



Agnes Waithira Kamau t/a Dee Ann School v NIC Bank Kenya PLC (Commercial Appeal 004 of 2022) [2025] KEHC 9388 (KLR) (Commercial and Tax) (24 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9388 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL 004 OF 2022**

AA VISRAM, J

JUNE 24, 2025

BETWEEN

AGNES WAITHIRA KAMAU T/A DEE ANN SCHOOL APPELLANT

AND

NIC BANK KENYA PLC RESPONDENT

JUDGMENT

Introduction and Background

1. The present appeal arises out of a ruling of the subordinate court dated 15th July, 2019 (“the Ruling”) where the lower court struck out the Appellant’s Defence and allowed the Respondent’s application for summary judgment dated 29th March, 2019. The appeal is grounded on the Memorandum of Appeal dated 31st January, 2020 in the following terms:
 1. That the Learned Magistrate erred in law and fact in striking out the Appellant’s Defence and entering Judgment for the Respondent as prayed in the application dated 29th March, 2019, without taking into consideration the nature of the claim, the summary nature of the procedure, and the submissions made therein.
 2. That the Learned Trial Magistrate erred in law and in fact by making a finding that the Appellant’s Defence failed to disclose triable issues yet the same raised serious contractual, factual, and legal issues that could only be determined by way of a trial.
 3. That the Learned Magistrate erred in law and in fact in finding that the Appellant had not presented a Defence with triable issues.
 4. That the Learned Magistrate erred in law and in fact in failing to make any or any proper findings on the facts placed before him in light of the submissions.



5. That the Learned Magistrate erred in law and in fact in failing to find that the Appellant had presented a credible Defence with not one but several triable issues for determination.
6. That the Learned Magistrate erred in law and in fact in granting the Respondent's application as prayed.
2. The Appellant thus seeks that the appeal be allowed and that the Ruling be set aside, or in lieu thereof, an order be made dismissing the Respondent's suit with costs to the Appellant.
3. The case in the subordinate court originated from a claim by the Respondent for Kshs. 1,941,532.22/-, plus 13% interest, as a shortfall after a motor vehicle (registration KCE *B) financed by the Respondent, was repossessed and sold by public auction. After the close of pleadings, the Respondent filed an application dated 29th March, 2019, seeking, inter alia, pursuant to Order 2, rule 15, that the Appellant's Defence be struck out and that judgment be entered as prayed. After considering the Application, the Learned Magistrate noted that the Appellant's Defence raises no triable issues, and the same was accordingly struck out and judgment entered as prayed by the Respondent in its Plaintiff.
4. The above decision prompted the filing of the present appeal which has been canvassed by way of written submissions, which are summarize below.

The Appellant's submissions

5. The appeal is based on six grounds, primarily, arguing that the Learned Magistrate erred in striking out the Defence without considering the nature of the claim and the submissions made, and in finding that the Defence failed to disclose triable issues.
6. The Appellant contended that the Defence raised serious contractual, factual, and legal issues requiring a full trial. She submitted that she initiated the repossession process to avoid further costs, and that the sale price of Kshs. 3,500,000.00/- was questionable, because the forced sale value was Kshs. 4,060,000.00/-, raising a triable issue of whether the vehicle was undersold.
7. Additionally, she submitted that higher bids had been placed during the auction, including a bid at Kshs. 4,000,000.00/- which was not considered. She contended that the amount outstanding at the time of repossession was not adequately addressed by the Respondent, and nor were payments made by the Appellant considered.
8. She further disputed the accrued interest claimed by the Respondent and demanded the shortfall, stating that the outstanding balance was Kshs. 220,000.00/- not Kshs. 1,356,153.99/-.
9. The Appellant submitted that she was denied the fundamental right to a fair hearing and access to justice and she emphasizes that a Defence should not be summarily dismissed unless it "discloses no reasonable cause of action and is so weak as to be beyond redemption". Citing various cases, the Appellant argued that leave to defend should be granted if there is a "fair case for Defence or reasonable grounds for setting up a Defence or even a fair probability that he has a bona fide Defence".
10. The Appellant asserted that the Learned Magistrate Failed to apply the said legal principles and the Ruling ought to be set aside, or the Respondent's suit be dismissed with costs to her.

The Respondent's submissions

11. The Respondent proposed two main issues for the High Court to determine: Whether the Appellant's Defence disclosed triable issues; and whether the Learned Magistrate erred in striking out the Appellant's Defence and entering judgment for the Respondent. The Respondent submitted that the



Appellant's Statement of Defence did not present any triable issues that would warrant overturning the subordinate court's decision.

12. The Respondent submitted that the Appellant failed to service a loan advanced under a Chattels Mortgage Agreement, leading to the termination of the said agreement, and repossession, valuation, and sale of the subject motor vehicle.
13. In response to the claim that the vehicle was sold at undervalue, namely for Kshs. 3,500,000/- against a forced market value of Kshs. 4,060,000/-, the Respondent stated that the subject vehicle was advertised for sale and that the same was sold to the highest bidder for Kshs. 3,500,000/-, which was then credited to the Appellant's account. The Respondent submitted that the sale proceeds were insufficient to cover the loan, leading to the current claim of Kshs. 1,941,532.22/-, outstanding as of 8th November, 2018.
14. The Respondent asserted that the Appellant was aware of every step in the process, and that her allegations relating to sufficient sale proceeds were baseless. The Appellant pointed out that the Appellant had previously admitted her indebtedness in a letter dated 5th September, 2016, and had even committed to a repayment plan, which she later failed to honor.
15. The Respondent cited various decisions to support its argument that a "mere denial" or "general traverse" is not a sufficient Defence for a debt or liquidated amount, and the same constitutes a "sham Defence". It emphasizes that a court should not be a "haven for defaulters".
16. The Respondent argued that the Learned Magistrate was justified in striking out the Defence. It urged the court to find that the court had properly applied the principles relating to Order 2, rule 15 of the Civil Procedure Rules, which allows for pleadings to be struck out if they disclose no reasonable cause of action or Defence, are scandalous, frivolous, vexatious, may prejudice/embarrass/delay a fair trial, or are an abuse of court process.
17. The Respondent relied on Article 159 (2)(b) of *the Constitution*, in support of its argument that justice should not be delayed; and Section 1A of the *Civil Procedure Act*, which emphasizes the objective of facilitating the "just, expeditious, proportionate and affordable resolution of civil disputes". It argued that the court is bound by these provisions to promote speedy proceedings.

Analysis and Determination

18. I have considered the grounds set out in the memorandum of appeal, the contents of the record, the rival submissions of the parties, and the applicable law.
19. In my view, the grounds raised by the Appellant in her Memorandum of Appeal may be reformulated as a single issue: whether the Learned Magistrate erred in striking out the Appellant's Defence by stating that it did not raise any triable issue.
20. The above decision was an exercise of discretion by the Learned Magistrate, and this Court will not ordinarily interfere with the exercise of the discretion of a lower court unless it is satisfied that it misdirected itself on some material matter, and that as a result, arrived at a wrong decision, or unless it is manifest from the case as a whole, that the Magistrate was clearly wrong in the exercise of his discretion, and that as a result, there has been injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] KECA 39 (KLR))
21. The facts giving rise to this matter were stated in the introductory part and are not in dispute. By a Chattels Mortgage Agreement dated 11th September, 2015, the Appellant obtained a loan facility of Kshs. 3,845,760.00/- from the Respondent to purchase the subject motor vehicle. The Appellant admitted that she defaulted in repaying the loan and that she was in arrears, hence the Respondent



was entitled to repossess and sell the motor vehicle. The motor vehicle was accordingly sold, but the Appellant averred that this was done at an undervalue as it was below the forced valuation price given by the Respondent. Further, whereas the Appellant admitted to owing the Respondent, her letter of 5th September, 2016, speaks of arrears of Kshs. 220,000.00/- and not the Kshs. 1,941,532.22/- claimed by the Respondent in its Pleint.

22. In my view, the above issues are are triable issues that go the root of the claim and deserve an interrogation at a full trial. I do not think it was reasonable for the Learned Magistrate to draw a final conclusion based on an interrogation of the parties' averments and competing affidavit evidence only.
23. In his Ruling, the Learned Magistrate stated that a triable issue is not one that the Defendant would necessarily succeed on, it only needs to be Bonafide. This principle ought to have applied to the claim that the subject vehicle was sold at undervalue, and in respect of the issue concerning the actual amount in arrears. I say so noting that based on the record, the Appellant never admitted that she owed the Respondent the amount owed in the Pleint, and she expressly disputed the selling price of the motor vehicle based on its valuation.
24. Based on the reasons above, I do not think that she applied her discretion judiciously in accordance with the law as set out above. Accordingly, I find that there is an appropriate basis for this court to interfere with the decision of the lower court and set aside the decision of the lower court such that the Appellant may be afforded an opportunity to ventilate her position and defend the claim by the Respondent.

Conclusion and Disposition

25. In the upshot, I allow the appeal on the following terms:-
 - a. The ruling of the subordinate court dated 15th July, 2019 is set aside and substituted with an order dismissing the application dated 29th March, 2019.
 - b. The Respondent shall pay the costs of the application before the subordinate court and the costs of this Appeal.
 - c. The matter shall be mentioned before the subordinate court within 14 days from the date hereof for further directions with a view towards fixing a hearing date.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF JUNE, 2025.

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant: Sakina

.....for Appellant

.....for Respondent

