



**Board of Management St Mary's Girl's High School Runda v Gunga
General Office Supplies and Logistics Limited (Civil Appeal E017 of 2021)
[2023] KEHC 1980 (KLR) (Commercial and Tax) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E017 OF 2021
A MABEYA, J
MARCH 10, 2023**

BETWEEN

**BOARD OF MANAGEMENT ST MARY'S GIRL'S HIGH SCHOOL
RUNDA APPELLANT**

AND

**GUNGA GENERAL OFFICE SUPPLIES AND LOGISTICS
LIMITED RESPONDENT**

*(Being an Appeal from a Ruling of the Milimani Commercial
Chief Magistrate's Court at Nairobi by Honourable Kagoni E.M
(PM) dated the 1/2/2020 in Milimani CMCC No. 2921 of 2020)*

JUDGMENT

1. Vide a memorandum of appeal dated March 1, 2021, the appellant appealed against the ruling and orders of Hon Kagoni EM (PM) delivered on February 1, 2021 on the following grounds: -
 - a. The learned magistrate erred in law and in fact in holding that the statement of defence filed on the September 1, 2020 did not raise any triable issue.
 - b. The learned magistrate erred in law in failing to find that under the provisions of articles 50 and 159(2) (d) of the [Constitution of Kenya](#), the defendant was entitled to a fair trial on merit.
 - c. The learned magistrate erred in law and in fact in failing to uphold provisions of order 15 rule (2) and allowing the application dated the September 15, 2020 as a consequence.
 - d. The learned magistrate erred in law and fact in allowing the application and entering judgement against the appellant.



2. Based on the said grounds, the appellant prayed that its appeal be allowed and the lower court's orders made on February 1, 2021 be set aside. It also prayed for the costs of the appeal. The appeal was determined by way of submissions which the court has considered.
3. This being a first appeal, it is incumbent upon this court to review and analyse the evidence tendered before the court below and come to its own independent conclusion. See *Selle vs Motor Boat Company Ltd & others* [1968] EA 123.
4. The decision made by Hon EM Kagoni on February 1, 2020 struck out the appellant's statement of defence and entered judgment for the respondent in the sum of Kshs 7,867,800 with interest from the date the suit until payment in full and costs. The ruling is found at pages 75-83 of the record of appeal.
5. In the ruling, the trial court made a finding that the statement of defence did not raise any triable issues and constituted a mere denial. That the triable issues raised by the applicant were only stated in its submissions only and not in the statement of defence and therefore they could not be considered.
6. I have considered the respective submissions filed by the parties.
7. Order 2 rule 15 of the [Civil Procedure Rules](#) states that at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law.
8. The respondent's suit against the applicant was for the non-payment for goods supplied. In its defence, the defendant denied the plaintiff's claim and stated that there was no contractual relationship between the parties.
9. In the motion dated September 15, 2020, the respondent brought the same, *inter-alia*, under order 2 rule 15(1) (a), (b), (c) and (d) of the [Civil Procedure Rules](#). That is a provision for striking out pleadings for the various grounds set out thereunder.
10. The motion did not specify on what ground the defence was being sought to be struck out. It is significant that an applicant who makes an application under that order specify if the pleading is being struck out for; disclosing no reasonable cause of action or defence, or is scandalous, frivolous or vexatious, or it may prejudice, embarrass or delay the fair trial of the action, or is otherwise an abuse of the court process. As it stands, it is not clear on what ground the defence was sought to be struck out or for what the trial court struck it out.
11. More important, under order 15(1) (a), the application is not supposed to be supported by any evidence. The moment it is supported by evidence, it prejudices a respondent as it did here.
12. In this regard, the motion was incurably defective and should have been dismissed. To the extent that it was brought *inter-alia* under order 15(1) (a) and was supported by an affidavit, the same was incurably defective and should not have been allowed.
13. Accordingly, I find that the application before the court was incurably defective and the decision of the trial court cannot stand.
14. In any event, it is trite that courts lean towards saving suits and determining them on merit rather than rely on technicalities. It was wrong for the trial court to strike out an amended defence which seemed to raise triable issues then proceed to strike out the defence. In the premises, the trial court exercised its discretion wrongly.
15. In the premises, I find that the appeal has merit. I allow the same, set aside the ruling and order February 1, 2021 and substitute therefore with an order dismissing the application dated September 15, 2020.



16. Under article 159 of the *Constitution of Kenya*, and with a view to expedited trial, I exercise my discretion and admit the amended defence of the appellant and deem it to have been filed with leave. The suit is to proceed before another court other than Hon EM Kagoni PM. The appellant will have the costs of the appeal in any event.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

