



**Kevian Kenya Limited v Retail Synergy Limited (Civil Appeal E019 of 2021)
[2023] KEHC 1576 (KLR) (Commercial and Tax) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E019 OF 2021
DAS MAJANJA, J
MARCH 6, 2023**

BETWEEN

KEVIAN KENYA LIMITED APPELLANT

AND

RETAIL SYNERGY LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of Hon. E. Kagoni, SRM dated 18th February 2021 at the Nairobi Magistrates Court, Milimani in CMCC No. E264 of 2000)

JUDGMENT

Introduction and Background

1. Before the Subordinate Court, the Respondent filed suit seeking judgment for Kshs. 708,887.60 which it claims arose out of activation services it offered the Appellant at various Carrefour supermarkets for the Appellant's new energy drink 'Afa Malt'. In response to the suit, the Appellant filed a defence dated 2nd October 2020 ("the defence") denying the Respondent's claim.
2. The Respondent filed an application dated 26th October 2020 seeking to strike out the defence on the ground that it failed to disclose a reasonable defence in law, consisted of blanket denials, was a sham and did not raise any bonafide triable issues. The Respondent also sought judgment as prayed in the Plaint. In response, the Appellant contended that it had stated at paragraphs 7 and 8 of the defence that the Respondent had not performed the alleged services to the Appellant. In any case, it stated that it had amended the defence which disclosed a reasonable defence. It therefore urged the court to consider its defence together with the amended defence.
3. Having considered the application, the trial court issued a ruling on 18th February 2021 ("the Ruling") where it agreed with the Respondent that the defence was replete with denials and that the Appellant



did not make any attempt to explain or justify why liability should not attach. That the Appellant had stated at paragraph 8 of the defence that the Respondent had no claim against it and that this being a claim arising out of the alleged failure to complete part of the contract, the trial court expected an explanation why the Appellant held that there was no claim. The trial court stated that a denial in the absence of an explanation is not a viable defence and that the role of a deposition in opposition to an application for striking out a defence is to explain and adduce evidence showing that the defence constitutes triable issues. That by reiterating the contents of its defence, the Appellant showed that it had misconceived the role of its deposition.

4. The trial court further stated that the Appellant had failed or refused to annex any draft amended defence hence there was no proposed amended defence for the trial court to examine. The trial court also stated that the Appellant's action intending to annex a draft amended defence communicated to the trial court that it appreciated the shortcomings of its defence and despite such appreciation, it still failed or refused to annex the said amended defence. The trial court opined that this action was reckless despite noting the nature of this country's system of litigation was adversarial.
5. The trial court thus held that weighing the defence on record, the conduct of the Appellant of failing to annex the draft amended defence on one side and the Respondent's right to not be kept away from its judgment by a defendant who had filed a defence which was a sham for the purpose only of temporizing on the case as long as possible and the court's overriding duty, the circumstances of the case called for the striking out of the defence. The trial court added that it had a duty not to delay the judgment when the defence did not disclose any triable issue. Consequently, the court struck out the defence and entered judgment in favour of the Respondent.
6. The Appellant is dissatisfied with the Ruling and has now lodged an appeal with the court through the grounds set out in its Memorandum of Appeal dated 5th March 2021. The parties have canvassed the appeal by way of written submissions, which I have considered in my determination below

Analysis and Determination

7. Even though the Memorandum of Appeal raises 18 grounds, the parties agree that the main and singular issue for the court's determination is whether the defence raises any triable issue and whether the trial court was right to strike it out. The power of the court to strike out pleadings is set out in Order 2 rule 15(1) of the [Civil Procedure Rules](#), 2010 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—

- (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

8. The principles guiding the striking out of pleadings are now well settled and were highlighted by the trial court which relied on a number of decisions including [D T Dobie & Company \(K\) Ltd v Muchina](#) [1982] KLR 1. The general principle is that the court should not strike out a pleading summarily unless it appears so hopeless that it plainly and obviously does not disclose any reasonable cause of action or defence and is so weak as to be beyond redemption and incurable by amendment (see also *Co-operative Merchant Bank Ltd v George Fredrick Wekesa* Civil Appeal No. 54 of 1999).



9. The trial court struck out the defence on the ground that the same did not disclose any triable issue and was made up of general denials. However, the Appellant submits that at para. 7 of its defence, it specifically and quite clearly responds that;

“The Defendant denies the averments of contained in Paragraph 7 to 11 of the Plaint and in putting the Plaintiff to strict proof thereof and avers that the Plaintiff did not perform the services it alleges ...”

and that this paragraph does not constitute a mere denial, rather the Appellant went a step further to state that the Respondent did not perform the alleged services. Thus, the explanation and/or the reason as to why the Appellant does not owe money to the Respondent is because the services alleged were not performed and thus the defence raised a triable issue which ought to go to full trial.

10. I agree with the Appellant that the issue of whether any services were performed or not is a triable issue in the defence and the trial court has to make a determination on the same to determine whether the amount claimed is due. While I agree with the trial court that much of the defence is replete with general denials, the Court of Appeal in *Blue Shield Insurance Company Limited v Joseph Mboya Ogutu* [2009] eKLR stated that even one triable issue raised is sufficient to constitute a genuine defence that warrants a full hearing and such a defence or triable issue does not necessarily have to be a successful one nor does it mean that the defence will succeed.
11. I also hold that the trial magistrate erred in putting too much emphasis on a draft amended defence as a condition for allowing the application. It is not necessary for a draft amended defence to be annexed to the deposition in response for the application to strike out. What is important is that the court is obliged to consider whether the deposition discloses facts or arguments that would be the basis for ordering the respondent to amend its pleading. Where the court considers that the facts and arguments put forth by the respondent can breathe life to the suit, Order 2 rule 15(1) of the *Rules* empowers the court to order amendment of the pleading instead of striking it out.

Disposition

12. As this is an appeal against the exercise of discretion, this court can only intervene in exercise of the discretion if it satisfied that the trial court in exercising its discretion misdirected itself on matters of principle and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the trial court was clearly wrong in and that as a result there has been an injustice (see *Mbogo v Shab* [1968] EA 93). In this case there was clearly a triable issue which entitled the Appellant an opportunity to defend the suit.
13. For the reasons I have advanced, I allow the appeal on the following terms:
- a. The ruling and order of the Subordinate Court dated 18th February 2021 is set aside and substituted with an order dismissing the Respondent’s Notice of Motion dated 26th October 2020 with costs.
 - b. The Appellant shall have the costs of this appeal assessed at Kshs. 25,000.00.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

