



REPUBLIC OF KENYA



**Huka (Suing as personal representative of the estate of Huka Wako) v Kosi & 2 others
(Civil Cause 125 of 2003) [2023] KEHC 588 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CAUSE 125 OF 2003
TW CHERERE, J
FEBRUARY 2, 2023**

BETWEEN

**MOHAMMED HUKA PLAINTIFF
SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HUKA WAKO**

AND

**ADAN KOSI 1ST DEFENDANT
ABDI ADAN OMAR 2ND DEFENDANT
EDWARD SM JUMA 3RD DEFENDANT**

RULING

1. By a plaint amended on December 16, 2003, plaintiff sought damages against defendants for fatal injuries suffered by his father Huka Wako who on December 17, 2001 was travelling as a fare-paying passenger in motor vehicle KAN 151C when the 1st defendant so negligently drove the said vehicle that it was involved in accident and as a result of which the deceased sustained fatal injuries.
2. Interlocutory judgment was entered against the defendants and the matter proceeded by way of formal proof on August 18, 2016. Subsequently on March 7, 2017, judgement was entered against the defendants jointly and severally as follows: -
 - (a) Loss of dependency.....Kshs 4,000,000
 - (b) Pain and suffering.....Kshs 200,000
 - (c) Loss of expectation of life..... Kshs 100,000Total.....Kshs 4,300,000



3. By notice of motion dated January 13, 2022, 2nd defendant/applicant seeks that the judgment dated March 7, 2017 be set aside and he be allowed to defend the suit. The application is based mainly on the grounds that applicant was unaware of this case until December 6, 2021 when he was arrested for failing to settle the decretal sum, that he was aware of the accident in which deceased did but had paid his hospital bills and funeral expenses and also compensated the plaintiff in the sum of Kes 200,000/-.
4. The application is also supported by the affidavit of the 2nd defendant/applicant sworn on January 13, 2022 in which he reiterates the grounds on the face of the application.
5. By his replying affidavit sworn on January 21, 2022, plaintiff/ respondent avers that 2nd defendant/applicant was served with the plaint and summons on November 22, 2003 as is evidence by the affidavit of service sworn on November 22, 2003 and filed on February 12, 2009 and with notice of entry of judgment on June 28, 2019 as shown on the affidavit of service sworn on June 25, 2020 and filed on July 16, 2020. He faults the 2nd defendant/applicant for ignoring court summons and urges that the application be dismissed. He alternatively urges that if the application is allowed, 2nd defendant/applicant be directed to deposit the total decretal sum in court.

Determination

6. I have considered the application herein and the response thereto and the submission filed on November 9, 2022 on behalf of the 2nd defendant/ applicant and the issues for determination is whether the *ex parte* judgment is a regular one and whether the delay in filing the current application has been explained.
7. It is apparent that 2nd defendant/applicant does not deny the details contents of the affidavit of service sworn on November 22, 2003 and filed on February 12, 2009 where it is explained where, by whom and how he was served. Consequently, the allegation that he only became aware of this case on December 6, 2021 is untruthful and it is rejected. Having so found, I find that the judgment on record is a regular one.
8. This application was filed on January 14, 2022, nine years from the date of service of the plaint and summons and five years and two months after the regular judgment was entered. 2nd defendant/applicant has neither explained nor attempted to explain the prolonged delay or why the application to set aside a regular judgment is being made at this point in time in order for the court to determine if the application is being made in good faith. is being made at that particular point in time in order for the court to determine if the application is being made in good faith.
9. What amounts to unreasonable delay will depend on the individual circumstances of each case. (See *Jaber Mobsen Ali and Anor v Priscilla Boit and Anor* (2014) eKLR where the court found a delay of one month and 4 days to be unreasonable.
10. It is an equitable maxim that delay defeats equity or equity aids the vigilant and not the indolent. Granting the orders sought in this application and setting aside a regular judgment will be highly prejudicial to the respondent especially now that 2nd defendant/applicant does not dispute that the deceased who was a fare paying passenger died in the manner pleaded in the plaint.
11. As much as it should be the court's last resort to deny a party a chance to ventilate its case to the highest appeal level, a party approaching the court for a discretionary order must act diligently. This court cannot be said to be promoting the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of disputes if it is to allow parties to deliberately delay the court process.



12. Having found that the notice of motion dated January 13, 2022 has been brought with unreasonable delay, I decline to set aside the regular judgment and dismiss the application with costs to the plaintiff/respondent.

DELIVERED IN MERU THIS 02ND DAY OF FEBRUARY 2023

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Mr. Kinoti

For Plaintiff/Respondent - Kitheka & Ouma Advocates LLP

For 2nd Defendant/Applicant - Zainab Jirma & Co. Advocates

