



REPUBLIC OF KENYA



**Mwangi v Alwafi East Africa Ltd & another (Civil Suit E320 of 2019)
[2022] KEHC 10886 (KLR) (Commercial and Tax) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E320 OF 2019
A MABEYA, J
MAY 26, 2022**

BETWEEN

CHARLES KARIUKI MWANGI PLAINTIFF

AND

ALWAFI EAST AFRICA LTD 1ST DEFENDANT

BASEM MUSTAFA ABDEL RAHMAN RANTISI 2ND DEFENDANT

RULING

1. This is a ruling on an application dated 3/11/2021 brought pursuant to Article 50(1) of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act* 2010, Order 51 Rules 1 & Rule 15 and Order 8 Rule 3 of the *Civil Procedure Rules*.
2. The applicants sought an order to set aside or vary the court order of 14/10/2019; in the alternative, an order to deem as duly filed the applicant's replying affidavit sworn on 3/11/2021 in response to the application dated 26/11/2019. The defendants also sought leave to amend their defense.
3. The grounds for the application were that; the of 1/10/2019 and 14/10/2019 were obtained ex-parte. This was because the applicants' former advocates did not notify them of the application dated 26/9/2019. In the premises, they did not appear nor file a response to the said application. They had been condemned unheard due to the mistake of their former advocates. That the plaintiff had relied on forged documents in his supporting affidavit of the application as had been confirmed in the orders granted in Miscellaneous Criminal Application No.266 of 2019.
4. The 2nd defendant averred that he had been ailing during the pendency of the suit and he was therefore unable to follow up on the progress of the matter with his former advocate. That the respondent had delayed in prosecuting his suit after obtaining the ex-parte orders in 2019. That this had been



- detrimental to the 2nd defendant who was unable to move in and out of the country or to freely engage in business. That he needed urgent specialized treatment as advised by his doctors.
5. It was further contended that the 2nd defendant was not a flight risk and the 1st defendant has business interests in Kenya that is capable of satisfying any decree issued by the Court in the event that the plaintiff succeeded in his claim.
 6. In response to the application, the plaintiff swore a replying affidavit on 4/2/2022. He averred that the 2nd respondent was adequately represented by an advocate who was duly served and ought to have responded to the application. That the issue of the 2nd respondent's ailment ought not therefore to have affected the ability of his advocate to respond to the said application. That that the defendant's former advocates were present in court when the said application was mentioned and were afforded an opportunity to reply thereto but failed to do so.
 7. Further, that the defendants had not placed evidence before Court to prove the alleged fraud. That the plaintiff served an amended plaint but the defendants had failed to respond thereto.
 8. He further averred that he had not dragged the matter and that the 2nd defendant was a foreigner from Jordan and a flight risk. That the medical records provided did not prove that the 2nd defendant needed specialized medical care out of this country. In any event the application was being made too late in the day.
 9. The plaintiff prayed that in the alternative and without prejudice to his averments, that the Court do allow the defendants to provide security for costs and award the plaintiff thrown away costs and punitive damages.
 10. The 2nd defendant swore a further affidavit in response to the plaintiff's replying affidavit. He attested that in the absence of his written directions to the opposing counsel, the Summons to enter appearance along with the Certificate of Urgency, Plaint and the Court orders referenced in the annexure marked "CK-1" ought to have been served upon himself personally and not the firm of Khaminwa & Khaminwa Advocates. That the Plaintiff had not prosecuted the suit for almost 3 years.
 11. The Court has considered the entire record. The only issue for determination is; whether or not, the subject orders should be set aside.
 12. The Order of 14/10/2019 restrained the 2nd defendant from committing breach of contract by restraining him from leaving the country and/or deposit his passport court pending the hearing and determination of the suit.
 13. The defendants prayed inter alia, to set aside the said order on the grounds that it was obtained ex parte and they did not have an opportunity to contest the application that resulted in that order. That the plaintiff had relied on forged documents in his supporting affidavit and that the 2nd defendant is highly prejudiced as he is unable to leave the country for specialized medical treatment.
 14. The relevant legal provision is Order 12 Rule 7 of the [Civil Procedure Rules](#) which provides: -

"Where under this Order, judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."
 15. There is no dispute that the application was properly served upon the defendants' advocates. It is also not denied that the said advocates had notice of the application and hearing date. The complaint is that the said advocates simply that the said advocates did not attend court on the date of hearing.



16. The said Advocates did not swear any affidavit. There was also no evidence to show that they had been served with the present application by the defendants.
17. The 2nd defendant is deeply aggrieved with the fact that the ex parte order restricts his movement out of the country pending the determination of this suit. He provided his expired work permit and proof of application of its renewal as 'BMART-4', an agreement for the sale of property to him as 'BMART-7' and Memorandum of understanding between the 1st defendant and an entity known as Redhill Manor Ltd as 'BMART-5'.
18. The above annexures show that the defendants have interests in this country. The interests are quite substantial. With such interests, it is doubtful that the 2nd defendant can be a flight risk.
19. Order 12 rule 7 of the *Civil Procedure Rules* empowers the Court to vary an ex-parte order upon terms that it may deem just. This infers upon the court discretionary power to vary an order in the interest of justice.
20. It is clear that the order complained of was made ex-parte. However, no good reasons have been offered to explain the failure to attend court on the material day. It is good practice that where a client lays blame on an advocate such as in this case, for the advocate to be given a hearing. In regard, it behooves an applicant in the shoes of the defendants to serve the application upon an erstwhile advocate.
21. Considering that the order was made ex-parte, that the order had dire consequences as enumerated in the supporting affidavit. Further, considering that the plaintiff has taken no steps to prosecute the case, I am minded to vary the said order. That the 2nd defendant may leave the jurisdiction upon the defendants depositing in Court, a bank guarantee for the decretal sum.
22. As regards the prayer for amendment, the same was not opposed and is hereby allowed as prayed.
23. Accordingly, the application dated 3/11/2021 is hereby allowed as follows: -
 - a. The order of 14/10/2019 is hereby varied to the extent that the 2nd defendant may travel out of the country upon depositing a bank guarantee for the sum of Kshs. 15,700,000/-.
 - b. The defence be amended and served within 14 days of the date hereof.
 - c. The plaintiff is at liberty to reply to the amended defence within 7 days of service.
 - d. The costs in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2022.

A. MABEYA, FCI Arb

JUDGE

