



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 187 OF 2012

1. PWANI UNITED BUILDERS LTD

2. REGISTERED TRUSTEES OF PCEA

WOGECT CENTRE (HOTEL).....APPELLANTS

VERSUS

WATERWAYS (COAST) LIMITED.....RESPONDENT

(Being an Appeal from the Ruling of the learned Resident

Magistrate, B. Ekhubi delivered on the 9TH November, 2012)

JUDGMENT

1. This Appeal arose from the Ruling by **Hon. B. Ekhubi (RM)** delivered on **9th November, 2012** in Mombasa SPM Civil Suit No.1114 of **2012** as herein he awarded Summary Judgment for the sum of Kshs.332,122/=. The Application for summary judgment was allowed with no orders as to costs.

2. Being aggrieved with the decision, the Appellant has raised the following Grounds of Appeal: -

- 1. THAT the learned magistrate erred in law and in fact in failing to take into account the submissions of the defendant;**
- 2. THAT the learned Magistrate erred in fact and in law in ignoring the straightforward fact that: (a) the appellant's defence on record raises serious triable issues (b) the issue of breach of contract can only be properly ventilated during full hearing of the suit.**
- 3. THAT the learned magistrate misconducted and misapplied the well settled law set out in Taylor vs. Bolus (1981) KLR 536 that where the defence raises a fairly arguable case, irrespective of its likelihood of success, or can show triable issues, he must have leave to defend.**
- 4. THAT the learned magistrate erred in law and in fact in finding that the appellant had no defence on record or that the defence on record raises triable issues.**
- 5. THAT the learned trial magistrate erred in law and in fact in misapplying the provisions of the express provisions of Order 36 Rule 1 of the Civil Procedure Rules (2010) Cap 21 of the Laws of Kenya.**
- 6. THAT the learned magistrate erred in law and in fact in failing to accord the appellant an opportunity to canvass its case.**

3. Directions were then given on **26th October, 2020** that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions.

4. Parties relied on their written submissions as presented.

The Appellants' case

5. The Appellants' case is that the suit before the trial court was not one where summary Judgment could be issued because the statement of defence they filed on **4th July 2012** raised triable issues. It was submitted that paragraph 8 of the Statement of Defence addressed issues of breach of contract, which in view of the Appellants could only be determined by calling of evidence at the full trial.

6. It is the Appellants' case that under **Order 36 Rule 1 of the Civil Procedure Rules (2010)** a summary Judgment can only be granted where the claim is of a liquidated amount with or without interest or recovery of land where the Defendant has entered appearance but not filed a defence. Therefore the trial court misapplied the provisions of **Order 36 Rule 1 of the Civil Procedure Rules (2010)** by awarding the Respondents a summary Judgment while there was on record a Statement of Defence. And as for the issue of whether there was breach of contract or not, could only be ventilated during full hearing and therefore the trial court was duty bound to proceed with the hearing and determine the issue on merit.

7. In deliberating the appeal to have the court set aside the Summary Judgment when one has triable issues, the Appellants' cited and relied upon the principles set by the Court of Appeal in the cases of **ICDC –vs- Daber Enterprises Limited (2000) 1 EA 75; Dhanjal Investment Limited vs Shabaha Investment Limited (1998) eKLR** and **Kenya Trade Combine Limited vs Shah (2001) eKLR**.

8. It was finally submitted that the entry of the summary judgment violated the Appellants' right to a fair hearing as provided under **Article 50 (1) of the Constitution of Kenya**, and urged the court to find that their Appeal has merit and proceed to set aside the Ruling dated **9th November, 2012**. Further, the Appellants urged the court to direct that the suit be heard afresh before a different Magistrate, or in the alternative, this court adopts the submissions of the parties, and/or reassess the evidence and issue a Ruling thereon.

The Respondent's case

9. On the other hand, the Respondent submitted that it filed a **Plaint** dated **29th May, 2012** on **31st May, 2012** seeking Judgment against the Appellant for a liquidated sum of Kshs.332,122/= on account of breach of contract. It then filed an application for summary Judgment under **Order 36 Rule 1** of the **Civil Procedure Rules** on **25th June, 2012** after the Appellants had failed to put in a Defence within the prescribed timelines. It should however be noted that the Appellants filed their Statement of Defence on the **4th July, 2012**.

10. The Respondent stated that the Appellants in their Defence Statements had plainly and unequivocally admitted to owing the Respondent the sum as claimed in the **Plaint**.

11. The Respondents further submitted that the Learned Trial Magistrate did not err in finding that the circumstances surrounding the claim did warrant entry of Summary Judgment for the sum of Kshs.332,122/=. It was argued that it was upon the Appellants to show that they had triable issues so that they could be granted leave to defend the suit.

12. However, in the Respondent's view, the Appellants did not place any evidence before court to persuade the learned trial Magistrate exercise discretion in their favour. To support their case, the Respondents relied on the cases of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited) –vs- City Council of Nairobi (2019) eKLR; Dakianga Distributors (K) Ltd v Kenya Seed Company Limited (2015) eKLR** and **Zola vs Ralli Brothers (1969) EA 691**.

13. The Respondents sought that the Appeal be dismissed with costs as the Appellants, without any justification whatsoever denied them the chance to enjoy the fruits of their Judgment for over nine (9) years..

Analysis and Determination

14. I have carefully considered the pleadings and submissions filed herein. The Appellant raised six (6) grounds of appeal, but in their submissions condensed them into one issue for determination. The issue for determination is whether the summary judgment as granted is within the governing principles as provided under **Order 36 Rule 1** of the **Civil Procedure Rules**.

15. The gist of Summary Judgment is clearly stated under **Order 36 of the Civil Procedure Rules** which provides that: -

(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.***

16. The Respondent in this case filed a **Plaint** on the **31st May, 2012** claiming for an amount of Kshs.332,122/=. The Appellants on the other hand entered appearance on the **11th June, 2012** but did not file any Statement of Defence, until **27th July, 2012** when a statement of defence was filed.

17. On the **25th June, 2012** the Respondents filed an application under **Order 36 Rule 1, 2 & 9** of the **Civil Procedure Rules** for the entry of a summary Judgment against the Appellants.

18. The Appellants claim that the summary Judgment ought not to have proceeded before the trial court as they had duly filed their defence and the requirement under **Order 36 Rule 1** of the **Civil Procedure Rules** is that summary Judgment can only be awarded where the Defendant has entered appearance but not filed a defence.

19. Once an application for summary judgment has been made under **Order 36 Rule 1** of the **Civil Procedure Rules**, it is upon the Defendant to show the trial court that he should have leave to defend the suit as provided under **Order 36 Rule 2** of the **Civil Procedure Rules**.

20. In considering the application for summary Judgment as was filed by the Respondents, the trial court found that the application was rightfully filed before court in line with the provision of **Order 36 Rule 1** of the **Civil Procedure Rules**. The Court found that the Appellants entered appearance on **11th June, 2012** and did not file a Defence until the application for summary judgment had been filed, that is on **16th July, 2012**.

21. It was therefore upon the Appellants to show the trial court through affidavit or oral evidence that the leave ought to be granted for them to defend their suit as provided under **Order 36 Rule 2** of the **Civil Procedure Rules**.

22. The Appellants responded to the application for summary Judgment and stated that they had *bona fide* triable issues that the Respondent had breached the contract as was entered between the parties.

23. In the case of **Saudi Arabian Airlines Corporation –vs- Premium Petroleum Company Ltd [2014]eKLR**, the court defined a triable issue as follows: -

“...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 J 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....”

24. Further, In the case of **Job Kilooh –vs- Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015]eKLR**, the Court stated as follows:

“...Before the grant of summary judgment, the court must 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.”

What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court....”

25. I have looked at the pleadings before me and find that the summary Judgment application was properly before court as it was filed after the Respondents had entered appearance but was yet to file a defence. The ruling was however delivered on **9th November, 2012**, long after the Appellants had filed the defence. The trial court also appreciated that a defence had been filed and at the 2nd last paragraph of its Ruling at found that although the Appellant had pleaded breach on part of the Plaintiff which led to them spending Khss.231,362/= on reports, no receipt has been produced to buttress that argument.

26. I am unable to agree with the trial court at this point, firstly, because the case was still at the interlocutory stage and not at the hearing stage where the Appellants could produce these documents. Secondly I am of the view that a summary Judgment could not issue, as I find that the Appellant had raised a *bona fide* triable issue. The Appellant’s claim on breach of contract and whether there were documents in support thereof is one that can only be determined after the court has examined all the evidence before it. I must also reiterate that a triable issue is not one that must succeed upon trial but one that warrants further production of evidence so that it is considered on merit.

27. In view of the above, I find that the Appellant raised *bona fide* triable issues that can only be determined after parties have been heard and respective evidence presented before the trial court.

28. The upshot of the foregoing is that the Appeal herein is allowed, and the Ruling delivered on **9th November, 2012** set aside and subsequently substituted with an order directing that the suit Mombasa SPM **Civil Suit No.1114 of 2012** be heard on merit before a different Magistrate.

29. The costs of this Appeal shall abide with the outcome of the lower court case.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 13TH DAY OF MAY, 2021.

D. O. CHEPKWONY

JUDGE