



Mukanzi v Yes Savings and Credit Co-operatives Society Limited (Civil Appeal E133 of 2021) [2023] KEHC 2559 (KLR) (Civ) (22 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E133 OF 2021

JK SERGON, J

MARCH 22, 2023

BETWEEN

KENNEDY MUKANZI APPELLANT

AND

**YES SAVINGS AND CREDIT CO-OPERATIVES SOCIETY
LIMITED RESPONDENT**

(Being an appeal against the ruling and order of Honourable B. Kimemia (Chairperson) delivered on 27th August, 2020 in Co-operatives Tribunal Case No. 624 of 2018)

JUDGMENT

1. The appellant in this instance instituted a suit before the Co-operative Tribunal (“the Tribunal”) by way of the statement of claim dated November 20, 2018 and sought for the sum of Kshs 1,068,436/=; the value of his 2017 and 2018 dividends and costs of the claim plus interest thereon against the respondent, being a claim for refund of the sums contributed by the appellant during the time of his membership with the respondent with effect from July 24, 2018.
2. Upon the request of the appellant, a default judgment was entered against the respondent by the Tribunal on February 15, 2019 for failure to enter appearance and/or file its statement of defence.
3. Consequently, the respondent filed the application dated April 25, 2019 and sought for the setting aside of the default judgment and for leave to file its statement of defence out of time. The application was opposed by the appellant.
4. Upon hearing the parties on the abovementioned application, the Tribunal granted the prayers sought and gave directions on the filing of the respondent’s statement of defence, vide the ruling delivered on August 27, 2020.



5. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through his memorandum of appeal dated March 11, 2021 the appellant put the following grounds:
 - i. The learned Chairperson erred in law in finding that there was a question on whether the appellant was a guarantor at the time of entry of judgment.
 - ii. The learned Chairperson failed to take into account the submissions of the appellant in regard to the discharge of the guarantee as against the appellant.
 - iii. The learned Chairperson erred in law and in fact in finding there was a triable issue raised in the draft defence.
 - iv. The learned Chairperson erred in law and in fact in finding that the application to set aside judgment had been filed within reasonable time.
 - v. The learned Chairperson erred in law and in fact in failing to make a finding on the reasons alleged for the delay in filing the application to set aside the judgment.
6. This court gave directions on the filing of written submissions on the appeal. It is apparent from the record that the respondent did not participate in the appeal.
7. By way of his brief submissions, the appellant contends that the respondent did not explain the delay in bringing the application and yet the Tribunal did not address this in its ruling.
8. The appellant further contends that the issues raised in the respondent's draft statement of defence are not triable issues for consideration within the description given by the court in the case of *Edward Ngera Mwangi & another v Veronicah Ndida Kimende* [2021] eKLR thus:

“The court will have to consider the reasons given for the default in entering appearance or filing defence, the period of delay, that is, whether the application has been filed without inordinate delay, the content of the proposed defence, that is, whether it raises triable issues or even one issue and the prejudice that may be occasioned to the judgment or decree holder. The overall objective is to do justice to the parties.”
9. It is the submission by the appellant that both parties herein will be prejudiced by the continued delay in litigating the claim.
10. For the above reasons, the appellant is of the view that the appeal is deserving of a dismissal, with costs.
11. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the Tribunal. It is clear that the appeal fundamentally lies against the Tribunal's decision to set aside the default judgment and granting the respondent leave to file its statement of defence out of time. I will therefore deal with the grounds of appeal contemporaneously under the following limbs.
12. The first limb of appeal concerns itself with whether the Tribunal considered the explanation, or lack thereof, given for the delay in filing the application.
13. In the abovementioned application dated April 25, 2019 the respondent stated that the summons to enter appearance and the pleadings were neither served upon it.



14. In his replying affidavit to the application, the appellant stated that the summons and pleadings were properly served upon the respondent and that the application is an afterthought intended to delay the claim.
15. Upon hearing the parties on the application, the Honourable Tribunal analyzed that the default judgment in place is regular on the basis that there is evidence to indicate that the summons to enter appearance was properly served upon the respondent.
16. The Honourable Tribunal further analyzed that the application was filed within a reasonable time, having been filed close to three (3) months from the date of default judgment.
17. Upon my consideration of the above, I am of the view that contrary to the averments made by the appellant on appeal, the Honourable Tribunal addressed itself on the subject of delay and arrived at a reasonable finding thereon. Grounds (iv) and (v) of the appeal therefore fail.
18. The second limb of the appeal touches on whether the Honourable Tribunal arrived at a correct finding that the respondent's draft statement of defence raises triable issues.
19. In the application, the respondent stated that the appellant did not disclose material facts in his claim such as the fact that the appellant was a guarantor at all material times to one Ricky Mbogo who had outstanding dues and was therefore barred from leaving the membership of the respondent until the dues were settled; and that the dividends for the year 2018 had not been declared as at the time of filing the claim.
20. In response, the appellant stated that whereas it is true that he guaranteed the above-named person in respect to a loan, the said loan was to last for a two (2)-year period with effect from November 11, 2013 and which period lapsed.
21. The appellant also stated that the respondent's draft statement of defence is a sham and that the issue of dividends can easily be argued at the formal proof hearing of the claim.
22. In its ruling, the Honourable Tribunal pronounced that the issues raised in the draft statement of defence constituted triable issues which ought to be determined at the trial.
23. In determining whether or not to set aside an *ex parte*/interlocutory judgment, a court is required to consider whether a party has a triable defence even where service of summons is deemed to be proper. In so saying, I cite with approval the rendition in the case of *Tree Shade Motors Ltd v D.T. Dobie & Another* (1995-1998) IEA 324 relied upon in the case of *M/S Jundu Enterprises Limited v Spectre International* [2019] eKLR thus:

“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”
24. The above position is echoed in the case of *Patel v East Africa Cargo Handling Services* [1974] EA 75 cited in the impugned ruling.
25. Upon my study of the appellant's draft statement of defence, I observed that the same echoes the abovementioned averments made in the application regarding the appellant's position as a guarantor to a borrower who had not cleared his loan with the respondent, and regarding the dividends for the year 2018.



26. In my view, the foregoing consist of triable issues which can only be adequately ventilated at the hearing of the claim. I therefore find that the Honourable Tribunal acted correctly in finding that the respondent's statement of defence raises triable issues. Consequently, grounds (i) and (iii) of the appeal collapse.
27. The third limb of the appeal has to do with whether the Honourable Tribunal took into account the submissions filed by the appellant before it.
28. Upon my study of the impugned ruling, I have not come across anything to indicate that the Honourable Tribunal overlooked any of the material which was placed before it by the parties in respect to the application. Ground (ii) of the appeal cannot therefore stand.
29. On the subject of prejudice; if any; to be suffered upon the Tribunal setting aside the default judgment, from my study of the record I observed that the appellant did not place any credible evidence before the Honourable Tribunal to show that the prejudice suffered would be so irreparable as to constitute a grave injustice to him, or that any prejudice suffered cannot be adequately compensated by way of an award of costs.
30. Upon taking into account all the foregoing factors hereinabove, I see no reason to interfere with the impugned ruling. I am satisfied that the Honourable Tribunal arrived at a reasonable finding.
31. In the end therefore, the appeal is hereby dismissed with costs to the respondent. The ruling delivered by the Co-operative Tribunal on August 27, 2020 in Co-operatives Tribunal Case No 624 of 2018 is hereby upheld.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
22ND DAY OF MARCH, 2023.**

.....

J. K. SERGON

JUDGE

In the presence of:

No Appearance for the Appellant

No Appearance for the Respondent

