



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 34 OF 2013**

**SILAS MUGENDI NGURU (suing as the legal Representative of the estate of LUCY NJOKI KITHAKA .....PLAINTIFF**

**-VERSUS-**

**THE NAIROBI WOMEN’S  
HOSPITAL.....  
.....DEFENDANT**

**RULING**

By an application dated 23<sup>rd</sup> April 2014, the applicant the Nairobi Women’s Hospital seeks from this Court orders:

1. Spent
2. The court be pleased to stay execution of the decision of the court against the defendant, all proceedings and any consequential orders that may be issued including any warrants of attachment pending the hearing and determination of this application interpartes.
3. The court be pleased to set aside the default judgment entered against the defendant herein.
4. The defendant be given an opportunity to unconditionally defend the case on merit.
5. The costs of the application be provided for.

The application is predicated on the grounds that:

- a. Failure to file a defence in time was neither deliberate nor callous.
- b. The defendant has a bona fide good defence to this action;
- c. It is in the interest of justice and fairness for the defendant to be allowed to defend the suit.
- d. The award is substantial and the defendant shall be highly prejudiced if the application is not granted.
- e. No undue prejudice will be visited on the plaintiff as they will have an opportunity to respond.

The application is further supported by the affidavit of Doctor Majid Twahir and annexures thereto.

In his supporting affidavit sworn on 23<sup>rd</sup> April 2014 Doctor Majid deposes that he is the Executive Director of the defendant hospital and admits that indeed Summons to Enter Appearance (STEA) in this case were served upon the hospital on 13<sup>th</sup> February 2013 through their receptionist but unfortunately, and out of ignorance, the receptionist batched the STEA with other incoming documents for the day and made no further reference to the matter. That the procedure in the hospital

administration is that such documents/processes involving claims would have been handed over to ICEA their insurers through the Pacific Insurance Brokers (EA) for instructing an advocate to act for the defendant but that that was not done in this case.

That in this case, the documents were filed in the deceased/ patient's file and not acted upon, which inaction was also contributed to by the ongoing restructuring, transfers as well as registration of some staff which default culminated in judgment in this case being entered against the defendant on 1<sup>st</sup> April 2014.

That the plaintiff was also negotiating with the defendants' insurers with a view to an out of court settlement of the claim hence it was not expected that the plaintiff would go to court severally without notifying the defendants or their insurers.

That the Executive Director only learnt of the judgment herein when he came across a headline in the print media that there was judgment against the hospital for 9 million captioned "**Hospital to pay man 9 million for the wife who bled to death,**" after which he reported to the insurance brokers and on calling for the patients' file he also found the case reported on Kenya Law Website and constituted a panel of doctors to peruse the judgment who also perused the patients' file and found that the hospital has a good defence to the claim as shown by a draft defence annexed.

The deponent further avers that there are serious bona fide triable issues among them

- a. Whether the defendant was negligent as alleged by the plaintiff.
- b. Whether the death of the deceased was as a result of the alleged negligence.
- c. Whether the plaintiff is entitled to damages.
- d. Who should bear the costs of the suit?

It was further deposed that the defendant shall be prejudiced if the matter does not go to full trial hence judgment entered in default of appearance and or defence should be set aside and the defendant allowed to file its defence to the suit as it is in the interest of justice to have the suit heard interpartes on merit.

The plaintiff/respondent filed a replying affidavit on 15<sup>th</sup> May 2014, sworn by himself on the same date opposing the defendant's application and contending that the judgment entered against the defendants was regular and lawful and the same should not be disturbed since the defendant and their insurance company had notice to sue as well as summons to enter appearance and pleadings served on 15<sup>th</sup> February 2013.

That upon service of STEA upon the defendant the defendant's insurers did write to the plaintiff's advocates on 7<sup>th</sup> March 2013 seeking for indulgence as they had instituted investigations into the matter but the defendant went quiet even after the plaintiff's advocate responded to that letter notifying them that suit had been instituted against their insurer.

That the purported defence is a mere sham meant to delay the enjoyment of the plaintiff's fruit of his judgment and that Doctor Njue represented the defendant during the autopsy carried out on the deceased's body and that he did not object to the findings hence the application should not be allowed as the defendant had many opportunities to be heard in defence but they squandered their opportunity.

In their supplementary affidavit sworn on 4<sup>th</sup> July 2014 by Lucy Muriithi the Deputy Manager, Legal Department of ICEA Lion General Assurance Company Limited, the defendant's insurers, she deposes that the company was neither served with letter or court summons in the suit as alleged .

In a rejoinder, the plaintiff filed a further affidavit on 11<sup>th</sup> August 2014 asserting that his advocates maintain writing letter dated 15<sup>th</sup> March 2013 to ICEA Lion Insurance which letter was received on the same date as shown by exhibit SM5 copy of the said letter with an acknowledgment stamp and

signature.

The parties were encouraged by the court to attempt a negotiated settlement but they could not agree prompting a hearing to determine the application on merit. Both parties filed authorities supporting their respective positions and appeared before me for oral submissions on 5<sup>th</sup> February 2015.

In support of the application, the defendant's counsel Mr Mwai submitted, relying on the grounds, supporting and further affidavits referred to above and cited authorities filed on 7<sup>th</sup> July 2014 and 2<sup>nd</sup> February 2015 respectively and annexures to the supporting affidavits.

He submitted that the defendants admit being served with STEA but that the court should accept the explanation given for failure to enter appearance and file defence and set aside judgment in default as such failure to defend the suit was not deliberate.

Further, that the defendant has a bona fide defence that raises triable issues and being a hospital that offers charitable services and not for profit, it stands to suffer substantially as the award of over 9 million in favour of the plaintiff is substantial.

He urged the court to find that there was excusable mistake, relying on the case of **Pharmaceutical Products Limited vs Development Bank of Kenya & 2 others (2004) eKLR**.

Further, that the court in the above case after finding that there was excusable mistake set aside default judgment and ordered thrown away costs and costs of the application which this court can order the defendant to pay the plaintiff and that the plaintiff shall in no way be prejudiced if judgment is set aside and the defendant is granted leave to defend the suit.

Relying on the case of **DT Dobie vs Joseph Rading Wasambo CCA 38/98**, Mr Mwai submitted that the inconvenience caused to the plaintiff can be compensated by an award of costs since the draft defence raises triable issues. The same argument was advanced in reliance on the case of **Josam Ltd vs Mary Wanjiru & another (2014) e KLR**.

Mr Mwai prayed for the orders sought pledging to have the matter fast tracked and heard expeditiously.

In opposition, Mr Midikira advocate for the plaintiff relied on his client's replying and supplementary affidavits and annexures thereto and the authorities filed contending that the defendant's application had no merit as it had not satisfied conditions for setting aside judgment in default. First, that it had not been shown that there was an excusable mistake and or a defence on merit. That the defendants and their insurers deliberately refused to defend the suit and even after being notified severally prior to the filing of suit, they deliberately ignored to respond hence could not now be heard to plead excusable mistake since the judgment as entered was regular. That this court should examine the draft defence and find that it raises no triable issues as is premised on matters which were not challenged i.e. the post mortem report of the deceased. Mr Midikira relied on the decision filed in **HCC 2919/96 – Manju Patel vs Express (k) Ltd, HCC 40/2013 Sameer Africa Ltd vs Aggrawal & sons Ltd CA/15/2010 Amanyi Okumo Kasiala & Zolles vs Moses Okware Opau & another (2013) e KLR**; which decisions the courts analyzed the issue of whether there was defence that raised triable issues. He further submitted that the plaintiff shall be highly prejudiced if judgment which is regular is set aside owing to the defendant's don't care attitude and that if they are allowed to defend the suit they must deposit security. He urged the court to dismiss the defendant's application with costs.

In a brief rejoinder, Mr Mwai maintained that the letters referred to by Mr Midikira and his client were not written to the defendant and that this court should examine the plaint and draft defence to establish what triable issues are since the claim is not admitted and if allowed to adduce evidence the defendant would demonstrate that it has a good defence to the claim. He dismissed authorities relied on by the plaintiff as not being relevant as the courts found that the defence did not raise triable issues and that the cause of action in the cited cases is different from this case which is premised on professional medical negligence where experts have to be called to testify. He urged the court to allow

the application as prayed.

**Analysis and determination of issues.**

I have carefully considered the defendant's application for setting aside the *ex parte* judgment in default of appearance and defence and the opposition thereto by the plaintiff. The main issue for determination in the application is whether the defendant has made out a case for the setting aside of the *ex parte* judgment which was regularly entered in default of appearance and or defence and if so, on what terms.

The applicable law on the setting aside of *ex parte* judgment in default of appearance and or defence is order 10 Rule 10 and 11 of the Civil Procedure Rules which 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.”***

Under Order 10 Rule 9:

***“ subject to Rule 4, in all suits not otherwise specifically provided for by this order where any party served does not appear the plaintiff may set down the suit for hearing.”***

The power of the court to set aside judgment in default is a discretionary one, albeit that discretion should be exercised judiciously.

In the instant case, it is not in dispute that the defendant was served with summons to enter appearance on 15<sup>th</sup> February 2013 as it is readily admitted by the defendant. The only issue is whether the failure to enter appearance and or file defence giving rise to *ex parte* interlocutory and final judgment after formal proof hearing by Waweru J on 1<sup>st</sup> April 2014 was by “mistake” or inadvertence and whether that “mistake” is excusable.

In the exercise of the unfettered judicial discretion to set aside *ex parte* judgment the court must look at all circumstances of the case, bearing in mind that concern to do justice to the parties. Injustice to a party arising out of accidental slip, inadvertence or excusable mistake or error must be avoided. In addition, that discretion is not intended to aid a party who deliberately seeks to obstruct or delay the court of justice.

The court must also consider whether the draft intended defence raised triable issues and whether an award of costs would be reasonable compensation to the plaintiff for the delay, trouble or inconvenience occasioned. Finally, the court must also remember that to shut a litigant out of the court should be the court's last resort (see **HCC 572/2003- Pharmaceutical Products Ltd vs Development Bank of Kenya & 2 others** Waweru J on 27<sup>th</sup> October 2014).

The defendant herein has gone to great lengths to explain the circumstances under which they received STEA & pleadings and mistakenly filed them away and only learnt of the judgment after the same was reported in the media. Further, that they have a defence which raises triable issues. On the other hand, the plaintiff maintains that the defendant and their insurers deliberately ignored notices before and after institution of suit, an indication that they were not interested in defending or settling the matter but to delay and deny the plaintiff his lawfully obtained judgment and that in any case the defendant has no defence on merit as the suit is predicated on a post mortem report which was witnessed by their representative Doctor Njue who never contested the cause of the deceased's death as a result of medical negligence.

I have anxiously considered the parties respective positions as deposed and submitted and I am satisfied that the defendant's failure to enter appearance and or file defence was due to an excusable mistake and which mistake occurred when the receptionist who received the STEA and pleadings filed them away in the patient's file instead of bringing them to the attention of the management

responsible for legal processes. I am also satisfied that the mistake was discovered after judgment was placed in the media and Doctor Majid read about it, prompting action to set it aside.

I note that albeit the defendant and their insurers were notified of the intention to institute legal proceedings and that they did not pay heed, nonetheless they have been awakened by a regular judgment on record and they have shown a genuine interest to defend the suit as shown by their filing of draft defence. As to what constitutes a mistake, the case of **Belinda Murai & others vs Amos Wainaina (1978 ) KLR 278 per Madan JA with approval by Nyeri CA 18/2013 Richard Ncharpi Leiyagu vs IEBC & 2 Others – Visram, Koome & Odek JJA** is instructive that a party ought not to be denied an opportunity to ventilate his grievances as that would oust them from the judgment seat.

In the **Belinda Murai & Others (Supra)** case, Madan JA held:

*“A mistake is a mistake. It is no less a mistake because it is committed by Senior Counsel . Though in the case of junior counsel the court might feel compassionate more readily. If a blunder on a point of law can be a mistake, the door to justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”*

The learned Judge of Appeal further went on to state that:-

*“ It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes overrule.....”*

In **Phillip Chemwolo & Another vs Augustine Kubende (1982-1988) KAR at 1040**, Apallo J (as he then was) and cited with approval Nyeri CA 18/2013 **Richard Ncharpi vs IEBC (Supra)** the Court of Appeal posited that:

*“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. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding rights of the parties and not the purpose of imposing discipline.”*

In this case, I note that upon the judgment being delivered by Honourable Waweru J on 1<sup>st</sup> April 2014 after formal proof hearing on 5<sup>th</sup> February 2014, the media picked it up and published it on 9<sup>th</sup> April 2014 and on 23<sup>rd</sup> February 2014 which was within 2 weeks, the defendant filed the application to set aside the exparte judgment. In my view, the application was filed timeously and a hearing date was secured under certificate of urgency and the delay in disposing of the application was caused by the court urging the parties to try a negotiated amicable settlement. The parties did accept the courts' proposal and reported to court from time to time on the progress but when it became apparent that they could not agree, they were given a hearing date expeditiously and this ruling has also been delivered on schedule taking into account the heavy workload held by this court.

I do not find any evidence that there was fraud or that the defendant deliberately intended to overreach or delay or obstruct the course of justice for the plaintiff.

I have also examined the draft intended defence and I am satisfied that it raises triable issues. As to what triable issues constitute, In **Lalji T/A Vakkep Building Contractors vs Casousel Ltd (1989) KLR Nyarangi, Platt JJA and Kwach, Ag JA**) held:

*“.....A trial must be ordered if a triable issue is found or one which if fairly arguable is found to exist.”*

In **AAT Holdings Ltd vs Diamond Shields , International Ltd (2014) e KLR** the court in considering principles to guide the exercise of discretion in determining an application for summary judgment and in deciphering whether there were triable issues in a defence held, inter alia that :

**“.....2. That a trial must be ordered if a bona fide triable issue is found or one which is fairly arguable is found to exist. But a triable issue does not mean that which will succeed. It means an issue which raises a prima facie defence and which should go to trial for adjudication. See the opinion of Duffus P and Sheridan J, in Patel vs EA Cargo Handling Services Ltd (1974) EA 75.**

**3. But a trial should not be ordered in a case where the court strongly feels it is justified in thinking that the defence raised is a sham.....”**

Applying the above principles to the instant case, it is not in dispute that the plaintiffs claim against the defendant is general as well as special damages arising from the alleged medical negligence by the defendant which led to the very unfortunate death of the plaintiff's wife Lucy Njoki Kithaka (RIP). The draft defence denies that the defendant was negligent in the manner in which it handled the deceased and or that she died as a consequence of the alleged negligence.

In my view, the above two opposing positions in themselves prima facie raise a triable issue which need not necessarily succeed after the full hearing.

This court employs the principle that all parties to a dispute are entitled to be heard to ventilate their grievances arising from the right to access justice as guaranteed under Article 48 of the Constitution. Thus, whereas the plaintiff may be inconvenienced by the mistake and delay in enforcing the regular lawful judgment on record, on the other hand, there is the defendant who is eager to be accorded an opportunity to be heard and therefore it should not be driven from the judgment seat.

The novel and delicate balancing act of ensuring expeditious access to justice and the right to be heard by both parties is to exercise the unfettered discretion to allow the case to be heard and determined on merit. The plaintiff, in my view, can be adequately compensated by an award of costs of the application and thrown away costs, besides an order for fast tracking of the hearing of his case to ensure expeditious, fair and proportionate and economical disposal of the case herein. This decision is arrived at with a view to protecting a guaranteed right to be heard, which is also the cornerstone of the rule of law and good governance.

I find all the authorities cited by the defendant, in addition to the ones I have cited above, are relevant and applicable to the circumstances herein. On the other hand, the plaintiff's authorities cited are applicable but in circumstances where the court finds that indeed the draft defence raises no triable issue. As I have stated, I find that the draft defence exhibited raised triable issues among them, whether the defendant was negligent and whether that negligence was responsible for the demise of the deceased Lucy Njoki Kithaka who was their patient. It is an issue which will be determined only after calling expert evidence.

For the above reasons, I allow the defendant's application dated 23rd April 2014 and set aside the ex parte judgment delivered on 1<sup>st</sup> April 2014 by Honourable Waweru J.

I further order that the defendant shall within 7 days from the date hereof enter an appearance and file defence. In addition, the defendant shall bear the costs of the application herein and pay to the plaintiff thrown away costs of kshs 35,000/- within 14 days from the date hereof. In default of any of the orders herein above made, the order setting aside an ex parte regular judgment being a discretionary one, shall lapse and the plaintiff shall be at liberty to execute decree.

**Dated, signed and delivered in open court at Nairobi this 29th day of April 2015.**

**R.E. ABURILI**

**JUDGE**

29.4.2015

Coram Aburili J.

C.C. Kavata

Mr Rono for defendant/applicant

Miss Chepkurui holding brief for Mr Midikira for Plaintiff/Respondents. **COURT**- Ruling read and delivered in open court this 29<sup>th</sup> April 2015 at 4.15 p.m.

**R.E. ABURILI**

**JUDGE**

**29.4.2015**