



**Toyota Auto Mart Kenya Limited v Kenyariri (Civil Appeal 008 of 2021)
[2023] KEHC 3093 (KLR) (Civ) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3093 (KLR)

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

CIVIL

CIVIL APPEAL 008 OF 2021

A MABEYA, J

APRIL 14, 2023

BETWEEN

TOYOTA AUTO MART KENYA LIMITED APPELLANT

AND

CHRISTOPHER ORINA KENYARIRI RESPONDENT

JUDGMENT

1. The appellant moved this Court vide the memorandum of appeal dated 22/7/2021 having been aggrieved by and dissatisfied with the ruling and orders of 16/7/2021 issued by Hon D O Mbeja in CMCC No 9289 of 2019, Milimani.
2. The ruling emanated from an application dated 9/4/2021 by the respondent. He had sought orders that the appellant's statement of defence dated 15/9/2020 be struck out and judgment be entered as prayed for in the plaint.
3. In response, the appellant had filed a replying affidavit as well as a preliminary objection dated 15/9/2020. The trial court found that the defense consisted of mere denials and proceeded to allow the application, effectively striking out the defence.
4. In its Memorandum of Appeal, the appellant raised several grounds. These included that; the trial court erred in law and in fact by allowing the respondent's application dated 9/4/2021 despite lacking jurisdiction to hear the application as it defied the principle of res judicata. That the court ignored and disregarded the preliminary objection dated 28/4/2021 thereby failing to address the points raised therein.
5. That amongst the grounds of the preliminary objection was that the application was res judicata as it raised issues that had already been heard on merit and determined by other courts, including the High



- Court. That the court failed to consider the pertinent triable issues of law and fact raised in the defence, and generally failed to consider all the pleadings filed by the appellant.
6. The appellant filed the record of appeal dated 30/5/2022 whereas the respondent filed a supplementary record of appeal dated 3/7/2022.
 7. The parties were directed to dispose the appeal by way of written submissions. The appellant's submissions were dated 6/7/2022 whereas those of the respondent were dated 13/6/2022. This Court has considered the rival pleadings and submissions as well as the entire record.
 8. As a first appellate Court, this Court has a duty to examine matters of both law and fact and subject the whole of the evidence tendered in the lower court to a fresh and exhaustive scrutiny, before drawing its own independent conclusions. This duty is captured by section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court as being to '..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'
 9. Further, the Court of Appeal held in *Peter M. Kariuki v Attorney General* [2014] eKLR, thus: -

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui v Republic*, (1984) KLR 729 and *Susan Munyi v Kesbar Shiani*, Civil Appeal No 38 of 2002 (unreported).”
 10. The appellant's appeal is that the Learned Magistrate failed to consider the preliminary objection dated 28/4/2021 on grounds of res judicata thus erred in his ruling dated 16/7/2021.
 11. This Court has seen that preliminary objection at page 70-71 of the record of appeal. It was on grounds, inter alia, that the respondent's application dated 9/4/2021 contravened section 7 of the *Civil Procedure Act*, that the orders sought therein were spent, and that the respondent had concealed material facts thus the application was bad in law and an abuse of court process.
 12. This Court has also seen the ruling dated 16/7/2021 appearing at page 168-171 of the record. This Court notes that the magistrate only made reference to the appellant's replying affidavit date 28/4/2021, but not the preliminary objection. The magistrate did not at any point address himself to the preliminary objection raised before him.
 13. This is contrary to the principal of preliminary objections which dictates that preliminary objections ought to be addressed immediately they are raised, as they are capable of dispensing the entire suit. See *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696.
 14. The preliminary objection was grounded on res judicata. The determination on that ground alone could have led to a different finding and if argued successfully, it could have disposed off the respondent's application.
 15. To that end, this Court finds that the magistrate erred by failing to consider the appellant's preliminary objection raised before him before making a determination.
 16. With that finding, the next task for this Court is to determine whether the preliminary objection dated 28/4/2022 was merited. This is by virtual of section 79B of the *Civil Procedure Act* which sets out the powers of this Court on appeal. Those powers include the consideration of the matter before the trial court and making appropriate orders thereon.



17. From the record, the facts of the case are that the respondent filed the lower court suit vide a plaint dated 16/12/2019. The appellant failed to enter appearance and default judgment was entered in favor of the respondent on 3/2/2020.
18. The appellant applied to set the default judgment aside which was allowed on 9/9/2020 by Hon P. Muholi on condition that the appellant filed its statement of defence within 7 days and pay thrown away costs of Kshs. 15,000/=. The appellant complied with those conditions.
19. The respondent was however dissatisfied with that decision and filed an application in High Court Civil Appeal No E042 of 2020 seeking orders staying the proceedings in the lower court. The application was dismissed and the high court directed the parties to proceed with the suit.
20. It is then that the respondent filed the application dated 9/4/2021 in the lower court seeking the striking out of the appellant's defense. It is at that point that the appellant raised the subject preliminary objection on grounds of res judicata.
21. The appellant submitted that amongst the grounds of appeal raised by the respondent in Civil Appeal No E042 of 2020, was that Hon P. Muholi misdirected himself by failing to find that the statement of defence filed by the defendant was a sham, and that the respondent strongly argued that point in its submissions before the appellate court. It was argued that the issue of whether the appellant had an arguable defence had already been determined by the lower court and the respondent had not prosecuted his appeal. That the application dated 9/4/2021 therefore contravened the principle of res judicata, and the prayer for striking out the appellant's defense was also spent.
22. This Court has seen the high court's ruling dated 10/3/2021 on the respondent's application to stay the lower court's proceedings. At paragraph 11 thereof, it is clear that amongst the grounds pleaded by the respondent to support the contention that his appeal was arguable was that 'the defence filed by the defendant is a sham for failure to address the main issue as to how monies entrusted with the defendant was utilized to source the subject motor vehicle.'
23. Further, amongst the two issues for determination was whether the setting aside of the interlocutory judgment in the lower court was rightful and justifiable.
24. At paragraph 24 of the ruling, the court found that the respondent had not demonstrated that he had an arguable appeal because the setting aside of the interlocutory judgment was well within the trial court's jurisdiction and was sanctioned by law. The court also found that granting orders for stay of proceedings would only delay the suit yet both parties had filed and exchanged their pleadings.
25. From the foregoing, the issue of whether or not the appellant's statement of defense disclosed triable issues was not only heard and determined by the Hon P. Muholi while considering the setting aside the default judgment, but also by the high court in the ruling delivered on 10/3/2021. Undoubtedly, the application subsequently filed seeking striking out of the defense over grounds that had been previously raised and determined upon was res judicata.
26. This Court has also seen the statement of defence in question. The respondent's case was that the appellant imported a car worth Kshs 2,350,000/= on behalf of the respondent, and the applicable duties amounted to Kshs 2,350,000/=. That the respondent paid Kshs 4,700,000/= for the importation. That however, the applicant fraudulently adjusted the purchase price downwards by Kshs 1,176,684/=:, and the respondent sought a refund of that amount.
27. The appellant denied that claim and produced inter alia, the duly executed import order agreements and put the plaintiff to strict proof. The appellant also denied having committed any fraud on its part. That it had delivered the vehicle to the respondent who was enjoying its ownership and possession.



The appellant also filed two witness statements, and list of documents dated 15/9/2020 enclosing 14 documents relating to the transaction which it sought to rely upon at the trial. Could it then be said that the defense only contained mere denials and failed to disclose any triable issues? I think not.

28. The magistrate misdirected himself despite having relied on precedents in his ruling which held that striking out of a defence was draconian and effectively denied a defendant its right to be heard, thus the discretion to allow striking out ought to be applied consciously.
29. In the end, this Court finds the appeal to be merited and allows the same with costs. The ruling of Hon Mr. D.O Mbeja dated 16/7/2021 is hereby set aside and the matter referred back for trial before another court.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

A. MABEYA, FCI Arb

JUDGE

