



**Ethics and Anti-Corruption Commission v Nobert t/a Firmline Company & 3 others (Anti-Corruption and Economic Crimes Civil Suit E017 of 2021) [2022] KEHC 15726 (KLR)  
(Anti-Corruption and Economic Crimes) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15726 (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 E017 OF 2021  
EN MAINA, J  
NOVEMBER 24, 2022**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... APPLICANT**

**AND**

**ACHIRO NOBERT T/A FIRMLINE COMPANY ..... 1<sup>ST</sup> RESPONDENT**

**MORRIS KIWINDA MBONDENI ..... 2<sup>ND</sup> RESPONDENT**

**AMOS KABUE MWANGI ..... 3<sup>RD</sup> RESPONDENT**

**FRANK JACKSON WERE ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a plaint dated June 9, 2021 the plaintiff sought a sum of Kshs 47,296,990.60 from the defendants jointly and severally.
2. By its own admission the 1<sup>st</sup> defendant/applicant was served with the plaint on June 9, 2021 and thereafter with summons to enter appearance on July 12, 2021.
3. The 1<sup>st</sup> defendant did not however enter appearance or file a defence and so on November 2, 2021 the plaintiff filed a request for judgment under order 10 rules 4(1) and 10 of the *Civil Procedure Rules*.
4. The record shows that the request was not acted upon until March 3, 2022 when the Deputy Registrar of this court entered a default judgment against the 1<sup>st</sup> defendant. By then and more specifically on February 2, 2022 the 1<sup>st</sup> defendant had filed a preliminary objection contesting the jurisdiction of this court to hear and determine the suit.



5. The preliminary objection is premised on grounds that in the absence of a compensation order granted under section 54(1) of the [Anti-Corruption & Economic Crimes Act](#) the plaintiff has no *locus standi* to institute this suit; that compensation orders can only be granted by a court which has tried and convicted the defendants for corruption or economic crimes as set out in section 54 of the [Anti-Corruption & Economic Crimes Act](#) and further that this court does not have jurisdiction to entertain ordinary civil suits such as the instant suit.
6. When the parties first appeared before me on March 10, 2022 Mr Oduor B, Learned Counsel for the 1<sup>st</sup> defendant, informed the court that he was not made aware of the default judgment and that he wished to bring an application to set it aside. This court granted him leave to do so whereupon he filed the notice of motion dated March 24, 2022. This court then gave directions that the application and the preliminary objection filed earlier would be heard together by way of written submissions.
7. This court received submissions from the plaintiff/respondent, the 1<sup>st</sup> defendant and also the 2<sup>nd</sup> and 3<sup>rd</sup> defendants although the latter two are not affected by the interlocutory judgment.

### **Analysis and Determination**

8. Having perused the court record and having considered the preliminary objection, the notice of motion, the rival submissions of the Learned Counsel for the parties and the law I find the following to be the issues for determination:-
  1. Whether this court has jurisdiction to hear and determine this suit.
  2. Whether the application to set aside the judgment entered against the 1<sup>st</sup> defendant is merited.

### **Issue No 1 - Whether this court has jurisdiction to hear and determine this suit.**

9. I shall start with the submission of Counsel for the 1<sup>st</sup> defendant/applicant which faults this court for entering the default judgment despite the preliminary objection. Order 6 rule 1 of the [Civil Procedure Rules](#) requires a defendant who has been served with summons to appear to enter appearance within the time prescribed in the summons. Thereafter the defendant is required to file his defence within fourteen days of entering appearance. On both occasions it is “unless some other or further order be made by the court”. In this case no other or further order had been made by this court to excuse the entry of appearance or filing of defence by the 1<sup>st</sup> defendant. Order 10 rules 4(1) and 5 provide for what ought to happen where a defendant fails to enter appearance and to file a defence and in regard to default of defence it states:-

“ 4 (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail to appear, the court shall, on request in form No 13 of appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs. ....

5. Where the plaintiff makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in form No 13 of appendix A, enter judgment against any defendant failing to appear in accordance with rule 4, and execution may issue upon such judgment and decree without



prejudice to the plaintiff's right to proceed with the action against such as have appeared.”

10. The suit herein is for a liquidated amount only and the Deputy Registrar therefore acted procedurally by entering the default judgement. It is my finding that the judgment is a regular judgment.
11. As to whether the plaintiff/respondent has jurisdiction to file the suit I say it does as it is mandated under section 11(1)(ii) of the [Ethics and Anti-Corruption Commission Act](#) and section 55(3) of the [Anti-Corruption and Economic Crimes Act](#) to file proceedings for recovery of public funds on behalf of public entities.
12. As to whether such recovery proceedings can only be brought upon the conviction of the defendant for a corruption or economic offence my finding is that section 55(1) and (2) of the [Anti-Corruption and Economic Crimes Act](#) give the plaintiff power to file civil recovery proceedings irrespective of whether there are criminal proceedings pending section 193A of the [Criminal Procedure Code](#) recognizes that criminal proceedings and civil proceedings can run concurrently. Indeed in the case of [Ethics and Anti-Corruption Commission v Judith Marilyn Okungu & Dakane Abdullbi Ali](#) [2017] eKLR the Court of Appeal castigated the judge who had done exactly what this court is being asked to do after hearing a preliminary objection very similar to the present one. The Court of Appeal stated:-

“This finding ought to dispose of this appeal but we need to state also that the learned judge was clearly wrong to conclude, as he did, that the proceedings before him amounted to harassment of the 1<sup>st</sup> respondent merely because there was a pending criminal case before the Anti-Corruption Court. The matters forming the basis of the litigation traversed both the civil and criminal terrain. There is no law stating that the two types of proceedings cannot be carried out concurrently. It is spelt out expressly in section 193A of the criminal procedure code that the existence of the one should not lead to a stay of the other. ....”

13. Counsel for the 1<sup>st</sup> defendant put reliance on the case of [Registered Trustees of Sisters of Mercy \(Kenya\) t/a “Mater Misericordiae Hospital” v John Muriithi & 2 others](#) [2019] eKLR. However, the aforesaid decision of the Court of Appeal seems not to have been brought to the attention of the judge hearing the above case and as the Court of Appeal decision is binding on this court, I shall not say more on the issue of concurrent proceedings.
14. On whether this court has jurisdiction to hear and determine this case given that it is a civil suit my finding is that it does. That jurisdiction flows firstly from article 165 (3)(a) of the [Constitution](#) which gives this court unlimited original jurisdiction in civil as well as criminal cases, the [Civil Procedure Act](#) and the Rules thereunder but also more especially from the Practice Directions for the Anti-Corruption and Economic Crimes Division gazetted by the Hon Chief Justice on July 26, 2018. I am surprised that Counsel for the 1<sup>st</sup> defendant did not take cognizance of Practice Directions 6(b), (d) and (e) which give this division the exclusive mandate to hear:-

“(b) All proceedings relating to corruption and economic crimes over which the magistrates Anti-Corruption Court has no jurisdiction.

(d) cases relating to corruption and economic crimes filed under the following Acts: -

(i) Anti-corruption and Economic Crimes Act, cap 65.

.....



- (xiii) or filed under any other enabling provisions of law.
  - (e) Disputes touching on or related to –
    - (i) offences or the recovery or protection of public property, or
    - (ii) the tracing of, freezing of, or confiscation of proceeds of corruption or related to corruption and money laundering, and
    - (iii) the payment of compensation of proceeds of corruption and economic crimes.”
15. The suit herein is one for recovery of public funds and therefore this court has the requisite jurisdiction to hear and determine it. The preliminary objection has no merit and it is dismissed.

**Issue No 2 - Whether the application to set aside the judgment entered against the 1<sup>st</sup> defendant is merited.**

16. Despite the judgment herein being a regular one order 10 rule 11 provides that the same may be set aside or varied upon such terms as are just. The discretion of this court to set aside the judgment is therefore unfettered. In the case of *Waweru v Ndiga* [1983] KLR 236 the Court of Appeal held that the defendant is not even required to demonstrate sufficient reasons. It held: -

“The judge had not exercised his discretion judicially and had misdirected himself as to the law applicable to order 1XA rule 10 of the Civil Procedure Rules in wrongly stating that the appellant “must show sufficient reasons why the judgment should be set aside.”

17. In an orbiter in the same case, Hancox JA gave an explanation that: the words “sufficient cause” appeared in rule 24 of the former order 1X which had been replaced by three new orders 1X, 1XA and 1XB.”
18. I notice that the current order 10 rule 11 does not have the words “must show sufficient reasons” why the judgment should be set aside and therefore in my view the same position that obtained in the case of *Waweru v Ndiga* (*supra*) still obtains and the 1<sup>st</sup> defendant need not to have shown sufficient reasons for setting aside the judgment.
19. Be that as it may it was held in the case of *Shah v Mbogo & another* [1967] EA that nevertheless the discretion of the court should not be exercised to assist a party who had deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice; that it ought to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error.
20. There is no draft defence upon which I can determine whether the 1<sup>st</sup> defendant has a defence on the merits and while I also agree with Counsel for the plaintiff/respondent that Counsel for the 1<sup>st</sup> defendant has created a legal muddle by swearing the affidavit in support of the application, I do note that on March 10, 2022 this court granted leave to the 3<sup>rd</sup> and 4<sup>th</sup> defendants to file their defence out of time. While there may not have been a default judgment entered against them it would be unjust not to grant the 1<sup>st</sup> defendant a similar indulgence
21. My holding finds support in the words of Sheridan J in the case of *Sebei District Administration v Gasyali & others* [1968] EA 300 that:-

“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether



the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of the court.”

And in the case of *Rayat Trading Co Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR where the court held that:-

“If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant’s costs thrown away. In addition, the court may have considered imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the action.”

22. In the upshot the application to set aside the default judgment entered against the 1<sup>st</sup> defendant is allowed and the judgment be and is hereby set aside upon terms that the 1<sup>st</sup> defendant shall pay thrown away costs in the sum of Kshs 200,000 to the plaintiff before the hearing date and secondly that the 1<sup>st</sup> defendant shall file and serve its defence and all documents required of it, under order 7 rule 5 of the *Civil Procedure Rules* within 21 days of this ruling. The case shall be mentioned on December 19, 2021 to confirm compliance.
23. This ruling shall apply *mutatis mutandis* to the preliminary objections and the applications to set aside judgment in ACEC suits Nos E018 of 2021, E019 of 2021 and E020 of 2021.

Orders accordingly.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**E N MAINA**

**JUDGE**

