



REPUBLIC OF KENYA



KENYA LAW
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Paksons Enterprises Limited v Kipkoech t/a Paksons Agro Veterinary Solutions & another (Civil Suit 4 of 2018) [2024] KEHC 13235 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL SUIT 4 OF 2018
JK SERGON, J
OCTOBER 30, 2024**

BETWEEN

PAKSONS ENTERPRISES LIMITED PLAINTIFF

AND

**PATRICK KIPKOECH T/A PAKSONS AGRO VETERINARY
SOLUTIONS 1ST DEFENDANT**

THE HON ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. The application coming up for determination is a notice of motion dated 14th March, 2024 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That this Honourable Court be pleased to set aside its ex parte proceeding on the 6th February, 2024 and the matter be heard afresh.
 - (iv) That costs be in the cause.
2. The application is premised on the grounds set out on the face of the motion and the facts deponed in the supporting affidavit of Patrick Kipkoech, the applicant herein.
3. The applicant avers that his advocate on record informed him that this matter proceeded ex parte and that the same was due for judgement on 28th March, 2024.
4. The applicant avers that the matter came up for hearing on 11th October, 2023 but was adjourned because their documents were not on record and the same had long been sent to the email provided but were yet to be actioned by the registry. The applicant further avers that these documents were paid



for on 2nd June, 2024 through an invoice. The applicant avers that the hearing was scheduled for 6th February, 2024.

5. The applicant avers that they made efforts to confirm that the documents were received in the court registry and to ensure that the received copies were sent back for service upon the other parties but to no avail.
6. The applicant further avers that on 6th February, 2024 the matter was to be adjourned to enable them access the filed documents and effect service. The applicant stated that their attendance was virtual and that, their advocates on record attempted to log in severally but were not admitted to the session.
7. The applicant avers that the documents for his defence case are now in order and it would therefore be unfair to deny him a chance to ventilate his defence.
8. The applicant avers that he is ready to abide with any orders given by the court as a precondition to the grant of the orders.
9. The respondent filed a replying affidavit sworn by Wesley Rotich, one of the Directors of Paksons Enterprises Limited in response to the application.
10. The respondent avers that since the inception of the matter herein and throughout the entire proceedings, the defendant/applicant's counsel has always been served prior to the date in court and that the defendant/applicant's counsel had the tendency of not attending court even after being properly served by the plaintiff.
11. The respondent also averred that on 6th February, 2024 the defendant/applicant's counsel did not attend court and the court directed that the matter proceed for hearing and in the absence of the defendant/applicant or their advocates and the defence case was closed for non-attendance.
12. The respondent further stated that when the matter came up for hearing on 11th October, 2023 the defendant/applicant's counsel sought an adjournment on the basis of service of their documents and after that he did not attend court on the hearing date which was taken by consent of both parties. The respondent deponed that no plausible reason had been offered by the defendant/ applicant for non-attendance thereby warranting this court to reopen the case for fresh hearing.
13. The respondent avers that the application is an abuse of court process and the applicant is intent on delaying the delivery of justice. The respondent deponed that the defendant/applicant had taken about 7 years to file and serve their documents as required.
14. The respondent avers that in the unlikely event that this Court finds merit in the frivolous application, they would be seeking a throw away cost of Kshs. 50,000/= and that the matter be set down for defence hearing on the earliest date.
15. I have considered the pleadings filed by both parties and the issue (s) for determination is whether this court ought to set aside its ex parte orders issued on 6th February, 2024 and reopen the case for defence hearing.
16. On the issue of setting aside ex parte orders, section 3A of the Civil Procedure Act provides that; "Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."
17. Whereas Order 12, rule 7 of the Civil Procedure Rules states that; "Where under this Order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just."



18. I find that the reason given by the applicant for failing to attend court to plausible and excusable. This is a proper case for the court to exercise its discretion in favour of the applicant.
19. I find the reason offered to be reasonable and excusable. I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard, the opportunity of prosecuting his case.
20. The court of appeal in the case of Richard Nchapai Leiyangu v IEBC & 2 others [2013] eKLR expressed itself as follows:- “The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
21. The application is hereby allowed with the following consequential orders;
 - i. The ex parte orders issued on the 6th day of February, 2024 are set aside.
 - ii. This suit should be reopened and should set for defence hearing within 30 days of this ruling.
 - (iii) The applicant to pay the respondent thrown away costs assessed Kshs. 20,000/= within 21 days.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 30TH DAY OCTOBER, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Miss Chepkemai for 1st Defendant/Applicant

LLutukai holding brief for Madowo for Plaintiff

