



REPUBLIC OF KENYA



**First Community Bank Limited v Aima Enterprises Limited & 3 others (Civil Case 456 of 2016) [2024] KEHC 1496 (KLR) (Commercial and Tax) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1496 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 456 OF 2016  
JWW MONG'ARE, J  
FEBRUARY 19, 2024**

**BETWEEN**

**FIRST COMMUNITY BANK LIMITED ..... PLAINTIFF**

**AND**

**AIMA ENTERPRISES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MOHAMED ABDI ABUKAR ..... 2<sup>ND</sup> DEFENDANT**

**ABUBAKAR MOHAMED ABDI ..... 3<sup>RD</sup> DEFENDANT**

**UPPERHILL RADIOLOGY CENTRE LTD ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Defendants/ Applicants filed a Notice of Motion Application dated 5<sup>th</sup> July 2022, brought under Sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 9 Rule 9; Order 22 Rule 22 and Order 51 Rule 1 of the *Civil Procedure Rules*, seeking the following orders: -
  1. Spent
  2. Spent
  3. Leave be and is hereby granted to the firm of Rene & Hans Advocates LLP to come on record for the Defendants instead of the firm of M/S Onesmus Githinji & Company Advocates.
  4. The Judgment delivered on 15<sup>th</sup> October, 2021 by this Honourable Court be and is hereby set aside *ex-debito justitiae* and the consequential orders arising therefrom be vacated.
  5. This Honourable Court be pleased to order and direct that the hearing of this suit commences de novo and a matter be set down for hearing forthwith.



6. Costs of this application be provided for.
2. The application is supported by the grounds set on its face, the Supporting Affidavit sworn by the 2<sup>nd</sup> Defendant/Applicant, Mohamed Abdi Abukar on the same date and written submissions dated 16<sup>th</sup> December 2022.
3. It was deposed that the 2<sup>nd</sup> Defendant learnt by chance that on 15<sup>th</sup> October 2021, the Court delivered an *ex-parte* judgment in this matter, awarding the Plaintiff Kshs.136,000,000.00/= against the Defendants together with costs and interest; that the matter proceeded for hearing on 21<sup>st</sup> June, 2021 in the absence of the Defendants; that the Plaintiff's witnesses were not cross examined, the Defendants were neither heard nor had their evidence taken by the Court prior to delivery of Judgement.
4. The Defendants faulted the Defendants' then advocates, M/S Onesmus Githinji & Company Advocates for failure to notify them of the hearing date of 21<sup>st</sup> June 2021 and failure to attend Court on the said date. The Defendants contended that the advocates' mistake ought not to be visited upon them since they are innocent litigants who have been keen to defend this suit. The Defendants surmised that unless the orders sought herein are granted, they would be prejudiced and suffer injustice that is incomparable with the inconvenience against the Plaintiff which can be compensated by an award of costs.
5. In opposing the application, the Plaintiff filed a replying affidavit sworn by its Legal Officer, Claris Ajwang Ogombo on 11<sup>th</sup> October 2022 and written submissions dated 24<sup>th</sup> November 2022.
6. It was deposed that the judgment was regular, lawful and procedural; the judgment was issued *ex-parte* after the Defendants failed to attend Court on the scheduled hearing date despite being placed on notice for the hearing of the matter; that on 3<sup>rd</sup> June 2021, a process server was duly given a hearing notice dated 2<sup>nd</sup> June 2021 to effect service on the Defendants' advocates; that the Defendants were duly served with the said Hearing Notice on 3<sup>rd</sup> June 2021 and the same was stamped by the secretary of the law firm; that at all times, the Defendants' former advocate was aware of the ongoing proceedings; that the former advocates were also served with a physical copy of the Plaintiff's written submissions on 13<sup>th</sup> July 2021 and the same forwarded via email on 29<sup>th</sup> July 2021.
7. The Plaintiff contended that the instant application is a further delaying tactic highlighting that even earlier in the proceedings, the Defendant's missed court several times and neglected to file any witness statements or list of documents since 2016. Again, despite numerous seeking indulgence to pursue an out of court settlement on the Defendants' instructions, their erstwhile advocates never sent any proposal or called for a meeting. The Plaintiff further highlighted that this is the third time that the Defendants are instructing a new advocate in the matter to make similar applications.
8. The Plaintiff submitted that a successful litigant must not be denied enjoyment of the fruits of its judgment; that Court orders are not issued in vain and must be obeyed and that the Defendants are undeserving of the court's intervention due to their willful conduct and omission.

### **Analysis and Determination**

9. I have considered carefully the application, rival affidavits and submissions together with the authorities cited. To my mind, the issues that arise for determination in this case are as framed by the Defendants in their submissions which I adopt as follows:
  1. Whether the firm of Rene & Hans Advocates LLP is properly on record.



2. Whether the Defendants have made out a case for leave for Rene & Hans Advocates LLP to come on record.
  3. Whether the Court should set aside the ex-parte Judgement delivered on 15<sup>th</sup> October, 2021 and consequential orders and re-instate the suit for hearing.
10. On the first issue, the Plaintiff argued that the firm of Rene & Hans Advocates LLP is not properly on record as there was no Court order to effect the Change of Advocates as required under Order 9 Rule 9 of the *Civil Procedure Rules*. On the other hand, the Defendant contended that under Order 9 Rule 10, an application under Rule 9 may be combined with other prayers provided the question of change of advocate shall be determined first.
  11. Order 9 Rules 9 and 10 of the *Civil Procedure Rules* provide that: -
    - “ [Order 9, rule 9.] Change to be effected by order of court or consent of parties.
      9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
        - (a) upon an application with notice to all the parties; or
        - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
      - [Order 9, rule 10.] Procedure.
        10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”
  12. From the above, it is clear that for any change of advocates to be effected after judgment has been entered, there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. It is also clear that such an application may be accompanied by other prayers.
  13. In this matter, judgment was delivered on 21<sup>st</sup> October 2021. Among the prayers sought in the present application on 5<sup>th</sup> July 2022 is leave for Rene & Hans Advocates LLP to come on record. Hence, I find that the Defendants’ advocates have complied with the procedure under Order 9 Rules 9 and 10 by seeking leave to come on record as part of the prayers sought in the application herein.
  14. In the oft-cited case of *S. K. Tarwadi v Veronica Mueblemann* (HC Malindi Misc. Civil Appl. No. 6 of 2018) [2019] eKLR, Hon. W. Korir J. (as he then was) observed that, “...the essence of Order 9 Rule 9 *CPR* is to protect advocates from mischievous clients who will wait until a judgment has been delivered then sack the advocate and either replace him with another advocate or act in person.”
  15. However, in *Global Impex Machinery Limited v Vlan Construction Limited* (HCCC NO. E193 OF 2019) [2021] eKLR, the Court observed as follows:-
    - “In this regard, the court cannot stand in the way of a party seeking to exercise this right to legal representation as long as it is shown that such representation will not prejudice any of the parties to the suit and that the legal fees of the previous advocates on record are settled.



I am guided by the words of O’Kubasu, JA in *William Audi Odode & Another v John Yier & Another* Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04). In declining to bar an advocate from acting for some of the parties in the matter, the learned Judge stated as follows at page 3 of his ruling: -

“I must state on (sic) the outset that it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.’ (Emphasis added)

16. Applying the above principles, I note that there is no objection put forth by the Defendants’ previous advocates against the prayer for leave for Rene & Hans Advocates LLP to come on record for the Defendants. Neither is there any indication that the Defendants owe the previous advocates any legal fees so as to entitle them to object to the change of advocates. I also note that the Defendants faults its previous advocates for failing to notify them of the hearing date in respect of the matter. Further, I am not persuaded that the Plaintiff would be prejudiced if leave is granted. Therefore, I hereby grant leave to the firm of Rene & Hans Advocates LLP to come on record for the Defendants. The said firm of Rene & Hans Advocates LLP is therefore placed on record in place of the firm of Onesmus Githinji & Company Advocates that previously represented the Defendants in this suit.
17. I now move on to the third issue of “whether the set aside the ex-parte Judgement delivered on 15<sup>th</sup> October, 2021 and consequential orders and re-instate the suit for hearing”
18. The Court’s decision whether or not to set aside an ex-parte judgment is an exercise of discretion which must be exercised judiciously and not capriciously. This rule was rehashed by the Court in [Mureithi Charles & another v Jacob Atina Nyagesuka](#) [2022] eKLR, as follows:-

“17. That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended so to be exercised 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 vs. Mbogo & another* [1967] EA 116.”

19. The considerations to made in determining an application for setting aside an ex parte judgment are whether the judgement was procedurally entered, the reason why the Applicant failed to turn up at the hearing, whether the defence which was already on record raised prima facie triable issues or was reasonable and whether the Applicant has demonstrated an excusable mistake, inadvertence, accident or error. These were clearly captured by the Court of Appeal in [CMC Holdings Ltd v James Mumo Nzioki](#) (Civil Appeal No. 329 of 2001) [2004] eKLR, as follows:-

“In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion



properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex-parte judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the Applicant failed to turn up for the hearing on the hearing date but also whether the Applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard ex parte and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the Applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed.”

20. In addition, in *Bouchard International (Services) Ltd v M'mwereria* [1987] KLR 193, the Court of Appeal held that:-

“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.”

21. In this case, the grounds proffered by the Defendants for setting aside the ex parte judgment are that their erstwhile advocates did not notify them of the hearing date and that as a result, they were denied an opportunity to cross examine the Plaintiff's witness.

22. As to whether the judgement delivered on 21<sup>st</sup> October 2021 was a regular judgment, Order 12 Rule 2 (a) provides that:-

2. If on the day fixed for hearing, after the suit has been called on or hearing outside the court, only the Plaintiff attends, if the court is attends satisfied —



(a) that notice of hearing was duly served, it may proceed ex parte;

23. From the record, when the matter came up for hearing on 21<sup>st</sup> June 2021, the Plaintiff was present but the Defendants were absent and the hearing proceeded ex parte. The Plaintiff had filed an affidavit of service sworn by duly authorized Court process server, Vincent O. Maiga dated 18<sup>th</sup> June 2021 deposing that on 3<sup>rd</sup> June 2021, he received a copy of the Hearing notice dated 2<sup>nd</sup> June 2021 for hearing slated for 21<sup>st</sup> June 2021 for the Plaintiff's advocates. On the same day, he effected service upon the Defendants' advocates on record M/s Onesmus Githinji & Co. Advocates at 4<sup>th</sup> Floor, Westery Towers, off Muthithi Road. The hearing notice that was served and stamped and signed by the secretary of the law firm is on record. Therefore, I am satisfied that the judgment delivered on 21<sup>st</sup> October 2021 was a regular judgment that cannot be set aside ex-debito justitiae but with exercise of discretion on terms that are just.
24. Although the Defendants attributed their failure to attend the hearing to their advocates' mistake, this is not an automatic reason for setting aside orders in every case, as litigants must show tangible steps taken to follow up their matters. This was held so in the case of *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR.
25. The Court in *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No.397 of 2002 cited with approval in *Multiple Hauliers v Enock Bilindi Musundi & 2 others* (Civil Appeal No. 30 of 2020 [2021] eKLR, observed that:-
- “Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.”
26. In this matter, the instant application was filed on 5<sup>th</sup> July 2022, about eight months and two weeks after the judgment and one year and two weeks after the suit had been heard. The Defendants neither explained the delay in bringing the application nor showed any efforts they made to find out the status of their case from their erstwhile advocates. The Defendants do not explain what actions they took to hold their erstwhile advocates to account for failure to render the services for which they were retained.
27. On whether the defence raises triable issues, my perusal of the defence leads me to the considered view that the defence is a mere denial that does not raise triable issues.
28. I also take into consideration the circumstances of this case and I note that the suit was instituted in 2016. I also note that the Defendants missed court several times and neglected to file any witness statements or list of documents and that despite numerous seeking time to pursue an out of court



settlement, neither the Defendants nor their erstwhile advocates sent any settlement proposal to the Plaintiff or called for a meeting to discuss the possibility of settling the case away from the Courts.

29. In conclusion, this court makes the following orders in respect of the Defendants' application dated 5<sup>th</sup> July 2022:-

1. That leave be and is hereby granted to the firm of Rene & Hans Advocates LLP to come on record for the Defendants instead of the firm of M/S Onesmus Githinji & Company Advocates.
2. That the court upholds the ex-parte judgment entered on 15<sup>th</sup> October, 2021.
3. That costs of this application are awarded to the Plaintiff.

It is so ordered.

**DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 19<sup>th</sup> DAY of FEBRUARY, 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

1. Ms. Wangui holding brief for Cohen Amany for the Plaintiff/Respondent.
2. N/A for the Defendant.
3. Amos- Court Assistant

