



**Ethics and Anti-Corruption and Economic Crimes Division v Otieno &
5 others (Anti-Corruption and Economic Crimes Civil Suit 24 of 2018)
[2023] KEHC 21310 (KLR) (Anti-Corruption and Economic Crimes) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 24 OF 2018**

EN MAINA, J

JULY 27, 2023

BETWEEN

**ETHICS AND ANTI-CORRUPTION AND ECONOMIC CRIMES
DIVISION PLAINTIFF**

AND

**BOB KEPHAS OTIENO 1ST DEFENDANT
CAROLYNE CHEPKEMOI SANG 2ND DEFENDANT
MAURICE ODIWUOR AMEK 3RD DEFENDANT
MICHAEL OWINO OWINO OORO 4TH DEFENDANT
ISAAC OUSO NYANDEGE 5TH DEFENDANT
JUDITH AKINYI OMOGI 6TH DEFENDANT**

RULING

1. By the Notice of Motion dated June 16, 2023 filed herein on June 20, 2023 supported by affidavit sworn on June 17, 2023 the 1st Defendant/Applicant seeks a review of this court's Ruling delivered on September 22, 2022.
2. The background is that on March 9, 2020 a judgment in default of defense was entered against the 1st Defendant/ Applicant by the Deputy Registrar of this court. Upon an application made by the 1st Defendant/Applicant on June 6, 2022 this court set aside the default Judgment and condemned the 1st Defendant/Applicant to throwaway costs of Kshs 150,000.



3. By the instant Notice of Motion, the 1st Defendant/Applicant seeks to have the order for thrown away costs reviewed. His application is expressed to be brought under Section 1A,1B,3A and 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and seeks orders as follows: -
 1. Spent
 2. That this Honourable Court be pleased to review and vary its order issued on September 22, 2022 setting aside the default judgment only to the extent of the throwaway costs of Kshs 150,000 awarded to the Plaintiff/Respondent.
 3. That the costs of this Application be in the cause.
4. The Application is premised on the following grounds as stated on the face of it and in the supporting affidavit of Bob Kephias Otieno, the 1st Defendant/Applicant herein:
 - 1) That this Honorable Court issued an order on September 2, 2022 setting aside the default judgment entered against the 1st Defendant/Applicant in this suit for want of prosecution.
 2. That the order awarded throwaway costs of 150,000 to the Plaintiff/Respondent.
 3. That at the time, the Honourable Court was not alive to the fact that the Plaintiff/Respondent herein had filed a myriad of cases against the 1st Defendant/Applicant.
 - 4) That the cases had been and some are still being litigated at great expense to the 1st Defendant/Applicant.
 - 5) That most recently, the Applicant was condemned to pay the judgment sum of Kshs 26,272,460 in ACEC Suit No 4 of 2018.
 - 6) That the throwaway costs awarded in this suit are excessive and punitive are likely to drive him away from the seat of justice.
 - 7) That the costs were awarded following an omission by the advocates previously on record for the 1st Defendant/Applicant to file a defense within the required timelines.
 - 8) That it is in the interest of justice that this Application be allowed.”
5. The Plaintiff/Respondent opposed the application through the Replying Affidavit of Grace Maina, Advocate, sworn on June 29, 2023. Both the Plaintiff and the 1st Defendant filed skeletal arguments and lists of authorities which this court has considered fully.

Issue for determination

6. The singular issue arising for determination is:

Whether the 1st Defendant/Applicant has met the threshold for review of the court’s ruling delivered on September 22, 2022.

Analysis and determination

7. The gist of the Application is that the thrown away costs ordered by this court were excessive and should be reviewed. The Applicant cites the provisions of Article 48 of the Constitution on access to justice which, decrees that any fee required shall be reasonable and shall not impede access to justice. He also relies on Section 27 of the Civil Procedure Act which provides for reasonable exercise of judicial discretion.



8. In opposing the Application, the Plaintiff contends that the costs were just and proportionate in indemnifying the Plaintiff for the delay occasioned by the 1st Defendant in filing his defense; that the quantum of costs is discretionary and that the 1st Defendant/Applicant has not demonstrated any error, mistake or misdirection warranting a review of the order for costs.
9. Thrown away costs are the payment of a party's costs for wasted preparation for a trial or other hearing. In this case the 1st Defendant/Applicant did not file a defence for close to 15 months upon entry of appearance. The judgment entered against him on March 9, 2020 was for all intents and purposes a regular judgment. The thrown away costs ordered by this court were intended to compensate the Plaintiff/Respondent for the time wasted by the default on the part of the 1st Defendant/Applicant. It is instructive that the application to set aside that judgement was filed two years after the entry of judgment.
10. Section 1A of the Civil Procedure Act obligates parties and their Advocates to assist the court in attaining the objectives of civil proceedings and where a party does not co-operate the court may sanction such a party. This inherent power is derived from Section 1A of the Civil Procedure Act as well as the Practice Directions of this court gazetted by the Hon. The Chief Justice on December 9, 2016, vide Gazette Notice No 7262. The directions enjoin parties to comply with the requirements, time limits and deadlines when filing pleadings, witness statements and documents as set out under the Civil Procedure Rules, (See Practice Direction No 11). Direction No 25 provides that non-compliance with the relevant Civil Procedure Rules, Orders and/or directions issued by the court may attract sanctions. The manner of determining such sanctions is provided at Direction No 27.
11. Order 10 Rule 11 provides that where a judgment such as the one in this case has been entered it may be set aside upon such terms as are just.
12. This court determined that what was just in the circumstances of this was to order the 1st Defendant/Applicant to pay thrown away costs and determined a figure which it considered reasonable. The thrown away costs are not fees and I need not go into the distinction between court fees and costs. A party or Advocate for a party who conducts themselves in the manner exhibited by the 1st defendant/Applicant ought to face the consequences of their indolence. That indolence is also evident in the period the 1st Defendant has taken to file this application. The order for thrown away costs was made on September 22, 2022 but this application was not filed until June 16, 2023, a period of close to nine months, a clear indication of the 1st Defendant/Applicant's contemptuous treatment of the rules and orders of this court. He has not even demonstrated his *bona fides* by depositing even a portion of the costs. A court of law much as a court of equity ought not to exercise its discretion in favour of an indolent party let alone one whose clear intention is merely to delay the finalization of a case.
13. It is trite that the jurisdiction for review is discretionary; the only fetter being that the discretion must be exercised judicially.
14. Costs are in the discretion of the court and in my considered view this court properly exercised its discretion given the circumstances of this case and there is no error apparent on the face of the record or new issue as is envisaged under Order 45 Rule 1 of the Civil Procedure Rules to warrant me to set aside the order or to review the costs. In my view this application is no more than a delaying tactic. The 1st Defendant/Applicant either pays the costs or risks the judgment being reinstated. The application has no merit and it is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 27TH DAY OF JULY, 2023.



E. N. MAINA
JUDGE

