Media Council of Kenya v Odanga (Civil Appeal E059 of 2024)
[2025] KEHC 13191 (KLR) (26 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13191 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E059 OF 2024

DK KEMEI, J

SEPTEMBER 26, 2025

BETWEEN

MEDIA COUNCIL OF KENYA ..... APPELLANT

AND

JOSIAH OMOLO ODANGA ..... RESPONDENT

(An appeal from the Ruling and Order of Hon. C.C. Maiyo (R.M) delivered on 13th November 2024 in Siaya CMCC No. E048 of 2024)

JUDGMENT

1. The appeal arises from the ruling of Hon C.C Maiyo (RM) in Siaya MCC No. E048 of 2024 dated 13/11/2024 wherein she dismissed the Appellant's application dated 8/10/2024 which sought for the setting aside of the ex-parte judgement that had been entered against the Appellant in default of appearance and filing of defence. The learned trial magistrate while dismissing the said application held that the Appellant had admitted negligence on the part of its staff and that they none- theless had been served through their last known email address.

2. Aggrieved by the said ruling, the Appellant lodged its Memorandum of Appeal dated 20/11/2024 wherein it raised the following grounds:

    i. That the learned magistrate erred in law by holding that the Appellants Notice of Motion application dated 8th October 2024 was short in merits and dismissed the same with costs to the Respondent.

    ii. That the trial magistrate erred in law by finding that the Respondent should not be subjected to prejudice arising from the Appellant's admitted negligence.

iii. That the learned trial magistrate erred in law and fact in referring to the Appellant's actions as admitted negligence from the onset, when the Appellant had indicated the same as excusable mistake of its officer and in doing so arrived at a wrong conclusion in law.

iv. That the learned trial magistrate erred in law and fact by failing to acknowledge the excusable mistake thereby making a finding that the Respondent had properly prosecuted his case and in failing to do so arrived at a wrong conclusion.

v. That the learned trial magistrate erred in law and fact by completely disregarding the Appellant's grounds for making the application to set aside the default judgment, the reasons for not entering appearance, the timeous act of filing the application upon discovery of the same and its desire to be heard on merit thereby basing her ruling on erroneous principles of law.

The Appellant therefore sought for an order setting aside the orders of the learned trial magistrate and substitute it with an order allowing the Appellant's application so that the suit could be heard denovo on merits and that the costs of the appeal be awarded to the Appellant.

3. Being a first appeal, i have a duty to appreciate the entire evidence subjecting it to a fresh exhaustive scrutiny and arrive at my own independent conclusion. I have to bear in mind that i did not have the opportunity to hear or see the witnesses and must therefore give due allowance for that. (See Selle & Another vs Associated Motor Boat Company Ltd & others [1968] 1EA 123; Peters v. Sunday Post Ltd(1958)EA 424;Mary Wanjiku Gachigi v Ruth Muthoni Kamau(Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA);Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000.(Okubasi, Githinji & Waki JJA).

4. A perusal of the lower court record reveals that the Appellant had been sued for damages arising from defamatory words uttered by the Appellant or its agents which disparaged the Respondent's reputation in the eyes of the public. The service of the plaint was effected vide the Appellant's last known email address. Apparently, the Appellant however, did not come to know of the said suit until after the default judgment had been entered and when the advocates' bill of costs was due for taxation. It is at that point that the Appellant moved the court via an application dated 8th October 2024 filed under certificate of urgency seeking the following orders:

a) Spent.

b) That the Honorable court be pleased to issue a stay of execution of the ex-parte judgment dated 4th September 2024 and the resultant bill of costs dated 11th September 2024 as well as any further proceedings in the matter pending the inter partes hearing and determination of the application.

c) That the Honorable court be pleased to set aside the exparte proceedings and exparte judgment/decree herein and any other or further proceedings subsequent thereto.

d) Such further and/or other orders be made as the court may deem fit and expedient.

e) The costs of the application be borne by the Plaintiff/Respondent.

5. The application was supported by an affidavit dated 8th October 2024 sworn by one Terence Bavon Minishi who deponed inter alia; that he is the Manager, Regulatory Affairs of the Appellant then Defendant (herein after referred to the Council) with authority to swear the affidavit; that the matter at the lower court was filed way back in May 2024 without the knowledge of the council and subsequently, the matter proceeded ex-parte and that a default judgment was entered on 4th September

2024 against the Applicant; that the Applicant was never notified of the existence of the proceedings or the ex-parte default judgment until 2nd October 2024 when the Complaints Commission assumed office and retrieved an email sent from infomoblaw.co.ke which had been forwarded by the officer manning the general email to the Registrar on assumption that the matter was a complaint to the complaints commission; that the Council's Complaints Commission being an independent body from the Appellant/Defendant noted that the matter relates to the Defendant/Appellant rather than the Commission and brought the discovery to his attention and upon perusal of the email, he noted that the council had been served with a bill of costs together with a court date in the matter; that at the time of filing and serving the pleadings, the Complaints Commission had not been constituted since the expiry of the previous commission's tenure in October 2023 and thus there was no Commission to look into or handle the complaints and thus any incoming complaints were filed away awaiting the assumption of the new Commission; that the new Commission was appointed on 10th July 2024 and was sworn in on 31st July 2024; that the Commission then proceeded for induction and general housekeeping until late September when it assumed office; that the Respondent did not make any effort to physically serve the Appellant; that in fact, the matter was mentioned once, fixed for hearing and a judgment entered without the trial court considering the mode of service; that the application was filed expeditiously, without undue delay and has merit.

6. The said application was opposed by the Respondent herein who filed a replying affidavit sworn on 18/10/2024 wherein he contended that the service of sermons was properly effected upon the Applicant and that he had a valid and regular judgment in his favour. He further contended that the Applicant's careless manner in handling court process should not be visited upon him yet he had duly followed all the processes and thus the application should be dismissed with costs. It was further averred that in the alternative, the Applicant should pay up 10% of the decretal sums as thrown away costs or the entire sums be deposited into an escrow account in the joint names of the Advocates and further that the Applicant be ordered to file and serve its statement of defence within seven days and a date for defence be set.

7. The trial magistrate considered the application and went ahead to rule in favor of the Respondent decree holder and dismissed the said application with costs and which culminated the instant appeal.

8. The appeal was canvassed by way of written submissions. Both parties duly complied.

9. The Appellant's submissions were largely a reiteration of the contents of the supporting affidavit and further went ahead to cite legal basis for setting aside exparte judgments. The Appellant likewise relied on several authorities including James Kanyita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] Eklr, Mwala v Kenya Beurau of Standards EA LR (2001) 1 EA 148, Mbogo & Another v Shah [1968] E.A 93, Patel v. EA Cargo Handling Services (1975) EA 75, Chemwolo & Another v Kubende (1986)KLR 492 and CMC Holdings vs Nzioki [2004]1 KLR 173 among others. It was the contention of the Appellant that it had a good and triable defence to the suit and ought to have been given an opportunity to defend it and that the delay to enter appearance and file defence was not deliberate on its part.

10. On his part, the Respondent's submissions were a reiteration of the contents of his replying affidavit at the trial court. He likewise placed reliance on a myriad of authorities including but not limited to Hosea Kiplagat v John Allan Okemwa [2018]KECA 667 , Agigreen Consulting Corp. Ltd vs National Irrigation Board(2020)e KLR among others. It was contended that a valid and regular judgement had been entered in his favour and thus the Appellant should not be allowed to interfere with his right to enjoy the fruits of the judgement.

11. I have considered the trial court record, the rival submissions on appeal and the vast authorities relied on by the learned counsels. I have addressed my mind to the content therein and find the issue for determination is whether the Appellants' application filed before the trial court dated 8th October 2024 had merit.

12. Setting aside of ex-parte judgements is provided for in Order 10 Rule 11 of the Civil Procedure Rules as follows :

> " 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."

13. In the case of Patel v EA Cargo Handling Services Ltd, [1974], EA 75 at page 76C and E the court held that:

> " Courts have been very liberal on applications of this nature and more often than not they would rather have the parties get full opportunity to be heard on the case for the ends of justice to be met than hear such cases ex-parte. There are no limits or restrictions of the judge's discretion to set aside an ex-parte judgment except that if he does vary any judgment he does so on such terms as may be
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> just. In this regard, the main concern of the Court is to do justice to the parties and it will not impose conditions on itself to fetter the wide discretion which the Civil Procedure Rules gives to it."

14. In Shah v Mbogo [1967] E A 116 Judge Harris, as he then was, had this to say –

> " 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 the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

15. This reasoning by Judge Harris was endorsed by the Court of Appeal appeal in the same matter in Mbogo v Shah [1968] EA 93 and in Shabir Din v Ram Parkash Anand (1955) 22 EACA 48 where Briggs JA as he then was said at page 51:

> " I consider that under order 9 rule 20 the discretion of the Court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."

16. It is noted from the averments of the Appellant in its affidavit that it does not dispute the issue of service but its gravamen is that the pleadings were sent to the Complaints Commission department and which were not acted for several months due to the fact that the Commission had not started off its operations. Indeed, there was sufficient time for the Appellant to have acted but it seems its officials at the Commission blundered by not raising it with the Appellant in time. In the case of Philip Chemwolo & Another Vs Augustine Kubende [1986] KLR 492 it was held that blunders continue to be made by parties and counsels from time to time and that the court must exercise discretion while considering reasons why parties or counsels failed to take appropriate steps. In the present circumstances, the

Appellant was craving to be given an opportunity to defend the suit even though the period within which to have entered appearance and filed defence had elapsed. The trial court was thus placed in a position to consider the merits of the Appellant's predicament and that it had the sole discretion to make such orders as are expedient in the circumstances of the case and to consider whether the reasons furnished by the Appellant were merited. In the case of James Kanyita Nderitu & Another Vs Marios Philotas Ghikas & Another [2016] eKLR the Court of Appeal held as follows:

> From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one, which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgement. Such a defendant is entitled, under Order 10, Rule 11 of the Civil Procedure Rules to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgement, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgement was entered; whether the intended defence raise triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgement among others.
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> In an irregular default judgement, on the other hand, judgement will have been entered against a defendant who has not been served with summons to enter appearance. In such a situation, the default judgement is set aside ex debito justiciae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgement is irregular; it can set aside the default judgement on its own motion. In addition, the court will not venture into consideration of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgement. The reason why such judgement is set aside as of right and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

17. Addressing my mind to the principles set out in the above authorities to the instant case, it is noted that the Appellant did render an explanation for its failure to enter appearance leading to the default judgement. The Appellant also brought to the fore the fact that it had a defence which raises triable issues. That the officer manning the general mail of the Commission had filed away the summons and pleadings from the Respondent, believing that they were complaints which needed to await the *constitution* of the new Commission. I find the conduct on the part of the officer of the Council was not designed to deliberately shield the Appellant away from its obligation or to obstruct or delay the cause of justice on the face of it. This is supported by the Appellant's quick action in filing the application to set aside ex-parte judgment on 8th October 2024 as well as a prayer for stay of execution filed on the same day. In my view, this was a perfect case where the Court's discretion ought to have been exercised in favour of the Appellant so as to afford it an opportunity to be heard in its defence. As the ancient adage goes, 'Nobody should be condemned unheard'. Even then, the claims made by the Respondent were subject to inquiry which would only be properly adjudicated upon when hearing both parties. It is also instructive that the Respondent in his replying affidavit did not have an objection if the Appellant is allowed to file its defence so that the matter could be heard on merit save that he proposed that the Appellant meet some costs. The trial court therefore ought to have given the Appellant an opportunity to defend the suit by allowing it to file its defence albeit out of time so that all the issues in controversy

could finally be thrashed out and determined on merit. Even though the Respondent was already on the seat of judgement and entitled to the fruits of the judgement, the trial court could as well have cushioned him with an award of some thrown away costs. It is also noted that the Appellant's defence raised triable issues which merited the same to be allowed for trial. The Appellant, as a party in the suit was entitled as well to be permitted to access justice by dint of the provisions of Article 48 of the *constitution*. I find that the Respondent did not suffer serious prejudice in the circumstances and that it was in the best interest of justice to allow the application with some attendant conditions for compliance by the Appellant herein.

18. In view of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The ruling by the learned trial magistrate dated 13/11/2024 is hereby set aside and substituted with an order allowing the Appellant's application dated 8/10/2024 in terms of prayer No. 3 thereof with an order that the Appellant pays the Respondent thrown away costs of Kshs 30, 000/and that the Appellant to file its Memorandum of Appearance and statement of defence within 7 days. Each party to bear their own costs of this appeal.

    It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 26TH DAY OF SEPTEMBER 2025.

D. KEMEI

JUDGE

In the presence of:

Kuloba.....for Appellant

M/s Mumbi Kiume.....for Respondent

Okumu.....Court Assistant