Njuca Consolidated Company Ltd v Commercial International Bank & 2 others (Civil Case E001 of 2023) [2025] KEHC 2990 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2990 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL CASE E001 OF 2023

FN MUCHEMI, J

MARCH 13, 2025

BETWEEN

NJUCA CONSOLIDATED COMPANY LTD ..... APPLICANT

AND

COMMERCIAL INTERNATIONAL BANK ..... 1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES ..... 2ND DEFENDANT

NJIHIA MUOKA RASHID CO LTD ..... 3RD DEFENDANT

RULING

Brief Facts

1. The application dated 7th June 2024 seeks for orders of setting aside order of this court made on 21st May 2024 dismissing the applicant's application dated 27th October 2023 for non-attendance. The applicant seeks for reinstatement of the said application upon setting aside the order of dismissal.

2. The 1st respondent opposed the application through a Replying Affidavit dated 27th June 2024.

Applicant's Case

3. The applicant states that on 21st May 2024, the honourable Court dismissed its application dated 27/10/2023 for non-attendance by his advocates. The applicant further states that it was at all material times of the belief that its then advocate Makuno Gacoya & Company Advocates was attending court and prosecuting the matter on its behalf. The applicant avers that it later learnt that its counsel on record failed to attend court for mention of its application dated 27/10/2023 which was dismissed on 21/5/2024.

4. The applicant argues that failure to attend court by counsel was an omission by the said counsel and that a litigant ought not to be punished for omissions of his advocate.

5. The applicant states that it is currently exposed to sale by way of public auction and the respondents may dispose of the suit properties at any moment rendering the application nugatory. The applicant further states that the applicant shall suffer irreparable damage if the orders sought are not granted as it will be condemned unheard contrary to the rules of natural justice.

6. The applicant states that it has brought the instant application urgently before the court without any undue delay. The applicant further states that it has demonstrated it is desirous of proceeding with the matter as demonstrated by the speed at which it has brought the application.

The 1st Respondent's Case

7. The 1st respondent states that the applicant filed an application dated 27th October 2023 seeking for a temporary injunction to restrain the respondents from attaching, selling, alienating, auctioning and disposing in any way parcels of land that had been issued as security to the 1st respondent.

8. The court granted interim injunctive orders on 30th October 2023 with a mention date slated for 21st November 2023. Despite being directed to serve the application within 7 days of the order, the applicant blatantly disregarded the courts directions and failed to serve the application and pleadings with the sole intention of denying it an opportunity to respond in good time.

9. The 1st respondent states that on 14th December 2023 upon it filing its response, the court issued directions on request of the parties to the effect that an out of court settlement be pursued and that no settlement was reached by 16th January 2024, each of the parties to file their submissions to the application dated 27th October 2023 within 14 days. Further, a mention date was slated for 22nd February 2024 to confirm either settlement or compliance in filing submissions.

10. The 1st respondent states that on 22nd February 2024, in the absence of the applicant, they appraised the court of the collapsed negations and the applicant's non-compliance in filing its written submissions to warrant their response. The court then rescheduled the matter for mention on 21st May 2024 and despite service, the applicant deliberately failed to attend court.

11. The 1st respondent avers that the applicant has been engaging in conduct that constitutes an abuse of the court process and has demonstrated a lack of diligence and proactivity in pursuing the suit. Thus, the 1st respondent argues that the applicant's actions or inactions have caused unreasonable delays in the progress of the case which is prejudicial to the administration of justice and to their interests as the applicant now enjoys interim orders.

12. The 1st respondent states that even as the applicant alleges that the omissions of its previous counsel should not be visited upon them, it is trite that it is incumbent upon a litigant to continuously follow up on their matter and where necessary take the appropriate action.

13. The 1st respondent argues that the applicant has not produced any evidence to demonstrate their proactive action in following up with its previous counsel in complying with the court's directions. Thus, the 1st respondent states that that excuse by the applicant is a mere conjecture meant to mislead this Honourable Court.

14. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

15. The applicant submits that while it may be argued that it ought to have made an effort to at least reach out to his advocate especially upon noting that there was a communication breakdown, the applicant

should not be punished for omissions of his advocates. The applicant submits that the actions or omissions of counsel should not be visited upon the litigant.

16. The applicant relies on the cases of Edney Adak Ismail *vs Equity Bank Limited Milimani HCCC No. 727 of 2012* and FM vs EKW [2019] eKLR and submits that the court ought to consider when setting aside proceedings is whether good reason had been given for the failure to attend court. The applicant further relies on the cases of Shah vs Mbogo (1967) EA 166 and Patel vs East Africa Cargo Handling Services Limited (1074) E.A 75 and submits that the setting aside of ex parte proceedings is at the discretion of the court and in doing so, such discretion is unfettered but the same should be exercised judiciously and not capriciously.

17. Relying on the case of Richard Murigi Wamai vs The A.G & Another (2018) eKLR, the applicant submits that no party should be condemned unheard and urges the court to give it its day in court.

18. The applicant submits that the court ought to be guided by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice with the focus being on substantive justice rather than procedural technicalities.

The 1st Respondent's Submissions

19. The 1st respondent relies on the case of Moses Kimaiyo Kipsang vs Geoffrey Kiprotich Kirui & 2 Others [2022] eKLR and submits that the dismissal was proper due to the applicant's disregard for court directions. The 1st respondent further submits that the applicant's repeated neglect and casual approach have caused delays, and it would only be in the interest of justice that the dismissed orders not be reinstated.

20. The 1st respondent submits that even though a mistake of counsel cannot be visited upon the client, an advocate is the agent of the litigant and where the advocate is guilty of an inaction, the litigant will bear the consequences of his advocate's inaction. The applicant having chosen its legal representation, it bears the ultimate responsibility for the conduct of the case and cannot absolve themselves of responsibility by blaming their advocate for negligence.

21. The 1st respondent relies on the cases of Moses Kimaiyo Kipsang vs Geoffrey Kiprotich Kirui & 2 Others [2022] eKLR and Clemensia Nyanchoka Kinaro vs Joyce Nyansiaboka Onchomba [2020] eKLR and submits that parties have a duty to attend court even in the absence of their counsel as it is the client's case and not the counsel's case.

22. The 1st respondent submits that it appraised the applicant of the next date by serving them with a mention notice dated 28th February 2024, but the applicant deliberately failed to attend court. Furthermore, the applicant has failed to canvass proper reasons to warrant the setting aside of the orders granted on 21st May 2024 having failed to give a reasonable excuse for failing to follow up on their matter and attend court but are instead shifting the blame on the then acting counsels. To support its contentions, the 1st respondent relies on the case of Wachira Karani vs Bildad Wachira [2016] eKLR.

23. The 1st respondent relies on the case of Thathini Development Company Limited vs Mombasa Water & Sewerage Company & Another [2022] eKLR and submits that courts have consistently upheld the principle that litigation should not be conducted at the convenience of the parties, especially when non-compliance with the court orders is evident. Furthermore, the court possesses inherent discretion to manage its proceedings, including the dismissal of applications where a party fails to comply with its directives. To support its contentions, the 1st respondent relies on the case of Samuel M. N. Mweru & Others vs National Land Commission & 2 Others [2020] eKLR and submits that the dismissal of

the application was within the court's discretion and grounded on the fact that litigants are expected to act with diligence in pursuing their claims.

24. The 1st respondent argues that the applicant's willful conduct can be seen from the onset of the suit following its failure to comply with the court's direction in serving the injunction application within seven days after obtaining the favourable interim order on 30th October 2023 and further non compliance in filing their written submissions. It is a principle of law that court orders are to be obeyed unless set aside. However, the validity of an order is contingent upon the parties' adherence to the conditions set by the court.

25. The 1st respondent relies on the case of Morgan Air Cargo Limited vs Everest Enterprises Limited [2014] eKLR and submits that costs follow the event and the applicant should rightfully bear the costs of the application.

The Law

Whether the orders dated 21st May 2024 ought to be set aside and reinstate the application dated 27th October 2023.

26. Under Order 10 Rule 11 of the Civil Procedure Rules the court can set aside or vary such judgment and any consequential decree or order upon such terms as are just. It provides as follows:-

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.

27. Notably, the above provision shows that a court has the discretion to set aside a default judgment. This principle was enunciated in the case of Patel vs EA Cargo Handling Services Ltd (1974) EA 75, where the court held that:-

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow a rule of procedure."

28. Similarly in Shah vs Mbogo & Another [1967] EA it was held that:-

> The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should therefore be refused.

29. Thus the principle that emerges from the above cited cases is that the discretion of the court to set aside or vary ex parte judgment entered in default of appearance or defence is a free one. Further, it is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.

30. The Court of Appeal in the case of Thorn PLC vs MacDonald [1999] CPLR 660 stipulated the following guiding principles to consider when setting aside an ex parte judgment;-

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 taken into account, but is not always a reason to refuse to set aside;

c. The primary considerations are whether there is a defence with a 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.

31. It is noted that the applicant filed the application dated 27th October 2023 together with the plaint seeking for injunctive orders against the respondents from selling, auctioning or otherwise disposing the suit properties. The Honourable Court granted interim injunctive orders on 30th October 2023 and directed that the application be served upon the respondents within seven (7) days together with directions given by the court on the same day. The court further slated the matter for mention inter parties on 21st November 2023.

32. On 21st November 2023, counsel for the respondents told the court that the applicant only served them with the orders but failed to serve them with the application deliberately and therefore they could not have put in a response. The matter thereafter came up on 14th December 2023 where parties told the court that they were pursuing an out of court settlement but the respondents stated that they wished to proceed with the application even whilst pursuing negotiations. The court then directed that if parties did not reach a settlement, they ought to file submissions on the application.

33. When the matter came for mention on 22/02/2024 before the Deputy Registrar, the applicant's counsel was absent and had filed an application to cease acting dated 13/02/2024. The said counsel had not filed submissions on the application dated 27/10/2023 as directed on 18th December 2023. The 1st respondent applied for dismissal of the application but the Deputy registrar sent the matter to the trial judge for mention on 22/02/2024.

34. The parties were still negotiating the matter for quite some time. It was on 21/05/2024 that the matter was mentioned before this court. The 1st respondent's counsel was present and due to the absence of the applicant's counsel, the counsel applied for dismissal of the application dated 27/10/2023. The court dismissed the application for want of prosecution and non-attendance and vacated the status quo orders given. The application to cease acting by the applicant's advocate Makuno Gacoya & Associates was also dismissed for similar reasons. These developments led to the filing of this application dated 7th June 2024 by the firm of M.W. Muli & Co. Advocates who just taken over this case from the previous advocate. The Notice of Change of Advocates was filed together with this application. Directions were given by the court on service of the application and orders of status quo were issued pending disposal of the application.

35. The applicant pleads that during the two occasions of non-attendance by the firm of Gacoya & Co. Advocates, it was unaware that the advocates had failed to attended court. The applicant argued that it should not be punished for the omission or misconduct of its advocate. During the time of non-attendance by the applicant's advocate, this court had directed that the parties do comply with Order 11 of the Civil Procedure Rules in respect of the suit but before the parties complied, this application was filed.

36. From the chronology of events leading to the current application, it is noted that the applicant took about 22 days from the date the application was dismissed to the date of filing the instant application. Thus the application was filed timeously.

37. It is trite law that where justice of the case mandates, mistakes of advocates even if they are blunders, should not be visited on the clients when the situation can be remedied by costs. In the case of Lucy Bosire vs Kehancha Div. Land Dispute Tribunal & 2 Others [2013] eKLR the court held as follows:-

> It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.

38. 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 Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002, Kimaru J (as he then was) held:-

> 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 dismissal.

Similarly in the case of Eldoret Grains Limited vs Gilbert Kiptoo Kipkoech & 14 Others (Civil Application 108 of 2019) [2021] KECA 273 (3 December 2021) (Ruling) the Court of Appeal cited with approval the case of Rajesh Rughani vs Fifty Investment Ltd & Another (2005) eKLR and held:-

> It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction that is not excusable mistake which the court may consider with some sympathy.

39. In Bains Construction Co. Ltd vs John Mzare Ogowe (2011) eKLR the Court of Appeal observed:-

> It is to some extent true to say mistakes of counsel as in the present case should not be visited upon a party but it is equally true when counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences.

40. It is noted that at the time the counsel for the applicant failed to attend court, he had already filed an application to cease acting for the applicant. There is no evidence on record that the applicant served his client with this application to cease acting. The said advocate did not prosecute the said application until the court dismissed it for want of prosecution. This means that the firm of Makuno Gacoya & Advocates remained on record for the applicant until the succeeding counsel filed Notice of appointment on 12th June 2024 together with this application. The 1st respondent's counsel attended mention in court two times in the absence of the applicant's counsel. He told the court that he had served the mention notices on the applicant's counsel. There is no evidence that the applicant personally became aware of the two mention dates within which period the court dismissed his application dated 27th October 2023 for non-attendance.

41. In the absence of any evidence of service on the applicant in person or any correspondence between the advocate and his client on their broken professional relationship, I find it not appropriate to blame the applicant for non-attendance on the two occasions being 22/02/2024 and 21/05/2024. This leads me to the conclusion that a party should not be blamed for acts or misconduct of his advocate unless

there is evidence that the party had knowledge that his advocate had abandoned his case and that his case was coming for mention or hearing on a scheduled date.

42. I am also aware that under Article 50 of *the Constitution*, each party has a right to be heard and that no party shall be condemned unheard.

43. Consequently, I find the application dated 7th June 2024 merited and I hereby allow it in terms of prayers 2 and 3.

44. The costs of this application shall abide in the suit.

45. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13TH DAY OF MARCH 2025.

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F. MUCHEMI

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JUDGE