



REPUBLIC OF KENYA



**KENYA LAW**

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**National Bank of Kenya Limited v Juma Construction Company Limited & 4 others (Civil Suit 48 of 2010) [2023] KEHC 17277 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17277 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 48 OF 2010**

**A MABEYA, J**

**MAY 12, 2023**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED ..... PLAINTIFF**

**AND**

**JUMA CONSTRUCTION COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GRACE SERAPAYI WAKHUNGU ..... 2<sup>ND</sup> DEFENDANT**

**JOHN JUMA ..... 3<sup>RD</sup> DEFENDANT**

**JOHN WALUKHE ..... 4<sup>TH</sup> DEFENDANT**

**AGNETA SIMULI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before Court is an application dated 3/5/2022. It was brought under sections 1A, 1B, 3A & 63 (e) of the [Civil Procedure Act](#) and order 12 rule 7 of the [Civil Procedure Rules](#).
2. The application sought orders that this Court's judgment of December 14, 2021 be set aside *ex debito justitiae* and the suit be set down for hearing *de novo* and *inter partes* on merit.
3. The grounds for the application were to be found on the face of it and in the supporting affidavit sworn by Agneta Simuli on 3/5/2022.
4. It was contended that the hearing date of 8/6/2021 was taken by consent. That both the applicant and her counsel logged into the session virtually and the matter was called out and placed aside to proceed after counsel for the parties confirmed the hearing. That the applicant and her counsel remained logged on but the file was not recalled and the virtual session was adjourned.



5. That it was only when the plaintiff's counsel served the applicant's advocate with the plaintiff's bill of costs and taxation notice that the applicant realized that the matter had proceeded in her absence and judgment delivered. That the applicant was denied her right to audience despite filing her statement of defence and complied with order 11 of the *civil procedure rules*.
6. That the judgment was thus secured ex-parte and ought to be set aside as it condemned the applicant without affording her an opportunity to be heard. That the applicant had a good defence and deserved an opportunity to be heard on merit.
7. The plaintiff opposed the application vide the replying affidavit sworn by Chrispus Maithya on 24/6/2022. It was contended that the applicant participated in taking various hearing dates including the final date of 8/6/2021 which was taken by consent. That on the day, the applicant's counsel virtually attended Court whereby, it was directed that the matter would be heard in open court at 10:30am on the same day. That neither the applicant nor her advocate attended open Court and the hearing proceeded as scheduled.
8. That the plaintiff counsel served the applicant's advocate with their written submissions vide email sent on November 29, 2021 and no queries were raised until the plaintiff served its bill of costs. That the applicant always had an opportunity to defend herself and participate in the suit and her lack of attendance could not be rewarded by setting aside the judgment.
9. The application was canvassed by way of written submissions which this court has considered alongside the rival pleadings and evidence before it.
10. The applicant's main contention is that she was denied a chance to defend herself as the hearing proceeded in her absence.
11. This Court has seen the proceedings of 8/11/2021. The matter was called out virtually and both the plaintiff's and applicant's counsels were present in court. The Court directed that the hearing was to proceed at 10:30 in open court.
12. At 11:00 am, the matter was again called out in open court. Only the plaintiff's advocate was present. The Court noted that: -

“It would appear that today's date was taken in court in the presence of all counsel on 9/6/2021. There is no reason why the counsels for the defendants are not present.”
13. The hearing thus commenced and the plaintiff called one witness and closed its case. Can the Court be accused of denying the applicant a chance to be heard when clear directions were given and not followed? The consequences of the applicant's non-attendance of the hearing can only be shouldered by the applicant and no one else.
14. In as much as the applicant contended that she only became aware that the matter had proceeded after being served with the plaintiff's bill of costs, there is evidence before court that the applicant's advocate was served with the plaintiff's submissions. That did not wake the applicant from her slumber. No effort was made to find out the genesis of the submissions. The applicant did not also attempt to inquire what transpired in court having realized that the matter was not recalled virtually as claimed. The applicant's laxity in the matter cannot be blamed on the court.
15. Admittedly, the court in its judgment mistakenly indicated that the applicant had not filed a statement of defence. Even if this was rectified, there would be no substantial effect on the judgment. A statement of defence and supporting documents can only be considered when a party calls a witness to lay a basis



to the defence and produce evidence. The same could not have been considered in the absence of any witnesses for the 5<sup>th</sup> defendant/applicant.

16. In the end, this Court finds that the applicant's application lacks merit and must fail. This is a 2010 suit. It took 12 years to obtain judgment. Litigation must come to an end and the defendant cannot be allowed to unjustifiably deny the plaintiff from enjoying the fruits of its judgment.

17. The application dated 3/5/2022 is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

