Miradi Ujenzi Consultancy v Gontier; Kenya Commercial Bank (Garnishee) (Civil Case E002 of 2024) [2025] KEHC 1946 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1946 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL CASE E002 OF 2024

WA OKWANY, J

FEBRUARY 6, 2025

BETWEEN

MIRADI UJENZI CONSULTANCY ..... PLAINTIFF

AND

GHISLAINE THERESE GONTIER ..... DEFENDANT

AND

KENYA COMMERCIAL BANK ..... GARNISHEE

RULING

Introduction

1. This ruling is in respect to the application dated 19th August 2024 wherein the Applicant seeks, inter alia, orders that: -

    1. That leave be granted to the Applicant to file the instant application and to defend and sign documents in relation to the Civil Suit No. E002 of 2024 on behalf of Ghislaine Therese Gontier a person suffering from a mental disorder by virtue of an order issued in the High Court of Kenya at Nairobi Misc. Application No. E169 of 2021 and upon leave the court to issue;

    2. That this Honourable Court be pleased to issue a temporary order for stay of any further proceedings up to and including the Garnishee Application dated 3/06/2024 pending the Hearing and Determination of this Application;

    3. That the Honourable Court be pleased to Set Aside and or vary or review the Judgment and Certificate of Costs dated 3/06/2024 for want of capacity of the Defendant;

4. That upon issuance of prayer 3 (above), the court do grant leave for the Applicant to file pleadings on priority basis;

5. That the pleadings filed in the suit be deemed as void ab-initio and hereby struck out on account of being drawn and filed by a firm and/or persons not licensed and/or accredited to practice law within the Republic of Kenya;

6. That the court subsequently strikes out the suit filed on 15/05/2024 in its entirety as the pleadings offend Civil Procedure and are marred by stark irregularities and illegalities;

7. That this Honourable Court do make such directions as may be necessary under the *Advocates Act* on the conduct of the firm purporting to act in the name and style of Maneo & Company Advocates and any such persons and/or individual purporting to act with and/or in the name of Maneo & Company Advocates to protect the integrity of the practice of law.

8. That cost of this Application be borne by the Plaintiff.

2. The application is supported by the affidavit of the Applicant's Legal Guardian Fernand Lois Selwyn Gendron and is premised on the grounds that: -

a. The Plaintiff herein has illegally and/or irregularly obtained Judgment in Default of Appearance and extracted a decree and certificate for the amount of Kshs. 36,081,938.00 all dated 03/06/2024;

b. That the Plaintiff has further obtained an Order Nisi restraining any debiting of account number 1106692314 held at Kenya Commercial Bank through Garnishee proceedings instated before this Honourable court causing untold financial hardship to the Applicant;

c. That the said Judgment in Default of Appearance was issued despite the Plaintiff not effecting service of summons and pleadings on the Defendant therefore NOT accorded the opportunity to state their case;

d. The High Court of Kenya declared the Defendant on 19/11/2021 in High Court Misc. Application No. E169 of 2021 to be a person suffering from mental disorder as per Section 26 of the *Mental Health Act*, Cap 248, Laws of Kenya;

e. That the said court appointed the Applicant to be the Defendant's legal guardian;

f. As such at the time of filing the suit, the Defendant had no capacity to be sued and could not mount a defence occasioning immense injustice;

g. Additionally, the purported contract relied on in obtaining the said Judgment is fraudulent as the company at the time of the contract was not registered therefore lacked capacity to enter into a contract and the signature of the Defendant was forged;

h. Additionally, the purported contract relied on in obtaining the said Judgment is fraudulent as the company at the time of the contract was not registered therefore lacked capacity to enter into a contract and the signature of the Defendant was forged.

i. That the actions of the Plaintiff are aimed at defrauding the Defendant who is a person suffering from a mental disorder.

j. The suit offends Order 32 rule 5 of the *Civil Procedure Rules* and therefore every order made therein should be discharged with costs to the Applicant;

k. In Addition, the Plaint and all the pleadings in the suit at fatally defective as the law firm, Maneo & Company Advocates, who have drawn and filed the said pleadings are not a registered entity and neither is there an advocate practicing in the name and style of Maneo and Company Advocates therefore the pleadings filed offend Order 2 rule 16 of the *Civil Procedure Rules*;

l. That the Plaintiff has purported to extract a Decree and Certificate of Costs which was tabulated without the costs being ascertained through taxation as is provided for under Section 94 of the *Civil Procedure Act*;

m. As such the Pleadings and the corresponding documents and orders issued are misconceived, lacking in merit and in toto incurably and fatally defective; the same constituted a gross abuse of the court process and cannot be sustained before this Honourable Court;

n. As it stands, the whole suit is marred by illegalities and as such the Judgment issued and all consequential orders are void ab initio;

o. That the Order Nisi obtained by the Defendant on the strength of the irregular Judgment and Decree restraining any debiting of account number 1106692314 held at Kenya Commercial Bank threatens to deprive the Applicant of much needed funds used to cater for her day to day needs;

p. That the Defendant in question is aged and mentally challenged and therefore requires round the clock care of which the said funds are critical;

q. Additionally, in furtherance of the rules of natural justice and fair hearing, it was necessary for this court to allow the application;

r. It is in the interest of justice that this application be allowed as prayed.

3. The Respondent opposed the application through his replying affidavit sworn on 9th October 2024 wherein he avers that the application is res judicata as the matters before the court have previously been determined in the ruling delivered on 5th August 2024 wherein the Applicant was directed to regularize his appearance by amending her application. He states that he duly served the Applicant with the summons to enter appearance and plaint as he was at the time unaware of the Applicant's mental incapacity. He further states that the company, Miradi Ujenzi Consultancy was duly incorporated way back in 2017 and that he therefore had the capacity to enter into the contract with the Applicant.

4. He further states that the law firm Maneo & Co. Advocates is duly registered as a business name under the *Registration of Business Names Act* Cap 499 and that his advocate George Ronald Morara Ngisa is duly admitted to the Roll of Advocates.

5. He avers that he has since changed his advocates to Eric Ntabo & Co. Advocates who have advised him that the Applicant is yet to demonstrate that he is desirous of defending the suit as he has not filed a draft defence despite making a prayer for leave to file the same. He contends that the Applicant does not expressly deny owing the decretal sum despite having been granted an opportunity to regularize his position.

6. The application was canvassed by way of written submissions which I have considered.

7. I find that the main issue for determination is whether the application is merited. The court will in addition to the main issue be required to determine: -

a. Whether the application is res judicata.

b. Whether Respondent's company, Miradi Ujenzi Consultancy, was duly registered and therefore clothed with the capacity to sue the Applicant.

c. Whether the law firm of Maneo & Co. Advocates is duly registered.

d. The import of the failure, by the Applicant, to annex/attach a draft defence to her application to set aside the interlocutory judgment.

a. Res Judicata

8. The Respondent argued that the application is res judicata as this court had, in its ruling delivered on 5th August 2024 directed the Applicant "to regularize his appearance by amending its application so as to include a prayer to appear in the suit on behalf of the Defendant."

9. According to the Respondent, the Applicant was supposed to amend her previous application dated 12th June 2024 (hereinafter "the earlier application") so as to include a prayer to be enjoined in the suit instead of filing a fresh application that raises similar facts.

10. The Applicant did not submit on the issue of res judicata.

11. The law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"

12. *Black's law Dictionary* 10th Edition defines "res judicata" as

> An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

13. The doctrine of res judicata posits that a person may not initiate more than one action in respect of the same or a substantially similar cause of action and that the Court must attempt to resolve all matters in dispute in an action so as to avoid multiplicity of actions.

14. When determining whether an issue in a subsequent Application or suit is res judicata, the court is required to look at the decision that is alleged to have settled the issues in question and ascertain the following: -

i. what issues were really determined in the previous Application;

ii. whether they are the same in the subsequent Application and were covered by the Decision.

iii. whether the parties are the same or are litigating under the same Title and,

iv. that the previous Application was determined by a court of competent jurisdiction.

15. In *Njangu vs Wambugu and Another* Nairobi HCCC No.2340 of 1991 (unreported), Kuloba J., held that: -

> If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face

lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

16. In *Siri Ram Kaura vs. M.J.E. Morgan*, *CA 71/1960* (1961) EA 462 it was held that: -

> " The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...
>
> The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
>
> It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

17. In *Uhuru Highway Development Ltd vs. Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court ruled that the Application before it was Res Judicata as the issue of injunction had been rejected both by the High Court and the Court of Appeal on merits and that the High Court Ruling had not been challenged on appeal. The court further emphasized that the same Application having been finally determined "thrice by the High Court and twice by the Court of Appeal", it could not be resuscitated through another Application.

The Court of Appeal further stated that: -

> " That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for."

18. Respect to a court's decision is fundamental to any civilised and just judicial system. Judicial determinations must therefore be final, binding and conclusive. This means that it will be a grave injustice if a party is required to litigate afresh on matters which have already been determined by the court.

19. A Decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be 'substantially undermined' if the Court

were to revisit them every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a Judicial Officer in the Court station.

20. Having regard to the above cited decisions and definitions of the doctrine of res judicata, I find that while it would have been desirable and prudent for the Applicant to simply amend the earlier application instead of filing a fresh application, the instant application cannot be said to be res judicata as the main issue raised in the earlier application, namely; the setting aside of the interlocutory judgment has not been determined.

b. Respondent's Registration

21. The Applicant averred that the Respondent lacks the capacity to sue as it is not a registered company.

22. The Respondent, on his part, produced a Certificate of Registration, under the *Registration of Business Names Act*, issued on 30th November 2017 (annexure marked "SPWNI") to show that his outfit is registered to carry out business under the name Miradi Ujenzi Consultancy.

23. I am satisfied that the Respondent demonstrated that his business is duly registered and that he therefore had the capacity to enter into the contract with the Applicant.

c. Registration of the Law Firm, Maneo & Co. Advocates

24. The Applicant contended that the firm which initially acted for the Respondent, Ms. Maneo & Co. Advocates, is not a registered entity and that neither is there an advocate practicing under the said name and style.

25. The Respondent on the other hand, exhibited the law firm's certificate of Registration under the *Registration of Business Names Act* (annexure "SPWN6") and the advocates practicing certificate for the year 2024 (annexure "SPWN7"). Applicant did not challenge the validity of the said certificates. I am satisfied that the Respondent established that the said law firm and advocate were qualified to represent him in these proceedings.

d. Merit of the Application

26. The gist of the present application is whether the Applicant has made out a case for the granting of leave to defend the suit and sign documents on behalf of the Defendant, who is a person suffering from mental illness. It was not disputed that the Defendant was, on 21st December 2021, declared to be a person suffering from a mental disorder under Section 26 of the *Mental Health Act*, Cap 248, Laws of Kenya in Nairobi High Court Family Division Misc. Application No. 169 of 2021.

27. Order 32 Rules 5 and 15 of the *Civil Procedure Rules* (CPR) stipulates that: -

> [Order 32, rule 5.] Representation of minor by next friend or guardian for the suit.
>
> 5. (1) Every application to the court on behalf of a minor, other than an application under rule 10 (2), shall be made by his next friend or by his guardian ad litem.
>
> [Order 32, rule 15.] Application of rules to persons of unsound mind.
>
> 15. The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

28. It was not disputed that the Applicant's deponent herein, Fernand Lois Selwyn Gendron, was duly appointed as the Manager of the Applicant's estate under Section 28 of the *Mental Health Act*. I am satisfied that the Applicant has made out a case for the granting of the prayer for leave to file the application to defend the suit and sign documents on behalf of the Defendant.

29. Turning to the prayer to set aside and/or vary or review the default judgment and certificate of costs dated 3rd June 2024, I note that besides the argument that the Applicant lacked the capacity to be sued owing to her mental illness, the Applicant also contended that the Defendant was not properly served with the summons to enter appearance and plaint. It was the Applicant's case that he only became aware of the case when the bank informed him of the garnishee order nisi.

30. The Respondent, in his part, maintained that he duly served the Defendant via her e-mail address and through registered post.

31. This court is vested with the wide discretion to set aside default judgments and the main consideration in such an application is to do justice to the parties (see *Philip Kiptoo Chemwolo & Another v Augustine Kubede* {1982 – 88) KAR).

32. In the instant case, having found that the Applicant is a person of unsound mind, it would be unreasonable and unjust to find that she was expected to understand or respond to the summons more so considering that she was not sued through her guardian. The question that this court has to grapple with is whether, in the circumstances of this case, the default judgment entered against the defendant can be said to have been regular.

33. In the case of *James Kanyiita Nderitu & Another* [2016] eKLR, the Court of Appeal made a distinction between regular and an irregular default judgment and rendered itself as follows : -

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another -vs- Shah (*1968) EA 98, *Patel -vs- E.A. Cargo Handling services Ltd* (1975) E.A. 75, *Chemwolo & Another -vs- Kubende* (1986) KLR 492 and *CMC Holdings -vs- Nzioka* [2004] I KLR 173.In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an

opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

34. Applying the reasoning in the above cited case to the present, I find that owing to the undisputed fact that the Defendant had been adjudged to be a person of unsound mind as at the time the service of summons was effected and default judgment was entered, it cannot be said that the said judgment was regular. This is however not to say that the Respondent, or any party for that matter, was to blame for the said entry of the judgment as the mental status of the Defendant was not known and had not been disclosed at the time. Suffice is to say that not even the Deputy Registrar who recorded the default judgment could not have known about the Defendant's condition until the issue was brought to the court's attention by the Applicant in the earlier application. It is my finding that in the circumstances of this case, the default judgment entered in this case cannot be said to have been regular. I therefore cannot hesitate but set it aside the default judgment in the interest of justice.

35. The Respondent also raised the pertinent issue of the failure, by the Applicant, to demonstrate that she has a triable case and is desirous to defend the case because he did not attach a draft defence to the application. The Respondent relied on the decision in *Moses Kimaiyo Kipsang vs. Geoffrey Kiprotich Kirui & 2 others* [2022] eKLR where it was held that a Defendant seeking to set aside a default judgment must demonstrate that he has a good defence that raises triable issues. The Respondent urged this court to dismiss the application since the Applicant did not show sufficient cause for failing to file a draft defence.

36. The Applicant, on her part, averred that she was wrongly sued in the proceedings as she has a mental disorder and therefore lacked the capacity to be sued. I note that the Applicant did not address her mind to the issue of a draft defence and merely relied on the issue of mental illness as the silver bullet to excuse her from any responsibility or claim.

37. I respectfully find that the position taken by the Applicant is misguided since mental illness perse does not exonerate a person from a civil claim since mentally unsound persons may sue or be sued through their guardians as provided under Order 32 of the *CPR*, which I have already highlighted hereinabove in this ruling. The Applicant was therefore expected to attach a draft defence in this application to prove to this court that there are triable issues to be canvassed should the default judgment be set aside. Failure to show a defence with triable issues has serious repercussions as was held in *Francis Mutinda Mutuli & 3 others vs. Stephen Kavandi Kamula & 5 others* where an application to set aside judgment was dismissed on the ground that no draft defence was annexed to the application so as to enable the court to evaluate whether it raises triable issues.

38. It is noteworthy that this is not the first time that the Applicant is making an application for orders when she has not fulfilled all the conditions that accompany the said orders sought. It is to be noted that the Applicant's earlier application dated 24th June 2024 failed on account of the Applicant's failure to include a prayer for leave to appear on behalf of the Defendant. It is clear to this court that the present application is, strictly speaking, incompetent for failure to attach a draft defence. This court could have therefore taken a cue from the previous decisions in similar applications where draft defences were not attached and dismissed this application. Be that as it may and having found that the default judgment was technically irregular on account of the fact that the actual Defendant is a person of unsound mind, I find that the failure to attach the draft defence is not fatal to the application.

39. Having regard to the nature of this case, the Defendant's state of mind and the concerns that have been raised, by the Applicant, over the manner in which the default judgment was entered, I find that the

justice of this case will require that the main suit/claim on the alleged breach of contract, be heard on its merit.

40. Bearing in mind the Defendant's mental condition, I also find that it will serve the interest of both parties to preserve the funds held in the garnishee account pending the hearing and determination of the suit. For the above reasons, I allow the prayer to set aside the interlocutory judgment on the following terms: -

    a. That the Applicant shall file and serve the defence on the Respondent within 7 days from the date of this ruling, failure of which the default judgment will be reinstated and the Respondent be at liberty to proceed with the execution.

    b. That the main suit shall be expedited and heard on priority basis.

    c. That the money held in the garnishee bank account shall remain in the said account pending the hearing and determination of the suit.

    d. The costs of the application shall abide the outcome of the main suit.

41. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 6TH DAY OF FEBRUARY 2025.

W. A. OKWANY

JUDGE