



REPUBLIC OF KENYA



KENYA LAW
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Stitching Medical Credit Fund v Mitunguu Hospital Ltd & 2 others (Commercial Case E007 of 2023) [2024] KEHC 15130 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEHC 15130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
COMMERCIAL CASE E007 OF 2023
HM NYAGA, J
NOVEMBER 28, 2024**

BETWEEN

STITCHING MEDICAL CREDIT FUND PLAINTIFF

AND

MITUNGUU HOSPITAL LTD 1ST DEFENDANT

HARRIET MUGITO KIAMBI 2ND DEFENDANT

ELIAS KIAMBI MUTUEANDU 3RD DEFENDANT

RULING

1. The Application for determination is the Notice of Motion dated 5th July, 2024. It seeks the following orders:-
 - i. Spent.
 - ii. Spent.
 - iii. That the Honourable Court be pleased to set aside the Interlocutory Judgment entered in their matter on 29th June, 2023 and the Defendants be allowed to defend the suit.
 - iv. That the annexed draft defence by the Defendants be deemed and properly filed and served.
 - v. That the Honourable Court be pleased to issue any other order that it deems fit in the circumstances.
 - vi. That the costs of this application be provided for.
2. The Application is propped by the grounds set out on the face of it and is supported by the affidavit sworn by Elias Kiambi Mutueandu, the 3rd Defendant/Applicant.



3. In a nutshell, it is the Applicant's case that upon initiation of this suit, the Defendants engaged the law firm of M/s Githinji Kirigiah & Co. Advocates to act for them and the said advocate proceeded for filing a notice of appointment and memorandum of appearance on 30/05/2023. That on 07/06/2023, the Plaintiff's Advocates served the Defendant's previous Advocates and with summons to enter appearance, plaint, list of witnesses, statements by witnesses and list of documents.
4. That at the time of serving the said documents, the Plaintiff's Advocates failed to disclose that they had filed an application for entry of Interlocutory Judgement and serve the same. That the Plaintiffs failed to disclose that some payments had been made to it by the Defendants.
5. The Applicants aver that as a result of the Interlocutory Judgement, they will be condemned unheard, yet they have a good defence to the claim by the Plaintiff. That no prejudice will be caused to the Plaintiff since they failed to disclose material facts while serving the pleadings in the suit.
6. The Plaintiff/Respondent opposed the application, through an affidavit sworn by Michael Muya, advocate for the Plaintiff.
7. In brief, the Respondent states that this suit was filed and summons extracted on 15/05/2023. That the Defendants were served with the summons and pleadings herein on 18/05/2023 through their official email address and whatsapp numbers obtained in the documents signed by the parties in respect to the loan facility. That on 24/05/2023, the firm of Kithinji Kirigiah & Co. Advocates entered appearance on behalf of all the Defendants. That on 07/06/2023 the Plaintiff physically served the summons, plaint and pleadings herein upon the said advocate, who acknowledged receipt. That the Defendant failed to file defence and on 19/06/2023, and the Plaintiff proceeded to request for judgment in default of the defence. That interlocutory judgement was entered on 29/06/2023. That on 30/06/2023, the Defendants' Advocate were then notified of entry of the judgment and the Plaintiff proceeded to file its bill of costs dated 11/06/2023 to which a notice of taxation was issued on 24/10/2023. Subsequently a decree was dated 23/05/2024 was obtained and a certificate of costs issued. Thereafter warrants of execution were issued.
8. It is the Respondent's position that the default judgment entered herein was lawful and regular. That the Defendants were indolent in ignoring the statutory timelines and have failed to justify their delay in acting.
9. The Respondents further stated that although this court had discretion in the matter, the Applicant have not provided sufficient or satisfactory explanation for their failure to file defence when they had the opportunity. It is averred that the Applicants are out to obstruct and/or delay the course of justice.
10. It is also stated that the defence accorded does not raise triable issues and only contains mere denials, assertions and even an admission.
11. The parties filed their respective submissions, which I will not rehash. It suffices to state that I have considered them and will refer to them.
12. The issues for determination are:-
 - a. Whether the interlocutory Judgement was regular, lawful or otherwise.
 - b. Whether the Applicants have provided sufficient grounds to set aside the judgement herein.
13. It is well settled law that where a judgement is found to have been irregularly entered, then the same ought to be set aside ex debito justitiae. If on the other hand, the court is to find that the Judgment in



question was regular, the court has a discretion to set it aside, if there are sufficient reasons for doing so and that the court is satisfied that there is a defence on merits.

14. This point was stressed by the Court of Appeal in *James Kanyita Nderitu Vs Maries Philotas Ghika & Another* [2016] eKLR, where it stated that:

In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice such party is likely to suffer.

[J]udgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.

15. This was also held in the case of *John Muthee Ngunjiri Vs Ali Ibrahim* (2021) eKLR cited by the Applicant.
16. I will begin by examining whether the default judgment herein was regular or not.
17. From the court record, the erstwhile advocates for the Respondents entered appearance on 30/05/2023. The memorandum of appearance was filed alongside a notice of appointment of advocates.
18. Having duly entered appearance through an advocate, it is thus not possible to find that the Applicants were never served with the summons. Having entered appearance upon service, the Defendants did not file any defence with the prescribed time. This resulted in the Plaintiff requesting for judgment in default of defence, on 20th June, 2023. Judgement in default of defence was subsequently entered on 29th June, 2023.
19. In my view there is nothing unlawful or irregular about the Judgment. The Plaintiffs acted as provided for being the rules.
20. Even assuming that there was no service of the pleadings as alluded to, nothing prevented the Defendants upon entering appearance, from requesting for the same. I find this line of argument to be an afterthought.
21. So since there is a regular default judgement, the next issue is to determine whether there are good grounds to set aside the same. In doing so the point for consideration and determination is whether



on the facts and circumstances the court ought to exercise its discretion in favor of the defendant/ applicant and set aside the judgment. In determining whether or not to exercise its discretion to set aside the court has to take into account the reasons that may have occasioned default in appearance and such reasons and/or explanations as the applicant may adduce. (See John Muthee Ngunjiri Vs Ali Ibrahim (supra).

22. The Court of Appeal in the case of James Kanyiiita Nderitu & Another -Vs- Marius Phillotas Chikas & Another (2016) eKLR summarized the criteria upon which the courts exercise discretionary jurisdiction as follows: -

“In regular default judgment, the defendant will have been duly served with summons to enter appearance or to file a defence, resulting in default judgment. Such a defendant is entitled under Order 10 Rules 11 of the Civil Procedure Rules to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole, it is in the interest of justice to set aside the default judgment, among others.”

23. This was also the holding in Patel Vs East Africa Cargo Handling Services Co. Ltd (1974) E.A. 75. The court held;

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

24. The Applicants have pointed an accusing finger at their erstwhile advocates for failing to file defence. It is argued that the mistake of an advocate ought not to visit upon the client.

25. I have considered the matter at length. Indeed, it is evident that the applicant’s erstwhile advocates, having entered appearance, ought to have taken steps to file defence and any other subsequent pleadings as required by the Rules. This did not happen, hence the current situation.

26. This plea that the mistakes of counsel ought not to be visited upon the client is a common one and any advocate who fails to perform a duty due to his client will invariably seek relief on this ground.

27. In the case of BELINDA MURAS & 6 OTHERS –VS- AMOS WAINAINA [1978] KLR Hon Madan J.A. (as) he then was defined what constitutes a mistake as follows:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.” [emphasis mine]



28. Similarly in Phillip Chemwolo & Another –Vs- Augustine Kubede [1982-88] KLR 103 at 1040 Apaloo J.A. as he then was stated thus:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit”. [emphasis mine again]

29. It is common knowledge that a client who instructs an advocate to act for him/her relies on that advocate’s professionalism to so act for him/her. It would thus be harsh to punish such a client on account of errors of omissions of their advocate.

30. The period between the dates entry of appearance and the request for judgement was just one month. The applicant moved the court as soon as it discovered that there was judgment herein. So it can’t be argued that the applicant was indolent. I am prepared to accept the explanation given. It is only fair and just that the defendant have a chance to defend the suit on merits.

31. This is a fundamental rule of natural justice. In the case of [*Martha Wangari Karua –VS- IEBC Nyeri Civil Appeal No.1 of 2017*](#) the Court of Appeal held as follows:-

“The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be..”

32. The next issue to determine is whether there is a defence to the Plaintiff’s claim. I have considered the draft defence which raises several issues inter alia:-

- a. That the Defendants have made part payment.
- b. That the Plaintiff is exercising a charge over the Defendant’s property.

33. I find these to be triable issues. The exercise of the court’s discretion is meant to avoid hardship that may be occasioned to a party and is not meant to aid a party who is out to obstruct at delaying the cause of justice. This point, which needs no emphasis, was reiterated in Shah –Vs- Mbogo & Another [1967]6.A U7, where the Court of Appeal for Eastern Africa held that:-

“Applying the principle that the court’s discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused.”

34. I do not think that the applicant can be said to be out to obstruct the cause of justice. They deserve their day in court and should therefore not be dislodged from the seat of justice. The amount involved is substantial by any measure.

35. The Plaintiff’s only prejudice will be in respect to costs incurred so far and being asked to present its case on merits. Thus the setting aside of the judgement will only be a mere inconvenience. They can be adequately compensated by way of costs.

36. Having considered the matter at length, I am inclined to set aside the default judgment on the following terms:-

- a. The Applicants are to pay thrown away costs to the Plaintiff/Respondent which I assess at Kshs. 50,000/- (Fifty Thousand Only) payable within 30 days from the date of this ruling.



- b. The Applicants are to file and serve their statement of defence within the next 14 days and their witness statements, list of witnesses, document and list of documents within 14 days thereafter.
- c. The Plaintiff/Respondent is granted leave to file a reply to defence, if necessary within 14 days of services of the said defence.
- d. The Applicants shall also bear the Advocates, costs to be agreed upon or taxed by the Deputy Registrar as provided for under Rule 55 of the Auctioneers Rules.
- e. In default of compliance with Order (a) above, the judgement shall be automatically reinstated and the Plaintiff/Respondent shall be at liberty to execute.
- f. The application dated 09/08/2024 by the Auctioneer is dispensed with as it has been overtaken by events subject to the orders hereinabove.

H.M. NYAGA

JUDGE

SIGNED, DATED AND DELIVERED AT MERU THIS 28TH DAY OF NOVEMBER 2024.

H. M. NYAGA

JUDGE

In the presence of :-

