



**Mulwa v Kenya Orient Insurance Company Limited & another; Kimondolo & 2 others (Interested Parties) (Civil Suit 26'A' of 2019) [2024] KEHC 11216 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL SUIT 26'A' OF 2019  
MW MUIGAI, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**FELIX VUNGA MULWA ..... PLAINTIFF**

**AND**

**KENYA ORIENT INSURANCE COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**INSURANCE REGULATORY AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**CATHERINE NZILANI KIMONDOLO ..... INTERESTED PARTY**

**MUSYOKI MOSES ALIAS DOMINIC MUSYOKI (MINOR SUIING  
THROUGH HIS FATHER AND NEXT FRIEND) MOSES MUTUA**

**TOM ..... INTERESTED PARTY**

**MUTHOKA MOSES ALIAS DENNIS MUTHOKA (MINOR SUIING  
THROUGH HIS FATHER AND NEXT FRIEND) MOSES MUTUA**

**TOM ..... INTERESTED PARTY**

**RULING**

**Notice Of Motion**

1. Vide an application dated 17.11.2023 brought under section 1A,1B,3A and 95 of the [Civil Procedure Act](#) and order 10 Rule 11, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, the Applicant seeks the following orders, that;

a. Spent.

b. Spent.



- c. The Court to set aside and/or vary the interlocutory judgment entered on 15<sup>th</sup> November, 2022 against the 1<sup>st</sup> Defendant/Applicant and all consequential orders thereto.
  - d. The 1<sup>st</sup> Defendant/Applicant be granted leave to file their statement of Defence out of time and the draft statement of Defence annexed hereto be deemed as duly filed.
  - e. Costs of the Application be in the cause.
2. The Application is supported by the affidavit of Kathike Mary Musengya, Advocate who deposed that upon service of the summons to enter appearance and pleadings upon the 1<sup>st</sup> Defendant/Applicant, the firm of J. Maluki & Company Advocates entered appearance on its behalf and served the Memorandum of Appearance upon the Plaintiff. It was deposed that on 4.02.2020, the Plaintiff was ordered to serve the 1<sup>st</sup> Defendant's counsel with the application dated 15.10.2019 which has not been done to date and orders were issued in its absence and as a result, the 1<sup>st</sup> Defendant failed to file a defence. It was contended that an interlocutory judgment was entered against the 1<sup>st</sup> Defendant on 6.12.2022 and it was entered irregularly.
  3. It was stated that the 1<sup>st</sup> Defendant has an arguable defence in law that raises triable issues worth consideration on merit in a full trial before this court and that if the orders sought are not granted, then the 1<sup>st</sup> Defendant stands to suffer great prejudice, irreparable harm and substantial loss and damage as the Plaintiff will execute their property and they will be condemned unheard. Further, the 1<sup>st</sup> Defendant stated that the application had been made without undue delay and they were willing to abide by any conditional terms.
  4. There is an affidavit of service dated 5.12.2023 that indicates that the application was served upon the Plaintiff, the 2<sup>nd</sup> Defendant as well as the firm of Mutua Mboya & Nissi Advocates, A.K. Mutua Advocates and Annie Thoronjo & Company Advocates however none of them filed responses to the application.
  5. This court directed that the Application be served upon the 1<sup>st</sup> Defendant/Applicant vide an order issued on 13.05.2024 and the same was done by the court bailiff as indicated by the affidavit of service dated 3.07.2024. The order also directed that parties file and exchange submissions within 14 days in the presence of the advocate for the 2<sup>nd</sup> Defendant, Mr. Mutua for the Plaintiff together with Mr. A. K. for the interested party.
  6. As at the time of writing this judgment, the Application was not opposed.

### **Submissions**

7. The 1<sup>st</sup> Defendant/Applicant filed submissions on 17.07.2024 in which they relied on the cases of James Wanyoike & 2 others vs CMC Motors Group Limited & 4 others [2015] e KLR, Bank of Africa Kenya Limited vs PUT Sarejevo General Engineering Co Ltd & 2 other [2018] e KLR, CFC Stanbic Limited Vs John Maina Githaiga & another [2013] e KLR and submitted that the failure to file the Defence was inadvertent and the same should be excused by this H Court as the Applicant has a reasonable Defence and has no intention to delay the suit.
8. Secondly, it was submitted that the Defence has merit and raises triable issues which should be determined through a full hearing.
9. Thirdly, it was submitted that the Plaintiff would not suffer any prejudice and in the unlikely event that they do, the same would be compensated by costs. Further, it was contended that the court had unfettered discretion to set aside its judgment to ensure that justice is done. Reliance was placed on the



case of M/S Jundu Enterprises Limited vs Spectre International [2019] e KLR and Martha Wangari Karua vs Independent Electoral & Boundaries Commission & 3 others [2018] e KLR.

10. The Respondents and interested parties did not file submissions.

### **Determination**

11. I have considered the application and the submissions on record. I have noted that the following documents were filed;
- a. A plaint filed on 16.10.2019
  - b. Affidavit of service dated 18.10.2019
  - c. Memorandum of Appearance dated 22.10. 2019
  - d. An affidavit of service dated 4.11.2019
  - e. Amended plaint filed on 16.01.2020
  - f. Affidavit of service dated 17.12.2021
  - g. Request for judgment dated 17.12.2021
  - h. Letter dated 26.10.2022
  - i. The court issued an order on 7.02.2020
  - j. Affidavit of service 3.07.2024
  - k. The 2<sup>nd</sup> Defendant's defence dated 13.02.2020
  - l. Court order issued on 13.05.2024
12. The Applicant seeks to have the interlocutory judgment entered against the 1<sup>st</sup> Defendant on 6.12.2022 set aside. The Court of Appeal in CMC Holdings Ltd vs. Nzioki [2004] Eklr stated 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.”

13. James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR

We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, 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 judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment 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 judgment, 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 judgment was entered; whether the intended defence raises 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 judgment, among other. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173).

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance.



In such a situation, the default judgment is set aside *ex debito justitiae*, 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 judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment 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 the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General* [1986-1989] EA 456).

14. The Court record reflects the following;
15. This Court took over this matter on 28/7/2022 parties did not appear.
16. On 15/11/2022 Counsel for both parties were present online and Mr Mutua for the Plaintiff sought judgment for 1<sup>st</sup> Defendant. This Court referred the matter to Deputy Registrar Machakos High Court.
17. On 6/12/2022, the parties and/or Counsel did not appear in Court physically or online.
18. On 7/2/2023, Mr Mutua informed the Court that judgment was entered against 1<sup>st</sup> Defendant and a hearing date for the Plaintiff and 2<sup>nd</sup> Defendant could be taken. Hearing was scheduled on 7/3/2023 and did not take off.
19. On 18/4/2023 parties/ Counsel did not attend Court. On 15/6/2023 both parties were represented by respective Counsel. On 11/7/2023 the matter was considered for Pre-Trial and on 3/7/2023 parties through Counsel were negotiating and on 26/9/2023 the matter commenced hearing with evidence of PW1.
20. On 25/10 /2023 the matter was scheduled to proceed and was adjourned to 26/10/2023 and was scheduled for hearing on 31/10/2023 when 2<sup>nd</sup> Defendant was heard.
21. Written submissions were to be exchanged and filed.
22. On 22/11/2023 Certificate of Urgency was filed by 1<sup>st</sup> Respondent and mentioned on 5/12/2023 for parties to exchange and close pleadings before Deputy Registrar Machakos High Court.
23. On 15/4/2024. The Plaintiff's advocate, Mr. Mutua brought to the attention of the Court that the instant matter though listed appeared under different names. Mr. Ondieki also confirmed that there was an error of 2 files with same number and the 2 files were separated with different numbers A & B.
24. On 13/5/2024, the Plaintiff's Advocate complained that the matter took 3 years without being heard after his client's vehicle was attached, the 1<sup>st</sup> Defendant went underground and surfaced upon completion of the hearing.
25. The Court took the view that the instant application be disposed of first before hearing and determination of the matter.
26. The Plaintiff & 2<sup>nd</sup> Defendant waived right to file written submissions to the Certificate of Urgency.
27. The Plaintiff did not controvert the allegation that the 1<sup>st</sup> Defendant was not served with the application dated 15<sup>th</sup> October 2019 nor that orders were issued in his absence. However, the Court



record confirms that as at 4/2/2020, the application of 15/10/2019 was served to both Defendants and on 7/2/2020, the Plaintiff's advocate filed Affidavit of service and being unopposed the Trial Court Hon. D.K. Kemei J granted prayers 2 & 3 of the Application and directed that the Plaintiff to serve the Plaintiff to all parties. The Allegation by 1<sup>st</sup> Defendant that the Application of 15/10/2019 is not borne out by the Court record. Secondly, the Court record further confirms that the parties through Counsel appeared before Hon. D. K. Kemei J but declined attendance before this Court and sought mentions severally before DR MHC. The issue of non-service is dismissed. Secondly, the 1<sup>st</sup> Defendant entered Appearance as early as 22/10/2019 which confirms proper service yet failed to file Defense, now annexed to the instant Application.

28. This Court has perused the Statement of Defense dated 17<sup>th</sup> November 2023 attached to the application and the same raises triable issues. However, I have perused the file and no interlocutory judgment was entered on 6.12.2022 as indicated in the submissions. On that day no parties appeared in Court. On 15.11.2022 the court stated as follows;

“The Deputy Registrar, Machakos High Court to consider the application of judgment in default. The matter to be mentioned on 6/12/2022.”

29. This Court finds despite proper service of the application of 15/10/2019 and thereafter the Plaintiff and the 1<sup>st</sup> Defendant filed memorandum of Appearance, the Defense was not filed. Despite several requests by Counsel for the Plaintiff as exhibited on the Court record, judgment in default was not entered. The 1<sup>st</sup> Defendant surfaced upon completion of Trial in their absence.
30. To the merits of the application, the Court not to condemn parties unheard and consider twin issues, proper service and triable issues in the draft defense. Whereas this Court is satisfied that service was proper; the Draft defense raises triable issues as shown in paragraphs 5 & 13 of the said Defense that require proof through viva voce evidence and Testing veracity of the evidence and credibility of the witness.

### **Disposition**

1. The Certificate of Urgency filed on 24/11/2023 is allowed/granted that the 1<sup>st</sup> Defendant is granted leave to file Defence within the statutory period; the annexed Draft Defence is deemed as filed and shall be served to the parties; Plaintiff & 2<sup>nd</sup> Respondent & interested parties within 7 days from today.
2. The Plaintiff 2<sup>nd</sup> Respondent & interested parties may file Reply to Defense if need be within 14 days after service.
3. PW1 & 2<sup>nd</sup> Defendant witness shall be recalled to testify after close of pleadings.
4. Hearing shall proceed on 24/10/2024 in Court No 3.
5. Throwaway costs of Kshs. 30,000/- be paid by 1<sup>st</sup> Defendant to Plaintiff & 2<sup>nd</sup> Defendant before next hearing date.

**RULING DELIVERED DATED & SIGNED IN OPEN COURT ON 24/9/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W.MUIGAI**

**JUDGE**

In The Presence Of:

Mr. Mutua Mboya – Absent for The Plaintiff



Ms Kariuki For The 1<sup>st</sup> Defendant

Mr Ondieki for the 2<sup>nd</sup> Defendant

Mr. A. K. Mutua for the 1<sup>st</sup> interested party

Geoffrey/Patrick - Court Assistants(s)

