



National Bank of Kenya Limited v Attorney General & another (Commercial Case 104 of 2012) [2024] KEHC 12400 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 104 OF 2012
MN MWANGI, J
OCTOBER 4, 2024**

BETWEEN

NATIONAL BANK OF KENYA LIMITED PLAINTIFF

AND

THE HONOURABLE ATTORNEY GENERAL 1ST DEFENDANT

COUNTY GOVERNMENT OF NAIROBI 2ND DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 29th November, 2023 filed by the 2nd defendant pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 51 of the Civil Procedure Rules, 2010 and Article 159(2) of *the Constitution* of Kenya. The 2nd defendant is seeking orders for setting aside of the proceedings of 27th September, 2023 and prays for this suit to be heard afresh on merits, for leave for the 2nd defendant to file a defence out of time, and for the draft defence attached to the application to be deemed as duly filed and served upon payment of the requisite fees.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Caroline M. Mitema, an Advocate of the High Court of Kenya and learned Counsel for the 2nd defendant. She averred that she received an email from Murugu Rigoro & Company Advocates informing her that this case was scheduled for mention on 30th November, 2023 to confirm the filing of submissions. That she then contacted the said law firm and spoke with Mr. Victor Liech, who confirmed the said information and he also informed her that the case had proceeded for hearing on 27th September, 2023 in the absence of the 2nd defendant.
3. She explained that after checking her email account, she discovered that all emails from Murugu Rigoro & Company Advocates, including the Hearing Notice for 27th September, 2023 and an application to



amend the plaint dated 22nd May, 2023, had gone to her spam folder, which was the reason why she did not see them, and as a result, she was unaware of the hearing date, hence the reason why neither she nor her client attended Court on 27th September, 2023. She apologized for the oversight and urged the Court not to penalize the 2nd defendant for her mistake. She stated that the 2nd defendant has a strong defence that raises triable issues such as the registration of the title in favour of the purchaser pursuant to a Court order, and the fact that the plaintiff's claim is statute-barred.

4. In opposition to the application, the plaintiff filed a replying affidavit sworn on 6th December, 2023 by Victor Liech, an Advocate of the High Court of Kenya and learned Counsel for the plaintiff. Counsel stated that the 2nd defendant had ample time to file a defence and trial bundle but failed to do so, despite the law firm of C.M. Mitema & Company Advocates taking over the case on 10th September, 2015. He noted that apart from a Memorandum of Appearance dated 29th February, 2012, the 2nd defendant had not filed any other pleadings. He also claimed that the case had been scheduled for mention multiple times to confirm compliance with pre-trial directions, but the 2nd defendant had consistently failed to attend Court despite being served. He indicated that the Court record shows that the last appearance by the 2nd defendant was on 11th March, 2019 during a pre-trial conference.
5. Counsel stated that this matter was set for mention before the Presiding Judge on 22nd May, 2023, but the 2nd defendant did not appear. Consequently, the matter was scheduled for hearing on 27th September, 2023, and the plaintiff was granted leave to amend the plaint, specifically to substitute the defunct City Council of Nairobi with the County Government of Nairobi. Mr. Liech stated that he promptly amended the plaint and instructed a Process Server to serve the amended plaint and a Hearing Notice to all the defendants. He noted that while the 2nd defendant had denied receiving the Hearing Notice for 27th September, 2023, it did not deny having received the amended plaint that was served along with the said Hearing Notice. He also pointed out that although the 2nd defendant's Counsel claims that emails from their law firm were going to the spam folder, no evidence had been provided to support the said claim.
6. In a rejoinder, the 2nd defendant filed a further affidavit sworn on 10th January, 2024 by Caroline M. Mitema, an Advocate of the High Court of Kenya and learned Counsel for the 2nd defendant. She asserted that contrary to the plaintiff's claims, the 2nd defendant had filed several documents, including a list of documents, a list of witnesses, and witness statements dated 15th March, 2012, as well as additional witness statements and a list of witnesses dated 27th June, 2013, and a list of authorities filed on 15th March, 2012. She stated that she had been instructed by Mr. Patrick Wokabi Murage (deceased), a lawyer handling the matter within the 2nd defendant's legal department, that a defence to the plaintiff's claim had been filed.
7. Counsel stated that upon reviewing the Court file, she discovered that all the documents filed by the 2nd defendant, except for the Memorandum of Appearance, are mysteriously missing. She contended that the law firm representing the plaintiff is on the panel of Advocates for the 2nd defendant and represents the 2nd defendant in other cases, which she claimed creates a conflict of interest in this matter.
8. The plaintiff also filed a further affidavit sworn on 25th January, 2024 by Victor Liech, an Advocate of the High Court of Kenya and learned Counsel for the plaintiff. He averred that even if the 2nd defendant's current Counsel on record relied on instructions and/or information from Mr. Murage, she had a duty to go through the Court record and satisfy herself that the 2nd defendant had complied in terms of filing all the requisite pleadings and/or documents. He further averred that even if the documents that were allegedly filed mysteriously disappeared from the Court record, it begs the



- question as to why the 2nd defendant has never taken notice of the same or raised the said issue with the concerned Registry and/or individuals.
9. The instant application was canvassed by way of written submissions. The 2nd defendant's submissions were filed by the law firm of C.M. Mitema & Company Advocates on 20th February, 2024, whereas the plaintiff's submissions were filed on 5th March, 2024 by the law firm of Murugu, Rigoro & Company Advocates.
 10. Mrs. Mageto, learned Counsel for the 2nd defendant referred to the provisions of Order 5 Rule 22B of the Civil Procedure Rules, 2010 and submitted that there was no proper service of the Hearing Notice of 27th September, 2023. She noted that the affidavit of service filed to demonstrate service of the said Hearing Notice is not accompanied by an attachment of the Electronic Mail Delivery Receipt of the email. She relied on the case of Sifuna & Sifuna Advocates v Hon. Patrick Simiyu Khaemba ELC Misc. Civil App. No. 14 of 2021, and submitted that service by email ought to be supplemented by either phone calls or text messages, which was not done in this case.
 11. She cited the provisions of Article 50(1) of *the Constitution* of Kenya, 2010 and stated that in light of the foregoing, the proceedings of 27th September, 2023 were a violation of the 2nd defendant's right to a fair hearing. Counsel referred to the provisions of Sections 3(1) & (2) of the Public Authorities Limitations Act and argued that the cause of action between the parties herein arose on 3rd September, 2008, but the suit herein was filed on 28th February, 2012, which is three years and five months after the cause of action arose, without leave of Court, thus the suit herein is time barred.
 12. Mr. Liech, learned Counsel for the plaintiff relied on the provisions of Section 107 of the *Evidence Act* and the case of Suleiman Waithaka Mwangi v Jimmy Karatu Kimaru & 5 others [2021] eKLR, and submitted that the 2nd defendant has not tendered any evidence in support of the claim that the email forwarding the Hearing Notice of 27th September, 2023 went to its Advocates email spam folder. Thus, the defendant did not discharge its burden of proof. He relied on the provisions of Order 5 Rule 22B of the Civil Procedure Rules as read with paragraphs 6(2) & (3) of the Electronic Case Management Practice Directions, 2020 and stated that the plaintiff had no obligation to call other parties to inform them of service effected by email, as long as such service conforms to, or meets the legal threshold.
 13. He cited the case of Moses Kimaiyo Kipsang v Geoffrey Kiprotich Kirui & 2 others [2021] eKLR, and stated that the 2nd defendant cannot be compelled to exercise its constitutional rights where it has elected not to. He expounded that in this case, the 2nd defendant elected not to exercise its right to fair hearing despite being granted several opportunities to do so. He relied on the Supreme Court case of Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR, and contended that the plaintiff cannot be punished for the 2nd defendant's failure to follow the laid down procedural law. He asserted that granting the orders sought herein will violate the plaintiff's right to have this suit resolved without delay. He referred to the case of Moses Kimaiyo Kipsang v Geoffrey Kiprotich Kirui & 2 others (supra) and stated that the 2nd defendant's current Advocates on record had a duty to peruse the Court file when they took over conduct of the matter on behalf of the 2nd defendant, and ensure that the 2nd defendant had complied in terms of filing all the requisite Court pleadings.

Analysis And Determination.

14. Upon consideration of the instant application, the grounds on the face of it and the affidavits filed in support thereof, the replying and further affidavit by the plaintiff, as well as the written submissions by Counsel for the parties, the issue that arises for determination is whether the application herein is merited.



If the instant application is merited.

15. This Court's jurisdiction to review and set aside its decisions is wide and unfettered. In the case of *Shah v Mbogo & another* [1967] EA 116, the Court of Appeal of East Africa held as follows -

This discretion (to set aside ex parte proceedings or decision) 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. (Emphasis added).

16. It is now well settled that in dealing with an application seeking to set aside ex parte proceedings, an applicant has a duty to demonstrate sufficient cause to warrant the Court to exercise its discretion in his/her favour. This was the holding by the Court in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR where it was held that -

Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand.

There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause... (Emphasis added).

17. This matter proceeded for hearing in the absence of the 2nd defendant on 27th September, 2023. On that day the plaintiff's and the defendants' cases were closed and the Court gave directions for the filing of written submissions. The 2nd defendant has filed the instant application seeking to set aside the proceedings of 27th September, 2023 and the consequential orders thereto, and for leave to file a defence out of time. It is noteworthy that the 2nd defendant's Counsel did not dispute service of the Hearing Notice for 27th September, 2023 but avers that the same was received in her spam folder hence she did not see it. She explained that for the said reason, neither she nor the 2nd defendant was present in Court on 27th September, 2023 when this matter proceeded for hearing.

18. Upon perusal of the 2nd defendant's further affidavit, it is evident that the 2nd defendant is challenging service of the said Hearing Notice on the ground that the affidavit of service sworn on 21st September, 2023 by Peter Onserio Nyamosi as proof of service of the aforesaid Hearing Notice did not attach the Electronic Mail Delivery Receipt confirming service as provided for under Order 5 Rule 22B (4) of the Civil Procedure Rules, 2010. I have perused the said affidavit of service that was uploaded on the Court Case Tracking System and I note that annexed to it is an Electronic Mail Delivery Receipt confirming service. I am therefore satisfied that the plaintiff duly complied with the provisions of Order 5 Rule 22B of the Civil Procedure Rules, 2010.

19. The 2nd defendant contended that in as much as the Hearing Notice for 27th September, 2023 was sent to its Advocates email address, the plaintiff's Counsel had a duty to do a follow up call or send a text message to its Advocate, notifying her that service of the said Hearing Notice had been effected via e-mail. Neither the Civil Procedure Rules nor any other written law provides for any follow up call or text message when a litigant opts to effect service of pleadings and/or Notices via e-mail. As such, this Court cannot fault the plaintiff and/or its Advocate for failing to do a follow up call or send a text message to the 2nd defendant's Counsel when they served them with the Hearing Notice for 27th September, 2023 and an amended plaint via e-mail.



20. Given the foregoing state of affairs, the question that arises is whether the 2nd defendant's failure to attend Court for hearing on 27th September, 2023 and on all other instances when this matter has been coming up for mention is due to willful neglect or it has been done deliberately to delay the course of justice. After Covid-19 Pandemic and the 2020 amendment to the Civil Procedure Rules which introduced service by e-mail under Order 5 Rule 22B, service by e-mail is an accepted mode of service in Kenyan Courts. Additionally, the 2nd defendant supplied the plaintiff's Counsel with her email address for purposes of service. It is apparent that the 2nd defendant's Counsel uses the said email for official communication. Accordingly, I agree with Counsel for the plaintiff that the 2nd defendant's Advocates had a duty to check the spam folder of their email address from time to time, to find out if there were emails worthy being attended to, that had landed in the said folder.
21. It is not disputed that service to the 2nd defendant by the plaintiff has always been by e-mail as demonstrated by the plaintiff. The 2nd defendant did not allege not having received pleadings and/or notices served to it by the plaintiff via e-mail in the past, save for the Hearing Notice of 27th September, 2023. From the Court record, it is evident that despite service of mention notices in the past, the last time the 2nd defendant was in Court was on 11th March, 2019 when it was granted leave to substitute its witnesses and file fresh witness statements. Evidently, from the 2nd defendant's further affidavit, the 2nd defendant has never complied with the said directions to date. Further, despite the fact that the 2nd defendant confirmed receipt of a Mention Notice for 30th November, 2023 for purposes of confirming filing of written submissions, which Notice prompted the 2nd defendant's Counsel to reach out to the plaintiff's Counsel and subsequently file the instant application, neither the 2nd defendant nor its Advocates on record were in Court on 30th November, 2023.
22. Having carefully considered the explanation given by Counsel for the 2nd defendant and the circumstances of this case, and the conduct of the 2nd defendant and its Counsel in failing to attend Court despite service of Mention Notices and Hearing Notice in issue, I am satisfied that the failure by the 2nd defendant and its Advocate on record to attend Court for hearing of this matter on 27th September, 2023 was due to negligence on the part of the 2nd defendant's Advocates. The said Counsel has urged this Court not to penalize the 2nd defendant for her mistakes. I agree with Counsel for the 2nd defendant that where the justice of the case dictates, mistakes of Advocates even if they are blunders, should not be visited on their clients when the situation can be remedied by an award of costs. In the case of *Lucy Bosire v Kehancha Div. Land dispute Tribunal & 2 others* [2013] eKLR, Odunga J., (as he then was) held as follows -

It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See *Philip Keipto Chemwolo & Another -vs- Augustine Kubende* [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74.

23. I however note that it is not in every case that a mistake of Counsel would be a ground for setting aside Court orders. The Court of Appeal in the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR, stated as hereunder in respect to mistake of Counsel -

...From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.



(See. Halsbury's Laws of England, 4th Edn, Vol 44 at p 100-101) and also Re Jones [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:

'...I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...'

Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client...Hence, the mistakes of Mr. Mouko's clerk became the mistakes of Mr. Mouko. This takes us back to the question, was the same excusable enough to warrant court's favour?

In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit.....The respondents were basically being held at ransom by the appellant's laxity in having the matter laid to rest. .. As stated by this Court in the case of Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR

"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel." (Emphasis added).

24. Bearing the above decision in mind, it worth noting that this suit was filed in the year 2012. Inasmuch as the 2nd defendant has a right to a fair hearing, the parties herein have a right to access to justice and to have this dispute resolved expeditiously. The 2nd defendant on the other hand has had very many opportunities to comply by filing a statement of defence and even attending Court when the matter was fixed for pre-trial directions but failed to do so. The 2nd defendant can therefore not run to Court now and seek cover under the provisions of Article 159 of *the Constitution* of Kenya, 2010 and Sections 1A, 1B & 3A of the *Civil Procedure Act*, that this Court should not pay due regard to procedural technicalities. Failure to file a statement of defence for over eleven (11) years and failure to attend Court for mentions and hearings when served with the requisite Notices in my view does not amount to procedural technicalities. The 2nd defendant has had several opportunities to file a statement of defence and/or raise an objection on the ground that the suit herein is statute barred but failed to do so.
25. The discretion to set aside ex parte proceedings must be done upon terms which are fair to both parties. In this case, the plaintiff has had to wait for approximately eleven (11) years before this suit was finally set down for hearing. Having noted that the conduct of the 2nd defendant and its Counsel has been more than wanting in moving this case forward, setting aside the ex-parte proceedings and reopening this case for hearing will definitely prejudice the plaintiff.
26. In light of the foregoing, and the fact that the 2nd defendant has never filed a statement of defence to this suit since this matter was filed in the year 2012, I am not persuaded that the 2nd defendant has demonstrated sufficient cause to warrant this Court to exercise its discretion in its favour.
27. In the end, this Court finds that the application herein is not merited. It is hereby dismissed with costs to the plaintiff.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF OCTOBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mrs Mageto for the 2nd defendant/applicant

Mr. Liech for the plaintiff/respondent

No appearance for the 1st defendant

Ms B. Wokabi – Court Assistant.

