



REPUBLIC OF KENYA



**Jubilee Insurance Company Limited v Nyamu (Civil Appeal E576 of 2021)  
[2023] KEHC 2914 (KLR) (Civ) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2914 (KLR)

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

**CIVIL  
CIVIL APPEAL E576 OF 2021**

**JK SERGON, J  
MARCH 31, 2023**

**BETWEEN**

**JUBILEE INSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**MERCY WANJA NYAMU ..... RESPONDENT**

*(Being an appeal against the ruling and order dated 12th August 2021 given by the Chief Magistrate's Court at Nairobi (Hon M.W Murage (Ms) in CMCC No.849 of 2020)*

**JUDGMENT**

1. The appeal herein is against the ruling of the trial court (Hon. M. W. Murage) in Milimani CMCC No. 849 of 2020 wherein the trial court dismissed the appellant's application dated 24.11.2020 and in which it sought for the orders for setting aside of the default judgment and for unconditional leave to file its defence within 14 days after hearing of the said application.
2. The appellant being aggrieved preferred this appeal and put forward the following grounds:
  - i. That the learned Magistrate erred in law and in fact, in finding that the default judgment entered 17<sup>th</sup> September, 2020 was obtained regularly, despite evidence that due process was not served upon the appellant with regard to the request for judgment leading up to entry of default judgment.
  - ii. That the learned Magistrate erred in law and in fact, in failing to find, consider or appreciate at all, that the request for judgment dated 9<sup>th</sup> July 2020 was not duly served upon the appellant herein, thereby denying the appellant of the



right to a fair process, and allowing the respondent to steal a march on the respondent.

- iii. That the learned Magistrate erred in law and in fact and exercised her discretion wrongly, by failing to take into account matters which she ought to have taken into account.
- iv. In particular, the learned Magistrate erred in fact and in law in failing to consider that the appellant had a valid reason and explanation for its failure to file a defence, in that parties were engaged in good faith out of court negotiations aimed at resolving the matter amicably whereby there was an implied and/or express agreement that the respondent would withhold filing of its defence pending the outcome of said negotiations.
- v. That the learned Magistrate erred in fact and in law in failing to find that the appellant's draft statement of defence raises triable issues, and further failed to exercise her discretion in a manner that would allow for determination of the dispute between the parties on its merits, as opposed to technicalities.
- vi. That the learned Magistrate erred in law and in fact in dismissing the appellant's application dated 24<sup>th</sup> November, 2020 and failing to set aside the default judgment entered on 17<sup>th</sup> September 2020.
- vii. That the learned magistrate misapprehended both the facts and the applicable law in the matter, disregarded the submissions and relevant authorities that were presented before her and arrived at a decision that was contrary to the law.
- viii. In the circumstances, the learned magistrate failed to do justice as regards the matter that was before her and accordingly erred in law by arriving at the decision that she did, and which ultimately resulted in a gross miscarriage of justice.

3. Directions were given that the appeal be canvassed by way of

written submissions. Accordingly, the parties complied and filed their respective submissions. I have also considered the rival written submissions found the issues for determination put forward by both parties to be as follows:

- i. Whether the learned Magistrate erred in law and in fact in dismissing the appellant's application for setting aside interlocutory judgment.
- ii. Who should bear the costs of the appeal

4. On the first issue, the appellant submitted that the respondent gained the interlocutory judgment through deceit, fraud, and hoodwinking by omitting to serve them through their advocates on record with court process, therefore the trial court had the jurisdiction to reverse it as of right rather than at its discretion.

5. The appellant further submitted that the respondent additionally acquired the default judgment irregularly by hiding the ongoing out-of-court settlement negotiations, which is an affront to the principles of natural justice and a violation of the standards of practice and procedure.



6. On this the appellant relied on the case of *James Kanyita Nderitu v Maries Philotas Ghika & Another* (2016) eKLR it was held:

“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 appearance 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 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 other”

7. It is the appellant’s submission that the setting aside the interlocutory judgment it will not occasion any prejudice to the respondent. On this the appellant relied on the case *Mbogo and another v Shah* (1968) E.A 93, the Court of Appeal stated that:

“The court’s discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice, the motion should therefore be refused”

8. The appellant further stated that it has neither delayed the cause of justice nor caused hardship on the respondent and all it did was to sought to do was resolve the matter amicably outside the court process. On this argument the appellant relied on the case of *Elizabeth Kavere & another v Lilian Atho & another* (2020) eKLR where the court stated that:

“Although the default judgment was properly and regularly entered having been on a claim of a liquidated sum the Plaintiff and Summons whereof was properly served on the defendant’s agent in accordance with the rules of the court, the existence of a triable issue warrants the grant of leave to defend. In accordance with the authorities leave to defend in the circumstances where there is a triable issue but a lawful regular judgment is granted upon reasonable conditions imposed by the court.

46. Receipt of Ksh.2,600,000/- is admitted by the 1<sup>st</sup> defendant in the very terms of the joint venture agreement herein. I consider that the grant of leave to defend which occasions the setting aside of the otherwise regular judgment should be made conditional upon the deposit into court of the said sum, receipt whereof is acknowledged by the 1<sup>st</sup> defendant and which is the basis of the plaintiff’s claim for profit and damages for breach of contractual duty to account. However, as regards the claim based on the profits at Ksh.22,937,900/- on the amount, which the defendant denies, there should be unconditional leave to defend. Accordingly, as a condition for the grant of leave to defend the suit, the 1<sup>st</sup> defendant shall, within 14 days from the date of the ruling, deposit into court the sum of Kenya Shillings Two Million Six Hundred Thousand (Ksh.2,600,000/-), in default whereof the conditional leave to defend granted herein shall lapse and be of no effect”



9. In retort, the respondent submitted that the interlocutory judgment entered by the learned magistrate is regular and the court was within its jurisdiction to enter judgment against the appellant. On this the respondent places reliance on the case of James Kanyita Nderitu (supra) where the Court of Appeal held 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 appearance or to file defence, resulting in default judgment.”

10. The respondent further submitted that contrary to what the appellants claim, parties did not agree at the time of discussions that the appellant would not file a defence. This claim is untrue and intended to deceive the court, and the appellants have not provided any evidence to support this claim.

11. It is the respondent’s submissions that out of court negotiations is not a ground for refusal to file a defence as nothing prevented the appellant from filing a defence and later engage them and notify the court of the same.

12. The respondent on this argument relied on the case of National Bank of Kenya v Ndzai Kayanijonathan HCC No.775 of 2002 as cited in Oriental Commercial Bank (K) Ltd v Maendeleo Pharmacy 2006 (K) Ltd & Others (2007) eKLR where Hon.Ringera J stated as follows:

“In the final analysis this to me is a case where a defendant who was duly served did not take the step of entering appearance or filing a defence in time. He has no explanation for the default. And he has no defence on the merits of the suit. In those circumstances it cannot be in the interest of justice to set aside the judgment obtained by the plaintiff on any view of the jurisprudence pertinent to setting aside default judgment. To accede to the Defendant’s request would be to assist a person who is obviously bent on delaying the course of justice. That, I refuse to do.”

13. As I noted earlier, the application which was before the trial court sought for orders for setting aside of the ex-parte judgment dated 12.08.2021 and leave to file defence and have the matter heard on merit. Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an ex parte judgment for default of appearance and defence. The principles applicable under this rule were laid down by the Court of Appeal in Pithon Waweru Maina v Thuka Mugiria [1983] eKLR and restated in Toshike Construction Company Limited v Harambee Co-operative Savings & another [2019] eKLR as:-

“(a)Firstly, 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 conditions on itself to fetter the wide discretion given it by the rules. Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76 C and E

(b)Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA

(c)Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from



the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [supra]."

14. In *Abdirahaman Abdi v Safi Petroleum Products Ltd. & 6 others* [2011] eKLR, the Court of Appeal while discussing the input of article 159 of *the Constitution* in dispute resolution held:-

".....Article 159(2)(d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its documents. The court in that regard exercise judicial discretion".

15. Similarly in *Nicholas Salat v IEBC & 6 others*, CA (Application) No 228 of 2013, the Court of Appeal further held that:-

"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."

16. It is therefore clear from the aforesaid provisions that the court has power to set aside the default judgment and allow the appellant herein to file a suitable defence. However, such leave is not to be granted as a matter of course. The court must satisfy itself that there is a good explanation that has been offered to set aside such judgment and upon such terms that it would deem fit in the circumstances for the reason that such action would definitely be taking a respondent back in time causing delay in the conclusion of their case especially where the matter had proceeded to formal proof and a judgment given.
17. I am satisfied with the appellant's explanation that indeed they were trying out of court of settlement which the courts have been encouraging but by the look of things, it did not bear any fruits and in this case, it would be only fair if the appellant is given a chance to defend themselves and also a right to be heard.
18. A court should not assist a party who had "deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice" as was held in the case of *Shah v Mbogo* (Supra). However, having had due regard to the cases inter alia *John Peter Kiria & another v Pauline Kagwiria* [2013] eKLR and *Kenya Pipeline Company Limited vs Mafuta Products Limited* [2014] eKLR amongst several other cases where it was held that no party should be shut out from ventilating its defence, that a court may set aside interlocutory judgment if a party had a reasonable defence which raises triable issues and that at all possible times, cases should be heard on merit.
19. It is my considered view that despite the appellant having taken long to prosecute this matter, it is only fair and just to allow it to enjoy the right to be heard as enshrined in Article 50(1) of *the Constitution* of Kenya. The appellant has shown its intentions to be heard and it would not be in the interest of justice



to deny it an opportunity to be heard. The prejudice that the respondent would suffer for the delay in the conclusion of his case by having it heard on merit can be compensated by way of costs.

20. In the end, the appeal is found to be meritorious. It is allowed. Consequently, the ruling/order dismissing the application dated 24<sup>th</sup> November, 2020 is set aside and is substituted with an order allowing the aforesaid motion. Therefore, the default judgment is set aside and the appellant is granted unconditional leave to defend the suit. A fair order on costs is to order which I hereby direct that each party meets its own costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 31<sup>ST</sup> DAY OF MARCH, 2023.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

