



**Alterfin CVBA v Timo & another (Civil Suit 447 of 2015)
[2022] KEHC 11961 (KLR) (Commercial and Tax) (19 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11961 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 447 OF 2015
A MABEYA, J
AUGUST 19, 2022**

BETWEEN

ALTERFIN CVBA PLAINTIFF

AND

ADOK TIMO 1ST DEFENDANT

REGISTERED TRUSTEES OF ARCHDIOCESE OF KENYA 2ND DEFENDANT

RULING

1. Before court is a motion on notice dated October 7, 2021 by the plaintiff. The same was brought under order 40 rule 7 of the *Civil Procedure Rules*, articles 48 and 50 of the *Constitution*.
2. The plaintiff sought the setting aside of the order made on October 7, 2021 which allowed the defendant's application dated August 31, 2021. It also sought that the defendants' application dated August 30, 2021 be set down for inter partes hearing on merit.
3. The application was based on the grounds that the defendants' application dated August 30, 2021 was fixed for hearing on October 7, 2021 and the plaintiff's counsel was unable to be present. That the plaintiff's counsel was later informed by the defendants' counsel that the said application had been allowed unopposed.
4. The plaintiff averred that it had opposed the defendants' application vide a replying affidavit that was filed and served on September 23, 2021. That it was therefore erroneous for the application to be allowed as unopposed notwithstanding the absence of its counsel.
5. In opposition, the defendants' lodged grounds of opposition dated October 12, 2021. They contended that the plaintiff's application was defective in substance and offended the mandatory provisions of



the Civil Procedure Act, Companies Act and the Oaths and Statutory Declarations Act. For that reason, the same should be dismissed with costs.

6. The court has considered the parties contestations and the submissions of learned counsel. The setting aside of *ex parte* orders are provided for under order 12 rule 7 of the Civil Procedure Rules which states: -

“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.”
7. From the foregoing, the setting aside of an *ex parte* order is discretionary. That discretion however, should be exercised judiciously. The principles applicable in such an application are; the reason for non-attendance and the prejudice, if any, to be suffered by the opposite party. In addition, the application should be made expeditiously.
8. The plaintiff submitted that its advocate failed to attend court on October 7, 2021 because his microsoft teams call was dropped just before the matter was called out. It was also submitted that the defendants’ application of August 20, 2021 was opposed *vide* the replying affidavit sworn on September 22, 2021.
9. The court has seen annexure ‘PCK 1’ in the plaintiff’s supporting affidavit. It is the plaintiff’s replying affidavit and the payment receipt from the judiciary for the filing of the said affidavit. It is therefore not correct that the defendant’s application was unopposed.
10. Further, it is not denied that the plaintiff’s advocate’s microsoft teams call dropped before the matter was called out. The court finds that the reasons advanced for none attendance were plausible.
11. As regards the prejudice to be suffered, none was shown. Further, the application was made timeously as it was filed on the same day the order was made. That is evidence that the plaintiff is not taking the court for a ride.
12. The defendant only attacked the application on technicalities. The court finds that it would be unfair in the circumstances and contrary to the interests of justice if the plaintiff’s response to the allowed application is not considered by the court before making a determination on the defendant’s application dated August 30, 2021.
13. Accordingly, the application dated October 7, 2021 is hereby allowed. The order of October 7, 2021 is hereby set aside and the defendants’ application dated August 30, 2021 is to be set down for inter partes hearing on a priority basis. Costs to be in the cause.
14. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE

