



**Simiyu v Attorney General & 4 others (Civil Suit 2 of 1988)  
[2023] KEHC 981 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 981 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT 2 OF 1988  
RN NYAKUNDI, J  
FEBRUARY 10, 2023**

**BETWEEN**

**GEORGE FRANCIS SIMIYU ..... PLAINTIFF**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> DEFENDANT**

**THE INSPECTOR GENERAL OF NATIONAL POLICE  
SERVICE ..... 3<sup>RD</sup> DEFENDANT**

**CHRISTOPHER WANJALA ..... 4<sup>TH</sup> DEFENDANT**

**CHRISTIAN HEALTH ASSOCIATION OF KENYA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The applicant approached this court vide a notice of motion dated March 8, 2021 seeking the following orders;
  - a. Spent
  - b. Spent
  - c. The directions and proceedings made herein on 16/12/2020 be set aside and or vacated forthwith.
  - d. That this Honourable Court do allow the defendants to defend this suit and the same be determined on merit.
  - e. That the defence dated 23<sup>rd</sup> December 1988 attached to the application be deemed as properly on record.



- f. Such other order be made in the interest of justice as may be expedient.
  - g. The costs of this application be in the cause.
2. The application is premised on the contents of the grounds therein and the supporting affidavit sworn by one Valentine Jepkemei.
  3. A brief summary of the facts underlying the application are that the plaintiff filed an application under certificate of urgency on December 11, 2020 seeking leave to enter interlocutory judgement against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants and served the said application on the 1<sup>st</sup> defendant on 1 December 5, 2020. Leave was granted by court on 16.12.2020 and interlocutory judgement entered against the defendants on the same date for failure to file a defence. The applicants then proceeded to file the present application.
  4. The applicants' case is that leave was granted by court on 16.12.2020 and interlocutory judgement entered against the defendants on the same date for failure to file a defence in this suit yet the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their defence on 23.12.1988. They annexed a copy of the defence as VJ V. Further, they contended that the matter had been fixed for pre-trial directions on 23<sup>rd</sup> February 2021, yet the judgement in default was entered against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. In any event the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants failed to file the amended defence before the pre-trial date 23.2.2021 the plaintiff should have set the matter ready for hearing since there is a defence on record that was filed on 23.12.1988 and should have deemed the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to have waived their right to amend their defence.
  5. The applicant concluded by stating that it is in the in the interest of justice that the defendant be allowed to conduct this matter and not be shut out of litigation without a hearing as the Defendant/ Applicant has a good defence on record.
  6. The respondent did not oppose the application or file any response to said application.
  7. Upon considering the pleadings and annexures thereto, the issue emerging for determination is;
  8. Whether the court should set aside the directions of 16<sup>th</sup> December 2020.
  9. Order 10, rule 11 of the Civil Procedure Rules provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside, it reads as follows:
 

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
  10. In my understanding this provision grants the court discretionary powers to set aside orders made by the court in situations it deems just. In the case of, *Kenya Commercial Bank Ltd -v- Nyantange & another* (1990) KLR 443 Bosire J, (as he then was) held that:
 

“Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.”
  11. I have perused the record of the court and specifically the application dated December 11, 2020 from which the interlocutory judgment arose and it is evident that one of the grounds in seeking for orders was that the defendants failed to file a defence to the further further amended plaint.
  12. The matter had been fixed for pre-trial directions on February 23, 2021 and therefore it was unjust for the interlocutory judgment to issue. It is clear that the matter was still proceeding and I am in agreement



with the respondents that in the absence of an amended defence the defence on record should have been considered as the defence to be used in the matter.

13. *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd –vs- Augustine Kubede* (1982-1988) KAR page 1036, the court of Appeal held that:

The scope of the judicial power in promoting substantive justice in cases of this nature like the predicament in which the respondent find themselves is now well settled. This is precisely what the courts stated in:

“The court has unlimited discretion to set aside or vary a judgement entered in the default of appearance upon such terms as are just in the light of all fact as and circumstances both prior and subsequent and of the respective merits of the parties *Kamani v MC Come* (1966) EA 545 where the regular judgement had been entered the court would not usually set aside the judgement unless it was satisfied that there is a triable issue.”

14. Also in the case of *Sebei District Administration –vs- Gasyali & others* (1968) EA 300 Sheridan J observed that

“The nature of the action should be considered. The defence if one has been brought to the notice of the court however irregularly, should be considered the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of the court” In the case of *Royat Trading Co. Limited – Bank of Baroda & Tetezi House Ltd* (1018) eKLR the court held that: “If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant’s costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim.”

16. The court therefore has an equitable jurisdiction not only to do justice but to ensure that the right to a fair hearing under article 50 of *the Constitution* is not violated by any of the parties to a litigation. Under the principles stated in *WEA Records Ltd V.Vision Channel 4 Ltd and others* (1983) 2 All E.R. 589 and 593 the court has inherent wide discretion which is unfettered to give an opportunity for parties to be heard to enable it form its judgement on the merits: Thus “ As I have said ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists in his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and in so doing he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original orders.”

17. The case of *Haywood v. Cope* adverts to the guiding principles on the doctrine of discretion that those who have to advise reference to this subject should understand the rule which is adopted in this and the other Courts, which is that the discretion of the Court must be exercised according to fixed and settled rules: you cannot exercise a discretion by considering what, as between the parties would be fair to be done, what one person may consider very unfair, you must have some settled rule and principle upon which to determine how that discretion is to be exercised as cited in (1885 ch.) 25 (Beav. 140, 151, quoted in *Heyward V.Bradley* (1910, C,C,A)”)



18. In the premises and for those reasons together with the applicable principles I exercise discretion to grant the prayers sought in the motion dated March 8, 2021 with the following conditions precedent in place.
- a. The judgment issued on December 16, 2020 be and is hereby set aside.
  - b. The defence dated December 23, 1988 is deemed as properly on record.
  - c. The defendant to pay throw away cost to be assessed at the outcome of the main suit.
  - d. The suit be set down denovo on a priority basis and not later than 45 days from today's date.
  - e. The costs of this application to abide the merit of the cause of action.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 10<sup>TH</sup> DAY OF FEBRUARY 2023.**

.....

**R. NYAKUNDI**

**JUDGE**

