



REPUBLIC OF KENYA



**KENYA LAW**  
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**Zehyle v Mathias Mboya Maithaya t/a Yambo Merchants & Auctioneers (Civil Appeal E908 of 2022) [2024] KEHC 2920 (KLR) (Civ) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2920 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E908 OF 2022**

**AN ONGERI, J  
MARCH 22, 2024**

**BETWEEN**

**EBERHARD ZEHYLE ..... APPELLANT**

**AND**

**MATHIAS MBOYA MAITHAYA T/A YAMBO MERCHANTS &  
AUCTIONEERS ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. C. Maundu in  
Milimani CMCC No. 6145 of 2015 delivered on 22/9/2022)*

**JUDGMENT**

1. The appellant filed Milimani CMCC No. 6145 of 2015 seeking judgment on the amount taxed in HCC no. 22 of 2005 in the sum of ksh.1,744,955.
2. The suit was seeking to convert the certificate of costs into a decree.
3. The trial court struck out the appellant's defence on the grounds that it did not raise triable issues.
4. The appellant has appealed to this court against the striking out of the defence on the following grounds;
  - i. That the learned trial magistrate erred in law and in fact by finding that the certificate of taxation had crystalized despite there being pending objection proceedings to the taxation in HCC No. 22 of 2005 *Riuth Njeri Zehyle – v- Eberhard Zehyle*.
  - ii. That the learned trial magistrate erred in law and in fact by striking out the 2<sup>nd</sup> defendant statement of defence.



- iii. That the learned trial magistrate erred in law and in fact in entering judgment for the plaintiff as was prayed for in the plaint.
  - iv. That the learned trial magistrate erred in law in condemning the 2<sup>nd</sup> defendant unheard.
  - v. That the learned trial magistrate erred in law by finding that the respondent was entitled to receive payment for services that it had not provided.
5. The parties filed written submission as follows; the appellant submitted the trial court striking out his statement of defence and judgment having been entered against him is tantamount to condemning him unheard which is a violation of his constitutional right to fair trial.
  6. That the decree was irregularly issued as there was a pending application by the appellant which was not heard and determined. That further the statement of defence dated 11/12/2015 was not struck out hence the matter should have proceeded for full hearing and determination.
  7. In support of his position the appellant cited the case of *UAP Insurance v Lameck Bororio Mwene (Suing as the Legal Representative of Brian Lameck Momanyi — Deceased)* [2019] eKLR the court stated
 

“Without going to the merits of the case, a look at the appellant’s defence filed in the trial court reveals two issues which ought to have been determined after the hearing of the declaratory suit. The issues raised by the appellant’s defence are in regard to the ownership of the motor vehicle and service of the requisite notice as stipulated by Section 10 of the Act, which issues can only be determined after the conduct of a full trial. All the defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial and the triable issues raised does not mean a defence that must succeed (see *Kenya Trade Combine Ltd v Shab* CA 193/99). The Appellant’s defence contains bona fide triable issue and the Defendant should thus be allowed to defend the suit.
  15. In conclusion, I find the appeal meritorious. The ruling and order of the lower court striking out the Appellant’s statement of defence and entering judgment is set aside and I hereby reinstate the said defence. The lower court file shall be returned so that court can give directions as to how to proceed with other relevant processes towards the trial of the suit...”
  8. The respondent on the other hand submitted that the appeal herein should be dismissed as the same was filed out of time without leave of the court. The impugned ruling giving rise to the decree was issued on 22/9/2022 and the appeal herein was filed on 4/11/2022.
  9. The respondent submitted further that there is no pending objection proceedings in HCCC No. 22 of 2005 Ruth Njeri Zehyle v. Eberhard Zehyle. The ruling on taxation was delivered on 25/3/2015 with 30 days leave to appeal and on 15/4/2015 the appellant filed a notice of objection to taxation and requested for reasons. The matter was last in court on 24/9/2015 when the deputy registrar made an order that the reasons are contained in the ruling and they apply.
  10. The respondent submitted that the appellant did not appeal within the 7 days allowed by the *Auctioneers Act* or the 14 days permitted by the Advocates remuneration order, neither did he appeal within 30 days graciously granted by the taxing master. The court handled the matter under Order 2 Rule 15 which allows striking out of pleadings in appropriate cases.



11. This being the first appeal, the duty of the first appellate court is to re-evaluate the evidence of the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
12. I have considered the rival submissions and I find that the trial court struck out the appellant's statement of defence and entered judgment the appellant.
13. The appellant submitted that this was tantamount to condemning him unheard which is a violation of his constitutional right to fair trial.
14. Further, that the decree was irregularly issued as there was a pending application by the appellant which was not heard and determined.
15. The sole issue for determination is whether the trial court erred in striking out the defence.
16. I find that the proper channel was to file a reference from the taxation. Paragraph 11 of the [\*Advocates Remuneration Order\*](#) provides for the procedure for objecting to a decision on taxation and on the filing of a Reference, as seen hereunder:

- “(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
- (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
- (3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2), [and] may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
- (5) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”

17. There is no indication that the defendant raised any objection to the taxation of the bill of costs.
18. The only recourse for the appellant was to challenge the taxed costs by filing a reference.
19. Section 51(2) of the [\*Advocates Act\*](#) provides that:

“The certificate of the taxing officer by whom a bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court



may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

20. I dismiss the appeal for want of merit.

21. Each party to bear its own costs of this appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
22<sup>ND</sup> DAY OF MARCH, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent

