



Lake Navaisha Crescent Camp Limited v Kenya Deposit Insurance Corporation (Sued as Receiver Manager of Chase Bank (K) Limited) (Civil Case 24 of 2017) [2025] KEHC 8805 (KLR) (19 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 24 OF 2017
HI ONG'UDI, J
JUNE 19, 2025**

BETWEEN

LAKE NAVAISHA CRESENT CAMP LIMITED PLAINTIFF

AND

**THE KENYA DEPOSIT INSURANCE CORPORATION (SUED AS RECEIVER
MANAGER OF CHASE BANK (K) LIMITED) DEFENDANT**

RULING

1. In the Notice of motion dated 5th December 2024 the plaintiff/applicant prays for the following orders;
 - i. -iii- spent.
 - iv. That, the honourable court be pleased to set aside the proceedings and orders of the 28th November 2024 and the application dated 4th November 2024 be heard on merit.
 - v. That, the honourable court be pleased to make such other orders as it may deem fit in the interest of justice and circumstance of the case.
 - vi. That costs of the application be provided for.

2. The application is supported by the grounds on its face and the affidavit of Samuel Warugu Kimotho one of the applicant's directors sworn on even date. He deponed that the application dated 4th November 2024 was allowed on 28th November 2024 as it was unopposed. He stated that the applicant was not aware of the said orders since he had not seen any of the applications and mention notices said to have been served through his email. Further, that the said orders were unprocedurally obtained as the application dated 4th November 2024 was scheduled for a mention on 28th November 2024 and



not hearing. He urged the court to issue the orders sought to preserve the substratum of the suit and avert the irreparable and irreversible ruin that would be occasioned on the plaintiff/applicant

3. The defendant/respondent in response filed a replying affidavit sworn on 16th December 2024 by its legal officer one Stephanie Kioko. She averred that the instant application was a non-starter and made in utmost bad faith as the applicant sought for equity without approaching the court with clean hands. She stated that the applicant had evaded addressing the sole reason why the defendant/respondent sought to discharge the status quo that had subsisted for a long time.
4. Further that the claim that the orders issued on 28th November, 2024 were obtained irregularly was unfounded as the plaintiff/applicant was properly and effectively served with the defendant's application dated 4th November, 2024. He urged the court to dismiss the present application with costs.
5. The application was canvassed by way of written submissions.

Plaintiff/applicant's submissions

6. These were filed by Oyugi & Company Advocates on 28th January, 2025. Counsel submitted that the jurisdiction of this court to determine this application was discretionary however, the same ought to be exercised judiciously. He placed reliance on the decisions in *PMM v JNW* [2020] eKLR and *Shah v Mbogo & Another* [1967] EA 116.
7. Counsel identified three (3) issues for determination. On the first issue on whether there was proper service of the application, counsel admitted that documents were forwarded through his email address.
8. On whether there was sufficient reason advanced for non-attendance, counsel submitted that they were not aware of the dates when the matter came up in court. Also, that an email was indeed sent to them but it was delivered in the spam folder which he rarely opens. Thus, failure to attend court was not deliberate.
9. Lastly, on whether there is an injustice or hardship to be avoided and whether the hardship or injustice was occasioned by inadvertence or excusable error, counsel submitted that the court has inherent power to deal with instances like the one in this case where through no fault of the plaintiff/applicant nor its representatives they failed to attend court and defend an application. He urged the court to allow the plaintiff/applicant's application.
10. He placed reliance on the Court of Appeal decision in *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR where it was held as follows:

“... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.” See also *Meshallum Waweru Wanguku* (supra) This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.”

Defendant's/respondent's submissions

11. These are dated 2nd April 2025 and were filed by KOMM Advocates. Counsel identified three (3) issues for determination.



12. The first is whether service upon the plaintiff/applicant was proper, and counsel submitted that the plaintiff/applicant was served via its advocates email address in accordance with the provisions of Order 5 rule 22B of the Civil Procedure.
13. On the second issue on whether the ex-parte orders issued on 28th November 2024 should be set aside, counsel submitted that setting aside an ex parte order was discretionary to the court. That the plaintiff/applicant had failed to demonstrate why it is deserving of the orders sought and had not disputed being in default of its obligations to the defendant/respondent. He placed reliance in the decision in *Esther Wamaitha Njihia & Two others v Safaricom Ltd* 2014 eKLR, where the court being persuaded by the dictum in *Stephen Ndichu v Monty's Wines and Spirits* [2006] eKLR, held as follows;

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd.*) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought whether evasion or otherwise to obstruct or delay the cause of justice...”
14. Counsel further submitted that substantive justice requires that litigant's complaint to be heard on merit unless it can be established that such a litigant's intention was to delay the course of justice. He stated that the defendant/respondent continued to suffer harm and loss on account of the plaintiff/applicant's default while hiding behind the veil of the status quo order. He urged the court not to tolerate that infraction and misapprehension of an equitable remedy or shield the plaintiff/ from its obligations.
15. Finally, on whether SBM bank (K) Limited has locus standi. counsel submitted that the defendant/respondent, is the successor in the title of the defunct Chase Bank Kenya Limited the same having acquired the defendant/respondent vide the Gazette Notice dated 6th July 2018 and the Central Bank of Kenya Press release dated 20th August 2018. Thus, it was a misconception that SBM Bank (K) Limited was a stranger to these proceedings and lacked locus standi to sustain or defend the suit filed by the plaintiff/applicant against its predecessor.
16. He further submitted that clause 33 of the Legal Charge instruments provided as follows; -

“This charge shall continue to bind the continue to bind the Chargor notwithstanding any amalgamation or merger...and notwithstanding any reconstruction by the Bank involving the formation of and transfer of the whole or any part of the undertaking and assets of the Bank to a new company...”
17. He urged the court to dismiss the plaintiff/applicant's application.

Analysis and determination

18. I have carefully considered the application, affidavits and the submissions by both parties and I opine that the issue for determination is whether the applicant has made out a case for review and setting aside of the orders issued on 28th November 2024.
19. This court is guided by the principles as settled in the case of *Shah v Mbogo & another* (supra). where the court held as follows:

“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."

20. Further, in *Multiple Hauliers v Enock Bilindi Musundi & 2 others* [2021] eKLR the court referenced the decision in *Tana and Athi Rivers Development Authority v Jeremiah Kilnigho Mwakio & 3 Others* [2015] eKLR where the court held as follows;

"In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit"

21. This Court was moved by an application dated 4th November 2024, which was served upon the plaintiff/applicant on 22nd November 2024 via its advocates (Oyugi & company advocates) official email. The plaintiff/applicant's director in the supporting affidavit indicated that they became aware of the orders of 28th November 2024 on or around 3rd December 2024. Thereafter it moved the court through the present application on 5th December 2024 being two (2) days from the time it got to know of the existence of the said orders.
22. In view of the above, it is this court's finding that the plaintiff/applicant was duly served through its advocate's email address as set out in the affidavit of service sworn on 22nd November 2024. The plaintiff/applicant has nowhere shown that as at the time the court allowed the application dated 4th November, 2024 it had filed any response to it. Why had it not complied with the court's directions issued on 4th November, 2024? It is therefore not proper for the plaintiff/applicant to accuse the court of acting unprocedurally for allowing the application on a mention date.
23. That aside I find no delay in filing the application dated 5th December, 2024. This court takes Judicial notice of the fact that this is an old matter which is yet to be concluded. In exercising discretion, I am inclined to grant the plaintiff/applicant an opportunity to participate in the hearing of the application dated 4th November, 2024.
24. The upshot is that the application dated 5th December, 2024 is allowed, and the following orders shall issue:
- i. The proceedings and orders of 28th November, 2024 are hereby set aside.
 - ii. The application dated 4th November, 2024 to be heard on merit.
 - iii. The plaintiff/applicant to file and serve its response to the application dated 4th November, 2024 within 7 days.
 - iv. Leave granted to the defendant/respondent to file a supplementary affidavit (if need be) within 3 days of service of the response.
 - v. Parties to file and exchange brief written submissions limited to six (6) pages to the said application within 20 days upon service of the affidavit and/or supplementary affidavit.
 - vi. Mention on 21st July, 2025 before the DR to confirm compliance since this court will be on leave
 - vii. Costs shall be in the cause.



viii. These orders to apply to HCCC No. 46 of 2017. Lake Nakuru Lodge Ltd V The Kenya Deposit Insurance Corporation sued as Receiver Manager of Chase Bank Ltd.

25. Orders accordingly

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 19TH DAY OF JUNE, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

