Wesonga v Thuo (Civil Appeal E041 of 2024) [2025] KEHC 9544 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEHC 9544 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E041 OF 2024

A MABEYA, J

JULY 3, 2025

BETWEEN

YUSUF AMAUNDA WESONGA ..... APPELLANT

AND

JOHN WAITHAKA THUO ..... RESPONDENT

RULING

1. This ruling determines the application dated 18/12/2024 brought under sections 1A, 1B, 3A and 95 of the *Civil Procedure Act*, Order 10 Rule 11, Order 22 Rule 6, 21 (1), Order 45 Rule 1, Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*.

2. The applicant seeks to set aside the ex-parte judgment entered on 17/12/2024, stay execution of the said judgment and that the draft submissions be deemed as having been duly filed.

3. The application is supported by the grounds set out in the Motion and the the supporting affidavit of Theldred Wesonga.

4. The crux of the applicant's case is that he was never served with any notices, record of appeal and/or the applicant's submissions to enable him respond to the appeal and that he was made aware of the progress of the appeal when he was served with a copy of the judgment on the 17/12/2024 via personal e-mail.

5. That the instructing client, Directline Assurance Company Advocates halted its operations due to ongoing shareholder wrangles and thus if there was service effected at its head office in Nairobi, the same was not effected but that the respondent was aware of the Kisumu branch e-mail.

6. That the respondent stands to suffer no prejudice in the event the application is allowed as it has been brought without unreasonable delay.

7. In opposition, the respondent's advocate filed a replying affidavit dated 24/2/2024. They denied that the applicant was never served with any notices, record of appeal and/or his submissions. That there

was no tangible reason that had been given by the applicant's advocate for failing to attend court despite service of notices both by the court and by the respondent's advocate.

8. That there was no draft submissions annexed to the supporting affidavit and marked as required by law and thus the applicant could not have claimed to have moved with speed and prepared submissions for consideration by the Court. That the application was made in bad faith, meant to derail the wheels of justice by delaying the respondent from enjoying the fruits of judgment in his favour.

9. The parties filed submissions in support of their respective cases. The applicant submitted that this matter proceeded ex parte on diverse dates and that its evidence and submissions was not presented to the Court. That no sufficient notice was given to him despite the fact that the respondent knew the email address of the applicant's branch office.

10. That when service was effected upon the applicant's head office, the administrator could not access the same due to the ongoing company wrangles at the instructing client's servers.

11. That the attached draft submissions raise triable issues of quantum and as such the ex parte judgment should be set aside to allow both parties to be heard on merits as was held in the case of *Tree Shade Motors Ltd v D.T. Dobbie & Another* (1998) eKLR. That the prejudice that he stands to suffer outweighs that which will be suffered by the respondent which can be cured by compensation through costs.

12. In response the respondent submitted that the applicant, *vide* its email, info@kglaw.co.ke was given several notices by the Court starting with the hearing notice sent on the 29/6/2024, Court directions sent on 1/10/2024 after which the respondent forwarded its record of appeal and submissions via email on the 17/10/2024 as well as the judgment notice sent by both the Court and the respondent's advocate on the 24/10/2024 and 28/10/2024, respectively.

13. That the board room wars at Directline Assurance should not and cannot in any way affect the proceedings in Court involving their assured clients and thus this Court ought to find that the application lacks merit.

14. I have considered the record and the submissions made by both parties. The decision whether or not to set aside ex parte judgment is discretionary. That discretion is intended to avoid injustice and 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. See *Shah v Mbogo & Another* [1967] EA 116.

15. In the present case, the grounds upon which the application to set aside the judgment was made is that the applicant was never served with any notices, record of appeal and/or the respondent's submissions to enable him respond to the appeal. That he was made aware of the progress of the appeal when he was served with a copy of the judgment on 17/12/2024 via personal e-mail and thus he was denied the opportunity to present his case.

16. The courts in this country have variously held that they will not interfere with regular Judgment unless the Court is satisfied that's there is a Defence on merit which disclose triable issues. In *Sebei District Administration v Gasyali & others* (1968) EA 300, Sheridan J. observed that: -

> " The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be

considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court".

17. Further, it is trite that jurisdiction to set aside judicial decision must be exercised judiciously and each case is considered depending on its own peculiar circumstances. In *Shanzu Investment Ltd v The Commissioner of Lands*, Civil Appeal No. 100 of 1993, the Court of Appeal held that: -

> " The Court has wide discretion to set aside Judgement and there are no limits and restrictions on the discretion of the Judge except, that if the Judgement is varied, it must be done on terms that are just ..."

18. The principles to be considered while determining whether to set aside the ex-parte regular judgment entered herein are: -

    i. Explanation for the failure to attend court

    ii. Whether there is a defence on merit?

    iii. Prejudice to be suffered by the opposite party; and

19. As regards the explanation offered up by the applicant for his failure to attend Court leading up to the entering of the ex-parte judgment, it was contended that it was on lack of service.

20. The applicant's firm of advocates explained that it could not access its email as a result of the shareholder wars within its instructing client, Directline Assurance. That the respondent ought to have sent the said notices to its branch personal email as he did in forwarding the delivered judgment. I think that is a mistake of advocate. The advocate should have been vigilant as it knew of the existence of the appeal.

21. In *Philip Chemowolo & Another v Augustine Kubede* [1982-88] KAR 103 at 1040, it was held: -

> " Blunder 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."

22. That mistakes do occur in the process of litigation was appreciated by the Court of Appeal in *Murai v Wainaina* (No. 4) [1982] KLR 38 where it was held that: -

> " A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to us erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

23. Further to the above, it us trite that every person ought not to be shut out from accessing Court or having his day in Court and that the right of a party to enjoy the fruits of his judgment must be weighed

against the right of a party to access Court to have his dispute heard and determined by a Court or tribunal of competent jurisdiction.

24. I am satisfied that a reasonable explanation has been proffered as to the failure by the applicant to participate in the proceedings that resulted in the ex-parte judgment.

25. The second principle is the defence to the claim. From the record, the appeal was to be disposed by way of submissions following the filing of the Record of Appeal and submissions by the respondent. The applicant did not file any. The applicant contended that he was to raise the issue of quantum in his submissions particularly because the nature of injuries sustained by the respondent which were soft tissue in nature.

26. Considering that the issue between the parties herein was for compensation, it is my opinion that an issue of quantum is a triable issue.

27. As regards prejudice, it is not in doubt that the prejudice the respondent would suffer if the application is allowed would be delay in having his compensation or realizing the fruits of his judgment. That is a prejudice that can be compensated by way of costs whereas conversely, if the application is denied, the applicant stands to be driven away from the corridors of justice unheard.

28. Having considered this application, I find the same to be merited. In the circumstances, the same is allowed as follows: -

    a. That the judgment entered on the 17/12/2024 is hereby set aside.

    b. The applicant to file his submissions within 14 days of this ruling.

    c. The respondent is granted thrown away costs of Kshs. 10,000/-.

    It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE