



REPUBLIC OF KENYA



**Odhiambo v Mwananchi Credit Limited & another (Civil Case  
E030 of 2022) [2023] KEHC 18011 (KLR) (Civ) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18011 (KLR)

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

**CIVIL**

**CIVIL CASE E030 OF 2022**

**JN MULWA, J**

**MAY 25, 2023**

**BETWEEN**

**LEONARD VICTOR ODHIAMBO ..... PLAINTIFF**

**AND**

**MWANANCHI CREDIT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LEONARD CHEGE MWANGI T/A LAAR AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before the court is the defendant's application dated 10/11/2022.

The applicant, Mwananchi Credit Limited seeks for an order that the interlocutory judgment entered against it on the 3/11/2022 be reviewed, varied, discharged and/or set aside.

It is premised on order 51 and 45 of the [Civil Procedure Rules](#) as well as sections 1A, 1B, 3A and 6E & 80 of the Act.

He is grounded on reasons stated at the face thereof and supporting affidavit of Daniel Wokabi, an advocate acting for the applicant sworn on the 10/11/2022.

2. In opposition to the application, a replying affidavit duly sworn on the 23/1/2022 was filed; upon which both parties have filed written submissions.
3. The court has carefully considered the parties' pleadings and the submissions.

The Applicant was duly served with the plaint and summons to enter appearance on the 3/10/2022 which is duly acknowledged by the advocates for the applicant but stated that he inadvertently and mistake failed to file the Memorandum of Appearance in time, which period lapsed on the 18/10/2022, but upon discovery of the mistake, filed the same on 3/11/2022 which is a period of about three



- (3) weeks, unaware that the plaintiff had requested for interlocutory judgment on the 21/10/2022, prompting the Applicant to move this court for setting aside of the judgment, and to be allowed to file a defence, which draft is annexed as an exhibit in the supporting affidavit, and which the court has considered.
4. By the said draft statement of defence, the applicant avers that there are several trial issues relating to the loan, repossession of the subject motor vehicle and computation of interest, and thus seeks that the same ought to be allowed as prayed.
  5. The Respondent/Plaintiff however states that there was no mistake by the defendant's advocate and were aware of the existence of the suit at all material times and that it has failed to take into account that it has continued to retain the subject vehicle hence inconveniencing the plaintiff as the vehicle was its only means of transport, that it continues to wear out and losing value due to contingencies of weather and other factors.
  6. Upon the above material facts, should the orders sought by the applicant be granted?

Order 10 Rule II *Civil Procedure Rules* empowers the court to set aside order vary ad exparte judgment entered in default of appearance and defence; but upon terms as the court may determine, and upon its discretion.
  7. The court of Appeal in the case *Pithon Waweru Maina V. Thuka Mugiria* [1983] eKLR held that: -

This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence, 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 to course of justice.
  8. The said positions continued to be a benchmark for setting aside of variation of judgments of order  
See also *David Kiptanui Yego & 134 others*, [202] eKLR; *Winne Wambui Kibinge & 2 others v Match Electricals Limited* [2010] eKLR wherein the court held that it: -

“It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit”.
  9. There is no dispute that the judgment on record is not regular; it is regular and while considering whether to set it aside or not, the court ought to consider the following factors; -
    - a. The length of the delay
    - b. Whether the defendant has given a justifiable reason for the delay.
    - c. Whether the draft defence is plausible with real prospect of success.
    - d. Prejudice that may be occasioned to the plaintiff should the judgment be set aside.
  10. The plaintiff has relied on the case of *Mwangi S. Kimenyi v AG & Another* [2014] eKLR where the court rendered that  

There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given for the delay-----“



11. The plaintiff states that the five (5) months period taken by the defendant to bring this application after entry of the interlocutory judgment is inordinate.

I have carefully considered the relevant period taken by the defendant to approach the court.

It is definitely not five months. To be precise, the interlocutory judgment having been entered on the 3/11/2022, and this application filed on or about 10/11/2022, then, the period of delay from when appearance ought to have been entered is just slightly over one month. By all standards, a one month's delay cannot be said to be inordinate, especially where the advocates for the applicant have stated the reason as an inadvertent mistake.

12. The court is by no means justifying the Advocates "inefficiency" in this regard as they are mandated to assist the court to ensure timely and efficient disposal of cases – as stated in the case *Southern Empire Traders v Nakuru Players Theatre Club* [2015] eKLR.

Ultimately the court opines that the delay is not inordinate and has been satisfactorily explained to the court.

13. On the draft defence and counterclaim which I have premised, several issues are evidently displayed, including the amount that the plaintiff states to have paid in surplus, to the tune of Kshs 245,354/=.

Thus, as ably stated in the case Peter V. EA 75,

---- a trial issue --- is an issue which raises a prima facie defence and which should go to trial for adjudication”.

14. The court has also considered the case *Rayat Training Co. Ltd v Bank of Barada & Tetezi House Ltd* [2018] eKLR.

Wherein, in exercise of its discretion, the court will consider inter alia if;

- i. The defendant has a real prospect of successfully defending the claim; or
- ii. It appears to the court that there is some other good reason why;
- iii. The judgment should be set aside or relied;
- iv. The defendant should be allowed to defend the claim.”

15. Having carefully considered the above, it is my finding that the Applicant/Defendant should be given an opportunity to defend the claims against it, as it is a cardinal rule of natural justice that condemning a party unheard should always be done as the last resort.

The defendant/Applicant will therefore be granted an opportunity to defend the suit upon terms.

16. Consequently: -

- a. The interlocutory judgment entered against the 1<sup>st</sup> defendant/Applicant is hereby discharged and set aside
- b. The 1<sup>st</sup> Defendant/Applicant shall file its statement of defence and counterclaim if any, within 7 days of this ruling.
- c. The Applicant/1<sup>st</sup> Defendant shall pay to the plaintiff throw away costs assessed at Kshs. 50,000/= within 30 days of this ruling.



- d. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall release to the Plaintiff motor vehicle registration No. KCW 350Q forthwith to await the hearing and determination of the suit.
- e. Cost of this application shall abide by the outcome of the case.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY, 2023**

**JANET MULWA**

**JUDGE**

