



**Yawa v Kyalo Matata & Company Advocates (Civil Case
E071 of 2021) [2023] KEHC 22257 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E071 OF 2021
F WANGARI, J
JULY 7, 2023**

BETWEEN

MWAMUYE KAI YAWA PLAINTIFF

AND

KYALO MATATA & COMPANY ADVOCATES DEFENDANT

RULING

1. The Plaintiff through originating summons dated August 2, 2021 instituted suit against the Defendant for the following orders :-
 - a. That the Defendant as the advocate of the Plaintiff in Chief Magistrate's Civil Suit No 1737 of 2018 Mwamuye Kai Yawa versus David Waithaka Kamwaba to deliver the cash account he received on behalf of the Plaintiff/Applicant the Respondent/Advocate paid only Kshs 305,154/= to the Plaintiff/Applicant leaving the balance of Kshs 303,846/= plus cost and interest. The Applicant is entitled for cost and interest;
 - b. That the Defendant/Respondent as the advocate of the Plaintiff in CMCC No 1737 of 2018 Mombasa to make payment or delivery of cash account to the Plaintiff;
 - c. That the Defendant/Respondent to deliver to the Applicant a list of monies which the Respondent has in his possession or in control on behalf of the Applicant;
 - d. That the Respondent/Advocate to deliver up papers and documents to which the client is entitled;
 - e. That the Honourable Court do order the Respondent to comply with the above within 14 days from the date of the issuing of this order in default of which judgement be entered in favour of the Plaintiff/Applicant as against the Defendant/Respondent;
 - f. That the costs of this Applicant be borne by the Defendant/Respondent.



2. The Defendant entered appearance on October 25, 2021. However, it appears the Defendant did not file any response. The matter was fixed down for hearing on June 14, 2022. The court was satisfied that the Defendant had been served and it thus proceeded to hear the matter ex-parte. Judgement was delivered on November 4, 2022 wherein the Plaintiff's claim was allowed. This is what precipitated the current application. The Defendant in its application sought for the following orders:
 - a. Spent;
 - b. Spent;
 - c. That this Honourable Court be pleased to set aside the ex-parte judgement delivered on November 4, 2022 and orders arising therefrom and grant the Defendant/Applicant leave to file a response towards the Originating Summons;
 - d. That the costs of the application be in the cause.
3. Upon service, the Plaintiff filed his response dated 27th January, 2023 on the same day. Directions were taken that the application be disposed off by way of written submissions. Both parties duly complied by filing submissions and cited various authorities in support of their rival positions.

Analysis and Determination

4. I have considered the application, response, the submissions together with the authorities relied upon by the parties as well as the law and in my view, the following issues are for determination;
 - a. Whether the application dated January 25, 2023 is merited;
 - b. Who bears the costs?
5. On the first issue, the principles to consider on whether to set aside judgement or not are now settled. In *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR, the Court of Appeal held as follows: -

“...We are fully aware that in an application before a court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously... Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle...”
6. It is thus settled that this it is an exercise of discretion whether to grant the orders sought or not. It is not in dispute that the Applicant was served with all the requisite notices be it a mention or hearing date. It is equally not in contest that the Applicant never responded to the Plaintiff's claim. On non-attendance on the hearing date, the Applicant deponed that he was a candidate in the August, 2022 elections and was thus fully immersed in the campaigns. There is no dispute that indeed the deponent was a senatorial candidate for Kilifi County in the August, 2022 elections. I thus find the reason given for non-attendance to be plausible.
7. On the period taken to lodge the application, I note that judgement was delivered on November 4, 2022 and the application was filed on January 25, 2023. This is a period of about two (2) months and I find that the same was filed timeously. I have equally considered the Plaintiff's response and I note



that there is no prejudice that would be occasioned to him if the application is allowed. In any event, he can be comforted through an award of throw away costs.

8. It would be against the settled principles of justice to drive away the Applicant from the seat of justice considering the nature of the claim. An advocate's standing is on balance and it is only fair to allow the Defendant to prosecute its defence. I think I have said enough to show that the application dated January 25, 2023 is merited.
9. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. This is a preliminary application and having found merit in it, the only order that lends itself on costs is that the same shall abide the outcome of the suit.
10. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The application dated January 25, 2023 is merited and the same is hereby allowed on the following terms: -
 1. The Ex-parte judgement delivered on November 4, 2022 is hereby set aside on condition that the Applicant does pay the Respondent Kshs 5,000/= as throw away costs within thirty (30) days from the date hereof;
 2. The Applicant to file its response within the next seven (7) days from the date hereof;
 3. The Plaintiff is at liberty to file a supplementary affidavit if need be within seven (7) days upon service of the response;
 4. In default of (1) and (2) above, the judgement delivered on 4th November, 2022 shall automatically be reinstated;
 - b. Costs to abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

F. WANGARI

JUDGE

In the presence of;

Plaintiff/Respondent P.I.P

Kyalo Advocate h/b Mwabonje Advocate for the Defendant/Applicant

