



Mukunga t/a Jabri Enterprises Auctioneers v Tower Savings and Credit Cooperative Society Limited; David (Respondent) (Miscellaneous Civil Suit E004 of 2024) [2024] KEHC 9175 (KLR) (Civ) (26 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9175 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA**

CIVIL

MISCELLANEOUS CIVIL SUIT E004 OF 2024

CM KARIUKI, J

JULY 26, 2024

IN THE MATTER OF REPOSSESSION OF M/V KBZ 703Z, KBZ 704Z, KBZ 707Z, KBZ 709Z, KBZ 711Z, KBZ 714Z, KBZ 715Z, KBZ 716Z, KBZ 718Z, KBZ 719Z, KBZ 720Z, ZE 7774, ZE 7778, ZE 7784, ZE 7785, ZE 7785, ZE 7785, ZE 7732, ZE 7851, ZE 7855, ZE 7856, ZE 7859 AND ZE 7854

AND

IN THE MATTER OF THE AUCTIONEERS ACT

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER TO SURRENDER PROCLAIMED PROPERTY

BETWEEN

**JARED OMONDI MUKUNGA T/A JABRI ENTERPRISES
AUCTIONEERS APPLICANT**

AND

**TOWER SAVINGS AND CREDIT COOPERATIVE SOCIETY
LIMITED LENDER**

AND

ABAI OMUSALA DAVID RESPONDENT

RULING

1. Before the Court is the notice of motion dated 4 April 2024, in which the Applicant sought the following orders:-



- i. Spent
 - ii. Spent
 - iii. Spent
 - iv. Spent
 - v. The honorable Court would be pleased to set aside ex parte orders by Hon. Justice C Kariuki issued on 14 February 2024 and allow the applicant/Respondent to file their response and the Application before this Court and be heard to its logical conclusion.
 - vi. That costs be provided for.
2. Because:-
- i. The Applicant/Respondent was neither served with summons and pleadings regarding this matter nor granted leave to be heard, thus violating his right to access a fair trial.
 - ii. This matter proceeded ex-parte, and an order was issued against the Applicant/Respondent on 14 February 2024 without him being allowed to be heard, thus violating his right to a fair trial.
 - iii. The Respondent's/ Applicant's Application dated 12/02/2024 did not indicate how much the lender
 - iv. owes.
 - v. The auctioneer's license, attached to the court documents, is a Class A license limited to the region. However, the Applicant's operations are based in Kilifi, a coastal area.
 - vi. Some motor vehicles listed do not belong to the Applicant, e.g., Motor Vehicle Reg. No. KBZ 704Z, which is duly registered to one Desman Energy Limited.
 - vii. That the Respondent/ Applicant did not ascertain the condition of the motor vehicles before proclaiming, i.e., the motor vehicle reg. No. KBZ 709Z was involved in a road traffic accident and was entirely written off.
 - viii. It is in the interest of justice that the said orders be set aside and the Applicant/Respondent be allowed to defend himself.
 - ix. That the Respondent/Applicant is an infringement of the Applicant's/Respondent's constitutional right to be heard and own properties.
 - x. This honorable Court has the jurisdiction to issue the orders sought and to avert an injustice occasioned by the Respondent/Applicant's actions on the Applicant/Respondent.
 - xi. That the Application has been brought in good faith and without undue delay.
 - xii. The Applicant/ Respondent has a formidable defense against the Applicant/Respondent's Application that raises triable issues that may be discerned.
 - xiii. It is only fair and reasonable that the Application be allowed in terms of the prayers sought since no conceivable prejudice will likely be occasioned to the Respondent/ Applicant from the proposed draft defense annexed to the affidavit supporting this Application.
 - xiv. It is in the interest of justice that the said orders be set aside and the Applicant/Respondent be allowed to defend itself.



- xv. There has been no delay in making this Application, and the Respondent/Applicant will suffer no prejudice.
3. The Application was further supported by the supporting affidavit deposed by Abai Omusala David.
4. On the other hand, the Respondent /Applicant vide the replying affidavit dated 30 April 2024 sworn by Jared Omondi Mukunga deposing as follows:-
- i. He is a registered Class A auctioneer.
 - ii. He received a letter of instruction from Tower Saving and Credit Cooperative Limited dated 10 January 2024.
 - iii. In the said letter, he was to attach the property as per the attached letter of instruction dated 10 January 2024.
 - iv. The said letter of instruction emanated from a ruling of the Cooperative Tribunal at Nairobi on 3 August 2023.
 - v. He applied for police assistance, and the order was granted to him on 14 February 2024.
 - vi. With his team, he traveled to Kilifi County and repossessed the said motor vehicles with the assistance of police officers from Chesaba Police Station.
 - vii. On their way after the repossession, Timothy Muasya ordered the said vehicles to be returned to the Respondent, and he complained to the director of internal affairs and the good OCPD Chasimba.
 - viii. Therefore, he believes that the Applicant's Application dated 4 April 2024 has no merit and that the order for stay granted by the Court should be set aside.

5. Analysis and Determination

6. The instant Application seeks to set aside the ex parte orders issued by this Court on 14 February 2024 to allow the applicant/Respondent to file their response and the Application before this Court.
7. Courts have the discretionary power to set aside ex parte judgment, with the primary aim being that justice should prevail. The courts are not required to consider the merits of a defense when applying this nature (See *Jiangxi Khongmei Eng. Company Ltd v Maelo* (Civil Appeal E040 of 2021) [2023] KEHC 25412 (KLR) Therefore, courts ought to look at the draft defense to the plaint and accompanying witness statements before proceeding to give its ruling as to whether the Applicant's defense raises triable issues.
8. In *Patel v E.A. Handling Services Ltd*, *Tree Shade Motor Ltd v D.T. Dobie Co. Ltd*, and *Maina v Muriuki* the courts held that the discretion of the Court should be exercised to avoid injustice or hardship resulting from accident, inadvertence, and excusable mistake or error. Further, in *Shah v. Mbogo & Another*, where the Court, while addressing the subject of discretion, stated that:

“The discretion is intended to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”



9. Further, as was held by the Court of Appeal in *CMC Holdings Ltd v. Nzioki*:

“In an application for setting aside ex parte judgment, the Court exercises discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law, a court of law's discretion in deciding whether to set aside an ex parte order was meant to ensure that a litigant does not suffer injustice or hardship due to, amongst others, an excusable mistake or error. It would not be a proper use of such discretion if the Court turned its back to a litigant who demonstrates such an excusable mistake, inadvertence, accident, or error. Such an exercise of discretion would be the wrong principle. In the instant case, the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgment was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so, she drove the appellant out of the seat of justice empty-handed when it had what might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter that arises from the decision of the learned magistrate in dismissing the Application for setting aside the ex parte judgment is that in so dismissing the same Application, the learned trial magistrate does not appear to have considered whether or not the defense which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only the reasons why the defense was not filed or, for that matter, why the Applicant failed to turn up for the hearing on the hearing date but also whether the Applicant has a reasonable defense which is usually referred as whether the defense if filed already or if the draft defense is annexed to the Application, raises triable issues. In such cases, the Court has wide discretion to set aside ex parte judgment. In the instant case, the defense and counterclaim were already in the file when the matter was heard ex parte, and the trial magistrate stated that she considered the same and dismissed the same defense and counterclaim when the appellant was not in Court to put forward its case. Further, certain matters raised in the defense were not considered and could not be considered without the appellant's input. What the Trial Court should have done when hearing the Application to set aside the ex parte judgment was to ignore her judgment on record and look at the matter afresh, considering the pleadings before her and see if, on their face value, a prima facie triable issue (even if only one) was raised by the defense and counterclaim. If the same was raised, whether the reasons for the appellant's appearance were weak, she was legally bound to exercise her discretion and set aside the ex parte judgment to allow the appellant to put forward its defense. Of course, in such a case, the Applicant would be condemned in costs or even ordered to pay thrown-away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have, in the same way, looked at the pleading and considered whether the defense raised a triable issue. If so, then the appeal should have been allowed.”

10. I have read and considered the grounds relied on by the Respondent in support of his Application dated 4 April 2024 seeking the setting aside of this Court's orders issued on 14 February 2024. In a nutshell, the Respondent disputes service and denies knowledge of the suit. Further, the Respondent contended that his formidable defense raises triable issues. The Respondent also invoked constitutional principles on the right to be heard and own property.



11. I note that these proceedings emanated from the orders of the Cooperative Tribunal in [*Tribunal Case CTC No. 389. E480 of 2022*](#), wherein a similar application seeking a stay of execution had been filed and was successfully challenged by the Applicant. Vide its ruling dated 3 August 2023, the said Tribunal discharged the stay orders initially granted in the case. Thus, the Applicant was at liberty to proceed with the execution by attachment. There is no indication whether the Respondent challenged the Tribunal's ruling through an appeal or a reference.
12. Further, given the history of the case, the Respondent cannot be heard to argue that he was unaware of the suit. While the Respondent also contended that he has a formidable defense in the case, no evidence of this was demonstrated. Given the foregoing, it is clear to this Court that the Respondent is hell-bent on avoiding and frustrating his financial obligations to the lender, and this Court, being both a court of law and equity, cannot aid the Respondent in his endeavor.
13. Away from the substance of the Application, I find myself drawn to comment on the form of the Application dated 4 April 2024 in the manner in which it was drawn. How the Application was drawn has left a lot to be desired. Casualness has slowly crept into law practice, especially in the form of pleadings and applications filed in Court. The instant Application is a shining example of that casualness. Courts should be able to guess what a party meant in their Application.
14. Therefore, the upshot of the foregoing is that I find no merit in the Respondent's Application dated 4 April 2024. Thus, the court makes the orders;
 - i. Accordingly, the Application is dismissed with orders regarding costs to the Respondent/ Applicant Jared Omondi Mukunga t/a Jabri Enterprises.

DATED AND DELIVERED AT NYANDARUA THIS 26TH DAY OF JULY 2024

CHARLES KARIUKI

JUDGE

