REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT THIKA

CIVIL APPEAL NO. **E365** OF 2024

SIKO WARME DAWA……..……...……...…..……..…… APPELLANT

-VERSUS-

GODANA HALAKE GUYO…….....RESPONDENT

(Being an appeal from ruling and orders in the Chief Magistrate's Court at Thika (Hon. Atiang Mitullah SPM) case number 704 of 2018 dated 18th April 2023)

JUDGMENT

The genesis of this appeal is the ruling of the lower court dated 18th April 2023 in which the Honourable Magistrate struck out the appellant's replying affidavit dated 6th March 2023 for having been filed out of time given by the court and allowed the respondent's application dated 25th July 2022. In its ruling, the trial court held that the replying affidavit having been struck out, the application dated 25th July 2022 remained unopposed and the same was allowed without a formal prosecution.

The appellant has raised the following five grounds of appeal;

1. ***THAT*** *learned Magistrate erred in disregarding a duly filed and relevant replying affidavit lodged by the appellant and in directing that the said replying affidavit be expunged from the court.*

2. ***THAT*** *the learned Magistrate failed to consider the fact that his order would result in a party being denied a chance to be heard.*

3. ***THAT*** *learned Magistrate erred in failing to appreciate that the question of time frame is not the only sufficient reason to expunge a document.*

4. ***THAT*** *learned Magistrate erred in failing to appreciate that it is incumbent upon a trial court to take the total overall facts and in particular to ensure that parties are granted justice and not turn away at the altar of technicalities.*

5. ***THAT*** *learned Magistrate erred in failing to consider the appellant's replying affidavit even if the same seemed to have been filed out of time yet it did not prejudice the application but went only to state the appellant's response.*

The application which was allowed prayed for the following orders;

1. ***THAT*** *this Honourable Court be pleased to strike out the defendant/respondent's defence dated 2nd day of October 2018 and enter judgment for the plaintiff/applicant in terms of the amended plaint dated the 2nd November, 2021.*

2. ***THAT*** *the cost of this application be borne by the defendant/respondent.*

This is a first appeal and as such, the court has the mandate and obligation to evaluate the application and the circumstances and the process leading to the striking out of the replying affidavit and allowing the respondent's application and come to its own independent conclusion. This court is also bound to consider that

the orders appealed are discretionary and exercise caution in making its decision as the legal position dictates that an appellate court should not interfere with the discretion of the trial court unless it is demonstrated that the same was injudicious or the trial court misdirected itself or the decision is manifestly wrong and it resulted to injustice. In ***Ken Odondi & 2 others v James Okoth Omburah T/A as Okoth Omburah & Company advocates (2013) KECA 252 (KLR),*** the Court of Appeal held that;

> *'The principles upon which this court can interfere with the exercise of discretion of the trial judge are well established. This court must, to interfere, be satisfied that the judge has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.'*

This appeal was prosecuted by way of written submissions. The appellant filed two sets of submissions. The first one is dated 14th July 2025 and the second one is dated 5-09-2025 but basically, they both say the same thing. The respondent's submissions are dated 15th August 2025.

The respondent submits that the appeal is premature because the appellant did not seek review of the ruling before the trial court before preferring this appeal. This argument has no basis as appeal and review are options available to the parties and there is no requirement in law that an aggrieved party should apply for review before preferring an appeal. Actually, where one appeals, their window for review is closed. That is the purport of Section 80 of the Civil Procedure Act Chapter 21 of the Laws of Kenya which provides that;

> *'Any person who considers himself aggrieved-*

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.'

In ***Otieno, Ragot & Company Advocates v National Bank of Kenya Limited (2020) KECA 894 (KLR),*** the Court of Appeal held that;

'It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed.'

The suit before the trial court was seeking payment of the value of money of some land belonging to the respondent which the appellant had sold. The respondent through the application dated 25th July 2022 sought to strike out the appellant's defence and have judgement entered as prayed in the plaint. When the matter came for hearing of the application on 29th November 2022, the appellant sought and was granted adjournment to enable him file a response which was granted and the court ordered that the reply be filed within fourteen days.

The appellant did not file his replying affidavit within the period ordered by the court. He did so on 6th March 2023 which was about three months after the lapse of the period. When the matter came for mention on 7-03-2023, the counsel for the respondent pointed out to the court that the application was unopposed since he

had not been served with a replying affidavit and asked the court to allow the application. The counsel for the appellant pointed out that there was a replying affidavit filed the previous day and asked that the court allows parties to file submissions. The court reserved the matter for ruling on 18-04-2023 which culminated to the ruling being appealed.

It is not in doubt that for fair, expeditious and meaningful dispensation of justice to be achieved, the court handling a matter should have discretion and power to have control over the proceedings before it. This includes giving timelines and timings of the process including filing of necessary documents. However, in doing so, the court should not only be guided by the law but also consideration of the realities of life including the effect of the orders it gives and the fact that parties approach the courts for enforcement and protection of their rights.

Although each case depends on its peculiar circumstances, it should be understood that justice must be administered with the final goal being adjudicating of grievances within and among the members of the society. This can only be achieved by acknowledging that we are all human beings prone to errors, forgetfulness, health challenges and other intricacies of life. With this in mind, dispensation of justice should be tampered and laced with humanity such that the final orders of the court reflect the proportionality to the circumstances and their effect to the rights of the parties.

Having said the above, I note that the application before the court was seeking to strike out the appellant's defence and enter judgement for the respondent as prayed in the plaint. The prayers in the plaint were as follows;

a. ***THAT*** *a refund of the two plots value in cash at the current market price in accordance with the valuation report by Zanconsult Valuers & Management Company Limited or as the Honourable Court may determine in accordance with the present market value at the judgement.*

b. ***THAT*** *costs of the suit and interest at court rates from the date of filing until payment of the decretal sums.*

The above prayers would obviously call for hearing in form of formal proof in absence of a defence. There are two issues I pick from this position. The first one is that the act of striking out the defence left the appellant without a weapon to attack the claim. It is trite that striking out a pleading should be the last resort and in the clearest of the cases where the pleading is so hopeless that it may not be cured by way of amendments. In ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission, Wilfred Rotich Lesan, Robert Siolei, Returning Officer Bomet County, Kennedy Ochanyo, Wilfred Wainaina, Patrick Wanyama & Mark Manzo (2013) KECA 113 (KLR),*** it was held that;

> *'The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases.'*

The second issue is the way the court handled an application of this nature. In one sentence, the court stated that the application was not opposed and proceeded to allow it. An application of that nature in my view cannot be handled in the casual manner as the trial court seems to have done. The Honourable Magistrate was under legal and judicial obligation to analyse the merit or lack of it of the defence which was already regularly on record. It is not appropriate for the court to allow an application simply because it is not opposed. The court was required to look into the defence and ascertain whether it raised any reasonable defence or triable issues which it failed to do going by the contents of the ruling. The way the trial court handled the application paints a picture of a court which was either too lethargic or had a pre-determined outcome of the application.

The respondent's submissions before this court has concentrated on the merits of the appellant's defence. He argues that the defence was hopeless and he seems to say that even without striking out of the replying affidavit, the respondent had no chances in the application. That may be so but no one deserves to be condemned unheard however weak their case is. The appellant was denied that chance and was locked out of the seat of justice on account that he filed the replying affidavit late.

Concerning the decision to strike out the replying affidavit, I hold the view that the court should have called for reasons of the delay. There was no inquiry into that neither was there an explanation. Of course, the appellant failed to observe the timelines given by the court but in my opinion, striking out the replying affidavit which consisted of 8 paragraphs was draconian. The respondent did not demonstrate any prejudice this short affidavit caused him and I see none having gone through the affidavit which does not constitute any averment of facts.

The filing of the affidavit outside the time allowed by the court should have attracted a lesser sanction such as costs. Further, the fact that the replying affidavit was struck out did not mean that the application was unopposed. The appellant had deponed issues of law and had expressed his desire to oppose the application. In my view, the appellant would be within the law and his right to argue the issues of law even in absence of a replying affidavit. I hold that the action taken by the Honourable Magistrate was injudicious and I am inclined to disturbing his discretion. However, since the ruling was an outcome of the appellant's delay, he shall meet the costs of this appeal.

In the final analysis, I find this appeal merited and I allow it in the following terms;

a. The ruling of the trial court in Thika Cmcc number 704 of 2018 dated 18-04-2023 is hereby set aside.

b. The replying affidavit of the appellant sworn on 6th March 2023 is consequently reinstated.

c. The respondent's application dated 22nd July 2022 shall be set down for hearing before a Magistrate other than Honourable Atiang Mitullar.

d. The appellant shall pay the respondent's costs of this appeal.

Dated, signed and delivered at Nairobi this **28th** day of **November** 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Mutonyi for the appellant and Mr. Otieno for the respondent.