



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 235 OF 2016**

**DAVID KHAYO KOKOKO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**EQUITY GROUP HOLDINGS LIMITED**

**T/A EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**CREDIT REFERENCE BUREAU AFRICA LIMITED**

**T/TRANSUNION.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**SCHOLASTICA INDOMBO**

**SHIME-CHERO.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

**Background**

1. The plaintiff filed instant suit on 21<sup>st</sup> June 2016. Through an application dated 1<sup>st</sup> October 2019, the defendant sought orders for security for costs. The defendant did not attend court when the application came up for hearing on 5<sup>th</sup> February 2020 thereby leading to its dismissal for non-attendance.

**Application.**

2. Through the application dated 17<sup>th</sup> March 2020, the 1<sup>st</sup> defendant applicant seeks orders that: -

**1. Spent.**

**2. That this honourable court be pleased to set aside and or vacate the orders made on the 5<sup>th</sup> February 2020 dismissing the 1<sup>st</sup> Defendant Notice of Motion dated 1<sup>st</sup> October 2019 for non-attendance and reinstate the same for hearing on merit.**

**3. That the cost of this application be provided.**

3. The application is supported by the affidavit of the defendant's advocate **Mr. Geoffrey G. Mahinda** and is premised on the grounds that: -

**a) That the matter proceeded for hearing on 5<sup>th</sup> February 2020 in the absence of the 1<sup>st</sup> defendant/applicant and/or their counsel.**

**b) That failure to attend court by the applicant and or their counsel on 5<sup>th</sup> February 2020 was occasioned by an inadvertent mistake occasioned by their advocate and the advocate's court assistant to diarize the case.**

**c) Following the inadvertent mistake of the counsel for the 1<sup>st</sup> defendant/applicant, and without fault on the part of the applicant, the Notice of Motion dated 1<sup>st</sup> October 2019 was dismissed for non-attendance.**

**d) The 1<sup>st</sup> defendant's Notice of Motion dated 1<sup>st</sup> October 2019, has merit and it is only fair and just that the 1<sup>st</sup> defendant be granted an opportunity to ventilate the issues.**

**e) That the application has been made without inordinate delay.**

**f) That it is in interest of justice that the application be allowed.**

**g) The 1<sup>st</sup> defendant has a good defence in answer to the plaintiff's case.**

**h) No prejudice will be occasioned to the plaintiff/respondent if the order sought are granted.**

4. The plaintiff opposed the application through the Replying Affidavit of **Mr. David Khayo Kokoko**. The plaintiff's case is that in determining the question on whether or not to set aside the default judgment the merits of the plaintiff's application dated 1<sup>st</sup> October 2019 for security of costs ought to be considered as well. The plaintiff submitted that the instant application is prejudicial to the speedy disposal of the main suit which has been pending since 2016.

5. Parties canvassed the application by way of written submissions which I have carefully considered.

6. The main issue for determination is whether the applicant/defendant has made out a case for the setting aside of the orders of 5<sup>th</sup> February 2020 dismissing the application dated 1<sup>st</sup> October 2019 for non-attendance.

#### **Setting aside.**

7. Essentially, setting aside an *ex parte* judgement/order is a matter of the discretion of the court. However, the discretionary power must be exercised judicially and only in deserving cases. In *Esther Wamaita Njihia & two others vs. Safaricom Ltd* [2014 eKLR] the court citing relevant cases on the issue held *inter alia*:-

***"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd. [1974] EA 75) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo [1967] EA 166). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. [1968] EA 300) It also goes without saying that the reason for failure to attend should be considered."***

8. In the instant case, the applicant avers that there was an inadvertent mistake of counsel for the 1<sup>st</sup> defendant in diarizing the hearing date of 5<sup>th</sup> February 2020 which was wrongly diarized as 5<sup>th</sup> April 2020. Courts have taken the position that mistake by counsel should not be visited on the client. In *Belinda Muras & 6 Others v Amos Wainaina* [1978] KLR Hon Madan JIA (as he then was) defined what constitutes a mistake as follows:

***"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel 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 of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."*** [own emphasis]

9. Similarly, in *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KLR 103 at 1040 Apaloo J/A (as he then was) stated thus: -

***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit"***. [own emphasis]

10. I have perused the annexures to the instant application and I note that indeed there was a mistake on the part of the defendant's counsel in diarizing the hearing date of 5<sup>th</sup> February 2020.

11. Having regard to the above cited authorities on the subject of mistake by counsel, I find that the instant application is merited and I therefore allow it. I will however grant the costs of the application to the plaintiff who has all along been eager to have his case heard and determined.

12. I direct the parties herein to file and exchange their written submissions to the pending application dated 1<sup>st</sup> October 2019 within 7 days from the date of this ruling.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 22<sup>nd</sup> day of April 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Mahinda for 1<sup>st</sup> Defendant/Applicant.

Mr. Bwire for the Plaintiff.

Ms Wangui for Kisinga for 2<sup>nd</sup> Defendant

Court Assistant: Sylvia.