



Murang'a County Government v Red Brick Enterprises Ltd (Civil Suit E001 of 2021) [2022] KEHC 12664 (KLR) (29 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL SUIT E001 OF 2021
K KIMONDO, J
AUGUST 29, 2022**

BETWEEN

MURANG'A COUNTY GOVERNMENT PLAINTIFF

AND

RED BRICK ENTERPRISES LTD DEFENDANT

RULING

1. The defendant's notice of motion is four-pronged: Firstly, that the ex parte judgment entered on 30th June 2021 and the resultant decree issued on 5th July 2021 be set aside.
2. Secondly, that the firm of Nyaanga & Mugisha Advocates be granted leave to come on the record for the defendant. Thirdly, that there be stay of execution of the decree and all consequential orders; and, lastly, that the defendant be granted leave to file its defence out of time.
3. The motion is dated 14th March 2022 and predicated upon a deposition of Benard Kinegeni Maingi, the managing director of the defendant. There is also a supplementary affidavit by the same deponent dated 20th May 2022.
4. The defendant does not deny that its managing director was served with the plaint and summons to enter appearance. In fact, the company instructed the firm of Sagana & Biriq Advocates who filed a Memorandum of Appearance on 19th April 2021. It is however dated 7th April 2021 and the plaintiff complains that it was served late by email on 17th May 2021.
5. The defendant also concedes that its advocates did not file a defence to the action. What the defendant states is that the lawyers assured it that they were defending the action. It turned out to be untrue. The defendant now pleads that it should not be visited with the sins of its advocates.
6. The defendant has annexed a draft defence and counterclaim of Kshs 104,518,054. It denies being indebted to the plaintiff and prays to have its day in court.



7. Regarding the prayer for stay of execution, it avers that it was not served with the mandatory 10 days' notice before execution of the decree and that it will suffer substantial loss if the decree in excess of Kshs 250,000,000 is executed.
8. The motion is contested. The case for the decree holder is that the defendant is dishonest, is guilty of undue laches and has come into court with unclean hands.
9. According to the replying affidavit by Jackson Kinuthia, even the Memorandum of Appearance was suspicious as it bore no court stamp or receipt when it was served. Requests by the plaintiff for such evidence went unanswered. The plaintiff asserts that the deposition by Benard Maingi is thus false and should attract penalty for perjury.
10. The plaintiff contends that the defendant had no interest in the suit and was only woken up from its slumber by the decree. In view of admissions at pages 107-109 of the plaint, the plaintiff submitted that the present motion is mala fides and an abuse of court process and the applicant is undeserving of a discretionary remedy.
11. The applicant filed submissions on 3rd June 2022. The respondent lodged its submissions on 27th June 2022.
12. On 19th July 2022, counsel for all the disputants informed the court that they were relying entirely on the pleadings, depositions and the written submissions.
13. I take the following view of the matter. A decree has already been issued in this case. In the interests of justice and to progress the matter, I will grant leave to the firm of Nyaanga & Mugisha Advocates to come onto the record for the defendant.
14. I will now turn to the prayer to set aside the decree. The legal parameters in a matter of this nature are well settled. This court has wide and unfettered discretion to set aside an ex-parte order. As stated in *Shah v Mbogo* [1967] E.A 116, 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".
15. That decision by Harris J was affirmed by the Court of Appeal in *Mbogo and another v Shah* [1968] E.A 93. See also *Kimani v Mc Connell* [1966] E.A 547, *Patel v E. A. Cargo Handling services* [1974] E.A. 75, *Joseph Ngunje Waweru v Joel Ndiga* [1983] 1 KAR 210, *City Service Station v Njuguna* [1990] KLR 163.
16. The summons issued on 11th March 2021 required the defendant to enter an appearance within 15 days of service. According to the affidavit of service by Gideon Nguli, he personally served the managing director of the defendant, Bernard Maingi with the plaint and summons on 22nd March 2021. That fact is conceded by Bernard Maingi in paragraph 2 of his supporting affidavit sworn on 14th March 2022.
17. Granted those facts, I find that the period within which to enter appearance expired on or about 8th April 2021. The High Court is a court of record. The Memorandum of Appearance is dated 7th April 2021 and bears a court stamp of 19th April 2021. Doubt is removed by an official receipt number FSET-0007267 for Kshs 75 issued on 19th April 2021.
18. Clearly, the Memorandum of Appearance was filed well outside the 15 days from the date of service on the defendant, never mind that it was not served upon the plaintiff's counsel until many days later on 17th May 2021 via email.



19. The defendant then freely concedes that it never tendered a statement of defence. The explanation proffered is that it trusted its counsel to do so. On that aspect, the applicant deposes at paragraph 4 (a) to (f) of its supplementary affidavit that it had “able counsel” who informed the company that he had filed an appearance on 7th April 2021.
20. That information was obviously false. At paragraph 4 of the earlier affidavit sworn on 14th March 2022, the defendant states that it was also assured by its advocates that a defence “would be filed in due course”. As I have detailed earlier, no statement of defence was ever filed.
21. Learned counsel for the defendant relied on the decision in *Alexander Vincent Mabonga v Hilda Wanjiku Tulula & another*, Kitale ELC Case 52 of 2013 [2020] eKLR where Njoroge J stated that “mistakes of counsel are common and in certain deserving cases this court is inclined to overlook them if only to do substantive justice to an applicant”.
22. But in the instant case, the unexplained delays or mistake of counsel border on serious dereliction of duty or border on negligence. I say that very guardedly. Here is counsel who misleads his client that he filed an appearance on 7th April 2021; and, who tells his client that a statement of defence would be “filed in due course”. True, mistakes of counsel should not always be visited on the client. But this case is extreme.
23. It is on all fours with *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR where the Court of Appeal stated that-

It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.
24. Considering the commercial nature of this dispute and the sheer size of the claim, I would have expected the defendant to be a little more diligent. It is not lost on me either that the defendant itself had a counterclaim pleaded now at Kshs 104,518,054.
25. I have studied, as I am required to do, the proposed defence and counterclaim dated 26th September 2013. See *Tree Shade Motors Limited v D. T. Dobie & Another*, Court of Appeal, Nairobi, Civil Appeal 38 of 1998 [1998] eKLR. The pleading may not be entirely frivolous but it is only one of the factors to be taken into consideration in a motion to set aside the decree or for leave to defend the action.
26. The combination of the posture taken by the defendant and the unexplained lengthy delays or mistakes of its counsel militate against the exercise of discretion in its favour. The discretion was “not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice”.
27. Learned counsel for the defendant implored the court to apply the tenets of natural justice to reinstate the defendant onto the seat of justice. Paraphrased, to allow the matter to be heard on its merits. Reliance was placed on *Martha Wangari Karua v IEBC & 3 others*, Court of Appeal, Nairobi, Election Petition Appeal 1 of 2017 [2018] eKLR and *Kenneth Matiba v Attorney General* Court of Appeal, Nairobi, Civil Appeal 42 of 1994 [1998] eKLR.
28. I am equally alive to the overriding objective encapsulated in Article 159 of *the Constitution* and sections 1A and 1B of the *Civil Procedure Act* and the centrality of the right to be heard. However, *the Constitution* did not throw away the *Civil Procedure Act* or the Rules. On the facts here, I find that the application to set aside is completely unmerited.



29. Lastly, the defendant is not also without a remedy. If it is well advised, it may as well pursue a claim against its agent for negligence. But I say that obiter and without making a finding.
30. For all those reasons, I am disinclined to exercise my discretion to set aside the interlocutory judgment.
31. I will turn briefly to the prayer for stay of execution. By dint of Order 22 Rule 22 of the Civil Procedure Rules, the court shall order a stay of execution “upon sufficient cause being shown”. The applicant avers that it was not served with the mandatory 10 days’ notice before execution of the decree and that it will suffer substantial loss if the decree in excess of Kshs 250,000,000 is executed.
32. The rebuttal at paragraph 20 of the replying affidavit is that the claim “is unfounded as the plaintiff has not commenced execution proceedings hence the issue of failure of service of such a notice does not arise”.
33. True, there is a decree on the record. It is for a sizeable amount. But there is no evidence placed before the court that any execution has commenced. Paraphrased, it is too early to question the process of enforcement of the decree. There is no imminent danger at this juncture of attachment.
34. From the materials before the court, I am also not also satisfied that the applicant has demonstrated that it will suffer substantial loss. I remain alive that as a general proposition, the execution of a money decree does not constitute substantial loss. *Kenya Shell v Benjamin Karuga* [1982-88] 1 KLR 1018. In the end I am not satisfied at this stage that the judgment debtor has shown sufficient cause for stay.
35. Lastly, the principal prayer to set aside the interlocutory judgment having failed, it follows as a corollary that the plea for leave to file and serve a defence out of time has also fallen by the wayside.
36. My final orders are thus as follows-
 - a. That leave be and is hereby granted to the firm of Nyaanga & Mugisha Advocates to come onto the record for the defendant.
 - b. That the remainder of the defendant’s notice of motion dated 14th March 2022 is devoid of merit and is hereby dismissed.
 - c. That in the interests of justice; and, considering the predicament that has befallen the defendant, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG’A THIS 29TH DAY OF AUGUST 2022.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Ms. Gachango holding brief for Mr. Dachi for the defendant/applicant instructed by Nyaanga & Mugisha Advocates.

Mr. Kibe Njoroge holding brief for Mr. Ng’ang’a for the plaintiff/respondent instructed by Mbugua Ng’ang’a & Company Advocates.

Ms. Susan Waiiganjo, Assiatant.

