



REPUBLIC OF KENYA



KENYA LAW
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**Nziyamana & 12 others v Badoer (Civil Case E011 of 2022)
[2022] KEHC 13051 (KLR) (Civ) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13051 (KLR)

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

CIVIL

CIVIL CASE E011 OF 2022

JK SERGON, J

SEPTEMBER 22, 2022

BETWEEN

KARIM NZIYAMANA 1ST PLAINTIFF
SIBONA ABUOBA 2ND PLAINTIFF
KEVIN OMONDI ONYANGO 3RD PLAINTIFF
DERICK BERNARD OTANGA 4TH PLAINTIFF
VICTOR REUBEN NGINYA 5TH PLAINTIFF
LLYOD WAHOME KINGURE 6TH PLAINTIFF
TEDY OSOK 7TH PLAINTIFF
PISTON VUNYOLI KINGURU 8TH PLAINTIFF
STEVE NJUNGE NDUNGU 9TH PLAINTIFF
ELVIS RUPIA 10TH PLAINTIFF
DERICK ONYANGO 11TH PLAINTIFF
PHELIX INDEJE 12TH PLAINTIFF
SOLOMON ALUBALA 13TH PLAINTIFF

AND

RICARDO BADOER DEFENDANT



RULING

1. The defendant/applicant in this instance has brought the Notice of Motion dated March 30, 2022 supported by the grounds set out in its body and the facts deponed in the supporting affidavit. The applicant sought for the substantive order that this court set aside *ex parte* orders issued on February 18, 2022 and dated February 25, 2022.
2. The 13th plaintiff/respondent opposed the motion by filing the replying affidavit sworn on April 2, 2022.
3. The applicant stated that the respondent filed the application on January 14, 2022 and proceeded to cunningly serve the him with a copy which did not have any case number and that they were never served with the hearing notice, directions or any orders of the court thus the matter proceeded *ex parte*.
4. The applicant avers that the *ex parte* order was obtained through deceit and concealment of material facts to wit that the signatures of some of the plaintiffs herein were forged in the application without their knowledge or consent.
5. The applicant further avers that the *ex parte* order issued are not only prejudicial but detrimental to him, as they aim to cripple the operations of all his business and personal assets.
6. The applicant contends that the respondent's application is marred with false allegations and unsubstantiated information that has been only placed to mislead and sway the court in the respondent's favor.
7. The applicant pointed out that he met the various plaintiffs of the suit herein who have categorically stated that they have not given authority to Solomon Alubala Muyeka to file the said application and most of them were in utter shock.
8. In response, the 13th plaintiff/respondent stated that their application was slated for interparties hearing on February 9, 2022 and that their counsel on record then served the applicant via his email address but he did not respond or enter appearance and the matter proceeded *ex parte* where the orders were issued.
9. The respondent avers that the applicant was served with court order that had the hearing date and case number and that it is false that the he did not receive the hearing notice nor the court orders but decided to ignore the same.
10. The respondent stated that the signatures in the application were legitimate and that all the plaintiffs were aware of the suit and authorized him and that the applicant has been trying to reach out to the plaintiffs offering them in exchange of them signing an affidavit that states that they were not aware of the suit.
11. The plaintiff/respondent stated that the orders issued by this court in no way cripples the applicant's business as he can continue with business in this court jurisdiction as long as he does not sell or transfer the same to a third party.



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. In the instant case, I am of the considered view that the explanation advanced by the applicant for his failure not to respond to the application being that he was never served that the hearing notice, directions or any other orders of the court found their way to the spam section of his email, that being the case this court cannot entirely blame the applicant on the same since technology does sometimes fail, this to me is reasonable and excusable.
15. On the other hand the respondent had stated that they had served the applicant before in the same email, and that they should not be blamed for the failure of not receiving the hearing notices, which I agree but they should not also blame the applicant since the same can happen to anyone and the court should give them a chance to defend themselves.
16. The applicant also states that the application has a concealment of information, false allegations and he wishes to respond on the same. On the other hand the respondent believes that all that is in the application is true and that he had authority from the other plaintiffs to go ahead and do the application.
17. In my view this reason is enough to give the applicant an opportunity to defend himself.
18. 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 April 1st, 2022, constituted an excusable mistake, an error of judgment or was it meant to deliberately delay the cause of justice.
19. That the decision whether or not to set aside *ex parte* judgment or order is discretionary is not in doubt. The discretion is intended so to be exercised to avoid injustice and 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. See [Shah vs. Mbogo & Another](#) [1967] EA 116}}.
20. In the interest of substantive justice therefore, the *ex parte* orders issued on February 18, 2022 and dated February 25, 2022 are hereby set aside to enable the applicant to respondent and enable the court to determine the defendant/respondent application to be heard and determined on merit.



21. In the premises, I find merit in the application dated March 30, 2022 which I hereby allow and set aside the orders issued on February 18, 2022 and dated February 25, 2022. The application dated January 14, 2022 to be heard on merit. Each party to bear their own costs of the motion dated March 30, 2022.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2022.

.....

J K SERGON

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant/applicant

