



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**CIVIL APPEAL NO. 73 OF 2013**

**Philip Mururi Ndaruga.....Appellant**

**Versus**

**Gatemu Housing Co-operative Society Ltd.....Defendant/Applicant**

**JUDGEMENT**

The appellant seeks to overturn the Ruling delivered on 29<sup>th</sup> August 2013 in CMCC No. 13 of 2002 in which the learned Chief Magistrate refused to set aside *ex parte* proceedings of 8<sup>th</sup> August 2012 and the consequential judgement delivered on 19<sup>th</sup> September 2012 and allow the suit be tried on merit. In a very brief ruling the learned magistrate observed as follows:-

*"the applicant was not denied legal representation, he chose to stay away of the trial by refusing to pay court adjournment fees even after he was given time to do so. The grounds he has raised are not mountainous enough to have the trial proceedings and judgement set aside. His application is dismissed with costs to the Respondent."*

It's not clear why the magistrate cited the issue of legal representation because it was not raised in the application as the record shows. However, the above is the impugned decision. Perhaps I should say "*reasons*" for refusing the application. But the question that follows is, did the learned magistrate give reasons as to why or how she arrived at her decision? I pose the questions, **(a)** Should a court give reasons for its decision, and **(b)** what constitutes *sufficient reasons*. I propose to spare some ink and paper to address these pertinent questions.

I find it necessary to point out that the ruling in question is too brief and I find it difficult to extract the reasons as to why or how the court arrived at the impugned decision or why the could not exercise its discretion in favour of the applicant. It is a fundamental requirement of common law that reasons for judgment or ruling be given by the judicial officer. Thomas J in *Bell-Booth v. Bell-Booth*<sup>[1]</sup> put it succinctly when he rendered himself as follows:-

*"Reasons for judgment are a fundamental attribute of the common law. The affinity of law and reason has been widely affirmed and Judge's reasoning -his or her reasons for the decision - is a demonstration of that close assimilation. Arbitrariness or the appearance of arbitrariness is refuted and genuine cause for lasting grievances is averted. Litigants are assured that their case has been understood and carefully considered. If dissatisfied with the outcome, they are able to assess the wisdom and worth of exercising their rights of appeal. At the same time public confidence in the legal system and the legitimacy and dynamic of the common law is enhanced. The legal system can be seen by (sic) working and, although possibly at times imperfectly, striving to achieve justice according to law."*

The giving of reasons is a normal incident of the judicial process.<sup>[2]</sup> We are in the "age of reasons."<sup>[3]</sup> Never before have reasons been so praised, cherished, advocated, and promoted in public discourse as well as in academic circles.<sup>[4]</sup> The purpose of judicial reasons is to set forth an explanation for a decision on questions presented before a court. These reasons may include the court's articulation of the factual and legal basis for its decision as well as its interpretive and policy analysis of the law it is applying.

The obligation to explain how, and why, a particular decision has been reached stems from the common law. In more recent times, it has been suggested in some jurisdictions that this duty has a constitutional dimension as well.<sup>[5]</sup> Plainly, there are a number of justifications for requiring the provision of reasons. In the case of an appeal, reasons enable an appellate court to be satisfied that the decision-maker took into account all matters that he or she was required to consider, and did not have regard to extraneous material. Reasons also enable an appellate court to determine whether any other form of jurisdictional error has been demonstrated.

Reasons enable litigants to see whether any appealable or reviewable error had been committed, thereby informing the decision whether to appeal, or let the matter lie. The discipline of giving reasons could make decision-makers more careful, and rational. Finally, the provision of reasons could provide guidance for future cases. It is fair to say that the merits of giving reasons have never seriously been doubted.

In my opinion, there is no better explanation for the need to render reasons in a judgement or a ruling than those given by McHugh JA (as his Honour then was) in *Soulemezis v Dudley Holdings*<sup>[6]</sup>

*"The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision. As Lord MacMillan has pointed out, the main object of a reasoned judgment "is not only to do but to seem to do justice." <sup>[7]</sup> Thus the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Secondly, the giving of reasons furthers judicial accountability. As Professor Shapiro has recently said (In Defence of Judicial Candor (1987) 100 Harv L Rev 731 at 737):*

*"... A requirement that judges give reasons for their decisions — grounds of decision that can be debated, attacked, and defended — serves a vital function in constraining the judiciary's exercise of power."*

Also, under the common law system of adjudication, courts not only resolve disputes — they formulate rules for application in future cases.<sup>[8]</sup>

Even though it may not be easy to set out what constitutes sufficient reasons, there must be some process of reasoning set out which enables the path by which the conclusion has been reached to be followed. If it is not possible to understand from the reasons given how the conclusion was reached then plainly those reasons will be inadequate. The reasons should trace the major steps in the reasoning process so that anyone reading them can understand exactly how the decision-maker reached his or her conclusion.

The appellant averred that he attended hearing together with his then advocate and that the issue of his failure to pay court adjournment fees and costs due to the Respondent for previous adjournments was raised and he paid the court adjournment fees but the Respondent objected to his participating in the proceedings on grounds that he had not paid Respondents costs as ordered on three previous occasions. The court upheld the objection which he construed to mean that he would not participate in the proceedings unless he paid the said costs. The court further directed that the hearing proceeds at 2 pm the same day. The appellant stated that he was ready and willing to pay the said costs and he instructed his advocate to plead for two weeks but the request was rejected. The appellant stated that at the material time he was going through financial constraints and his wife was sick. He was able to borrow some money some minutes before 3pm but when he came to court he found that hearing had been concluded and a date fixed for judgement. Ultimately, judgement was entered *ex parte* and his counter claim dismissed without him being heard.

At pages 94 of the record, the trial magistrate stated that *"The court proceeded to hear the plaintiffs case without participation of the defendant."* This raises a fundamental issue of the appellants right to be heard before a decision is rendered against him. Also, I note from the record that the Appellant had been convicted of a criminal trial on issues related to the civil claim against him and referring to the criminal trial the Magistrate observed *"Having considered the evidence adduced and in support thereof the*

*conviction for theft, the court has no reason to doubt the evidence of the plaintiff that the defendant is liable for the amount claimed.*" It is important to mention that the Appellant successfully appealed against the said conviction in Nyeri Criminal Appeal number 76 of 2012 and the said conviction was quashed and sentence set aside. If the basis of the magistrates decision was based on the evidence of the said conviction, then, the ground has since shifted because the conviction was subsequently overturned as stated above.

The Respondents counsel submitted that the grounds of appeal are directed against the judgement in question, yet there is no appeal against the judgement. In my view, the prayers sought in the memorandum of appeal clearly shows that the Appellant seeks to set aside the ruling delivered on 29<sup>th</sup> August 2012. Further, grounds one and two are relevant to the appeal before me and the appeal can be determined on the said grounds which can conveniently be reduced into one, as I hereby do, namely, whether the learned Magistrate erred in law in dismissing the appellants application. It is also important for the court to note that the appeal was prepared by the Appellant acting in person and he represented himself in court and accordingly, the court cannot expect the pleadings to be as exhaustive as if drawn by a professional advocate. Further Article 159 (2) (d) of the constitution enjoins the court to determine cases without undue regard to technicalities of procedure.

Respondents counsel also submitted that whether or not to allow the application was a matter of the discretion of the court and there is nothing to fault the magistrate for not exercising her discretion in favour of the Appellant. The fundamental question is whether the Appellant gave sufficient reasons for failing to attend the proceedings and whether the learned magistrate exercised her discretion properly and judiciously while dismissing the said application.

On whether or not the Appellant gave sufficient reasons to warrant the court to set aside the *ex parte* judgement, guidance can be obtained from **Mulla**, *The Code of Civil Procedure*[9] whereby he has illuminated the grounds for setting aside an *ex parte* decree/order and what constitutes sufficient cause for setting aside an *ex parte* judgement/decreed/order. Essentially, setting aside an *ex parte* judgement or order is a matter of the discretion of the court. In the case of *Esther Wamaitha Njihia & two others vs. Safaricom Ltd*[10] the court held *inter alia*:-

*"the discretion is free and the main concern of the courts is to do justice to the parties before it.[11] 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.[12] 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.[13] It also goes without saying that the reason for failure to attend should be considered."*

Once an applicant satisfies the court that he had sufficient cause not to attend court, the court is under duty to grant the application and make the order setting aside the *ex parte* decree or order, subject to any conditions the court may deem fit.

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania Discussing what constitutes sufficient cause[14] had this to say:-

*"It is difficult to attempt to define the meaning of the words 'sufficient cause.' It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)*

A similar position was held in *Daphene Parry vs Murray Alexander Carson*[15] where the court held:-

*'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,'*

its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, .....”(Emphasis added)

Examining similar provisions, **Justice Adoyo** of the High Court of Uganda<sup>[16]</sup>stated that:-

"The rationale for this rule lies largely on the premise that an ex parte judgement is not a judgement on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing" (Emphasis added)

The Supreme Court of India in the case of *Parimal vs Veena* observed that:-

*"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement or order impugned before it.<sup>[17]</sup> The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which a party could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application.<sup>[18]</sup> Thus, the applicant must demonstrate that he was prevented from attending court by a sufficient cause.

The question that follows is whether the applicant has demonstrated "sufficient cause" to warrant the exercise of the courts discretion in its favour. The applicant has in my view offered a candid and frank explanation as to why he did not attend court. He stated that he went to look for money and came back at 3 pm only to find that the case had proceeded. He had been ordered by the court to pay costs to the Respondent. He states that he understood that to mean he had to pay before he could be heard. The court record does not show that the magistrate warned him of consequences if he did not pay before 2 pm. I also find that it was unfair for the magistrate to proceed *ex parte* under such circumstances considering that there was a defence and a counter claim on record. I find that the reason given by the applicant for failing to attend court is excusable and that this was a proper case where the court ought to have exercised its discretion in favour of the applicant. The Appellant had filed a defence and a counter claim. To me, its greater injustice to deny a party the opportunity to be heard rather than adjourn the matter.

It was unjust and a miscarriage of justice to deny a party who had expressed the desire to be heard the opportunity of to be heard. In *Richard Nchapai Leiyangu vs IEBC & 2 others*<sup>[19]</sup> the court stated as follows:-

*"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"*

Also relevant is the decision of the court of appeal in *CMC Holdings Ltd vs James Mumo Nzioka*[20] where it was held *inter alia*:-

*“The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error”*

The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside. The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[21] The inherent power, as observed by the Supreme Court of India[22] *“has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it.”* Lord Cairns[23] stated as follows:-

*“One of the first and highest duties of all Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case.”*

Having considered the facts of this appeal, the relevant law and authorities all of which are in agreement that the right to a hearing is highly safeguarded and can only be taken away if there are sufficient and compelling reasons, I conclude that this is a proper case for this court to exercise its discretion in favour of the appellant. Sufficient cause in an application to set aside *ex parte* orders has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case.

Accordingly I find myself constrained to allow this appeal. I therefore allow the appeal, set aside the orders made on 29<sup>th</sup> August 2013 and substitute the said orders with an order setting aside the *ex parte* proceedings of 8<sup>th</sup> August 2012 and the judgement delivered on 19<sup>th</sup> day of September 2012 and all the consequential orders/decrees and further order that **RMCC NO. 13 of 2012** be remitted back to the lower court for hearing afresh as a defended case.

Each party shall bear his/its own costs for this appeal.

Orders accordingly

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 20<sup>th</sup> of September 2016

**John M. Mativo**

**Judge**

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[1] [1998] 2 NZLR 2

- [2] Public Service Board of New South Wales v Osmond (1986) 159 CLR 656 ('Osmond').
- [3] See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV.L.REV. 1, 19–20 (1959) "The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it."
- [4] Mathilde Cohen, When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach, 72 Wash. & Lee L. Rev. 483 (2015), <http://scholarlycommons.law.wlu.edu/wlulr/vol72/iss2/3>
- [5] Wainohu v New South Wales (2011) 243 CLR 181.
- [6] {1987} 10 NSWLR 247 ('Soulemezis').
- [7] The Writing of Judgments (1948) 26 Can Bar Rev at 491.
- [8] Taggart "Should Canadian Judges Be Legally Required to Give Reasoned Decisions In Civil Cases" (1983) 33 University of Toronto Law Journal 1 at 3-4.
- [9] Mulla, The Code of Civil Procedure Act V of 1908, Sixteenth Edition
- [10] HCCC No. 62 of 2011, Nairobi
- [11] see Patel vs E.A. Cargo Handling Services Ltd {1974} E.A. 75
- [12] see Shah vs. Mbogo {1969} E.A.116
- [13] See Sebei District Administration vs Gasyali1968} E.Way 300
- [14] See The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006 ( Munuo JA, Msoffe JA and Kileo JJA)
- [15] {1963} E.A. 546
- [16] Transafrika Assurance Co Ltd vs Lincoln Mujuni, Misc App No 789 of 2014, High Court of Uganda, Kampala
- [17] Ibid
- [18] Ibid
- [19] Civil Appeal No. 18 of 2013
- [20] {2004}KLR 173
- [21] See Mamraj vs Sabri Devi, AIR 1999 P & H 96
- [22] In Raj Bahadur Ras Raja vs Seth Hiralal, AIR {1962} AC 527
- [23] See Roger Vs Comptoir D' Escompts De Paris