



**National Cereals and Produce Board v Aberdares Maize  
Milling Company Limited & 2 others (Civil Suit 609 of 2010)  
[2023] KEHC 1734 (KLR) (Commercial and Tax) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1734 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 609 OF 2010  
A MABEYA, J  
MARCH 3, 2023**

**BETWEEN**

**NATIONAL CEREALS AND PRODUCE BOARD ..... PLAINTIFF**

**AND**

**ABERDARES MAIZE MILLING COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**PATRICK KINYUA MUNYITO ..... 2<sup>ND</sup> DEFENDANT**

**JANE MUTHONI KINYUA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before Court is the 2nd and 3rd defendant's (the defendants) Notice of Motion dated 8/12/2021 brought *inter alia* under Order 10 Rule 11, Order 22 Rules 22 and 32 of the [Civil Procedure Rules](#).
2. The defendants prayed that the Judgment entered against them on July 31, 2018 be set aside and for leave to defend the claim on merit.
3. The grounds for the application were that the plaintiff filed a Complaint dated September 10, 2010 which was subsequently amended on November 10, 2010. It sought recovery of Kshs 44,115,595/=-, damages for breach of contract, interest and costs of the suit. The defendants entered appearance vide a Memorandum of Appearance filed by the firm of Kamau Kuria and Kiraitu Advocates on October 27, 2010 together with a Statement of Defence.
4. The defendants contended that the firm of Kamau Kuria and Kiraitu ceased to act for them without giving adequate notice to them. This was occasioned by the alleged failure by the 1<sup>st</sup> defendant to give instructions to the said firm. In this regard, the hearing of the suit proceeded on July 10, 2018 in the absence of the 2nd and 3rd defendants and an *ex parte* judgement was entered on July 18, 2018.



5. They averred that they were in imminent danger of arrest pursuant to a warrant of arrest issued on November 24, 2021. That they were elderly persons both in fragile health and were now in peril of the imminent arrest and committal to civil jail to be compelled to pay a colossal sum of Kshs 103,797,250.77 indicated on the face of the Warrant of Arrest dated November 24, 2021.
6. That the amount of Kshs 103,797,250.77 indicated to be owed by the 1st defendant, a company in which the 2nd and 3rd Defendants are said to be directors, contests the debt as the principal sum was only Kshs 44,115,59500/-. That the inflated interest amounted to Kshs 58,479,149/- calculated by the Decree-Holder despite Court rates awarded only allowing interest to be calculated at the rate of 6% per annum.
7. The 2nd and 3rd Defendants argue that they have an arguable defence which never saw the light of day with high chances of success and unless interim relief is granted, their constitutional right to freedom may be infringed.
8. In its response, the plaintiff filed a replying affidavit sworn on 17/1/2022 by its corporation secretary.
9. It was averred that the judgment debtors were aware of the nature of the court proceedings and should have been advised of the likely outcomes. That on 8/12/2017, the judgment debtors requested 21 days to comply with case management and file their documents. Despite being permitted to do so, they did not take any action. On 18/4/2018, the Judgment Debtors appeared, in person and sought time to file documents and or statements in support of their case which the court granted with the hearing scheduled for 10/7/2018.
10. That on 10/7/2018 when the matter came up for hearing, the Judgment Debtors were not present and the hearing proceeded whereby the Decree Holder's testimony was admitted. Judgment was made on 31/7/2018 and a decree issued on 19/9/2018 for the sum of Kshs 44,115,595/- with interest and costs.
11. The Decree Holder is intent to recover on the decree and has pursued this in Court including the committal of the Judgment Debtors to civil jail. That the 1st, 2nd and 3rd Judgment Debtors remain under an obligation to satisfy the Decree jointly and severally for the sum of Kshs 44,115,595/- plus costs and interest at court's rate of 12% pa from the date of filing the suit until payment in full.
12. The issue for determination is whether the judgment debtors have shown sufficient cause to set aside the *ex parte* proceedings and the judgment of 31/7/2018.
13. In *Shah v Mbogo* 1967 EA 166, it was held that: -
 

“This discretion to set aside an *ex parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
14. In paragraph 11 of the 2nd defendant's replying affidavit, it is admitted that he was present in court on 18/4/2018 when the court set the hearing date of 10/7/2018. He further indicated to the court that he would avail 5 witnesses at the hearing to testify on behalf of himself and the 3rd defendant.
15. However, on the hearing date, neither the 2<sup>nd</sup> defendant nor the other defendants were present. The court proceeded with the hearing *ex parte* and an *ex parte* judgment was made.
16. In the said judgment, annexed as 'PKM-4' in the 2nd defendant's supporting affidavit, the court noted that this matter had been adjourned numerous times since 2010.



17. I find that there is no sufficient cause shown by the 2nd and 3rd defendant to warrant the setting aside of the *ex parte* hearing and judgment. The defendants were well aware of the hearing date but did not show up. It would delay the course of justice if this court would set aside the judgment or the proceedings without sufficient cause.
18. In the premises, I find no merit in the application and the same is dismissed with costs to the plaintiff.  
It is so ordered.

**DATED AND DELIVERED VIRTUALLY THIS 3<sup>RD</sup> DAY OF MARCH, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

