Ethics & Anti-Corruption Commission v Otieno & 5 others (Anti-Corruption and Economic Crimes Civil Suit 24 of 2018) [2022] KEHC 13058 (KLR) (Anti-Corruption and Economic Crimes) (22 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13058 (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

SEPTEMBER 22, 2022

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF

AND

BOB KEPHAS OTIENO ..... 1ST DEFENDANT

CAROLYNE CHEPKEMBOI SANG ..... 2ND DEFENDANT

MAURUCE ODIWUOR AMEK ..... 3RD DEFENDANT

MICHAEL OWINO OORO ..... 4TH DEFENDANT

ISAAC OUSO NYANDEGE ..... 5TH DEFENDANT

JUDITH AKINYI OMOGI ..... 6TH DEFENDANT

RULING

1. By the Notice of Motion dated 6th June, 2022 the 1st Defendant/ Applicant herein seeks to set aside the default judgment and all the consequential orders thereto entered against him in this case on 9/3/2022.

2. The application is premised on grounds that:-

> " i. That the 1st Defendant was served with the Summons dated 21/9/2018 as well as the Plaint in this matter and immediately instructed the firm of M/s Oguttu, Ochwangi, Ochwal and Co. Advocates of P. O Box 330-40200, Kisii to enter appearance and file a Statement of Defence on his behalf.

ii. That accordingly, the said firm of Advocates entered appearance on behalf of the 1st Defendant by filing in Court the Memorandum of Appearance dated November 12, 2018. However, the said firm of Advocates did not file a Statement of Defence within fourteen days after the 1st Defendant had entered an appearance.

iii. That in the circumstances, the Plaintiff made a request for judgment against the 1st Defendant on December 17, 2019 under the provisions of Order 10, Rule 10 of the *Civil Procedure Rules*, 2010 and the Court subsequently entered a judgment in default of Defence against the 1st Defendant on 9/03/2020.

iv. That the Plaintiff has never effected service of the Notice of Entry of Judgment upon the 1st Defendant.

v. That the failure to file the 1st Defendant's Statement of Defence within the requisite period was not intentional but was as a result of an inadvertent omission on the part of their Advocates on record.

vi. That the inadvertent failure by the 1st Defendant's former Advocates to file a Statement of Defence ought not to be visited upon the 1st Defendant.

vii. That the 1st Defendant has retained the firm of M/s Allamano & Associates Advocates of P. O BOX 7168-00200, NAIROBI to act for him in this matter in place of the former M/S Oguttu, Ochwangi, Ochwal and Co. Advocates.

viii. That the 1st Defendant' s current Advocates on record have since filed a Notice of Change of Advocates and drafted a meritorious Statement of Defence which raises cogent and triable issues that ought only to be determined on merits by this Court at trial.

ix. That if the said Judgment is not set aside, the 1st Defendant would be condemned unheard, which event would be contrary to the express provisions under Article 50(1) of *the Constitution* of Kenya 2010 as well as the Rules of Natural Justice.

x. That furthermore, the 1st Defendant stands to suffer prejudice and irreparable loss if the said judgment in default of defence is not set aside as his properties and assets are likely to be attached which would unjustly deprive him of his constitutionally protected property rights.

xi. That it is in the interests of justice that the Court hears both parties and determines the suit on its merits and any prejudice suffered by the Plaintiff could be adequately compensated by an award of costs if the said judgment were to be set aside.

xii. That the Court should exercise its discretion in the 1st Defendant's favour to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error by the 1st Defendant's former Advocates.

xiii. That the 1st Defendant is, and has always been, ready and willing to abide by the just terms of the Court."

3. In the affidavit sworn in support of the application, the Applicant deposes that he was duly served with summons; that he immediately instructed the firm of Oguttu, Ochwangi, Ochwal and Company, Advocates who entered appearance on 12th November, 2018 but defaulted in filing a defence and consequently the Plaintiff/Respondent applied and obtained an exparte judgment against him on 9th March, 2020. He also deposes that he was never served with a Notice of Entry of Judgment as required under Order 10 Rule 10 of the *Civil Procedure Rules* (The correct rule is found in Order 22 Rule 6 of the Rules). He further deposes that failure to file a defence was occasioned by an inadvertent omission on the part of his advocates and the same ought not to be visited upon him and that his current advocates have filed a draft statement of defence which raises cogent triable issues which this court should determine on its merits and hence this application ought to be allowed. He contends that should the application not be allowed he shall suffer prejudice as his properties are at risk of being auctioned without him being given an opportunity to be heard; that the Plaintiff/Respondent can be compensated by an award for costs and that this court should exercise its discretion in his favour to avoid injustice or hardship resulting from inadvertence on the part of his previous advocate and that it is only just and fair and in the interest of justice that the application be allowed.

4. In his submission Learned Counsel for the Applicant reiterated that failure to file the defence was not intentional but arose from an inadvertent mistake on the part of the applicant's previous advocates. Counsel also explained that upon learning about the default judgment the applicant immediately instructed his advocates currently on record who promptly entered appearance and filed this application and that therefore the delay in filing this application is excusable. Relying inter alia on the case of *Patel versus. E.A Cargo Handling Services Ltd* (1947) E.A 75, the case of *Rahman v Rahman* [1999] LTL 26/11/9 and also the case of *Thorn PLC v Macdonald* [1999] CPLR cited with approval in *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* [2021] eKLR Counsel stated that the discretion of the court should be exercised so as to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error. Counsel also argued that a case should be heard on its merits. To support this submission Counsel relied on the case of *Winnie Wambui Kibinge & 20 others versus Match Electrical* Limited Civil Case No. 222 of 2010 (citation not provided). Counsel further relied on the case of *Lee G. Muthoga versus Habib Zurich Finance (K) Ltd & Another*. Civil Application No. 236 of 2009 among others to support his submission that a mistake on the part of the advocate should not be visited on an innocent party. Counsel stated that even if no good explanation is advanced for the delay that per se is not a reason to refuse to set aside a default judgment. For this submission Counsel relied on the case of *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* (*supra*).

5. Counsel also argued that the Applicant has a meritorious defence which raises triable issues and relied on the case of *Tree Shade Motor Limited v D.T. Dobie Company Ltd* (*Supra*) to urge this court to set aside the default judgment. Counsel asserted that the defence is valid and meritorious and the same ought to be allowed to be heard on the merits. Counsel reiterated that the Plaintiff/Respondent stands to suffer no prejudice as it can be compensated by an award for costs.

The Plaintiff/Respondent's Response

6. The application is vehemently opposed based on the replying affidavit of Culent Simiyu Lunyolo sworn on 17th June 2022 and written submissions filed herein on 17th August, 2022. Learned Counsel for the Respondent submitted that the failure of the Applicant to file a defence one year and one month after he had entered appearance occasioned the Respondent to request for judgment; that even after being served with the Request for Judgment, on 13th January 2020, the Applicant took no steps to file a defence; that judgment was entered on 9th March, 2020; that the judgment is a regular judgment and that no explanation has been given by the applicant for the period between the time appearance

was entered and the request for judgment. Counsel submitted that the discretion of this court must be exercised judicially and only to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a party who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. Counsel pointed out that even after the entry of the default judgment the Applicant actively participated in the proceedings with knowledge that there was no defence on record and it is only when the suit was confirmed and fixed for hearing that he brought this application so as to delay the hearing and determination of the case. Counsel stated that the Applicant's Advocate did not attend court on 1st March, 2022 when the application to set aside the judgment was to be mentioned hence illustrating that the Applicant has not been keen to defend the suit.

7. Counsel further submitted that the defence filed does not raise triable issues but is full of mere denials. Counsel contended that this application is frivolous, vexatious, incompetent, misconceived and improperly before the court and an abuse of the court process and it ought to be struck out/ dismissed with costs. Counsel also contended that the application is a delaying tactic, an afterthought and merely intended to occasion delay.

8. On the issue of prejudice Counsel for the Respondent submitted that allowing the application will highly prejudice the Respondent as it will be denied an opportunity to expeditiously have the suit heard and determined. Counsel urged this court to dismiss the application with costs and proceed to give directions on the hearing of the suit. To support his submissions Counsel relied on the following cases:*Habo Agencies limited v Wilfred Odhiambo Musingo* [2015] eKLR where the court held that:

> " it is not enough for a party to blame the advocate as the party too has a responsibility to show interest and follow up their case".

David Kiptanuti Yego & 134 others v Benjamin Rono & 3 others (*supra*) where the court stated that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues and where the court dismissed the application to set aside the judgment as the applicant had not been keen on regularizing his pleadings.

Analysis and Determination

9. The impugned judgment was entered on 9th March 2020 almost fifteen (15) months after the Applicant entered appearance on 20th October 2018. The claim against the Applicant is for a liquidated amount and the judgment was therefore regularly entered under Order 10 Rule 4 and 5 of the *Civil Procedure Rules*. It is also evident that the Applicant was by a request for entry of judgment dated 17th December, 2018 duly notified of the request for judgment through his then advocates on record. As evidenced by the rubber stamp of the firm, the request was received by the advocates on 13th January 2020. However, the present application was not filed until 7th June 2022 which is close to 1½ years upon entry of the judgment. Be that as it may, Order 10 Rule 11 of the *Civil Procedure Rules* provides that the court may set aside or vary such judgement and consequential decree or order upon such terms as are just.

10. The principles upon which the court exercises its discretion in that regard were settled in the case of Patel v E.A Cargo Handling Services Ltd [1974] E.A Page 75 where it was held that whereas discretion of the court is unfettered the main concern ought to be to do justice to the parties and that:

> " ....the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that was obtained only by a failure to follow any rule of procedure."

11. In determining whether to set the judgment aside the court is enjoined to consider the length of the delay, the reason for the delay, whether there is a defence on the merits, and the prejudice, if any, that may be occasioned to the plaintiff. It is of course trite that a defence on the merit is not one that must necessarily succeed. It is enough that it raises triable issues (see the case of *Tree Shade Motor Limited v D.T. Dobie Company Ltd* (*supra*)).

12. As stated earlier this application was brought more than one year after the entry of judgment the Applicant having not entered a defence close to two years upon entry of appearance to the suit. The explanation given for the delay both for not filing a defence and for bringing this application is that it was due to an inadvertent error on the part of Counsel then on record. Counsel for the Applicant has urged this court to accept the explanation offered and asserted that even where no application is offered that in itself is no reason not to grant the application. He has also urged that the mistake of the advocate, then on record, should not be visited upon the Applicant. Counsel for the respondent has on his part urged this court to reject the application as it is only a ploy to delay the hearing and determination of the case. He has pointed out, and correctly so, that the same was only brought after the court sought to fix the suit for hearing.

13. My considered finding on this is that no good reason or explanation has been proffered either for the delay in filing a defence or for bringing this application. Indeed, I find that in both instances the delay is inordinate. As for the argument that the mistake of an advocate ought not to be visited on his client my view is that it was because of that very argument that parliament in its wisdom enacted Sections 1A and 1B of the *Civil Procedure Act*. The said sections place a duty on a party to a suit, to assist the court to further the overriding objective of the Act by participating in the processes of the court and by complying with the directions and orders of the court. The overriding objective of the Act, is as set out in Section 1A, to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. In my considered view therefore, parties can no longer hide under the guise of mistakes of their advocates as they are expected, by the Act, to keep track of their cases. The Applicant has not stated that he tried but failed to get information of what was happening in the case. It is also instructive that no explanation at all was proferred by the advocate previously on record for failing to file a defence, or even for the delay in bringing this application.

14. Be that as it may, I am enjoined to consider the draft defence filed and having done so I am persuaded that the same raises triable issues namely, whether the money claimed and which is alleged to have been fraudulently paid to the Applicant were lawfully disbursed to him as imprests and allowances and whether indeed any monies belonging to the County Government of Homabay got lost during his tenure as the Clerk of the County Assembly. It is for that reason and noting that an arguable defence is not one that must necessarily succeed that I am inclined to allow the application. I am also guided by the principle that the Respondent is unlikely to suffer prejudice which cannot be compensated by an award of costs. Also that the Applicant has three other co-defendants and the case against them is yet to commence.

15. Accordingly, the application is allowed and the order for setting aside the default judgment is granted but with an order that the Applicant shall pay to the Plaintiff/Respondent thrown away costs in the sum of Kshs. 150,000/= before the date that shall be fixed for hearing. The Applicant having already filed a defence dated 27th November 2020, which is exactly word for word as the draft defence, that defence be and is hereby deemed as duly filed. The 1st Defendant/Applicant shall serve the same upon the Plaintiff/Respondent and his Co-defendants within 7 days of the date of this ruling. Thereafter parties shall have 30 days to comply with Order 11 of the Civil Procedure Rules and attend a pre-trial conference on 14th November, 2022.

Orders accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 22ND DAY OF SEPTEMBER 2022.

E.N. MAINA

JUDGE