



Nguru (Appealing as the Administrator of the Estate of the Late Nguru Githuba) v Kiriga & 3 others (Civil Appeal E320 of 2024) [2025] KEHC 29 (KLR) (Civ) (13 January 2025) (Judgment)

Neutral citation: [2025] KEHC 29 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E320 OF 2024
RC RUTTO, J
JANUARY 13, 2025**

BETWEEN

DAVID NJOROGE NGURU (APPEALING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE NGURU GITHUBA) APPELLANT

AND

**DAVID KIMANI KIRIGA 1ST RESPONDENT
GRACE WANJIKU KIRIGA 2ND RESPONDENT
ISAAC NGURU KIRIGA 3RD RESPONDENT
MARY WANJIRU KIRIGA 4TH RESPONDENT**

(An appeal from the ruling and order of the Chief Magistrate's Court at Nairobi (R.L. Musiega, SRM.) delivered on 16th February 2024 in MCOMMSU No. E134 of 2023)

JUDGMENT

1. This is an appeal against the dismissal of the appellant's Notice of Motion dated 11th October 2023 in which the appellant sought inter alia, to review and set aside the ex parte judgment entered on 9th May 2023, the resultant decree issued on 23rd June 2023 and any further orders ensuing therefrom.
2. Upon considering the application, the affidavits, the annexures thereto and the parties' written submissions, the learned magistrate found that had the appellant been a diligent litigant he would have pressured and followed up with his advocate to ensure the speedy prosecution of his case. The trial court having established that the Applicant was aware there was a suit in situ, considered the appellant's indolence, in establishing the whereabouts of the dispute and held that it would be a travesty of justice to exercise discretion in his favour. The trial court proceeded to dismiss the application with costs to the respondent.



3. The appellant aggrieved with the findings of the trial court lodged this appeal on the basis of six grounds summarized as follows; the learned magistrate failed to appreciate that the appellant's draft defence raised triable issues; that the failure to set aside the *ex parte* judgment occasioned prejudice on the appellant as his right to be heard under Article 50 (1) of *the Constitution* had been infringed; the learned magistrate failed to address all the issues raised by the appellant, the learned magistrate erred in law and fact by dismissing the application despite the weight of evidence on record and authorities cited, and applicable laws. In the premised circumstances, the appellant prays that the ruling of the learned magistrate be set aside and be substituted with an order that the appellant be granted leave to defend the suit and file his statement of defence. The appellant further prays for costs of the application and this appeal.
4. The appeal was disposed of by way of written submissions that were orally highlighted. The appellant, in his written submissions dated 11th June 2024, submitted that the trial magistrate failed to consider the draft defence which raised triable issues. As such, he made reference to numerous authorities including the case of *Rayat Trading Co Limited v Bank of Barofa & Tetezi House Ltd (2018)eKLR* and urged that the trial court did not direct its mind to the principles governing setting aside of *ex parte* judgments as espoused in the case.
5. In applying the principles, the appellant submitted that first, the they filed the application to set aside the interlocutory judgment immediately they became aware of the judgment. That the 5 months delay in lodging the application was excusable as it was not grave and that there was no past conduct of the appellant in the prosecution of the case to warrant refusal of exercise of discretion in his favour. Secondly, that they had a good defence which raised triable issues such as whether the estate of Nguru Githuba is liable under the Deed of family settlement dated 26th September 2016. Finally, the appellant submitted that no prejudice will be occasioned on the respondents if the orders sought are granted and in the event of any prejudice to the respondent the same could be addressed by way of costs. On the contrary, he will suffer grave prejudice as he will not be given an opportunity to be heard and this would violate their right under article 50(1) of *the Constitution*. The appellant made reference to numerous other authorities and urged this court to allow the appeal.
6. In their joint written submissions dated 7th June 2024, the respondents submitted that the impugned ruling was laudable and bereft of any fault. That the application was intended to frustrate the execution of the court's decree. They set out two issues for determination namely; whether the trial court was right in dismissing the appellant's application and whether the appellant draft defence raises any triable issues?
7. It was their submission that the judgment was regular since service is not disputed, the appellant knew of the instant case but chose not to take steps to ensure his interests were well protected. That he was ignorant and ignorance is no defence in law. They also submitted that the appellant's defence did not raise any triable issues worth of consideration. The respondents urged this court not to interfere with the trial court's decision and dismiss the appeal with costs as they would continue to suffer prejudice since the execution of the decree will be further delayed.
8. This being a first appeal, this Court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the Record of Appeal and make its own conclusions. See the case of *Selle vs Associated Motor Boat Company Limited (1986) E.A 123*.
9. I have considered and analyzed the record of appeal as well as the parties' submissions and the issue for determination is whether the trial court properly exercised its discretion in dismissing the Appellant's application to set aside the *ex parte* judgment and in failing to granted leave to the appellant to file its defence.



10. Order 10 rule 11 of the Civil Procedure Rules 2010 gives the Court unfettered discretion to set aside an ex-parte judgment that was entered in default of appearance and defence.
11. In *Thorn PLC-V Macdonald (1999) CPLR* as cited in *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others [2021] eKLR* the Court of Appeal highlighted the following guiding principles in the exercise of this discretion:
 - a. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
 - b. Any failure by the defendant to provide a good explanation for the delay is a factor to be considered but is not always a reason to refuse to set aside;
 - c. Primary considerations are whether there is a defence with real prospect of success and that justice should be done; and
 - d. Prejudice, or the absence of it, to the claimant also has to be taken into account.
12. Also in the case *Mohamed & Another vs. Shoka (1990) KLR 463*, the court set out the tenets a court should consider in entering interlocutory judgment and which include:
 - i. Whether there is a regular judgment;
 - ii. Whether there is a defence on merit;
 - iii. Whether there is a reasonable explanation for any delay;
 - iv. Whether there would be any prejudice.
13. From the above this court has the power to set aside an ex-parte judgment and allow the appellant to file a suitable defence. However, such leave is not granted as a matter of course. The court must be satisfied that the above set parameters have been met before setting aside the judgment. The court too may impose such terms as it deems appropriate under the circumstances. This is because such action would undoubtedly disadvantage a Plaintiff who has invested time prosecuting their claim.
14. The central issue, therefore is whether the trial court appropriately exercised its discretion in denying the appellant leave to defend the suit. In this instance the appellant has presented two principal arguments first that he instructed a firm of Advocates to represent his interests but, no action was taken by the said firm resulting to judgment and decree, secondly, that the trial court erred in failing to consider his draft defence which raised triable issues.
15. On the first ground it is not in dispute that the judgment seeking to be set aside was a regular judgment, the appellant having been served with summons to enter appearance and failed to file his statement of defence. The appellant's argument was that the failure to do so was occasioned by his erstwhile appointed advocates who failed to execute his instructions. In the case of *Warui & another vs. Nguyo & another (Sued as Administrators of the Estate of Richard Munene Maina - Deceased)* [2023] KEHC 25915 (KLR) held as follows:

“A case belongs to the litigant not to his lawyer. Any person who files a suit has an obligation to follow up on the progress of his case. A litigant cannot abandon his case and then turn around and blame the lawyer. It is said that a bad workman blames his tools – litigants have a habit of blaming their Advocates any time they lose a case.

In *Neeta Gohil –vs Fidelity Commercial Bank Limited* [2019] eKLR the court observed as follows:



“However, it is not in every case that a mistake committed by an Advocate would be a ground for setting aside orders of the court. In *Savings and Loans Limited Vs Susan Muritu (milimani)* Hccs No. 397 Of 2002 Kimaru, J expressed himself as follows:

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour is an indictment on the defendant. She had been indolent and taking into account her last conduct in the prosecution the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant. I hold similar view that it is not enough for a party to simply blame an advocate for a mistake but the party must show tangible steps taken by him in following up his matter (own emphasis).”

16. This court takes the same approach. I find that in the present case, the appellant was under an obligation to ensure that his case had been defended right from the beginning and not complain upon conclusion of his case.
17. On the second ground, namely to whether the trial court exercised its discretion judiciously in considering the application to set aside the ex parte judgment. The parameters for setting aside an ex parte judgment have been well set out in the earlier paragraphs of this judgment and include; whether there is a regular judgment, whether there is a triable issue, the defence is merited; reasonable explanation for any delay and whether there is a reasonable explanation for the delay.
18. This court notes that the Ruling of the trial court turned on the conduct of the appellant. The trial court based its decision on the finding that the appellant had been indolent, and taking into account his past conduct in prosecution of his case, it would be a travesty of justice to exercise discretion in his favour. This court observes that while the trial court referenced the appellant’s previous conduct in the matter, it did not specify the particular conduct or actions that influenced its decision. It is essential for a court to clearly articulate the specific conduct or actions of a party that informs its decision. This allows for a proper understanding of the rationale behind the court’s decision.
19. Further, this court notes that as submitted by the appellant the trial court failed and or neglected to consider whether their draft defence raised triable issues despite this being a critical aspect that should have been addressed. The Court of Appeal in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR defined what constitutes a triable issue as “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.”
20. Consequently, I have taken liberty to review the plaint and the draft defence, and note that the basis of the dispute is a deed of family settlement dated 26th September 2016. The appellant alleges that their defence denies owing liability to the respondents. Notably the respondents in their own submissions



admit that the dispute arose out of clause 5 of the deed which provided that the late Mary Njoki Nguru would pay the late Kiriga Githuba a sum of Kshs 4,500,000/- upon the first sale of the properties that were to be sold. The court finds that the issue of liability raises a triable issue which warrants a determination through judicial examination and process. It calls for a determination by the court as it could potentially affect the outcome of the case. The presences of such issues justify granting the defendant an opportunity to present their case.

21. In the Court of Appeal decision in *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR it was stated that:-

“The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues. The case of *Tree Shade Motors Limited vs D T Dobie & Company (K) Limited & Joseph Rading Wasambo*, Civil Appeal No 38 of 1998 was a case on an application to set aside a default judgment. However, the legal principles are the same as in a case where an ex parte judgment is obtained for nonappearance of a party at the hearing of his case. In that case this Court stated as follows:-

“The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff claim. Where a draft defence is tendered with the application to set aside the default judgment, the Court is obliged to consider it to see if it raises a reasonable defence to the plaintiff’s claim. If it does, the defendant should be given leave to enter and defend.”

22. In this regard, guided by the above authority, and taking into account the provisions of Article 50 of *the Constitution* on the right to fair hearing I will not shut out the Appellant from ventilating its defence as it raises a triable issue. Further, it will not be in the interest of justice to deny the Appellant an opportunity to be heard. The prejudice that the 1st Respondent would suffer for the delay in the conclusion of the case can be compensated by way of costs.

23. In that regard, I do allow the appeal and make the following orders;

- a. The Ruling delivered on 16th February 2024 is hereby set aside and is substituted with an order allowing the Notice of Motion Application dated 11th October 2023.
- b. The ex-parte judgment entered on 9th May 2023 and all consequential orders are hereby set aside.
- c. The Appellant is given 14 days from the date hereof to file its defence.
- d. The Appellant shall pay to the Respondent throw away costs in the sum of Kshs 20,000/= within fourteen (14) days from the date of this ruling.
- e. In the event the Appellant fails to comply with order (c) and/or (d) hereinabove, the Respondent will be at liberty to move the Court for appropriate orders.
- f. Each party to bear its own costs for the Appeal.

Orders accordingly

RHODA RUTTO

JUDGE



DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY 2025

For Appellant:

For Respondent:

Court Assistant:

