



**Keengwe t/a Kengwe & Co Advocates v Waumini Cooperatives
Savings & Credit Society Limited (Civil Suit E920 of 2021)
[2022] KEHC 16511 (KLR) (Commercial and Tax) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16511 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E920 OF 2021
A MABEYA, J
DECEMBER 16, 2022**

BETWEEN

SAMUEL B KEENGWE T/A KENGWE & CO ADVOCATES PLAINTIFF

AND

**WAUMINI COOPERATIVES SAVINGS & CREDIT SOCIETY
LIMITED DEFENDANT**

RULING

1. By a plaint dated November 12, 2021, the plaintiff claimed against the defendant Kshs 21,338,544.44 and an order for accounts. The defendant entered appearance but failed to file its defence and consequently judgement was entered against the defendant accordingly.
2. Subsequently, the defendant has filed the present application 16/3/2022. The same was brought under Order 50 rule 6, 51 rule 1, Order 10 rule 4 of the *Civil Procedure Rules*, Articles 48, 50(1) and 159(2)(d) of the *Constitution of Kenya, 2010*. The defendant seeks the setting aside of the interlocutory judgment entered on 28/2/2022 and leave to file the defence out of time.
3. The application was supported by the affidavit sworn by James N Ngugi an advocate. The applicants case is that the delay was inadvertent as it was occasioned by the advocate who had fallen ill with covid. That after entering appearance on December 10, 2021, the advocate contracted Covid-19 and was down until 27/1/2022 by which time the time for filing the defence had passed.
4. That he sought indulgence from the plaintiff wo declined. That subsequently, he learnt that the court had issued judgment in default in favour of the plaintiff. The defendant argued that it would suffer irreparable harm and the mistakes of counsel should not be visited on the client.



5. The application was opposed. The respondent filed a replying affidavit dated 31/3/2022 sworn by Samuel B Keengwe who is the proprietor of plaintiff firm. He stated that the defendant had filed the memorandum of appearance out of time however the plaintiff indulged the defendant to ensure the suit was disposed expediently.
6. That there was no evidence that the defendant's advocate was ailing from covid thus unable to act. He averred that the advocates actions in handling the suit were indolent and could be termed as a deliberate attempt to delay and obstruct the course of justice. He further stated that the judgement was regularly entered and the plaintiff would be greatly prejudiced if the orders sought were granted.
7. The application was canvassed by written submissions which I have considered.
8. The applicant submitted that the advocates illness was sufficient explanation as to why the defence was not filed on time. Counsel submitted that the judgment entered was a nullity as the award of costs could only be given upon the hearing and determination of the reliefs in part b and c of the plaint.
9. The respondent submitted that judgment was regular as it was entered after the defendant had failed to file its defence within the stipulated time. Counsel submitted that the defendant had had ample time to file an application for extension of time but failed to do so. It was further submitted that the defendant failed to give a satisfactory reason as to why the defence was not filed as the issue of the advocates illness was an afterthought. It was the plaintiff's submissions that the defence did not disclose a reasonable defence or raise triable issues.
10. I have considered the pleadings, the response and the submissions. The main issue for determination is whether the judgment entered on 28/2/2022 should be set aside and the defendant be granted leave to file its defence out of time.
11. Order 10, rule 11 of the [Civil Procedure Rules](#) provides: -

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
12. It is not disputed that the defendant was served with the summons to enter appearance and file a defence. It entered appearance on December 14, 2021 but failed to file a defence 14days after entering appearance as required. The reasons advanced by the defendant was that its counsel was indisposed and was therefore unable to comply with the rules of procedure. In support of this the defendant produced medical reports.
13. The plaintiff opposed the application stating that the reasons given by the defendant were not satisfactory and termed them as an afterthought. The plaintiff further faulted the defendant for not using another advocate from the firm to proceed with the matter. In view of the above, that the judgment was regular and what is before court is whether the defendant had made out a case for the Court to exercise its discretion in its favour.
14. In [James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another](#), Civil Appeal No 6 of 2015 eKLR, the Court of Appeal held: -

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one



reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shah* (supra), *Patel v EA Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* [1986/ KLR 492 and *CMC Holdings v Nzioki* [2004/ 1 KLR 173].”

15. In the present case, the judgment was regular. The reason for the failure to file defence was explained, and the Court is satisfied, to be the illness of the defendant’s advocate. There were medical reports that were produced to prove that fact.
16. As regards the time taken, I note that the advocate was up and running after 27/1/2022. He made effort to be accommodated to file the defence out of time but was not granted. Judgment was entered on 28/2/2022 and the present application lodged on 16/3/2022. In my view, there was no inordinate delay in applying to set that judgment aside.
17. As regards the proposed defence, the Court has considered the same. It cannot be said to be frivolous. In *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR, the Court of Appeal observed of what would be considered to be triable issues as follows: -

“What then is a defence that raises no bona fide triable issue” A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”
18. In its defence the defendant raised an issue of the amount owing having been collected by another firm of advocates not the plaintiff. It also denied the existence of any service level agreement with the plaintiff. In my view, those are contentious issues that necessitate interrogation.
19. In *Patel vs EA Cargo Handling Services Ltd* (1974) EA 75 , it was held that: -

“There are no limits or restrictions on the judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”
20. It is my view that it would be in the interests of justice that the parties be allowed to ventilate their respective cases on merit. I note that the plaintiff would not be highly prejudiced if the orders sought are granted as the case can be expedited as opposed to locking out the defendant from the seat of justice. An order for costs can compensate the plaintiff accordingly.
21. In the premises, I find merit in the application and set aside the judgment entered on 28/2/2022 on the following terms: -
 - a. The defendant do file and serve its defence within 14 days of the date of this ruling.



- b. The defendant to pay the plaintiff thrown away costs of the suit assessed at Kshs 30,000/- within 30days of the date hereof, in default execution to issue.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

A. MABEYA, FCIArb

JUDGE

