



REPUBLIC OF KENYA



**Shuma v Ochume (Judicial Review E009 of 2022)
[2025] KEHC 4397 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
JUDICIAL REVIEW E009 OF 2022**

AC BETT, J

APRIL 3, 2025

BETWEEN

JACKLINE AYIKA SHUMA APPLICANT

AND

OTINGA PATRICK OCHUME RESPONDENT

RULING

1. This is a ruling on an application dated 24th January 2023 where the Respondent/Applicant sought orders to review and set aside an order dated 14th December 2024 dismissing his application dated 3rd April 2023 for want of attendance.
2. In support of the application, the Respondent swore an affidavit in which he deponed that on the day his application was dismissed, his Counsel encountered network technicalities while logging into virtual court and requested a colleague to hold his brief in court only to discover later that no one held his brief and hence the order of dismissal. According to the Respondent, he had a good case with high chances of success and should not be punished for the happening of events beyond their control.
3. The application was opposed. The Applicant averred that the Respondent was indolent and had failed to comply with the timelines as ordered by court. She further deponed that the Respondent had not disclosed the Advocate who had been instructed to hold brief on behalf of her Advocate nor furnished proof of any attempt to log in virtually by her Advocate.
4. The application was canvassed through written submissions.
5. The Respondent submitted that this court has inherent powers to make such orders as are necessary for the ends of justice and that Section 1A and 1B of the *Civil Procedure Act* enjoins the court to ensure that there is just determination of proceedings.



6. He relied on the case of *Abdullahi Mohammed v. Mobammad Kabiye* [2015] eKLR which cited the Court of Appeal case of *Stephen Boro Gitiba v. Family Finance Building Society & 3 others* [2009] KECA 44 (KLR) where the court put forth the proposition that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way.
7. The Respondent further argued that justice mandates that mistakes by advocates should not be visited upon the innocent client and relied on the case of *Lucy Bosire v. KebanCHA Div. Land Disputes Tribunal and 2 others* [2013] KEHC 681 (KLR). He submitted that he had no role to play in the actions leading to the dismissal and stands to suffer irreparable loss if his application is not allowed while the Respondent has not demonstrated any prejudice she would suffer in the event the application is reinstated.
8. On her part, the Applicant relied on the case of *Joan Njuru Mwangi & Another v. Nyambura Mwangi & Another* [2021] eKLR and submitted that the explanation given by the Respondent is not convincing due to want of evidence.
9. The Applicant also contended that the application was not brought timeously and so it should not be allowed.
10. Further, the Applicant argued that the present application is a waste of the court's precious time since the application dated 3rd April 2023 was seeking to review orders that were granted upon the court exercising its discretion. She urged the court to dismiss the application with costs.
11. It is trite that the court has unfettered powers to set aside *ex parte* orders provided the court sets aside such orders upon such terms as are just.
12. The discretionary power to set aside an *ex parte* order has been held to be intended to avoid injustice and hardship resulting from an accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought to obstruct or delay the course of justice whether by evasion or otherwise. This was held in the case of *Shah v. Mbogo & Another* [1967] EA 116.
13. The background of the present application is that the Applicant filed judicial review proceedings in this court on 3rd August 2022. Upon being served, the Respondent filed a response to the application on 18th August 2022 and written submissions on 8th December 2022. Coincidentally, the Applicant filed a notice to withdraw the suit on the same date of 8th December 2022. On 30th January 2023, the Deputy Registrar endorsed the notice of withdrawal of the suit as framed which was that the Applicant wished to withdraw the suit with no order as to costs.
14. The endorsement of the Applicant's notice to withdraw the suit with no order as to costs was made without the input of the Respondent who had already filed pleadings and being aggrieved, he filed an application dated 3rd April 2023 for review and setting aside of the said orders of the Deputy Registrar.
15. The application dated 3rd April 2023 was dismissed on a day when the matter was slated for mention to confirm the filing of submissions. I have perused the file and established that the Respondent had not filed his written submissions by then and therefore had not complied with the orders of the court.
16. In the case of *Lucy Bosire v. KebanCHA Div. Land Dispute Tribunal (Supra)*, the Court cited held as follows:-

“The principles guiding the setting aside *ex parte* orders are trite that the court has wide powers to set aside such *ex parte* orders save that where the discretion is exercised the Court



will do so on terms that are just. In *CMC Holdings Limited vs. Nzioki* [2004] 1 KLR 173 it was held as follows:-

“That discretion must be exercised upon reasons and must be exercised judiciously..... In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate”.

In *Branco Arabe Espanol vs. Bank of Uganda* [1999] 2 EA 22, Oder, JSC stated:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.

17. Whereas I agree with the Applicant that the explanation given by the Respondent is not convincing, I must also take judicial notice of the fact that with frequent power outage and unreliable internet connectivity, there is a strong possibility that the Respondent’s Advocate may have faced challenges in logging into court. Despite the Applicant’s contention that there were no sufficient reasons given, it is clear that the absence that led to the dismissal of the Respondent’s application was his Advocate’s mistake.
18. Time and again the courts have held that mistakes of advocates ought not be visited on their clients. In the celebrated case of *Philip Chemwolo & Another v. Augustine Kubede* [1982-1988] KAR 103 at 104, Apaloo J.A stated:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”
19. Under Article 50 (1) of the *Constitution*, every party has a right to be heard and the fundamental duty of the court is to ensure that the parties that are seeking justice can access justice by being accorded such opportunity to be heard.
20. In the case of *Mureithi Charles & Another v. Jacob Atina Nyagesuka* [2022] KECH 1805 (KLR), the court held as follows:-

“28. In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and



subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See *Bouchard International (Services) Ltd vs. M'mwereria* [1987] KLR 193; *Evans vs. Bartlam* [1937] 2 All ER 647.”

21. For justice to be done to a party, the court needs to ensure that an excusable mistake does not consign the affected party's case to oblivion irrespective of its merits. The court is obliged to consider all the surrounding circumstances before taking the drastic step of shutting the doors of justice upon a litigant therefore driving the litigant out of the seat of justice empty handed.
22. It has not been demonstrated that the Respondent deliberately sought to obstruct or delay the cause of justice. The date the Respondent's application was dismissed for non-attendance was the first time the matter was being mentioned after directions had been taken. The application to set aside the order of dismissal was filed a month after the dismissal of the application for review. There was no delay in the filing of the application as most of the intervening period fell on the Christmas vacation during which time does not run.
23. The Respondent proffered an explanation for the delay of one year in filing the application challenging the order allowing the Applicant to withdraw the judicial review proceedings with no order as to costs. The delay in filing the application points to a failure by the Applicant to serve the Respondent with the Notice of withdrawal of suit. There is no telling whether the failure was inadvertent or deliberate. However, the Applicant did not contest the Respondent's averment that he was not served with the Notice to withdraw the suit and this lends credence to the Respondent's averment that he filed the application that was subsequently dismissed upon learning that the suit had been withdrawn with no order as to costs.
24. Taking into account the entire circumstances of the case, I find that it would be an injustice to deny the Respondent a chance to present his case. Substantive justice can only be served if the Respondent is allowed to have his day in court in view of his assertion that he has been condemned unheard twice,



first when the order regarding costs was granted and then, when his application for a review of the said order was dismissed for non-attendance.

25. I therefore allow the application with no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 3RD DAY OF APRIL, 2025.

A. C. BETT

JUDGE

In the presence of:

No appearance for the Applicant/Respondent

Ms. Adeya for the Respondent/Applicant

Court Assistant: Polycap

