



REPUBLIC OF KENYA



**County Government of Trans Nzoia v Manaseh Distributors & Wholesalers Limited
(Civil Appeal 10 of 2018) [2024] KEHC 389 (KLR) (29 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 10 OF 2018
AC MRIMA, J
JANUARY 29, 2024**

BETWEEN

COUNTY GOVERNMENT OF TRANS NZOIA APPELLANT

AND

MANASEH DISTRIBUTORS & WHOLESALERS LIMITED RESPONDENT

(Being an Appeal arising out of the ruling and order of Hon. P.C. Biwott (Senior Principal Magistrate) in Kitale Chief Magistrate's Court Civil Suit No. 104 of 2017 delivered on 5 th April 2018)

JUDGMENT

Background:

1. The Respondent herein, Manaseh Distributors & Wholesalers Limited, instituted Kitale Chief Magistrate's Court Civil Suit No 104 of 2017 Manaseh Distributors & Wholesalers Limited v County Government of Trans Nzoia (hereinafter referred to as 'the suit'). The Plaintiff was filed on 18th April, 2017.
2. The Appellant thereafter came on record and filed its Statement of Defence on 17th May 2017. The Respondent then filed an application by way of a Notice of Motion dated 17th November 2017 on 21st November 2017 where it sought the following reliefs: -
 1. That the Defence filed in this suit be struck out;
 2. That judgment be entered for the Respondent herein for Kshs 11,871,574.00 with costs and interest as prayed in the Plaintiff;
 3. That costs of the Application be provided for.



3. The application was supported by an Affidavit sworn by one Manaseh Njenga, a Director of the Respondent.
4. The Appellant vehemently opposed the application. It filed a Replying Affidavit through one Pius Munialo, the Appellant's County Secretary. The Affidavit was sworn on 8th February, 2018.
5. The application was canvassed and the trial Court on 5th April, 2018 found that the application was merited. Consequently, the Appellant's Statement of Defence was struck out. Judgment was entered for the Respondent for Kshs 11,874,574.00 with costs and interests hence the Appeal.

The Appeal:-

6. The Appellant's Memorandum of Appeal was filed on 7th May 2018.
7. It raised several grounds in support of the appeal. It faulted the trial Court for striking out its Defence summarily as it was denied a right to a fair hearing yet the Defence raised triable issues. It proposed that the evidence adduced by the Respondent in its application ought to have been scrutinized with the benefit of a hearing where parties would testify in Court. That, the Respondent was not given an opportunity to rebut or controvert the contents of the Respondent's documents. Finally, the Appellant accused the trial Court of bias. It prayed that the appeal be allowed, the ruling delivered on 5th April 2018 be set aside, the matter proceeds for hearing and that it be awarded costs of the appeal.
8. The Appeal was heard on the basis of the parties' written submissions. The Appellant captured the facts as enshrined in the Plaintiff and the Statement of Defence. It pitted out that the Respondent's failure to file a Reply to Defence was tantamount to the Respondent's concession that the issues raised in its Defence remained undisputed. In its stead, the Respondent filed an application for summary judgment six months after receipt of the Appellant's Statement of Defence.
9. The Appellant further outlined the application and Replying Affidavit. According to the Appellant, seven core issues raised in its Defence necessitated a need for a full hearing of the matter. It added that even one *bona fide* triable issue necessitated an adjudication. It cited *Isaac Awuondo v Surgipharm Limited & another* [2011] eKLR for this proposition.
10. The Appellant further faulted the trial Court for failing to find that the said issues raised in its Defence were triable issues and that it ought to have been given an opportunity to defend its case. On the basis of *Postal Corporation of Kenya v IT Inamdar & 2 others* [2004] eKLR, the Appellant submitted that summary judgment can only be granted in the clearest of cases; the present case did not qualify.
11. It thus urged this Court to set aside the orders of the trial Court. The trial Court was further accused of making determinations on matters not pleaded. The Appellant then challenged the nature of the prayers sought maintaining that they did not seek summary judgment but final orders as sought in the Plaintiff. Since the orders were ambiguous and poorly drafted, they ought not to have been granted.
12. The Appellant finally submitted that interlocutory judgment is generally discouraged as it occasions an injustice. It urged this Court to allow the appeal as the trial Court erroneously and misdirected itself in the exercise of discretion.
13. The Respondent opposed the appeal.
14. It submitted that the trial Court properly exercised its discretion in granting the orders sought. It then laid a background synopsis of the facts as captured in its Plaintiff justifying that the orders sought were



lawfully granted. Having perused through the Defence, the Respondent submitted that the Appellant had failed to furnish the particulars of fraud, irregularities, illegalities and breach of contract as alleged. The Respondent accused the Appellant of demonstrating inconsistencies with his averments since it initially denied that the Respondent was awarded the tenders and then later maintained that the Respondent did not carry out the works and breached the contract. Furthermore, the Respondent observed that the Appellant insisted that the Respondent was not prequalified to tender yet was subsequently awarded the said tender.

15. The Respondent submitted that in light of this, the Appellant was in breach of Order 2, Rule 6 of the *Civil Procedure Rules*. It was further pointed out that the Appellant did not deny that it had disbursed a sum of Kshs 2,472,508.00 to the Respondent thus admitting that the works carried out by the Respondent were satisfactory.
16. Additionally, eight inspection reports demonstrated that the Respondent had carried out the works as contracted. It maintained that the Defence was a sham as it raised no triable issues. The Appellant was thus estopped from alleging that no evidence was adduced to demonstrate that the works were done. The Respondent's submissions were fortified by two decisions namely; Civil Appeal No 134 of 2003; *Isaac Awuondo v Surbipharm Limited & another* and HCCC No 219 of 2013; *Fidelity Commercial Bank Limited v Greenwoods Limited & 2 others*.
17. The Respondent urged this Court to dismiss the appeal with costs.

Analysis:

18. This is an appeal against a ruling. It is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that the decision is clearly wrong because the Court misdirected itself on the facts and/or the law, or because it acted on matters which it should not have acted or it failed to take into account matters which it should have taken into consideration and in doing so arrived at a wrong decision. [See *Mbogo v Shah* (1968) EA 93].
19. In its application, the Respondent invoked the provisions set out in Order 2, Rule 15 (b) & (c) as well as Order 10, Rules 4 and 10 of the *Civil Procedure Rules* to seek entry of judgment summarily against the Appellant.
20. The principles governing entry of summary judgment are quite well settled and well enunciated in our jurisdiction. In the locus classicus case of *DT Dobie Company (Kenya) Ltd v Muchina* (1982) KLR, Madan JA (as he then was) stated as follows: -

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.



21. Similarly, the Court of Appeal in *Harit Sheth T/a Harit Sheth Advocates v Sharma Charania* [2014] eKLR held that: -

This court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination (see also *Continental Butchery Ltd v Ndhiwa* (1989) KLR 573.

In *Dhanjal Investment Ltd v Shabaha Investments Ltd* Civil Appeal No 232 of 1997, the Court had earlier stated as follows regarding summary judgment.

The law on summary judgement procedure has been settled for many years now. It was held as early as in 1952 in the case of *Kandial Restaurant v Devshi & Company* (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of *Souza Figuerido & Company Ltd v Mooring Hotel Ltd.* (1959) EA 425 that, if the defendant shows a *bona fide* triable issue, he must be allowed to defend without conditions....

Regarding what constitutes triable issues, in *Kenya Trade Combine Ltd v Shah*, Civil Appeal No 193 of 1999, this court states as follows:

In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.

22. In *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR, the Court of Appeal posited summary judgment 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.

A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. In the case of *Giciem Construction Company v Amalgamated Trade & Services* LLR No 103 (CAK) this Court stated:

As a general principle, where a defendant shows that he has 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, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment. (emphasis added)

23. The foregoing is the law guiding entry of summary judgments in Kenya.



24. Drawing therefrom, it is the duty of a Court to establish that the application for summary judgment has been made in the clearest of cases. That is to say that, the Defence, which instigates the application, is a sham. The rationale being that if the Defendant is allowed to defend his case with a sham Defence, that would be tantamount to wastage of the limited and precious judicial time. It must thus be plainly obvious that the Defence does not warrant any issue which may call for substantiation in a full hearing. As said, it must be allowed in the clearest of cases.
25. Did the present case qualify for grant of the orders sought? Put differently, did the Appellant demonstrate that it had a Defence that raised triable issues necessitating a full adjudication of the matter?
26. This Court has carefully perused the pleadings and scrutinized the application, the response as well as the annexures thereto. It has also considered the submissions and the decisions referred therein.
27. Without much ado, and with tremendous respect to the Learned Magistrate, the Statement of Defence in this case raised several triable issues. The suit was based on allegation of a party having been granted several tenders on road construction and maintenance. The issues that were raised by the Appellant were serious. They included whether the Respondent was legally qualified to undertake the works in issue, whether the Respondent was legally qualified by the Appellant as a service provider with the capacity to undertake the works, whether the documents in issue (including the contracts) genuinely originated from the Appellant and were issued by persons with the capacity to do so, whether all the works were undertaken as expected, among many other relevant issues.
28. Such issues could not, by any shred of imagination, be settled summarily. They called for a full hearing where witnesses will have to be called.
29. It is on that basis that the appeal must succeed.

Disposition:-

30. Consequently, this Court settles the appeal as follows: -
 - a. The appeal is hereby allowed. The ruling dated 5th May 2018 and all the consequential orders arising therefrom are hereby set-aside forthwith.
 - b. The suit shall be fully heard and determined on its merits.
 - c. The Respondent shall shoulder the costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 29TH DAY OF JANUARY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Mr. Karani, Counsel for the Appellant.

Mr. Ndarwa, Counsel for the Respondent.

Duke – Court Assistant.

