



Mungania v Times U Savings & Credit Co-operative Society Ltd (Civil Appeal 1 of 2022) [2023] KEHC 26913 (KLR) (Civ) (15 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26913 (KLR)

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

**CIVIL
CIVIL APPEAL 1 OF 2022**

CW MEOLI, J

DECEMBER 15, 2023

BETWEEN

JACKSON KITHINJI MUNGANIA APPELLANT

AND

**TIMES U SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LTD RESPONDENT**

*(Being an appeal from the ruling of the Co-operative Tribunal at
Nairobi delivered on 7th November 2019 in CTC No. 306 of 2017)*

JUDGMENT

1. This appeal emanates from the ruling delivered by the Co-operative Tribunal (hereafter the Tribunal) on 07.11.2019 in CTC No. 306 of 2017. The proceedings before the Tribunal were commenced by way of a statement of claim filed by Times U Sacco Society Ltd the claimant before the Tribunal (hereafter the Respondent) against Jackson Kithinji Mungania, the respondent before the Tribunal (hereafter the Appellant). It was averred that at all material times relevant to the claim, the Respondent was a registered Savings and Credit Co-operative Society in which the Appellant was a legitimate Member.
2. Further it was averred that during his membership with the Respondent, the Appellant had successfully applied for a loan but defaulted in servicing the same; that as at 14.03.2017 the loan arrears were in the sum of Kshs. 959,784/- and despite reminders or demand to make good, the Appellant refused to heed the demand. Hence the Respondent's claim against him was for payment of Kshs. 959,784/- being inclusive of interest as of 14.03.2017, and further accrued interest until payment in full.



3. Despite service of summons to enter appearance and file response to the Respondent's claim, the Appellant failed to do so and upon a request for judgment being lodged by the Respondent, judgment was entered against the Appellant on 19.05.2017 in the sum of Kshs. 959,784/- with costs and interest.
4. On 24.05.2017, the Appellant's subsequent motion expressed to be brought under Sections 3A of the Civil Procedure Act and Order 42 Rule 6(2)(3)&(4) of the Civil Procedure Rules seeking inter alia that the Tribunal be pleased to grant a stay of execution of the judgment entered on 19.05.2017 and subsequent orders made pursuant thereto pending the hearing and determination of the claim; and that the Tribunal be pleased to set aside its judgment entered on 19.05.2017 together with subsequent orders.
5. The grounds on the face of the motion were amplified in the supporting affidavit sworn by the Appellant. To the effect that the default judgment was entered some two (2) days before his memorandum of appearance was filed as he was unwell in Meru and had dispatched a third party to file the it on 10.05.2017; that the said person was unable to locate the Tribunal premises but did not notify the Appellant who believed that the memorandum of appearance was filed within time; and that it was only on 22.05.2017 that the memorandum of appearance was filed, being too late as default judgment had since been entered on 19.05.2017. He further deposed that he had a good defence with a high chance of success which would be rendered nugatory if stay was not granted and therefore it was in the interest of justice that his application be granted.
6. The Respondent opposed the motion through a replying and supplementary affidavit dated 21.06.2017 and 28.05.2019 respectively. Thereafter, parties canvassed the Appellant's motion by way of written submissions. The Tribunal's ruling dismissing the Appellant's motion provoked the instant appeal, which is based on the following grounds:-
 - “1. That the honorable Tribunal erred in law and in fact in dismissing the Respondent's application for stay of execution of the judgment entered on 19th May 2017.
 2. That the honorable Tribunal erred in law and fact by disregarding the Appellant's draft defence which is arguable and raises triable issues.
 3. That in arriving at the decision, the honorable Tribunal erred in law when it disregarded the authorities cited in the submissions on behalf of the Appellant and failed to consider the guidelines provided therein with regard to circumstances where a judgment can be set aside.
 4. That the honorable Tribunal arrived at the whole decision without due regard to the principles of law and equity and the facts presented before it.” (sic)
7. The appeal was canvassed by way of written submissions. Counsel for the Appellant condensed the grounds of appeal into two issues for the court's consideration. As concerns the merits of the appeal, counsel anchored his submissions on the provisions of Article 50 of the Constitution, Order 10 Rule 11 of the Civil Procedure Rules, the of-cited decision in *Shah v Mbogo* as captured in Franklin J. B. *Chabari v Tharaka Nithi County Government & Another* [2019] eKLR and *Tabsei Chepngeno Tormoi & Another v John C. Koech & 3 Others* [2021] eKLR to submit that, the key considerations pertaining to the application were whether it was just to do allow the motion, and secondly whether by so doing, it would avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error.



8. Counsel argued that the Appellant gave a reasonable explanation for delay in entering appearance and filing a defence, and that his filing of documents before the Tribunal revealed the Appellant's desire to defend the claim. That if the Appellant's motion is allowed both parties would be accorded an opportunity to present their respective cases, hence no prejudice will be visited on the Respondent, and in the alternative if the Appellant is condemned unheard, he will be compelled to pay monies that are disputed.
9. On whether the defence raises a triable issue, counsel relied on the decisions in *CMC Holdings Ltd v Nzioki* [2004] KLR 173 and in *Delphis Bank Limited v Samwel O. Balla & 3 Others* [2005] eKLR as cited in *Felicia Muthoni Wangonde v Moses Amadi & Another* [2021] eKLR. In supporting the argument that the draft defence challenges the arrears claimed and therefore raises at least two triable issues that ought to be ventilated and determined via a hearing. Further while calling to aid the decisions in *John Peter Kiria & Another v Pauline Kagwiria* [2013] eKLR and *Nazmudin Abdulali Shariff & 2 Others v Kenya Railways Corporation* [2021] eKLR counsel submitted the Appellant has offered a reasonable explanation for his mistakes and has met the test to warrant the exercise of the court's discretion in his favour. In conclusion, the court was urged to allow the appeal.
10. The Respondent defended the Tribunal's findings. Counsel for the Respondent opted to contemporaneously address the Appellant's grounds of appeal. While relying citing the case of *Stephen Ndichu v Monty's Wines and Spirits* [2006] eKLR, counsel defended the Tribunal's finding that the Appellant did not show reasonable cause for failure to enter appearance within time and that the draft defence did not raise any triable issue. Moreover, pointing out the Appellant's delay of over 2 years in prosecuting the motion was relevant and its dismissal proper, here citing the decision in *Kiiru Mugambi & 39 Others v Moses Kirima Meenye & Kirima Advocates & 3 Others* [2020] eKLR.
11. Further relying on *CMC Aviation Ltd v Cruis Arif Ltd* (1978) KLR 103 as cited in the case of *Alfred Pengo Mamboleo v Oserian Development Co. Ltd & Another* [2018] eKLR counsel argued that the respective parties' submissions were considered by the Tribunal; that submissions cannot take the place of evidence and the Appellant's contestation in that regard lacks merit. In conclusion, the court was urged to dismiss the appeal with costs.
12. The court has considered the record of appeal, the pleadings before the Tribunal as well as the submissions by the respective parties. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kustbon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd (1958) EA 424*; *Selle and Anor. v Associated Motor Boat Co. Ltd* and Others (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.
See also *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR
13. The Appellant's motion before the Tribunal was expressed to be brought inter alia under Section 3A of the *Civil Procedure Act* and Order 42 Rule 6(2) (3) & (4) of the *Civil Procedure Rules*. The Tribunal in dismissing the Appellant's motion stated inter alia that :-

“We have carefully considered the submissions by the parties we note that this suit was filed on 11.4.2017, memorandum of appearance filed on 22.5.2017, request for judgment was filed on 19.5.2017 and judgment entered accordingly. Applicant filed his application on 24.5.2017 and interim orders granted on 29.5.2017. Since then the Applicant has never



prosecuted the said application until 28.5.2019 when the Applicant moved the Tribunal for directions.

We note the substance of the claim arises from the loan by the Respondent as pleaded in the statement of claim at paragraph 7 and or failed, partly serviced the loan. This fact has not been disputed in the draft defence.

This Application was brought under Certificate of Urgency and interim orders obtained; however, it has been over 2 years since the same was prosecuted. We have noted the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act* and Rule 4 of the Co-operative Tribunal Practice Rules which provide for expeditious disposal in the circumstances, the Applicant has been indolent enjoying interim orders for stay of execution for over 2 years.....However, we note that failure to prosecute, the Application has caused great delay in the matter.

We have also noted that contents of the draft defence and that the same has not demonstrated any sufficient grounds to stay execution and or set aside the judgment. We note that the defence does not raise any triable issues since there is no express denial of the amount owed. The draft defence proposes the modes of payment and the suggestion that the claimant should offset the amount from the savings of the Respondent in the circumstances therefore we find that the draft has not raised any triable issues.

We note that the Respondent was duly served and alleges failure to file a memorandum of appearance and defence within time due to the error/omission of a third party, which third party did not swear any affidavit on the said allegations.

The Respondent also alleges to have been unwell hence the reason why he sent the third party but no evidence or documents showing the nature of illness.

The two allegations/grounds raised by the Respondent do not demonstrate why sufficient cause to set aside interlocutory judgment.

In light of the above we find that no reasonable cause has been shown for the defendant's failure to enter an appearance within the stipulated time. We also find that the Respondent has not demonstrated sufficient grounds or merits to our satisfaction that there was a good defence as per the draft defence filed. In the circumstances we find that the application has no merit and its prosecution has be duly delayed.

We therefore dismiss the application dated 24.05.2017 with costs." (sic)

14. Evidently, the Appellant in his motion before the Tribunal failed to invoke the relevant provisions of the *Civil Procedure Rules* providing for the setting aside of the default judgment. Nevertheless, Order 10 Rule 11 of the Civil Procedure Rules provides that: -

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

15. The grant or refusal of an application to set aside or vary such judgment or any consequential decree or order, is discretionary. The discretion is wide and unfettered. However, it must be emphasized that like all judicial discretion it must be exercised judicially. Therefore, in considering this appeal, the Court is guided by the principles enunciated by Court of Appeal in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR stated:

“This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision,



or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (supra):

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this 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 as a result there has been injustice”.

See; *United India Insurance Co. Ltd v. East African Underwriters (K) Ltd* [1985] E.A 898”.

16. The object of the discretion conferred by Order 10 Rule 11 of the Civil Procedure Rules was addressed in the case of *Shah –vs- Mbogo* and Another [1967] E.A 116:

“The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

17. Platt JA (as he then was) in *Bouchard International (Services) Ltd vs. M’Mwereria* [1987] KLR 193 as cited with approval in *Miarage Co Ltd v Mwichuiri Co Ltd* [2016] eKLR had this to say regarding the exercise of the discretion:

“The basis of approach in Kenya to the exercise of the discretion to be employed or rejected ... is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to be set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail... Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte...



Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction”.

18. The matter of service of summons was not disputed by the Appellant. The Appellant's explanation for the delay in lodging pleadings upon service was an inadvertent mistake or misstep. The Tribunal was therefore confronted with a regular judgment and was called upon to consider whether to exercise its discretion to set it aside. The Court of Appeal in *James Kanyiita Nderitu & Another v Marios Philotas Gbikas & Another* [2016] eKLR set out the parameters to be considered when setting aside a regular judgment as follows:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173.”

19. Firstly, concerning the explanation proffered by the Appellant, it was argued that delay in entering appearance and filing a defence was due to illness and failure by his emissary to file the memorandum of appearance as directed or to duly inform the Appellant. Therefore, judgment had been entered against him on 19.05.2017, some three days before 22.05.2017 when his memorandum of appearance was filed. The Respondent took great exception to this explanation stating in its response that the Appellant failed to disclose the details of the emissary who perpetuated the delay in filing his pleadings pointing out that the said person did not swear an affidavit regarding his alleged difficulty in locating the Tribunal premises. It further challenged the Appellant's alleged illness citing absence of any medical documentation in that regard.
20. The Tribunal in its wisdom considered the rival arguments and was not persuaded that the Appellant had demonstrated any sufficient cause to set aside the default judgment. The Tribunal cannot be faulted in dismissing Appellant's explanation, as no material was tendered to support it. Despite the foregoing, a belated effort was made to file pleadings two (2) days after interlocutory judgment was entered, the Appellant presenting his motion to set aside default judgment some five (5) days later. That said, the Appellant subsequently took over 2 years to prosecute the appeal, in the meantime enjoying stay orders. There is no explanation for this delay and the Tribunal was entitled to consider this fact in its ruling.
21. Concerning the draft defence, the Tribunal opined that it did not raise triable issues, observing that the “draft defence proposes the modes of payment and the suggestion that the claimant should offset the amount from the savings of the Respondent in the circumstances therefore we find that the draft has not raised any triable issues”. In the court's view, the Appellant's defence was contradictory; while disputing the arrears asserted by the Respondent, the Appellant proposed utilization of his savings to



offset the loan and expressed willingness to settle the balance by paying up by installments of Kshs. 30,000/- per month. At paragraph 4 of the draft statement of defence it was averred that; -

“ 4. The Respondent denies the total amount in paragraph 6 and 7 of the claim and avers that he has run into the said amount in arrears. The Respondent aver that if there are such arrears, the same is as a result of the claimant’s failure to recover the same from the Respondent’s savings in his account with the claimant”. (sic)

22. The Court of Appeal in *Daniel Lago Okomo v Safari Park Hotel Ltd & Another* [2017] eKLR in defining a triable issue cited its decision in *Kenya Trade Combine Ltd v Shah*, Civil Appeal No. 193 of 1999, where it stated:

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

23. This court, having reviewed the said draft defence vis-a-vis the Respondent’s claim, is of the view that the Tribunal did not misdirect itself on the issue. Given the contents of the two rival pleadings before the Tribunal, the draft defence was inherently contradictory and incoherent. The subject default judgment being a regular one, the Appellant was obligated to make a strong case to warrant the exercise of the Court’s discretion in his favour. The draft defence simultaneously approbated and reprobated. With this kind of defence, it is difficult to see what prejudice or hardship the Appellant stood to suffer if the judgment was sustained.

24. The discretion to set aside such judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, as stated in *Shah v Mbogo*. While the right to be heard is a matter of justice and an integral part of the rule of law and should not be treated lightly, it also follows that onus was on the Appellant to satisfy the considerations pertinent to the exercise of the discretion to set aside. This discretion is exercised judicially and based on known principles, rather than whimsically. That too is a matter of rule of law.

25. The Tribunal correctly took note that it took close to two (2) years for the Applicant, who meanwhile enjoyed interlocutory orders in his favour, to prosecute his motion before it. No explanation was offered for the said delay by the Appellant. Reasonable explanation for delay is a key consideration to unlocking the court’s discretion invoked by an applicant who has been tardy in taking requisite steps in his matter. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR addressed the question of delay as follows; -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable.....”

26. This court agrees with the Tribunal that the delay in prosecuting the motion was inordinate and has not been satisfactorily explained. This kind of conduct runs afoul of the overriding objective, not to mention the obvious likely prejudice it portends to the Respondent, acting on behalf of its members. A party seeking to set aside interlocutory judgment must not be seen to presume on the Court’s discretion. The Appellant’s constitutional right to be heard cannot be gain said, but the right is not absolute and must be balanced against the Respondent’s entitlement to have its case determined expeditiously. The Respondent ought not to be compelled to pay the price for the disclosed indolent conduct on the part of the Appellant.



27. In the result, the court is of the considered view that the Tribunal duly addressed its mind to the pertinent issues before it and cannot be faulted for arriving at the decision it made. The appeal is without merit, and the justice of the matter lies in dismissing it with costs to the Respondent. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF DECEMBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Appellant:

For the Respondent:

C/A: Emily

