Kamau v Mwanthi & 2 others (Civil Case E006 of 2021)
[2025] KEHC 11347 (KLR) (16 June 2025) (Ruling)

Neutral citation: [2025] KEHC 11347 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL CASE E006 OF 2021

DO CHEPKWONY, J

JUNE 16, 2025

BETWEEN

ELIZABETH MUKAMI KAMAU ..... PLAINTIFF

AND

STEPHEN NZUE MWANTHI ..... 1ST DEFENDANT

JOSEPH KARIUKI KWERI ..... 2ND DEFENDANT

BENSON MWANGI NDUNGU ..... 3RD DEFENDANT

RULING

1. Before this Court for determination is yet another application by the Defendant/Respondents. It is a Notice seeking the following orders: -

    a. Spent.

    b. That the Honourable Court be pleased to Review and set aside the ruling delivered on the 16th January, 2024 and any other consequential orders.

    c. That in the alternative, an order be issued allowing both the applications dated 5th July, 2022 and 27th July, 2023.

    d. That the Applicants be granted leave to defend the suit by filing a defence within 14 days.

    e. That the costs herein be in the cause.

2. The application is supported by the grounds set out on the face thereof, as well as the Supporting Affidavit sworn by the 2nd Defendant/Applicant, Joseph Kariuki Kweri. According to the deponent, upon being served with pleadings in the present suit, the 1st Defendant promptly handed over the matter to his insurer, who in turn instructed the Firm of M/S Cheboryot & Company Advocates to represent the Defendants in the proceedings. The said firm duly entered appearance but failed

to file a statement of defence within the prescribed timelines. Consequently, on 26th May, 2022, an interlocutory Judgment was entered against the Defendants in the sum of Kshs.46,288,087/-.

3. The Applicants contend that the Judgment sum is excessively high, considering that the cause of action arose from a Road Traffic Accident that allegedly resulted in the Plaintiff sustaining minor injuries. Aggrieved by the Judgment, the Applicants, acting through their Insurer, instructed the firm of Urbanus, K & Associates, Advocates and they filed an application dated 5th July, 2022 seeking to set aside the interlocutory Judgment. The said application was allowed on an interim basis, subject to the condition that the Applicants deposit a sum of Kshs.1,000,000.00 as security, which they duly complied with. However, despite this initial step, the Advocates on record failed to prosecute the application or attend court sessions. As a result, and at the instance of the Plaintiff's advocate, the application was dismissed on 27th June, 2023.

4. Following this setback, the Applicants took personal initiative to salvage the matter by settling the requisite legal fees and appointing a new Firm of advocates, being L.A. Chemeli Advocates LLP. The new advocates subsequently filed a fresh application dated 27th July, 2023, seeking review of the orders that dismissed the earlier application dated 5th July, 2022. Unfortunately, this subsequent application met the same fate as its predecessor and was dismissed due to non-attendance by the Applicants' legal representatives. The 2nd Defendant/Applicant attributes his inability to actively follow up on the case to his ill health, specifically citing his hospitalization due to Empyema Thoracis and Anaemia, conditions which led to an extended admission spanning several months.

5. In addition to the above circumstances, the Applicants have raised a new and potentially significant issue regarding the authenticity of the receipts which were relied upon by the Plaintiff to support her claim for special damages. It is alleged that a substantial portion of the awarded sum, namely Kshs.46,288,087.00, comprises medical expenses supposedly incurred for treatment abroad. However, the Applicants now claim to be in possession of fresh evidence indicating that the hospital in question has denied issuing the impugned receipts. They assert that they are in the process of securing formal documentation to substantiate this position. In light of this newly discovered evidence, the Applicants urge the Court to grant them an opportunity to file their defence and challenge the Plaintiff's claim. They further submit that the Plaintiff should equally be afforded a chance to verify and authenticate her claim, particularly with respect to the alleged special damages.

6. The Plaintiff/Respondent, Elizabeth Mukami Kamau, has opposed the application through a Replying Affidavit sworn on 14th January, 2025. In her response, she contends that the Applicants have consistently failed to prosecute the matter with due diligence. She decries the current application as merely repetitive of previously dismissed applications and urges the Court to reject it, stressing that litigation must have finality. The Respondent argues that the Applicants' conduct constitutes an abuse of the court process and that allowing the present application would amount to reopening issues already settled by the Court.

7. Following directions by the Court, both parties filed written submissions in support of their respective positions, which the Court has taken into account in the determination of this application.

Analysis and Determination

8. I have carefully considered the application before the Court, the grounds in support thereof, the affidavits sworn by the parties, the annexures relied upon, and the written submissions filed. The principal issue for determination is whether the Applicants have met the threshold for the Court to exercise its discretion to review and set aside its earlier ruling and the interlocutory judgment entered against them on 26th May, 2022.

9. To the extent that the Applicants seek review of the ruling delivered on 16th January, 2024 and 27th June, 2023, this prayer falls within the ambit of order 45 rule 1 of the *Civil Procedure Rules*, 2010. The Rule provides that any person considering themselves aggrieved by a decree or order may apply for a review where:

   (i) there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced at the time the order was made;

   (ii) there is some mistake or error apparent on the face of the record; or

   (iii) for any other sufficient reason.

10. In the present case, having carefully read through the affidavits and records, I am convinced that the Applicants' ground for seeking review squarely fits within the first limb being the discovery of new and important evidence. They allege that a substantial portion of the Judgment sum was awarded as special damages being the cost incurred by Respondent for treatment abroad, which is supported by hospital receipts that have now come into question. According to the Applicants, the institution from which the receipts were allegedly issued has denied authoring them thus casting doubt on their authenticity. The Applicants submit that they are in the process of obtaining formal documentation from the said hospital to prove this claim. This revelation, if verified, would strike at the core of the Plaintiff's claim for special damages and directly impact the integrity of the Judgment. I am therefore satisfied that the allegation concerning potentially forged or misrepresented medical receipts constitutes a sufficient ground for review under Order 45, which then justifies the reopening of the matter to allow the truth to be ascertained through proper scrutiny at trial.

11. On the other hand, the legal foundation for the Court's power to set aside an ex-parte Judgment is rooted in Order 10 Rule 11 of the *Civil Procedure Rules*, 2010, which provides:-

> "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."

12. This provision vests the Court with wide and unfettered discretion to set aside interlocutory Judgments where justice demands, provided that the discretion is exercised judiciously and not arbitrarily or capriciously. The guiding principle is whether the Applicant has demonstrated a reasonable explanation for the default and whether they have a plausible or arguable defence that merits consideration on the merits.

13. In the case of *Shah v Mbogo & Another* [1967] EA 116, Harris J explained the general principle governing the exercise of this discretion as follows:

> "The discretion is intended so 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 to obstruct or delay the course of justice."

14. In the instant case, I find the Applicants have advanced a reasonably detailed account explaining how the default occurred. Upon service of the Summons to enter appearance, the 1st Defendant handed the matter to his Insurer, who instructed a firm of advocates to enter appearance. While this was done, the said firm failed to file a statement of defence, resulting in the entry of the ex parte Judgment. Subsequently, various efforts were made by different firms of advocates to remedy the default, including the filing of two separate applications, each of which failed due to non-attendance.

15. Notably, and most important, the 2nd Defendant/Applicant has provided a justification on medical grounds for his inability to personally follow up with the matter during the material period, citing prolonged hospitalization due to serious medical conditions. This explanation, though not ideal, offers some mitigating context for the delay and inaction. However, of particular significance to the Court is the averment that substantial portions of the decretal amount—totalling over Kshs.46 million—were based on special damages allegedly incurred for treatment abroad, and that the receipts used to support these claims have now been challenged. The Applicants assert that the hospital from which the receipts purportedly originated has since denied issuing them, and that formal evidence to this effect is being procured. This is not a frivolous claim. If substantiated, it goes to the very heart of the Plaintiff's case and could dramatically alter the quantum, if not the liability itself.

16. The law is well-settled that special damages must not only be specifically pleaded but also strictly proved. In the case of *Hahn v Singh* [1985] KLR 716, the Court of Appeal held:-

> "Special damages must be pleaded and strictly proved. The degree of certainty and particularity depends on the circumstances and nature of the acts themselves."

17. Whereas the authenticity of the documentary evidence supporting special damages is being challenged, particularly on allegations of fraud or misrepresentation, the principles of natural justice demand that the Defendant be accorded an opportunity to mount a defence and test the evidence through cross-examination and the full adversarial process.

18. The overarching objective of the civil process is the just determination of disputes on their merits. In the case of *Pithon Waweru Maina v Thuku Mugiria* [1983] eKLR, the Court emphasized that:-

> "It is trite law that a discretionary power should be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error."

19. The Plaintiff contends that the Defendants have been indolent and that the present application is but a repetition of previously dismissed efforts. While this Court is not blind to the importance of finality in litigation, it must also be alive to the higher call of substantive justice. The right to be heard which is the cornerstone of Article 50 of the *Constitution of Kenya* , 2010, should not be lightly denied, especially in circumstances where the issues raised in the application may significantly affect the outcome of the case. A balance must be struck between the need to uphold procedural integrity and the imperative to determine disputes fairly on the basis of tested evidence.

20. In this instance, the Applicants have demonstrated both a plausible reason for their earlier inaction and a prima facie defence that merits consideration. They have also shown readiness to engage with the litigation actively, having appointed new counsel and taken steps to challenge the basis of the special damages awarded. I am thus persuaded that the interest of justice would be better served by setting aside the interlocutory Judgment and allowing the Defendants to file their defence so that all matters in controversy can be ventilated fully and fairly.

Conclusion and Orders

21. In view of the foregoing, I find merit in the application. Accordingly, I make the following orders:-

    a. The Ex-parte interlocutory Judgment entered against the Defendants on 26th May, 2022 together with all consequential orders arising therefrom is hereby set aside.

    b. The Defendants/Applicants are granted leave to file and serve their statement of defence and any supporting documents within thirty (30) days from the date of this ruling.

c. The Plaintiff shall be at liberty to file a reply to the defence, if need be, within fourteen (14) days of being served by the Applicant /Defendant herein.

d. Mention on 4th August, 2025 before the Deputy Registrar for Pre-trial Conference.

e. Costs of this application shall be in the cause.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 16TH DAY OF JUNE 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:-

Mr. Mungai holding brief for Mr. Muturi counsel for the Respondent

Court Assistant - Martin