



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 324 OF 2014

ALTIMATE MANAGEMENT LIMITED.....1ST APPELLANT

WALTER MONGARE alias NYAMBANE.....2ND APPELLANT

VERSUS

FRANK ADIGA.....RESPONDENT

(Being an appeal from the ruling and judgment of Honourable C. Obulutsa (Mr.) (Ag. Chief Magistrate) delivered on 2nd July, 2013 in CMCC NO. 2520 OF 2012)

JUDGEMENT

1. By way of a plaint dated 4th April, 2012 the respondent instituted a civil suit against the appellants under Nairobi CMCC NO. 2520 OF 2012 seeking a refund in the sum of Kshs.681,762/= plus costs of the suit.
2. The respondent pleaded in his plaint that sometime on or about the 9th of January, 2012 he and the appellants executed a Memorandum of Understanding to the effect that the respondent would sponsor the production of a comedy show titled 'The Nyambane Show' by way of a deposit of Kshs.681,762/= and which show was set to be conceptualized, directed, produced and ultimately televised by the appellants on either of the local television networks, internet and mobile platforms for a definite period of time.
3. The respondent further pleaded that despite having tendered the above sum as a down payment as per the agreement, the appellants declined to produce the show and/or refund the said sum.
4. Upon being served with summons and a copy of the pleadings, the appellants entered appearance on 4th June, 2012 and thereafter filed their joint statement of defence on 14th June, 2012 to which the respondent lodged a reply on 22nd June, 2012.
5. Subsequently, the respondent filed a Notice of Motion dated 31st December, 2012 seeking for inter alia, the entry of summary judgment against the appellants on the abovementioned sum. In reply, the appellants put in Grounds of Opposition dated 16th April, 2013 to which the respondent rejoined with a supplementary affidavit. Parties then filed written submissions on the Motion.
6. In the end, the said Motion was allowed, with the trial court striking out the defence and entering summary judgment as prayed.
7. The appellant has now moved this court by way of an appeal against the aforesaid decision. The memorandum of appeal dated 24th July, 2014 is premised on the grounds of appeal hereunder:

i. THAT the learned trial magistrate erred in law by entering summary judgment against the appellants in the sum of Kshs.681,742/=.

ii. THAT the learned trial magistrate erred in law and in fact by not finding that the appellants had raised triable issues in their defence.

iii. THAT the learned trial magistrate completely erred in law by denying the appellants an opportunity to defend themselves.

iv. THAT the learned trial magistrate erred in law and in fact by finding that the respondent had proved his case.

v. THAT the learned trial magistrate erred in law and in fact by finding that the respondent was entitled to payment of Kshs.681,742/= plus costs and interest.

vi. THAT the learned trial magistrate misdirected himself and arrived at a wrong decision.

8. When the appeal came up before this court on 30th November, 2018 for directions, the respondent was notably absent from court. That notwithstanding, parties were directed to file and exchange written submissions. The appellants were further ordered to inform the respondent of the said directions. The record shows that the respondent neither participated in the appeal nor filed submissions despite having been served with various notices. The appellants filed their submissions on 21st January, 2019.

9. I have considered the grounds of appeal as laid out in the memorandum of appeal. I have equally re-evaluated the arguments presented before the trial court in support of and in opposition to the Motion.

10. The grounds of appeal all revolve around the learned trial magistrate's analysis and decision to enter summary judgment in favour of the respondent upon striking out the appellants' statement of defence. Though the appellant put forward a total of six (6) grounds of appeal those grounds may be summarized to three main grounds.

11. The first main ground has to do with the question as whether the appellants' statement of defence raises triable issues. The appellants have submitted that their defence raises a number of triable issues, hence the trial court's decision to have it struck out at the interlocutory stage resulted in a grave error on its part as it denied the appellants their constitutional right to access justice and a fair hearing under Articles 48 and 50(1) of the Constitution respectively.

12. The application for summary judgment filed before the trial court was premised on the grounds that the defence does not raise any conscionable issues and is purely aimed at delaying the respondent's enjoyment of the fruits of his judgment.

13. In their Grounds of Opposition, the appellants were of the submissions that their defence does raise triable issues.

14. In his submissions placed before the trial court, the respondent maintained that the defence is a sham aimed at delaying the judgment and that the same does not give rise to any triable issues. In their opposing submissions, the appellants drew the trial court's attention to the legal principle that in instances where a statement of defence raises even one (1) triable issue, the relevant defendant ought to be granted leave to defend it unconditionally and as such, summary judgment is not available to a party.

15. The trial court came to the conclusion that it had been established that the appellants had received the disputed sums but had failed to meet their contractual obligations hence their defence did not raise any triable issues.

16. Having considered competing arguments I think it is important to examine what is a triable issue. In the case of *Mercy Karimi Njeru & another v Kisima Real Estate Limited [2015] eKLR* cited by the appellants wherein reference was made to the Court of Appeal's rendition in *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR* it was stated inter alia that:

"A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial."

17. The court further observed that a triable defence need not be one that will ultimately succeed.

18. I have perused the appellant's statement of defence and note that therein lie certain issues which in my view would warrant further investigation by the court. These include:

a) Whether the production of the comedy show was conditional upon the respondent paying to the appellants the sum of Kshs.600,000/= per episode.

b) Whether or not the appellants performed their contractual obligations.

c) Whether or not there was a breach of contract on the part of either of the parties.

19. It would appear that the appellants' statement of defence raises *bona fide* triable issues and find that the learned trial magistrate ought to have determined as such.

20. The second main ground of appeal is whether summary judgment was properly entered. It is the appellants' submission that since their defence raises triable issues, the trial court had no basis on which to enter summary judgment.

21. In allowing the application for summary judgment, the learned trial magistrate stated that the appellants' defence does not constitute triable issues.

22. I have already formed the opinion hereinabove that the statement of defence filed by the appellants raises triable issues which would need to be further investigated and this can only be adequately done at the trial stage. In the premises, I am of the view that the learned trial magistrate erred in striking out the said defence and consequently, in entering summary judgment.

23. The principles to be considered in applications for summary judgment are well settled that where a defence with triable issues exists, then the court ought to grant a defendant an opportunity of defending his or her case.

24. In the case of *Rift Valley Water Services Board v Oriental Construction Co. Limited [2018] eKLR* the Court of Appeal stated inter alia that:

“In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend.”

25. In the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (supra)* the court further stated:

“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.”

26. In my view, the learned trial magistrate failed to note that the defence disclosed triable issues therefore he should not have been quick to strike out the defence therefore the entry summary judgment was improper.

27. The last ground of appeal is in respect of the question as to whether summary judgment ought to be set aside. Going by my determination in the preceding grounds hereinabove, I am satisfied that there was no basis for entry of summary judgment in the first place.

28. In the end, this appeal has merit. It is allowed. Consequently

a) The order entering summary judgement made on 2nd July, 2013 and all the consequent orders are hereby set aside and is substituted by an order dismissing the motion dated 31.12.2012..

b) The appellants’ statement of defence dated 11th June, 2012 is hereby reinstated. The suit be heard and determined on its merits.

c) The appellants are given costs of the appeal.

Dated, Signed and Delivered at Nairobi this 5th day of July, 2019.

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J. K. SERGON

JUDGE`

In the presence of:

..... for the Appellants

..... for the Respondent