



**Bajrang Construction Limited v Vasisht & another; Adminstrators Thika School of Medical and Health Sciences Limited (Interested Party) (Civil Case E005 of 2022) [2025] KEHC 11438 (KLR) (11 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 11438 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL CASE E005 OF 2022  
DO CHEPKWONY, J  
MARCH 11, 2025**

**BETWEEN**

**BAJRANG CONSTRUCTION LIMITED ..... PLAINTIFF**

**AND**

**DR BARHAM DEV VASISHT ..... 1<sup>ST</sup> DEFENDANT**

**SANGITA BARHAM DEV VASISHT ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**ADMINSTRATORS THIKA SCHOOL OF MEDICAL AND HEALTH SCIENCES LIMITED ..... INTERESTED PARTY**

**RULING**

1. What is before the court for determination is the Notice of Motion application dated 25<sup>th</sup> January, 2024 which seeks the following orders:-
  - a. Spent.
  - b. Spent.
  - c. That the exparte Judgment delivered on the 2<sup>nd</sup> day of November, 2024 the exparte proceedings of 26<sup>th</sup> July, 2023 and all other consequential orders issued thereafter be set aside.
  - d. That leave be granted to the Defendants/Applicants to file their witness statements and/or documents in support of their defence to the suit.
  - e. That the costs of this application be provided for.



2. The Application is based on the grounds as set out on the face of it and the supporting affidavit of Jimmy Rayani sworn on the instant date. It is the Applicant's case that the matter proceeded exparte on 26<sup>th</sup> July, 2023 whereby a Judgment was entered on 2<sup>nd</sup> November, 2023 as against the Defendants/Applicants in the sum of Kshs. 256,845,079.00 together with costs and interest of the suit. The Applicants avers that the failure to attend court on 27<sup>th</sup> July, 2023 was inadvertent and on unfortunate mistake as the Counsel who was personally seized of the matter was indisposed from 24<sup>th</sup> June, 2023 till 22<sup>nd</sup> December, 2023 and as such the mistake of the Counsel should not be visited upon the Applicants.
3. According to the Applicants, the matter is now fixed for taxation and it would be in the interest of justice that the exparte proceedings of 27<sup>th</sup> July, 2023 and all consequential orders be set aside so that they can be allowed to defend their claim on merit. They argue that no prejudice will be suffered by the Applicant if the exparte proceedings and Judgement of 27<sup>th</sup> July, 2023. The Applicants have expressed that they are ready and willing to abide by any orders imposed with regard to payment of thrown away costs and that the defence is good as it raised triable issues which need to be adjudicated upon in a full hearing.
4. The application was opposed through Replying Affidavit of Harshad Hirani sworn on February 2024, wherein he deponed that the Applicants were duly served with the hearing notice dated 28<sup>th</sup> April, 2023 through their appointed advocates and it was also served via email which was litigation@arcwil.co.ke, which automatically forwards the email to all the email addresses contained within the list and the court satisfied itself that service had been effected before proceeding to hear the Plaintiff and Interested Parties, hence the hearing on 26<sup>th</sup> July, 2023 did not proceed exparte.
5. According to the Respondent, while commensurates with the Applicants, he is of the view that they are using the illness of Mr. Jimmy Rayani as an excuse as he has never attended court in the matter but one Mr Charles Ojuok, Advocate is the one who has. Also, that their firm has five lawyers and other support staff who have been diligent to pick up the court dates and there should have been an advocate, Mr Jimmy Rayani's brief and seek for an adjournment on 26<sup>th</sup> July, 2023. It is the Respondent's case that the matter had been before court for more than five times, during which times it has been confirmed that the Defendants had never complied with the case management directions by filing any other document other than Defence dated 11<sup>th</sup> May, 2022 and neither did they comment on the letter forwarding the draft list of agreed issues received by them on 22<sup>nd</sup> May, 2022.
6. The Respondent contends that without the witness statements and list of documents the presence of the Defendants'/Applicants' Counsel would not have changed anything. Further, the Respondent argues that it stands to be greatly prejudiced if the application is allowed since it will cause further delays, the defence does not raise triable issues and the case has impoverished the subcontractors in the company. The Respondent has urged that the application dated 25<sup>th</sup> January, 2024 has not been brought in good faith but just to cause further delays.
7. Pursuant to court's directions, the application was canvassed by way of written submissions and the Applicant's submissions are dated 18<sup>th</sup> March, 2024 while the Respondent's Submissions are dated 19<sup>th</sup> March, 2024. The court has read through them and confirm that they are a reiteration of the parties affidavits, hence will be considered in the determination of the application.

### **Analysis and Determination**

8. In consideration of the Notice to Motion application dated 25<sup>th</sup> January, 2024, I have read through the Supporting Affidavit and Replying Affidavit together with the respective submissions filed and cited authorities by either party and find the issues for determination being:-



- a. Whether the ex parte proceedings of 26<sup>th</sup> July, 2023 and Judgment delivered on 2<sup>nd</sup> November, 2024 together with all the consequential orders can be set aside.
  - b. Whether the Defendant can be granted leave to file and serve their witness statements and or documents in support of their defence.
  - c. Who bears the costs of the application.
9. On the issue of whether the proceedings and Judgment delivered herein should be set aside, it is the Applicants' submission that the reason they seek this order is that their advocate, Mr. Jimmy Rayani, who was personally seized of their case, was not able to attend the hearing on 26<sup>th</sup> November, 2023 because he had been indisposed from 24<sup>th</sup> June, 2023 to 22<sup>nd</sup> December, 2023. That the matter was never brought to the attention of the Managing Partner of the firm so she could take necessary action. The Applicants have urged that the failure to attend court on the alleged date was beyond their control and or counsel and pray that the inadvertence and or error should not be visited upon them since they have always been and are still keen to defend the suit on merit.
10. In opposition, the prayer for the proceedings and Judgment to be set aside, the Plaintiff/Respondent submitted that the Defendants/Applicants were properly served with the hearing Notice dated 28<sup>th</sup> April, 2023 through their appointed advocate via email which was also copied to the distributor email. According to the Respondents' Director, the Applicants' counsel has dishonestly used his sickness not to attend court and it's advocate, Charles Abok who has always attended. He also pointed out that the Firm of M/S Archer and Wilcock has more than five (5) lawyers who should have been diligent enough to hold brief for Mr. Rayani and seek for an adjournment. The Respondents' Director went on to enumerate the various dates the Defendants/Applicants and or their counsel failed to comply with case management directions and or file any witness' statements or comment on a letter that forwarded a draft list of agreed issues. And since cases belong to litigant and not counsel, it is the Respondents' contention that the Applicants ought to have followed up on their case. They have urged that the court not to be persuaded by the Applicants' as they stand to be prejudiced if the prayers are granted because of delays on the debt, the imminent impoverishment of the 13 sub-contractors and suppliers awaiting payments for works already done and yet the Defendants' defence raises no triable issues.
11. The prayer for setting aside proceedings and Judgment is based on the provision under Order 12 Rule 7 which states as follows:-

“[Order 12, rule 7.] Setting aside judgment or dismissal.

7. Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

12. The issue of whether or not to set aside the proceedings and Judgment, is an exercise of discretion which courts are required to do on terms that are just that is, like any other exercise of discretion, it must be based on sound legal principles and evidence. In the case of *Shanzu Investments Ltd v Commissioner of Lands* [1993]eKLR, the court delivered itself thus:-

“The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party's favour, depends, on a large measure, on the facts of each particular case. The tests for the



exercise of this discretion are these: - First, was there a defense on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay.”

13. Having carefully considered the arguments and sentiments by the parties and or their respective counsel in this case, this Court finds that it has not been disputed that the Defendants/Applicants were indeed served with the hearing Notice through their appointed advocate. However, it is noted that their counsel, Mr. Jimmy Rayani has owned up to the failure to attend court on 26<sup>th</sup> July, 2023 by affidavit evidence and gone on to explain why this happened by providing evidence vide a letter from Dr. Barham Dev Vasisht to confirm his indisposition then.
14. The Respondent, even though claims that the said advocate has dishonestly used this excuse of sickness, has not demonstrated the same save to state that the Firm of M/S Archer and Wilcock has many advocates and staff who would have held brief for Mr. Rayani or take new dates. This Court finds that when it comes to how a Firm of Advocates is managed, it is an internal matter that it would be unfair to expect litigants to know how it organises itself when it comes to dealing with respective cases.
15. Having said that, this Court is satisfied with the explanation of counsel for the Applicants as to why they failed to attend court for hearing on 26<sup>th</sup> July, 2023 and thus cannot fault the Applicants for the same. This is what the court in the case of *Lee G. Muthoga v Habib Zurich Finance (K) Ltd & another*, Civil Application Nai 236 of 2009, had this to say:-

“It’s a widely accepted principle of law that a litigant should not suffer because of his advocate’s oversight.”
16. On the issue of the Applicants being granted leave to file witnesses statements and documents in support of their case, it will be noted that the Respondent has urged that save for the defence dated 11<sup>th</sup> May, 2022, the Applicants/Defendants never filed witness statements or any other document, or comply with case management directions. The Respondent also urged that the defence be struck out for being bare with no triable issues.
17. It is the Defendants’/Applicants’ contention in response to this that although in their defence they have denied the claim in the Plaints filed by the Plaintiff/Respondent, the main issue is that they have disputed the existence of any binding contract between them and the Plaintiff/Respondent. The Applicants have also pointed out that they have raised the issue of the Plaintiff being guilty of non-disclosure of material facts such as the existence of another case being HCCC. No.E20 of 2021, *Bajrang Construction Limited v Thika School of Medical and Health Sciences Limited* on the same sum (debt). The Applicants have cited cases where it has been held that a defence is not one which is likely to succeed but one which raises triable issues that ought to be subjected to judicial examination.
18. Order 2 Rule 15 of the [Civil Procedure Rules](#) provide for striking out of pleadings in the following terms:-

“(1) (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

  - (a) it discloses no reasonable cause of action or defence in law; or
  - (b) it is scandalous, frivolous or vexatious; or
  - (c) it may prejudice, embarrass or delay the fair trial of the action; or



- (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.
19. In the case of *Job Kinloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rioro* [2015]eKLR, the Court had this to say of a defence that raises triable issues:-
- “Before the grant of summary Judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary Judgment or in any other manner.”
20. I have read through the Plaint and statement of defence filed by either party in this case and find that the subject matter of this case is firstly, whether there exists a contract between the Plaintiff/Defendant and Defendants/ Applicants, and secondly, whether there has been material non-disclosure of facts in this case by the Plaintiff/Respondent. This Court believes that the two issues require calling of evidence for the same to be determined and this can only happen if the matter proceeds to full trial on merit. For this reason, coupled with the need to sustain a suit in the interest of justice and fairness for the parties, this Court finds that the Plaintiff/Respondent has not demonstrated any reasonable cause why the defence dated 11<sup>th</sup> May 2022 should be struck out.
21. In the case of *Jubilee Insurance Company Limited v Grace Antona Mbinda* [2016]eKLR, the Court quoted with authority the celebrated case of *Saudi Arabian Airlines Corporation v Premium Petroleum Company Limited* [2014]eKLR, where it was held:-
- “... the power to strike out a suit or defence should be used sparingly and only on the clearest of case, where the impugned pleading is “demurer or something worse than a demurer” beyond redemption and not curable by even an amendment. It raises no bona fide triable issue worth trial by a court. ... a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication.”
22. It is also worth noting that the Applicants/Defendants were yet to file their witness statements and list of documents in support of their case and hence it would not suffice to strike out their defence for the reason that it raised no triable issues.
23. The upshot is that the Notice of Motion application dated 25<sup>th</sup> January, 2024 is allowed and:-
- a. The exparte proceedings of 26<sup>th</sup> July, 2023, the Judgment delivered on 2<sup>nd</sup> November, 2024 and all other consequential orders issued thereafter be and are hereby set aside.
- b. The Defendants/Applicants be and are hereby granted leave to file and serve their witness statements within fourteen (14) days from the date of this ruling. The Plaintiffs/Respondents and Interested Parties be at liberty to file and serve any further witness statements and or documents in response within fourteen (14) days of being served by the Defendants/Applicants.



- c. The Defendants/Applicants to pay to the Plaintiffs/ Respondents throw away costs of Kshs.20,000/=. Mention on 2<sup>nd</sup> April, 2025 for parties to confirm compliance and take further directions.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 11<sup>TH</sup> DAY OF MARCH , 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Wanjiku Kingori counsel for Defendants/applicants

Mr. Christopher Muchiri holding brief for Mr. Waigwa for Plaintiffs/Respondents

Mr. Ondati counsel for Interested Party

Court Assistant - Martin

