



**Bahari Forwarders Limited v Abyssinia Group of Industries & 3 others
(Civil Suit E024 of 2021) [2025] KEHC 12124 (KLR) (7 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E024 OF 2021
F WANGARI, J
JULY 7, 2025**

BETWEEN

BAHARI FORWARDERS LIMITED PLAINTIFF

AND

ABYSSINIA GROUP OF INDUSTRIES 1ST DEFENDANT

ABYSSINIA IRON & STEEL LIMITED 2ND DEFENDANT

WESTERN STEEL MILLS LIMITED 3RD DEFENDANT

PRIME STEEL MILLS LIMITED 4TH DEFENDANT

RULING

1. The ruling herein relates to two (2) applications dated 21st November, 2024 and 18th December, 2024. For ease of reference, the application dated 21st November, 2024 shall be referred to as the first application while the one dated 18th December, 2024 shall be referred to as the second application.
2. The first application which was brought under the provisions of Articles 50 (1) and 159 (2) (d) of *the Constitution* of Kenya, section 3A of the *Civil Procedure Act*, Orders 9 Rule 9, 10 Rule 11, 12 Rule 7, 42 Rule 6 (1) (2) and 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following reliefs: -
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. That this Honourable Court be pleased to set aside the judgement delivered on 19th January, 2024 by this Honourable Court;



- e. That this Honourable Court be pleased to grant such further or other orders as it may deem just and expedient in the circumstances; and
 - f. That the costs of this application be provided for.
3. The grounds in support of the application are briefly that judgement was delivered on 19th January, 2024 by this court awarding the Plaintiff a decretal sum of Kshs. 20,492,884/= plus compound interest at 1.5% per month from 10th February, 2021 until payment in full. According to the Applicants, they were not properly made aware of the developments in the case including judgement and were only recently informed thus their appointment of new Counsel.
 4. They stated that they were concerned that the Plaintiff might execute the judgement thus creating a risk of irreparable harm. They further averred that they had strong grounds to warrant the orders sought. They therefore urged the court to allow the prayers. The application was supported with the affidavit of even dated sworn by one Ravi Gada, their Chief Finance Officer. It restated more or less the grounds in support and I thus see no need to rehash the same.
 5. The Applicants once again moved the court with the second application brought under the provisions of section 3A of the *Civil Procedure Act*, Orders 40 Rule 3 (1), (3) and (4), 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. They sought the following orders: -
 - a. Spent;
 - b. That pending the hearing and determination of this application inter-parties, this Honourable Court be pleased to grant a temporary order of injunction restraining the Plaintiffs/ Respondents and their agents, Sure Auctioneers from attaching and/or executing the judgement of this court delivered on 9th January, 2024, possessing and auctioning the Defendants'/Applicants' property;
 - c. That this Honourable Court be pleased to grant an order citing the Plaintiffs/Respondents and their agents, Sure Auctioneers for contempt of court for their disobedience of this court's orders given by Hon. Lady Justice Florence Wangari on 4th December, 2024 maintaining the status quo;
 - d. That this Honourable Court be pleased to commit the Plaintiffs/Respondents and their agents, Sure Auctioneers to Civil Jail for six (6) months or for such period as this Honourable Court may deem fit for contempt of court;
 - e. That in the alternative to prayer 4 above, the Honourable Court be pleased to grant an order citing the Respondents for contempt of court and fining them an amount equivalent to the decretal sum of Kshs. 20,492,884/= awarded in the judgement delivered on 9th January, 2024 in Civil Suit No. E024 of 2021;
 - f. That this Honourable Court be pleased to grant such further or other orders as it may deem just and expedient in the circumstances; and
 - g. That the costs of this Application be provided for.
 6. The grounds in support briefly are that through its first application, a stay of execution was granted with further directions to be made on 4th December, 2024. On 4th December, 2024, status quo was maintained pending the Court of Appeal ruling on stay. On the same 4th December, 2024, the application for stay in the Court of Appeal was marked as withdrawn triggering a chain of events.



7. It is said that the Plaintiffs through their agents Sure Auctioneers went ahead to serve the Applicants with a proclamation notice dated 13th December, 2024 giving seven (7) days' notice to clear the outstanding sum or else possess and auction the Applicants' property.
8. It was the Applicants' apprehension that the disobedience of the court's orders was deliberate, intentional and unless stopped by the court, there was reasonable cause to believe that the Plaintiffs would continue sending, using and/or instruction of their agents, Sure Auctioneers to commit such acts as will defeat the purpose of the court orders. They thus urged the court to grant the prayers sought.
9. The application was supported by the affidavit of even date sworn Ravi Gada. The contents therein are a reflection of the grounds in support save for the annexures.
10. Both applications are opposed. The first application is resisted through the replying affidavit dated 29th November, 2024 sworn by one Mr. Meetal Parmar, its Chief Operating Officer. In a nutshell, he averred that judgement in the suit was entered in favour of the Plaintiff on 19th January, 2024 for a sum of Kshs. 20,492,884/= together with interest at a rate of 1.5% per month from 10th February, 2021 until payment in full.
11. It is stated that following delivery of judgement, the Defendants filed an application before the Court of Appeal seeking orders of stay of execution pending appeal and the orders were granted. The application was argued and a ruling was delivered on 21st June, 2024 dismissing the application for orders of stay of execution.
12. That despite the dismissal, the Applicants filed a second application before the Court of Appeal on 5th July, 2024 seeking stay of the dismissal and payment by instalments which was said to be scheduled for hearing on 4th December, 2024. It was averred that though the Applicants' present Counsel have sought and obtained leave before this court, the same has not been done in the Court of Appeal.
13. In essence, it was the Respondent's contention that the Applicants ought to have disclosed existence of similar matters before the Court of Appeal while making the present application for stay. It was also contended that the claims by the Applicants that they only recently came to learn of the Judgement and Decree of the court but failed to indicate that they had filed three (3) separate applications before the Court of Appeal. It therefore sought that the application be dismissed with costs.
14. In response to the second application, the Plaintiff filed its replying affidavit dated 13th January, 2025. In a nutshell, it stated that on 4th December, 2024, this court issued further orders maintaining the status quo pending hearing and determination of the Applicants' application dated 5th July, 2024 before the Court of Appeal which was coming on the same date 4th December, 2024.
15. It is averred that before the Court of Appeal, the Applicants' Counsel before it made an application to withdraw their application dated 5th July, 2024 and the same was allowed with costs. Accordingly, the Applicants' application was conclusively determined and as a result, the status quo orders previously issued by the court lapsed on their own terms.
16. The Plaintiff stated that it is only after lapse of the status quo orders that the Plaintiff proceeded with execution of the judgement and decree given on 19th January, 2024. Accordingly, it was its position that it was not in contempt of any court orders contrary to the Applicants' averments.
17. On injunction, it was the Plaintiff's position that there was no legal or procedural right accruing to the Applicants to seek the same since the suit had been determined. It therefore sought for the application to be dismissed with costs.



18. The Applicants filed a further affidavit dated 6th February, 2025. They reiterated their position that they were not properly informed about the judgement delivered on 19th January, 2024 and the subsequent decree. On representation by two firms of advocates, they contended that the firm of Oluoch Kimori Advocates were given instructions to take up the matter once it became apparent to the Applicants that there was urgent need of legal representation.
19. On the withdrawal of the stay application before the Court of Appeal, they averred that the firm of Olendo Orare & Samba Advocates LLP withdrew the application once they knew they no longer had instructions and that this court is the correct court to make the application for stay.
20. Directions were taken to dispose off the application by way of written submissions. Both parties duly filed their respective submissions. The Applicants' filed two (2) sets of submissions all dated 24th March, 2025 addressing each of their applications.
21. On the application to set aside the judgement, they submitted that the court has discretion to do so even when the judgement is regular. In their case, they blamed their Counsel. They made reference to several decisions among them *Yooshin Engineering Corporation v AIA Architects Limited (Civil Appeal E074 of 2022 [2023] KECA 872 (KLR) (7 July, 2023) (Judgement)*.
22. On contempt, they submitted that the Plaintiff despite being aware of stay orders in place proceeded to proclaim and therefore, they posited that the Plaintiff was guilty of contempt and should be punished for the same. Several decisions among them *Econet Wireless Ltd v Minister for Information & Communication of Kenya & Another [2005] eKLR* were cited in support of the prayers.
23. The Plaintiff's submissions are dated 25th March, 2025. They were in reference to both applications. On setting aside, it submitted that there was no evidence offered of how the Applicants' erstwhile advocates was ineffective or uncommunicative. Reference was made to several decisions among them *Water Painters International v Benjamin Ko'goo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries [2014] eKLR*.
24. On contempt, the Plaintiff submitted that the status quo orders were supposed to last until the Court of Appeal delivered its ruling which it did with the effect that the status quo orders lapsed on their own terms. Accordingly, as there were no orders of stay of execution or maintenance of status quo in place, the Plaintiff was at liberty to proceed with execution as it did.
25. Therefore, it submitted that it was not in contempt of court orders which were inexistent as they had lapsed. It cited several authorities among them *New Age Associates v Mantic Africa Limited; Ecobank Kenya Limited (Garnishee) [2022] KEHC 12661 (KLR)*.

Analysis

26. I have considered the two applications, the responses, parties respective rival submissions, cited authorities and the law and the issues falling for the court's determination are: -
 - a. Whether either or both applications have merit;
 - b. If the answer to (a) is in the affirmative, what orders ought to issue? and
 - c. Who bears the costs?
27. The first application essentially seeks for an order to set aside this court's judgement delivered on 19th January, 2024. Setting aside a judgment, particularly a default judgment, is an exercise of discretionary



power donated to courts. The court can set aside a judgment, whether ex parte (without the other party present) or regular, if it's deemed just and reasonable.

28. This power is typically exercised when a party demonstrates a valid reason for not appearing or defending the case such as mistake, inadvertence or excusable neglect. The court will also consider whether the Applicant has a prima facie defense on the merits. Before the court exercises this power, it must first determine whether the judgement in issue is regular or an irregular one. In *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193, the Court of Appeal held as follows: -

“...The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgement by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The discretion is intended so 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 has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge 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, the good sense of the matter, were certainly matters for the judge. It is an unconditional 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 revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure...”

29. In interrogating the present case vis a vis the parameters set in the above case, it is not in dispute that the judgement in place and which is sought to be set aside is a regular one. The Applicants filed a statement of defence and which defence the court referred to it in its judgement. This being the case, a party seeking to set aside a regular judgement must advance valid reason (s) to justify the setting aside.
30. What is the reason advanced by the Applicants? From the grounds in support of the first application as well as the supporting affidavit, the Applicants appear to fault their former advocates for not updating them on the progress of the case. This might be the case but the case belongs to a litigant, not his advocate.
31. Though am alive to the several decisions of this court and other superior courts that mistakes of Counsel should not be visited upon innocent litigants, this is not a carte blanche to do all and sundry.
32. In *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR, the Court held as follows: -

“...It is true that where the justice of the case mandates, mistake of advocate even if they are blunders should not be visited on the clients when the situation can be remedied by cost...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...I fully agree with the above holding. It is not



enough for a party to simply blame the advocate but must show tangible steps taken by him in following up his matter...”

33. The court record of 18th October, 2023 shows that the Applicants were granted four chances to prosecute their defence. These were on 22nd May, 2023, 31st July, 2023, 17th October, 2023 and 18th October, 2023. Despite all these occasions, the Applicants failed to utilize their opportunity to prosecute their case. In fact, on 17th October, 2023, the Applicants’ Counsel informed the court that the Applicant’s witness was admitted at Aga Khan Hospital.
34. Since the court does not take matters of illness lightly, it proceeded to give the date of 18th October, 2023 to enable the Applicants’ Counsel avail the hospital documents. However, on 18th October, 2023, the document availed showed that the Applicants’ witness Ravi Gada was on a five days bed rest according to the document availed. Of interest is that the said document emanated from a private hospital in Kiambu, not Aga Khan Hospital as earlier alleged.
35. With this finding, the defence case was duly closed. With this chronology of events, I am afraid that the reason advanced by the Applicants to set aside judgement does not pass muster. The same witness who was said to have been admitted at Aga Khan Hospital is the same one who swore the affidavit in support of the application to set aside judgement. I do not find the reason advanced plausible so as to exercise discretion in the Applicants favour. I have said enough to demonstrate that the application dated 21st November, 2024 must fail.
36. On the second application, can the Plaintiff be said to have been in contempt when it proclaimed on 13th December, 2024? The answer is found in the proceedings of 4th December, 2024. On the said date, parties appeared in court for further directions since interim stay had already been granted on 22nd November, 2024. The court issued two substantive orders. The first one was; the status quo be maintained pending the delivery of the Court of Appeal ruling on stay.
37. However, from the annexures attached, there is a ruling from the Court of Appeal of even dated showing that the application which the court had based its decision to maintain status had been withdrawn on the same date. The effect of the withdrawal was that the status quo order issued lapsed automatically since its lifespan depended upon the Court of Appeal.
38. I therefore agree with the Plaintiff that there was nothing stopping it from proceeding in the manner it did on 13th December, 2024. This being the case, I do not see how the Plaintiff can be said to have been in contempt of this court’s orders since the same had automatically lapsed when the Court of Appeal pronounced itself in Civil Application No. E002 of 2024.
39. In *Jason Sore Shikuku v Christopher Naibey Chemengu* [2018] eKLR, it was held as follows;

“...An order that has lapsed ceases to exist and cannot be a basis upon which any contempt proceedings can be founded...”
40. This is the situation obtaining in the present case. This being the case, the second application must also fail.
41. On costs, the same follows the event. However, the court retains discretion whether to award the same or not. Though both applications have failed, I do not discern any bad faith in the manner the same they were brought. The applications were neither frivolous, vexatious, scandalous nor abuse of court process. In the circumstances, I direct that each party to bear own costs.



Determination

42. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. The Notice of Motion Applications dated 21/11/2024 and 18/12/2024 are devoid of merits and the same are hereby dismissed; and
- b. Each party to bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2025.

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F. WANGARI

JUDGE

In the presence of;

Ms. Oluta Advocate for the Plaintiff.

Mr. Kamanzi Advocate for the Defendants

Ms. Getrude, Court Assistant

