



**Otto Mruttu & Partners Limited t/a Otto Mruttu & Partners Architects v Moi University (Civil Suit E918 of 2021) [2023] KEHC 3553 (KLR) (Commercial and Tax) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3553 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E918 OF 2021  
JWW MONG'ARE, J  
APRIL 18, 2023**

**BETWEEN**

**OTTO MRUTTU & PARTNERS LIMITED T/A OTTO MRUTTU & PARTNERS ARCHITECTS ..... PLAINTIFF**

**AND**

**MOI UNIVERSITY ..... DEFENDANT**

**RULING**

1. The defendant/ applicant has moved the court through a notice of motion dated August 24, 2022 brought under article 159 (a), (d) & (e) and article 50(1) of the Constitution of Kenya, order 10 rule 10 7 11, order 51 rule 1 of the Civil Procedure Rules, 2010 and section 1A, 3 and 3A of the Civil Procedure Act, cap 21 laws of Kenya. The applicant seeks the following orders;
  - a. Spent
  - b. Spent
  - c. Spent.
  - d. That this honourable court do issue an order of stay of execution of its decree dated July 29, 2022 in favour of the plaintiff/respondent.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Petronila Chepkwony sworn on August 24, 2022. The application is opposed and the respondent has filed a replying affidavit on September 22, 2022 and a further replying affidavit sworn on February 14, 2023. Both parties filed their written submissions which they sought to rely on and highlighted the same orally before the court.



3. It is the applicants case that they are public institution fully funded by the government as a chartered university. The applicant submits that it seeks to enjoin the various ministries involved namely, National Treasury and Planning and Ministry Education which also bear shared responsibilities but were enjoined in the suit by the plaintiff.
4. The applicant has enumerated the challenges it faced when it sought to file its defence and states that the e-filing system was down and by the time a hard copy of the defence was placed in the court file, summary judgement had already been issued.
5. The applicant states that as a public institution they will suffer great prejudice if the matter proceeds to execution without an opportunity in a defence and enjoin the relevant government ministries to shoulder the financial burden arising from the suit. It is their argument that their defence raises triable issues and urge the court to allow the application, stay the execution of the decree and set aside the summary judgment and allow the respondent to file its defence.
6. The applicant relied on the following decided cases; *Kenya Commercial Bank Limited v Nyantage & another* (1990) KLR 443 on the issue of the courts discretionary power to set aside *ex-parte* judgment, Bosire J stated as follows;

“order ixa rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside *ex-parte* judgment entered in default of appearance or defence and any consequential decree or order upon such terms are just.”

The applicant also cited the case of *Patel v EA Cargo Handling Services Ltd*( 1974) EA 74 where the court was urging the use of discretionary power judiciously. *Phillip Kiptoo Chemolo and Mumias Sugar Company Limited v Augustine Kubede* (1982-1988) KAR at page 1039 the Court of Appeal held as follows;

“the court has unlimited to set aside or vary a judgement entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”.

7. Flowing from the above cited cases, the applicant urged the court to use its discretion to set aside the *ex-parte* judgment and allow the university to defend the suit.
8. In its written and oral submissions, the respondent vehemently opposed the application for setting aside their *ex-parte* judgement and urged the court to allow the execution of the decree to proceed to its logical conclusion. The respondent argues that the applicant had ample time to file its defence if it was interested in defending the suit from the time it filed its memorandum of appearance but chose not to so.
9. The respondent further took issue with the defence which is evidenced in the pleadings is a mere admission and does not raise any triable issue and allowing it to be filed just delays the realization of the judgment by the respondent/plaintiff.



10. In their submissions the respondent cited several authorities which it urged the court to be guided by in arriving in determining the application. Among the matters cited included the case of *Patel v E.A Cargo Services Ltd*(supra) where the court stated:-

“Accordingly, it is imperative for the court to ascertain, first and foremost, whether the impugned judgment was regularly entered or not, for, if it be the case that the judgment is an irregular judgment then the court would be obliged to set it aside *ex debito justitiae*”.

The respondent also relied on the case of *Mombasa Cement Ltd v Speaker, National Assembly & another*(2018) eKLR where Mativo J(as he then was) states as follows:-

The filing of a civil case requires the payment of filing fees. It follows that failure to pay court fees renders the suit incompetent because there is no competent suit filed before the court...consequently, I find and hold that failure to pay the requisite court filing fees, which is a prerequisite for instituting suits renders this petition incompetent.”

The respondent also cited the cases of *Mwalia v Kenya Bureau of Standards* EALR (2001)1 EA 148, *James Kanyitta Nderitu & another v Marios Phillotas Ghikas & another* (2016)eKLR and *Iseme Kamau & another v Kenya Airports Authority* (2019)eKLR, in an effort to buttress their arguments in opposing the application by the applicant.

11. I have considered the submissions by both parties and read the documents and pleadings in respect of this matter and I have noted that this the only issue I need to address is:-

“ 1. Whether the applicant has established a good case for this court to exercise its discretion and set aside the exparte judgment entered by the court in default of a defence by the defendant.”

12. To determine the above issue, I have considered several factors. One, the applicant and the respondent entered into a contract for consultancy services for the design, preparation of bidding documents and construction supervision of Moi University Building on plot No 209/102777 off Loita Road, Nairobi at a fee of Kshs 191,658,673.04/- which sum is not disputed by the applicant.

13. It is also not disputed that the applicant is a public institution that has to access funds from the National Treasury to meet its financial obligations. Barring financial support from the exchequer, the applicant has no independent funds of its own from which it can meet its financial obligations.

14. I note that the judgement debt as per the judgment of the April 6, 2022 is for the sum of Kshs 220,004,283.31/- which sum will continue to attract interest at court rates until it is settled. From the submissions by the applicant, I am persuaded that if the relevant responsible government ministries are not made party to this suit, then the applicant may experience difficulties in making payments.

In line with the constitutional dictates under article 159 that urges courts;

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) .....

(b) .....

(c) .....

(d) justice shall be administered without undue regard to procedural technicalities;”



15. I have considered that the power of the courts in setting aside an *ex-parte* judgement is a discretionary one and courts have urged that the same should be exercised judiciously. I have considered the case before me and I am persuaded that justice will be better served if the applicant is allowed to rope in the relevant government ministries to the matter in order to for them to bear their responsibilities.
16. To my mind, I find and hold that justice will be better served and it is in the interest of the both the applicant and the respondent to bring into the suit the relevant and responsible government agencies to the suit for expediency.
17. The upshot of my determination is that the application hereby allowed and the *ex-parte* judgement entered on April 6, 2022 is set aside. The applicant has 14 days to file its defence from the date of judgment. Costs of this application will be borne by the applicant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18<sup>TH</sup> DAY OF APRIL 2023.**

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**J. W. W. MONGARE**

**JUDGE**

IN THE PRESENCE OF

Mr. Barasa holding brief for Ms. Chepkwony for the Applicant

Mr. Obegi for the Respondent

Sylvia- Court Assistant

