



**End to End Limited & another v Rafiki Microfinance Bank Ltd & another (Civil Suit E004 of 2024) [2024] KEHC 12330 (KLR) (16 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 12330 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
CIVIL SUIT E004 OF 2024  
G MUTAI, J  
SEPTEMBER 16, 2024**

**BETWEEN**

**END TO END LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**SAMMY ANDREW MATANO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**RAFIKI MICROFINANCE BANK LTD ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KWALE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiffs/applicants' application dated 19<sup>th</sup> February 2024 came up for hearing interpartes on 29<sup>th</sup> February 2024. The advocates for the defendants were absent. As the application dated 19<sup>th</sup> February 2024 was not opposed, the Court allowed it.
2. The said decision aggrieved the 1<sup>st</sup> defendant/applicant. Consequently, it filed a Notice of Motion application dated 1<sup>st</sup> March 2024 vide which it sought various orders, among which was:-
  - “ 3. That the honourable court be pleased to set aside its orders issued on 29<sup>th</sup> February 2024 directing the matter to proceed in the absence of the 1<sup>st</sup> defendant and or its witnesses and substitute the same with orders reopening the plaintiffs/applicants application dated 19<sup>th</sup> February 2024.”
3. The plaintiffs/respondent opposed the application.
4. On 4<sup>th</sup> April 2024, the application dated 1<sup>st</sup> March 2024 was withdrawn as the 1<sup>st</sup> defendant/applicant had on 28<sup>th</sup> March 2024 filed an application of even date seeking 5 orders to wit:-
  1. Spent;



2. Spent;
3. That upon interpartes hearing of the instant application, this honourable court be hereby pleased to discharge, vary and or set aside the orders made on 29<sup>th</sup> February 2024 and consequently reinstate the Plaintiff's application date 19<sup>th</sup> February 2024 for interpartes hearing on merit;
4. That upon grant of prayer 2 above, the honourable court be pleased to issue directions for disposal of the plaintiffs' application dated 19<sup>th</sup> February 2024 and or any orders the honourable court will be pleased to grant; and
5. That the Plaintiffs be hereby ordered to pay the undisputed amount of Kes.27,305,500.00.
5. The application was supported by the affidavit of Ms Maureen Wachira, learned counsel for the 1<sup>st</sup> defendant/applicant. Counsel deposed that she could not log into the Court session on the day the matter was due for the interpartes hearing due to technical challenges. She averred that the defendant/applicant has a good defence to the claim. Ms Wachira further filed a supplementary affidavit sworn on 19<sup>th</sup> April 2024.
6. The latter application was opposed by the plaintiffs/respondents. A director of the 1<sup>st</sup> plaintiff/respondent, Abdirahman Mohamed, filed an affidavit dated 11<sup>th</sup> April 2024. Vide the said affidavit he deposed that the application dated 19<sup>th</sup> February 2024 was served on the defendants/applicants. On the date the matter came up on 29<sup>th</sup> February 2024 the 1<sup>st</sup> defendant/applicant had an opportunity to log in, but failed to do so. He accused the 1<sup>st</sup> defendant/applicant of being indolent. The deponent averred that the defendants/Applicants would not be prejudiced if the application was denied as they could still file a defence and further documents if they so wished.
7. The application was canvassed by way of written submissions.
8. The 1<sup>st</sup> defendant/applicant submissions are dated 22<sup>nd</sup> May 2024. Vide the said submissions the 1<sup>st</sup> defendant/applicant identified 2 issues:-
  - a. Whether the honourable court should discharge, vary and or set aside the orders made on 29<sup>th</sup> February 2024; and
  - b. Whether the honourable court should reinstate the application dated 19<sup>th</sup> February 2024.
9. Regarding the 1<sup>st</sup> issue it was submitted that it would be in the interest of justice to set aside the orders made on 29<sup>th</sup> February 2024.
10. On the second issue it was urged that the 1<sup>st</sup> defendant/applicant has a strong response which it should be allowed to ventilate.
11. The plaintiffs/respondents submissions are dated 12<sup>th</sup> July 2024. They identified issues coming up for determination as being:-
  - a. Whether the Court should vary discharge and set aside the orders issued on 29<sup>th</sup> February 2024 and reinstate the application dated 19<sup>th</sup> February 2024 for interpartes hearing on merit upon granting prayer 3 of the application; and
  - b. Whether the Court should order the plaintiffs to pay the alleged sum of Kes.27,305,500.00.
12. It was urged that the orders of this Court ought not to be set aside as the 1<sup>st</sup> defendant/applicant had ample time to prepare for trial. Regarding challenges with logging in it was urged that many advocates



- accessed the Court without difficulty on the said date and that there was no logical explanation for the difficulty the 1<sup>st</sup> defendant/applicant allegedly experienced.
13. Counsel relied on the case of *Tana & Athi River Development Authority vs Jeremiah Kimigho Mwakio & 3 others*[2015]eKLR for the proposition that courts should not aid litigations who don't show sufficient diligence. It was urged that what the impugned orders did was to preserve the subject matter.
  14. On the second issue counsel submitted that there was no clear unequivocal admission that Kes.27,305,300.00 was owed by the plaintiffs/respondent's counsel and thus urged I should dismiss the application with costs.
  15. I have considered the application and the response thereto. In my view there are 3 issues that call for my determination namely:-
    1. Whether the Court should set aside its orders of 29<sup>th</sup> February 2024;
    2. Whether the honourable Court should reinstate the application dated 19<sup>th</sup> February 2024; and
    3. Whether the Court can compel the defendants/respondents to pay Kes.27,305,500.00 to the 1<sup>st</sup> defendant/applicant.
  16. I shall look at each issue in turn.

Should the Court Set Aside the Order it Issued on 29<sup>th</sup> February 2024?
  17. It is common ground that this Court heard the application on 29<sup>th</sup> February 2024. The counsel for the first defendant/applicant was absent. In her affidavit, she deposed that she had challenges logging in. The nature of the said challenges hasn't been set out in sufficient detail.
  18. I note, however, that on the said date, the court heard matters without challenge. In fact, the application dated 19<sup>th</sup> February 2024 was heard after 1220 in the afternoon, which should have given the first defendant/applicant sufficient time to get its house in order.
  19. Given the circumstances, should this Court set aside its orders? This was the first time the matter was coming up for hearing interpartes. On the said date, the matter came before me in Kwale, having been previously handled by Justice Kizito Magare. As counsels for the 1<sup>st</sup> defendant/applicants are based in Nairobi, it is highly likely that they were unaware of the practices of the Mombasa & Kwale Law Courts. In the circumstances, I am persuaded that their non-attendance was inadvertent and not due to lack of diligence.
  20. I agree with the holding of the Court in *Stephen Kiama Kiganjo & another vs Zaveramand Ramji Shah & 3 others* [2013]eKLR, where it was stated that:-

“In view of the overriding objective of the court to do justice spelt out at article 159 of *the constitution* and sections 1A and 1B of the Civil Procedure Rules, I will disregard that technicality. Having said so, I find that the Chamber Summons dated 13th September 2011 has merit. I thus allow it and vary the order of the Court delivered on 8th December 2010...”
  21. I am thus persuaded that I should set aside my orders of 29<sup>th</sup> February 2014 in the interests of justice.

Should I reinstate the Application dated 19<sup>th</sup> February 2024?
  22. Having set aside my previous orders, the status quo that was in place on 29<sup>th</sup> February 2024 is reinstated. In the circumstances, the application dated 19 February 2024 must be heard on merit.



23. I agree wholly with the decision of the Court in Joseph Kinyua vs G O Ombachi [2019]eKLR and in particular, its statement that:-

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.” .....” However, as I stated, dismissal is a draconian order which drives away the litigant from the seat of justice. Therefore, in spite of the gaps I have noted, I still think that justice would be served in reinstating the appeal but with strict conditions. No prejudice will be suffered by the respondent in reinstating the appeal. Accordingly, I set aside the dismissal order and reinstate the appeal.”

24. I, therefore, order that the application dated 19<sup>th</sup> February 2024 be reinstated.

Should the Plaintiff/Respondents be compelled to pay Kes.27,305,500.00?

25. The 1<sup>st</sup> defendant/applicant did not submit on this point, notwithstanding that it was prayer No. 5 in its application.

26. I note that there has not been an equivocal admission of the claim. I agree with the submissions of counsel that under order 13 Rule 2 of the Civil Procedure Rules a judgment on admission may only be entered where there is an unequivocal admission. This is not one such instance.

27. I am, therefore, unable to agree with the 1<sup>st</sup> defendant/applicant.

### **Disposition**

28. Although the explanation for not attending the Court on 29<sup>th</sup> February 2024 is not convincing, this court shall, in the interest of justice, allow the application dated 28<sup>th</sup> March 2024 in terms of prayer No. 3.

29. I, therefore, reinstate the application dated 19<sup>th</sup> February 2024 and order that it be heard on merit on 30<sup>th</sup> September 2024 before His Lordship Justice Francis W. Andayi. I extend the interim orders that will were subsisting on 29<sup>th</sup> February 2024 to 30<sup>th</sup> September 2024.

30. I order the plaintiff/applicant to file Written Submissions within seven days of today.

31. The defendant/respondent shall have seven days after that to file and serve written submissions.

32. I award the Plaintiffs/Respondent costs of Kes.20,000.00.

33. Orders accordingly.



**DATED AND SIGNED THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2024 AT MOMBASA. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**Gregory Mutai**

**JUDGE**

In the presence of: -

Ms Mukoya, for the Plaintiffs/Respondents;

No appearance for the 1<sup>st</sup> Defendant/Applicant;

No appearance for the 2<sup>nd</sup> Defendant; and

Arthur - Court Assistant.

