



**I & M Bank Limited v Omolo (Civil Case 11 of 2020)  
[2023] KEHC 18002 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18002 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL CASE 11 OF 2020  
RE ABURILI, J  
MAY 30, 2023**

**BETWEEN**

**I & M BANK LIMITED ..... APPLICANT**

**AND**

**NELSON ASINO OMOLO ..... RESPONDENT**

**RULING**

1. This suit came up for hearing on March 13, 2023 after the court fixed the hearing date with the consent of both parties' advocates.
2. On the latter date, the Plaintiff's witness was present while the Defendant was absent. Mr Okero advocate for the Defendant informed the court that his client had travelled from Nairobi the previous night but that he had fallen ill so counsel sought an adjournment on behalf of his client. He submitted that he had shared his predicament with Mr Maganga counsel for the Plaintiff and that he was to file documents in court to prove illness.
3. Mr Maganga confirmed that Mr Okero had shared with him the predicament but that the plaintiff's client's witness had travelled from Nairobi. The court observed in writing that albeit there was an allegation of the Defendant being ill, no evidence was available to prove the allegation.
4. I declined to grant a blanket adjournment and directed that Plaintiff's witness who was present in court to testify upon which, with proof of the Defendant's illness, the court was to consider that fact once the evidence was tendered in court.
5. The Plaintiff's witness testified and was cross examined and re-examined and the Plaintiff closed its case. That was at 10.58am. Mr Okero sought for an adjournment saying he was unable to reach his client. The court granted him an adjournment until 11.30am and proceeded with the other matters.



6. The file was recalled at 1.08pm and still, the defendant was nowhere. Mr Okero informed the court that he was unable to procure evidence of his client's illness saying he only had instructions his client was indisposed. Mr Maganga left the matter to court.
7. The court gave a detailed ruling on the matter of adjournment and concluded that there was no evidence of the Defendant's indisposition and declined to grant the adjournment sought. Parties were directed to file written submissions if any and judgment was set for April 17, 2023.
8. On the latter date and as scheduled, I delivered judgement in the presence of both parties' counsel.
9. Vide a Notice of Motion dated April 19, 2023, filed under certificate of urgency, the defendant seeks for the setting aside of the judgment delivered on April 17, 2023 and the order of March 13, 2023 closing the defendant's case be set aside; and the defendant's case be reopened to enable him present his case for the defence and that costs be in the cause.
10. The grounds upon which the application is predicated are among others, that the defendant was indisposed and that the nature of his indisposition made it impossible to reach his advocate with the said documents or to attend court after treatment, that the defendant had a right to be heard in defence; that it was in the wider interest of justice that he be allowed to present his defence; that the Plaintiff would suffer no prejudice if the judgment is set aside as it can be compensated by an order for payment of costs for hearing date thrown away (sic); that refusal of the application would drive him out of the judgment seat and deny him a fair hearing yet his non attendance on the hearing date and failure to produce evidence of his indisposition and treatment was due to his illness over which he had no control.
11. The defendant also swore an affidavit in support on April 19, 2023 wherein he deposes how he travelled from Nairobi on March 12, 2023 ready to attend to this case when he fell ill in the evening, notified his counsel, took medication from a pharmacy, did not recover, went to hospital on the morning of March 13, 2023, notified his counsel who advised him he would seek an adjournment on his behalf after notifying the other party's counsel; that he was too ill to communicate with his counsel, that he only got treatment notes after being attended to in hospital and was given bedrest. He annexed copy of treatment notes for March 13, 2023 from Kisumu County Hospital.
12. Opposing the Notice of Motion, the Plaintiff's counsel filed Grounds of Opposition dated May 12, 2023 asserting that the application is unmeritorious because there is no legal substance in the application and that no prejudice had been demonstrated to be suffered should the application be disallowed as the defendant expressly admitted his indebtedness.
13. That the application is a red herring to merely delay issuance of statutory Notices which the Applicant/ Respondent was yet to do.
14. The application was argued orally with Mr Okero canvassing on behalf of the Defendant while the Plaintiff was represented by Mr Maganga Advocate. The parties' advocates reiterated the averments by their respective clients as stated above. Mr Okero emphasized that his client had an arguable defence as the Plaintiff had no right to sell the defendant's property and further that there is no indebtedness arising from the letter of offer dated November 22, 2006 subject of these proceedings.
15. On the part of the plaintiff, it was argued that that the defendant admitted indebtedness and that even if this court sets aside the judgment, it will still arrive at the same decision. That the defendant can still challenge the statutory notices which the court rightly granted leave to issue.



## Determination

16. I have considered the application as presented and the opposition thereto. The issue for determination is whether the orders sought are merited. It is important to note that the power to grant or not to grant an adjournment is a discretionary one and in the exercise of that discretion, the court considers the reasons advanced for the application; any prejudice that may be suffered by the party being denied the adjournment and whether costs would adequately compensate.
17. It is not lost to this court that public policy as espoused in Article 159 of the *Constitution* and the overriding objective of the *Civil Procedure Act* at Section 1A thereof is in favour of expeditious disposal of cases from courts.
18. In the instant case, the court had fixed a hearing date in the presence of both parties' counsel and warned of no adjournment as the case had been pending since 2020 without any meaningful steps being taken to have it disposed of on merit.
19. The court nonetheless flexed its muscles when it was informed that the defendant who had travelled from Nairobi to Kisumu the previous day, solely for this case had been taken ill and had sought medication.
20. All that the court asked the defence counsel was simple – to avail to court copies of medical evidence that his client was indisposed.
21. Even after taking the evidence from the Plaintiff's witness, the court adjourned the case for defence hearing from 10.58 am until 1.08pm just waiting for medical evidence of the defendant's indisposition to no avail.
22. The question is what was the court supposed to do? to adjourn the hearing yet it had been informed that medical evidence of the defendant's indisposition was underway in the morning to no avail?
23. Although the defendant now strongly cites his right to be heard and to a fair hearing, he is short of telling the court his duty to the court and tying the court to its seat waiting for him to just sent the evidence that he was in hospital or was unable to attend court for reasons of his indisposition and only waited after the court had delivered judgment is when he came to court demanding that his defence be reopened and that he be heard in defence. He claims that his right to be heard has been violated. I disagree.
24. This court need not be reminded of its unfettered discretion in setting aside judgement or in according a party an opportunity to be heard save that parties often take advantage of the leniency of the court in according such opportunity or exercise of discretion and come to court demanding their rights as if the court would under any circumstances, be in a position to deny rights when its constitutional duty is to promote and protect rights as guaranteed by the same Constitution. This court is under no duty to deny any party the opportunity to be heard because it strongly believes in access to justice and the principle that justice is better served when both parties to a dispute are accorded opportunity to be heard on merits, to enable each party to ventilate their issues, unless it is demonstrably shown that the party in question has sought to merely delay or obstruct the cause of justice.
25. In this case, I take cognisance of the fact that the defence counsel, Mr Okero, did actively and fully participate in the Pre-trial conference and taking of directions and fixing of the hearing date and at the hearing, he was manifestly present despite his client literally letting him down by failing to communicate on his whereabouts that morning of the hearing and or sending over the medical



evidence that the was indisposed only to appear after judgment was delivered to seek for the discretion of the court.

26. Nothing stops this court from declining to exercise discretion in favour of a party who seeks by design, to delay the expeditious disposal of a suit. The party's rights to be heard must be balanced with the duty to assist the court to expedite justice delivery.
27. However, having perused the medical notes dated March 13, 2023, I am satisfied that the Defendant was indisposed and was attending treatment only that he did not dispatch that evidence to his advocate who was actively engaged in his case before court.
28. For the above reasons, I exercise discretion and review and set aside the order closing the defendant's case and substitute it with an order reopening the defence case for hearing.
29. Consequently, I set aside the Judgment and Decree rendered on April 17, 2023. As the default by the Defendant to appear for the hearing was due to sickness, I order that each party shall bear their own costs of the application dated April 19, 2023.
30. The defence case shall be heard on 3/10/2023.
31. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF MAY, 2023**

**R. E. ABURILI**

**JUDGE**

