



**Ndung'u v Safaricom Plc & another (Civil Case E284 of 2022)
[2025] KEHC 2138 (KLR) (Commercial and Tax) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E284 OF 2022
F GIKONYO, J
FEBRUARY 13, 2025**

BETWEEN

PAUL WANDERI NDUNG'U PLAINTIFF

AND

SAFARICOM PLC DEFENDANT

AND

PEVANS EAST AFRICA LIMITED NOMINAL DEFENDANT

RULING

1. Two significant orders have been sought by the Defendant/ Applicant, Safaricom PLC, in the notice of motion dated 21st February 2023; a) to set aside the interlocutory judgment entered against it in accordance with the Request for Judgment dated 2nd November 2022; and b) to stay proceedings in this suit pending the hearing and determination of HCCC E002 of 2023; Pevans East Africa v Paul Wanderi Ndung'u and Asenath Wachera Maina.
2. The application is expressed to be brought under Sections 1A, 1B & 3A of the *Civil Procedure Act*, Orders 10 Rule 11, 49 Rule 9 and 51 Rule of the Civil Procedure Rules.
3. The application is supported by the annexed and supplementary affidavits sworn by its Senior Legal Counsel, Daniel Mwenja Ndaba on 21st February 2023 and augmented by the written submissions dated 26th June 2023.
4. The main ground is that the Respondent did not seek leave of the Court to institute this suit, which is a derivative action, as required under Sections 238, 239 and 240 of the *Companies Act*, 2015- a point that was raised through a preliminary objection (PO) filed on 31st October 2022.



5. According to the Applicant, the filing of a defense would not precede the leave to institute or continue with a derivative suit.
6. The Applicant also complains that the interlocutory judgment was entered before consideration of its PO.
7. The Applicant further contends that there are Court Orders confirming that the Respondent has no locus standi to sue on behalf of the Nominal Defendant, Pevans East Africa Limited.

Response

8. In opposing the application, the Plaintiff/ Respondent, Paul Wanderi Ndung'u, filed replying and supplementary affidavits sworn on 8th September 2023 and 22nd November 2023. He also put in written submissions dated 17th July 2023. His core contentions are that both the Applicant and its advocates were served with the summons to enter appearance together with the Plaintiff, Notice of Motion, Certificate of Urgency and the Order of the Court issued on 1st August 2022 and that there is no reason why the Applicant did not file its Defense on time; and that, a PO cannot substitute the defense.

Analysis and Determination

9. Arising from the application, the grounds, the parties' respective affidavits and written submissions are the following issues for determination: -
 - i. Whether the court should set aside the interlocutory judgment; and
 - ii. Whether the proceedings in this suit should be stayed pending the hearing and determination of HCCC E002 of 2023; Pevans East Africa v Paul Wanderi Ndungu and Asenath Wachera Maina.

Setting aside interlocutory judgment

10. The court has the discretion to set aside an ex parte judgment. But, 'the discretion is exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice'. Shah v Mbogo & another [1967] EA 116.
11. A distinction is made: on the one hand; between a regular default judgment entered where the defendant was duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file a defense, resulting in the default judgment. Some of the factors that the Court considers in determining whether to set aside a regular judgment are whether the Judgment was entered procedurally, the reason for non-compliance with rules on filing of defense; whether the defence on record or draft defence annexed to the application raises triable issues and whether the Applicant has shown an excusable mistake, inadvertence, accident or error. CMC Holdings Ltd v James Mumo Nzioki (Civil Appeal No. 329 of 2001) [2004] eKLR
12. On the other hand, an irregular default judgment entered against a defendant, which would be set aside ex debito justitiae- as a matter of right.
13. In this case, the Applicant has not disputed service. However, it contended that the judgment was entered before the hearing and disposal of its PO dated 31st October 2022 which challenged the competence of the derivative suit for it was filed without the permission of the court.



14. The Respondent challenged the PO claiming that it had been fraudulently sneaked into the CTS and that the Applicant had not paid its filing fees.
15. The CTS shows that the Applicant filed its PO on 1st November 2022 at 13:08:52 and that it was paid for. Hence, it is doubtful of the allegation that the PO was fraudulently sneaked into the CTS and that filing fees were not accounted for.
16. The Applicant argued that, the PO ought to have been determined before the entry of judgment in default of appearance.
17. The respondent urged that, the PO is not a substitute for defense required to be filed in answer to the Summons and Plaintiff.
18. The core of the PO was that, the Respondent did not seek leave of the Court to institute or continue with this suit, which is a derivative action, as required under Sections 238, 239 and 240 of the [Companies Act](#).
19. Under Section 238 of the [Companies Act](#), a “derivative claim” is a proceeding by a member of a company in respect of a cause of action vested in the company. It has not been denied that this suit is a derivative claim; The Respondent has indicated in the Plaintiff dated 27th July 2022 that he is a 17% shareholder of the Nominal Defendant Company and that he filed the suit in a derivative capacity on behalf of the Company.
20. Section 239 (1) of the [Companies Act](#) provides that:-
 - “(1) In order to continue a derivative claim brought under this Part by a member, the member has to apply to the Court for permission to continue it.”
21. The Respondent does not dispute that he did not apply for or obtain permission of the Court to continue the suit.
22. Hitherto, there is no application by the respondent for permission of the court to continue the suit.
23. As the suit was filed as a derivative suit, the respondent ought to have applied for and obtain permission of the court to continue with the suit. Request for judgment as well as entry of judgment herein upon this suit is ‘to continue it’; actions which required Court’s permission. In ordinary language, the Respondent placed the cart before the horse.
24. In dealing with a similar scenario, the High Court in *Langata Gardens Co. Ltd v June Kathini Mutisya & 2 Others* (Civil Suit 409 of 2011) [2013] eKLR, observed that: -
 - “15. By his notice of preliminary objection dated 21st October 2011 the 2nd Defendant in effect challenged the Court’s jurisdiction to hear and determine the suit against him. That preliminary objection ought to have been disposed of first before interlocutory judgment could be entered.”
25. This being a derivative suit, and the jurisdiction of the court having been challenged through the PO on that basis, the respondent’s argument that a PO is not a substitute for defense, is not appropriately situated within the substantive and procedural law governing derivative suits especially the requirement for permission of the court to continue with the derivative suit. Eminent arguments which may profit the debate include; whether filing of an appearance and or defense by the defendant are acts of continuing the suit. Bringing to the conversation whether a PO is not the appropriate pleading or filing in such situation. There is nothing terribly wrong in filing a PO.



26. As such, the interlocutory judgment was entered without the permission of the court for the Respondent to continue with the suit in accordance with Section 238 (1) of the Companies Act, thus, the judgment and all consequential or attendant manifestations are a nullity; perfect candidate for setting aside ex debito justitiae.
27. The court is persuaded that the Applicant has met the threshold for an order to set aside the interlocutory judgment.

Stay of proceedings

28. The next issue is whether the proceedings in this suit should be stayed pending the hearing and determination of HCCC E002 of 2023; Pevans East Africa v Paul Wanderi Ndung'u and Asenath Wachera Maina.
29. This is a derivative suit. It was commenced without the permission of the court. But, it cannot continue unless permission of the court is given. Within that frame, arguments presented in support of or against the order for stay of proceedings are best argued in an application for permission to continue with the suit.
30. Let the Respondent apply for leave to continue this derivative suit. It is only after permission is granted will stay of proceedings become a feasible legal option. Pendency of other similar suits as well as the issue of the disputed expulsion of the Respondent from the membership of the Nominal Defendant in HCCC E002 of 2023, are, to my mind, matters for consideration by the court on whether the respondent should be permitted by the Court to continue with this derivative suit.
31. Accordingly, stay of this suit is not ripe.

Conclusion

32. In conclusion, the following orders are given: -
 1. The Interlocutory Judgment entered against the Defendant pursuant to Request for Judgment dated 2nd November 2022, and all consequential orders is hereby set aside.
 2. The respondent to apply, within 21 days, for permission of the court to continue with this derivative suit.
 3. The request for stay of this suit be made in the application for permission of the court to continue with this derivative suit.
 4. Costs be in the cause.
 5. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 13TH DAY OF FEBRUARY, 2025

F. GIKONYO M
JUDGE

In the presence of: -

Mr. Ekuru/Diana for the plaintiff



Mr. Ochieng for Mr Kiche for defendant

