearing of the case on priority basis.
  - d. There shall be no orders as to costs.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

**J.N. MULWA**

**JUDGE.**

