



REPUBLIC OF KENYA



**KENYA LAW**  
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**West Kenya Sugar Company Limited v Magoba (Civil Appeal  
E019 of 2023) [2025] KEHC 3445 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3445 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CIVIL APPEAL E019 OF 2023  
WM MUSYOKA, J  
MARCH 21, 2025**

**BETWEEN**

**WEST KENYA SUGAR COMPANY LIMITED ..... APPELLANT**

**AND**

**TRIX NNOLI MAGOBA ..... RESPONDENT**

*(An appeal arising from the orders made in a ruling of Hon. EA Nyaloti, Chief Magistrate, CM, delivered on 14th November 2023, in Busia CMCCC No. E414 of 2021)*

**JUDGMENT**

1. The suit, at the primary court, was initiated by the respondent against the appellant, for Kshs. 290,880.00, plus costs and interests. The respondent claimed that he had contracted the appellant to harvest cane at his farm on Bukhayo/Kisoko/6768. The harvesting was done, but not all the cut cane was transported to the factory belonging to the appellant, as some was left on the farm and was wasted, and its value was what was claimed in the suit.
2. The plaint and summons to appear were allegedly served at the offices of the appellant, at Olepito, on 22<sup>nd</sup> October 2021, and an affidavit of service was filed. A request for judgement was raised, dated 5<sup>th</sup> November 2021, and filed on 8<sup>th</sup> November 2021. Judgement, in default, was entered on 16<sup>th</sup> November 2021, and a formal decree was processed and issued, bearing the date of 16<sup>th</sup> December 2021. Costs were also assessed and a certificate of costs issued.
3. On 15<sup>th</sup> December 2021, a Motion, dated 7<sup>th</sup> December 2021, was lodged at the registry of the trial court, seeking the setting aside of the ex parte judgement of 16<sup>th</sup> November 2021, stay of execution of the resultant decree, and leave to defend. It was averred that a memorandum of appearance was filed on 10<sup>th</sup> November 2021, which gave the appellant 14 days to file defence. It was submitted that the entry of judgement, on 16<sup>th</sup> November 2021, was irregular, as the 14 days had not lapsed. It was argued that there was a good defence on merits. A copy of a memorandum of appearance, dated 8<sup>th</sup> November



- 2021, was attached. Grounds of opposition were filed, on 28<sup>th</sup> December 2021, bearing an even date. That Motion was allowed, on 4<sup>th</sup> January 2022, by consent, with an order that the appellant pays throwaway costs. It was further ordered that a statement of defence, filed together with the application, be deemed as duly filed.
4. In the said defence, dated 7<sup>th</sup> December 2021, the appellant conceded that there was an arrangement for harvesting cane, from a farm belonging to the respondent, but it was averred that that harvesting was to be, and happened, at a location at Nambale Sub-Location, Segero B area, but not at the location pleaded in the plaint. It was asserted that cane crop grown outside the permitted area was prohibited, and the appellant did not harvest cane in such areas.
  5. The matter came up on 2 occasions for pre-trial, but the parties were not ready. Eventually, it was given a date, on 2<sup>nd</sup> August 2022, for hearing. It came up for hearing on 17<sup>th</sup> November 2022, 16<sup>th</sup> February 2023 and 25<sup>th</sup> April 2023, and was adjourned, for a variety of reasons. The hearing eventually happened on 25<sup>th</sup> July 2023, in the presence of the Advocates for both sides, when 1 witness testified for the respondent. The matter was thereafter adjourned, to 14<sup>th</sup> September 2023. On 14<sup>th</sup> September 2023, the respondent and his Advocate attended court, the appellant and his Advocate were absent. The respondent presented 2 witnesses, who testified. The case for the respondent was closed, by the court, as the appellant was not present to present its defence. The matter was to be mentioned on 28<sup>th</sup> September 2023 for written submissions. The mention, scheduled for 28<sup>th</sup> September 2023, did not happen, as the trial magistrate was unavailable, and the matter was put off to 9<sup>th</sup> November 2023, when a date was given for ruling, for 14<sup>th</sup> November 2023.
  6. On 8<sup>th</sup> November 2023, a Motion, of even date, was filed by the appellant, under certificate of urgency, for the setting aside of the proceedings of 14<sup>th</sup> September 2023 and the re-opening of the case. The case by the appellant was that after the oral hearing on 25<sup>th</sup> July 2023, the matter was adjourned to 14<sup>th</sup> November 2023. It was explained that the non-attendance on 14<sup>th</sup> September 2023 was for good cause, as the information the appellant had was that the matter had been adjourned to 14<sup>th</sup> November 2023, and not 14<sup>th</sup> September 2023. It stated that the appellant was surprised to be served with a mention notice for 28<sup>th</sup> September 2023, when it came to light that the matter had proceeded on 14<sup>th</sup> September 2023 in its absence, and its defence was closed. It was averred that the Judiciary e-filing portal indicated 14<sup>th</sup> November 2023 as the date given, and that the witnesses for the appellant, who were in court on 25<sup>th</sup> July 2023, confirmed 14<sup>th</sup> November 2023 as the date given. It was further argued that the Advocate, who was in court, for the appellant, might have heard the wrong date, and diarised 14<sup>th</sup> November 2023. It was submitted that the non-attendance by the appellant was inadvertent and excusable.
  7. It is not clear whether the respondent replied to that application, but a ruling on it was delivered, on 14<sup>th</sup> November 2023, dismissing it. The trial court noted that a hearing date was given in open court, on 25<sup>th</sup> July 2023, in the presence of both sides, for hearing on 14<sup>th</sup> September 2023, and on the due date the appellant did not attend court, and the matter proceeded in his absence. The court noted that the matter was indicated in the cause list for Busia on the Kenya Law portal.
  8. It was the said dismissal, which provoked the filing of the instant appeal. The memorandum of appeal is dated 22<sup>nd</sup> November 2023. The grounds are that the trial court did not realise that the application was brought under Article 50 of *the Constitution* and Order 18 rule 10 of the Civil Procedure Rules, the court failed to find malice on the part of the Advocate for the appellant in not attending court on 14<sup>th</sup> September 2023, the documentary evidence in support of the application was not considered, the proceedings of 9<sup>th</sup> November 2023 were frustrated by the microphone for the court which was switched



off before the Advocate for the appellant could address the court, and the court erred in indicating that the ruling of 14<sup>th</sup> November 2023 was delivered in the presence of all the Advocates.

9. The appeal was canvassed by way of written submissions.
10. The appellant identifies 2 issues for determination: whether the trial court should have proceeded, with the hearing on 14<sup>th</sup> September 2023, in the absence of the appellant; and whether the ex parte proceedings of 13<sup>th</sup> November 2017 and the judgement of 14<sup>th</sup> November 2017 should be set aside. It is submitted that the date given on 25<sup>th</sup> July 2023 was 14<sup>th</sup> November 2023 and not 14<sup>th</sup> September 2023. It is further submitted that a mistake of an Advocate should not be visited on the client. Philip Keipto Chemwolo & another vs. Augustine Kubende [1986] eKLR (Platt, Gachuhi & Apallo, JJA) and Patriotic Guards Limited vs. James Kipchirchir Sambu [2018] eKLR (Waki, Warsame & Makhandia, JJA) are cited. Submissions are also made on fair trial and the right to judicial action, and Stephen Ndichu vs. Monty's Wines and Spirits Limited [2006] eKLR (Kasango & Azangalala, JJ) and Wachira Karani vs. Bildad Wachira [2016] eKLR (Mativo, J) are cited.
11. The respondent identifies 2 issues, whether the appeal was merited, and who should bear the costs. It is submitted that Order 12 talks about attendance by parties and not Advocates. Kanga Mwirambua & 11 others vs. Ndereba Naichu [2020] eKLR (Njoroge, J) is cited, for the point that mis-diarising is not a good ground for review. It is submitted that costs follow the event, based on Jasbir Singh & 3 others vs. Tarlochan Singh Rai & 4 others [2014] eKLR (Mutunga, CJ&P; Rawal, DCJ&VP, Tunoi, Ibrahim, Ojwang, Wanjala & Ndungu, SCJJ).
12. The principal issue is whether the hearing of 14<sup>th</sup> September 2023 should have been conducted in the absence of the appellant.
13. I have the original trial court records. The handwritten record maintained by the trial magistrate, Hon. Nyaloti, CM, indicates that on 25<sup>th</sup> July 2023, the Advocates for both sides were present. The respondent presented 1 witness, who was led in chief by Mr. Nandwa, Advocate, and was cross-examined by Ms. Kahiu, Advocate. Mr. Nandwa applied for adjournment, to call an additional 1 witness, and asked for witness summons. The adjournment was granted, and the matter was fixed for 14<sup>th</sup> September 2023.
14. Let me reproduce verbatim what the relevant part of that record reflects:

“Nandwa. I pray for adj to call one witness. I pray for summons.  
Ct. Witness summons to issue. Hg on 14/9/23.  
Signed  
25/7/23.”
15. So, the date that the court fixed on 25<sup>th</sup> July 2023 was not 14<sup>th</sup> November 2023, but 14<sup>th</sup> September 2023. That date was given in the presence of Ms. Kahiu, the Advocate who was present for the appellant. I note that that Ms. Kahiu did not swear the affidavit in support of the application, where the allegation, that the date fixed was 14<sup>th</sup> November 2023, and not 14<sup>th</sup> September 2023, was made. The affidavit in support was sworn by an Advocate who was not present in court on 25<sup>th</sup> July 2023, Mr. Sahil Javer, who could not speak authoritatively on what exactly transpired before the court that day.
16. Mr. Javer claims that the Judiciary e-filing portal indicates that the date given was 14<sup>th</sup> of November 2023. Court proceedings are presided over by a judicial officer, whether a Judge or a Magistrate. The presiding judicial officer maintains a record of what transpires in court, and that record is in the court



file. There is a handwritten record that was made of what went on in court on 25<sup>th</sup> July 2023. That record cannot be overridden or superseded by anything else, including what is on an online portal. The e-filing portal is not maintained by judicial officers, and whatever it might say, about the events of 25<sup>th</sup> July 2023, has nothing to do with Hon. Nyaloti, CM. Hon. Nyaloti, CM, did not populate it, for it was not her responsibility to, as populating such portals is a clerical role, played by registry staff.

17. The narrative, that Hon. Nyaloti, CM, had fixed the matter for a hearing on 14<sup>th</sup> November 2023, is not supported by the contents of the handwritten record that was made in the original trial file. In any case, the appellant, through the affidavit of Mr. Javer, blows both hot and cold. At paragraph 11, he claims the e-filing portal indicates that the date for hearing was given as 14<sup>th</sup> November 2023, and he has exhibited an alleged image of that portal page, and an email purported to have been written by Ms. Kahiu. Yet, in paragraphs 6, 13 and 14, of the same affidavit, he suggests that Ms. Kahiu might have heard the wrong date. It is on the basis of the latter averment that it is submitted that mistake of counsel ought not be visited on his client, whereupon I am invited to be guided by *Patriotic Guards Limited vs. James Kipchirchir Sambu [2018] eKLR (Waki, Warsame & Makhandia, JJA)*. So, what was it? Was 14<sup>th</sup> November 2023 the date given by the court, or was Ms. Kahiu mistaken about the actual date that the trial court had fixed?
18. Was the trial court at error, in proceeding to take evidence on 14<sup>th</sup> September 2023, in the absence of the defence, and to close the defence case? I do not see any wrongdoing. 14<sup>th</sup> September 2023 was fixed on 25<sup>th</sup> July 2023, in the presence of both parties. As the said date was given in court, in the presence of both sides, it can be said to have been obtained by consent of both, and there was no need for either party to serve the other with a hearing notice, as both were deemed to be aware of that date.
19. Order 12 of the Civil Procedure Rules, which provides for what should happen when a matter comes up for hearing, applies. If both sides are absent, the court may dismiss the suit. If only the plaintiff attends, and the defendant had due notice of the hearing, the matter may proceed ex parte, but the matter should be adjourned if the notice of hearing was either not served or service was inadequate. Where only the defendant attends, and he does not admit any part of the claims, the suit should be dismissed, except where there is good cause for adjourning it.
20. There was discretion, going by Order 12 of the Civil Procedure Rules, for the trial court to proceed in the manner of what happened on 14<sup>th</sup> September 2023, as only the plaintiff attended court, the defendant did not, yet the defendant had notice of the date, given that the same had been fixed by consent in open court on 25<sup>th</sup> July 2023.
21. I now turn to the events of 14<sup>th</sup> November 2023. Was the trial court wrong in not setting aside the proceedings of 14<sup>th</sup> September 2023? I am not persuaded that it was. Under Order 12 rule 7 of the Civil Procedure Rules, the power to set aside a judgement or proceedings, conducted based on Order 12, is discretionary. On an application to set aside the proceedings or judgement, the trial court may or may not set aside.
22. Did the trial court exercise that discretion properly or judiciously? I believe it did. Firstly, the appellant was not candid enough to own up to the fact that it was the author of its own misfortune. The hearing date had been taken by consent, in open court, yet the appellant, in its application, was blaming the trial court for proceeding to hear the matter on 14<sup>th</sup> September 2023, which was an unscheduled date, according to the appellant, as the court had fixed it for hearing on 14<sup>th</sup> November 2023. The trial court was being unfairly accused of mischief, by a party who had absented himself from court, yet the date had been given in its presence. Secondly, the appellant had no good faith. It had ill will towards both



- the court and the plaintiff, by insinuating that there was collusion between the 2, to proceed with the matter on 14<sup>th</sup> September 2023, behind its back.
23. Thirdly, there was a history. After being served with summons to enter appearance, as indicated above, the appellant did not appear nor file defence within the time given. A judgement in default was entered. The appellant sought setting aside of that ex parte judgement, on the pretext that that judgement had been entered despite appearance having been filed, yet no appearance had been filed, as noted by the court on 28<sup>th</sup> December 2021. There was a history of defaulting, and a history of distorting facts. It was the second time that setting aside was being sought, after default by the appellant to act as expected of it. There was no seriousness in the manner the appellant was approaching the proceedings.
  24. There is this mantra that clients ought not be punished for the sins of their Advocates, stated in such cases as Pithon Waweru Maina vs. Thuka Mugiria [1983] eKLR [1983] KECA 117 (KLR) (Potter, Kneller JJA & Chesoni Ag JA) and Patriotic Guards Limited vs. James Kipchirchir Sambu [2018] eKLR (Waki, Warsame & Makhandia, JJA). The so-called sins of an Advocate are, actually, displays of slovenliness and professional negligence in discharge of services to clients, and Advocates should not be allowed to run away from them, by seeking cover, from negligent conduct of litigation, under that mantra.
  25. In Charles Omwata Omwoyo vs. African Highlands & Produce Co. Ltd [2002] eKLR [2002] KEHC 1190 (KLR) (Ringera, J), the court stated that time had come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals, and it was asserted that the court would decline to exercise discretion in favour of an applicant on the grounds that he found himself in a predicament as a result of an alleged mistake of an Advocate. The client would not be without remedy, should he suffer loss or damage, for damages for professional negligence are available.
  26. In any case, the issue of the sins of an Advocate being visited on the clients should not even arise here. 14<sup>th</sup> September 2023 was a date fixed for hearing. The case belonged to the appellant, and not its Advocate. There was indication, in the affidavit of Mr. Javer, who should not even have sworn it, as he was not present in court on 25<sup>th</sup> July 2023, that the hearing date was fixed in the presence of defence witnesses, presumably individuals from the appellant. Those representatives of the appellant should have attended court on 14<sup>th</sup> September 2023.
  27. Article 50 of *the Constitution* and Order 18 rule 10 of the Civil Procedure Rules have been cited. I do not see their relevance. Article 50 is about fair hearing. The appellant obtained a date for hearing by consent. On the due date, there was no attendance on its part. The appellant cannot possibly turn around and claim denial of right to fair hearing, when it failed to avail itself for hearing. Order 18 rule 10 is about recall of witnesses. The issue of recall of witnesses does not arise here, it would only be relevant if the court had set aside the proceedings, which it did not.
  28. In view of everything said above, I do not find merit in the appeal herein, and I hereby dismiss it, with costs. The original trial court records, in Busia CMCCC No. E414 of 2021, shall be returned to the trial court, for completion of the proceedings that were being conducted there. The appeal file herein shall be closed. Orders accordingly.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 21<sup>ST</sup> DAY OF MARCH 2025.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.



Advocates

Mr. Sahil Javer, instructed by O&M LLP, Advocates for the appellant.

Ms. L Eroba, instructed by Nandwa & Company, Advocates for the respondent.

