



REPUBLIC OF KENYA



**Gulbahar & another v Fidelity Security Limited & 4 others (Civil Case 217 of 2019) [2022] KEHC 13073 (KLR) (Civ) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13073 (KLR)

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

**CIVIL  
CIVIL CASE 217 OF 2019**

**JK SERGON, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**BULENT GULBAHAR ..... 1<sup>ST</sup> PLAINTIFF**

**PARAGON ELECTRONICS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FIDELITY SECURITY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**WALTER OUMA OPIYO ..... 2<sup>ND</sup> DEFENDANT**

**DAVID WEKESA ..... 3<sup>RD</sup> DEFENDANT**

**JAGIT SINGH ..... 4<sup>TH</sup> DEFENDANT**

**NAZARUDIN YAKUB ADAM KASMANI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The defendants/applicants in this instance has brought the Notice of Motion dated 5<sup>th</sup> May 2022 which is supported by the grounds set out in its body. The applicant sought for an order to set aside the ex parte orders of 16<sup>th</sup> December 2021 pending the hearing and determination of this application inter-parties.
2. The plaintiffs/respondents opposed the Motion by filing a replying affidavit dated 31<sup>st</sup> May 2022.
3. In his affidavit filed in support of the motion dated 5/5/2022, Mr. Robert Ongeru the advocate to the defendants/applicants stated that on 24<sup>th</sup> March 2022 he received a call from the director of the 1<sup>st</sup> defendant who informed him of the orders allegedly emanating from proceedings that took place on 16<sup>th</sup> December 2021 when his offices were already closed for the annual December holiday.



4. He avers that there was lack of specific email address from the plaintiff's address which is assigned for the service of documents emanating in respect of this matter and that the different individual emails meant that the documents end up being directed to the spam section of their email.
5. He further avers that the respondents did not invite them to fixing of their application dated 6<sup>th</sup> September 2021 and that they deliberately took an inconvenient and unsuitable date when they knew that their offices had already closed for the annual Christmas break.
6. He further avers that the respondents indeed wrote a letter to their Law Firm on 6<sup>th</sup> August 2021 asking to be supplied with the materials sought in the application dated 22<sup>nd</sup> September, 2021 and they wrote back and advised the plaintiff that our clients did not have in possession of the said materials as the same were not in their physical custody.
7. The applicants contends that it would be proper that the court determines the correct parties to be addressed for the production sought by the respondents and also the application should be set aside to enable the applicants to respond and enable the court to determine the respondent's application.
8. In response, the respondents stated had purported to speak on behalf of the 4<sup>th</sup> and 5<sup>th</sup> applicants without being properly on record for them and that can only be termed as hearsay and such averments ought to be expunged.
9. He avers that the advocates for the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents were duly served and that the affidavit of service is available on the e-filing portal which the court confirmed before granting the orders on 16<sup>th</sup> December 2021.
10. He further avers that the deponent has not furnished this court with evidence that truly the emails went to spam as alleged and that the documents annexed in the supporting affidavit ought to have been accompanied by a certificate of electronic evidence hence they are inadmissible as they violate section 106B of the Evidence Act.
11. He also brought to the court's attention that the said averment by the deponent amounts to an appeal as it challenges the merits of orders issued by this court which are still valid unless or until determined otherwise.
12. I have given due consideration to the parties' respective positions as deposed. Order 12 Rule 7 of the Civil Procedure Rules under which the Application is brought 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”.
13. This provision is amplified by Order 51, rule 15 which provides that the court may set aside an order made ex parte.
14. The orders sought are discretionary. I am inclined to accept applicants' advocate explanation that they were never invited for the fixing of their application and the fact they normally close their offices for the annual Christmas break of which most offices do and thus making it an inconvenient and unsuitable date for them. Even though that could be case then, the client should not be punished for the mistakes of their advocates.
15. From the averments of the applicant's counsel, it is quite clear that this was not a case of deliberate failure to attend Court but they only got to find out that they had been served with the application and the hearing notice vide their email but unfortunately the same was passed on the spam folder as it was bulk and was not emailed using the respondent's official email.



16. Should the door of justice be closed to the applicant for the mistake of counsel? I think not. In this regard, I am guided by the holding in *Belinda Murai & Others - v- Amos Wainaina* (1978) LLR 2782 (CALL) where Madan, JA (as he then was) stated:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

17. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal stated:

“We agree with those noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. I have considered the reasons that were offered by the appellant regarding their failure to attend court on the 1st April, 2022 with anxious minds. I have asked myself whether failure to attend court on 1st April, 2022, constituted an excusable mistake, an error of judgment or was it meant to deliberately delay the cause of justice.

18. The respondents argument that the applicants advocate was not properly on record since a notice of change was not filed under order 9 rule 9 of the Civil Procedure Rules. On the other hand the applicants indicated that he had served the previous advocate a memorandum of appearance on behalf of the applicants and that his objection is misplaced.

19. I am of the considered view that even if I were to find that the notice of change of advocate ought to have been filed, which the applicants' advocate has not, proceeding to strike out the application would amount to giving due regard to technicalities of procedure contrary to Article 159 (2) (d) of *the Constitution* of Kenya 2010, and would in my view defeat the overriding objectives as set out under section 1A of the *Civil Procedure Act*.

20. The respondents further believe that the averments by the deponent amounts to an appeal as it challenges the merits of the orders which are still valid unless or until determined by in my view this is not the case as the main issue is that the orders were *ex parte*, all the applicants want is an opportunity to respond and enable the court to determine the same on merit.

21. In the interest of substantive justice therefore, the *ex parte* orders given on 16<sup>th</sup> September, 2021 should be set aside to enable the applicants to respond and enable the court to determine the respondent/ plaintiff's application to be heard and determined on merit.

22. In the premises, I find merit in the application dated 5<sup>th</sup> May, 2022 which I hereby allow and set aside the orders issued on 16<sup>th</sup> December, 2021 and that the application dated 6<sup>th</sup> September, 2021 to be heard on merit. Each party to meet their own costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022.**

.....



**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the 1<sup>st</sup> Plaintiff

..... for the 2<sup>nd</sup> Plaintiff

..... for the 1<sup>st</sup> Defendant/Applicant

..... for the 2<sup>nd</sup> Defendant/Applicant

..... for the 3<sup>rd</sup> Defendant/Applicant

..... for the 4<sup>th</sup> Defendant/Applicant

..... for the 5<sup>th</sup> Defendant

