



**Pyramid Construction Limited v Equity Bank (K) Limited & another (Civil Appeal E019 of 2022) [2024] KEHC 12616 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12616 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CIVIL APPEAL E019 OF 2022  
WM MUSYOKA, J  
OCTOBER 22, 2024**

**BETWEEN**

**PYRAMID CONSTRUCTION LIMITED ..... APPELLANT**

**AND**

**EQUITY BANK (K) LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SYLVESTER WANDERA ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from orders made in the ruling by Hon. Madowo, Senior Resident Magistrate, SRM, in Busia CMCCC No. 491 of 2015, delivered on 30th September 2021)*

**JUDGMENT**

1. The appellant had been sued by the 1<sup>st</sup> respondent, at the primary court, for recovery of a sum of Kshs. 484,038.00, arising from an overdraft, and interests at 24%. The plaint and summons to appear were served, on 27<sup>th</sup> June 2016, and an affidavit of service was filed. A request for judgement, dated 14<sup>th</sup> July 2016, was filed, on even date. A notice of appointment of Advocates was filed on 20<sup>th</sup> July 2016, together with a memorandum of appearance. By then judgment had been entered on 14<sup>th</sup> July 2016.
2. The ex parte judgment of 14<sup>th</sup> July 2016 was set aside, on 19<sup>th</sup> December 2016, on an application, dated 8<sup>th</sup> August 2016. The appellant was given 14 days to file defence, conditional to payment of throwaway costs of Kshs. 10,000.00. The appellant filed a defence, on 10<sup>th</sup> January 2017, dated 7<sup>th</sup> January 2017.
3. Although the appellant took advantage of the 14 days window, given to it by the court, to file a defence, by the order of 19<sup>th</sup> December 2016, by filing the defence of 7<sup>th</sup> January 2017, it did not comply with the condition that throwaway costs be paid. That prompted the 1<sup>st</sup> respondent to apply for reinstatement of the ex parte judgment, vide an application, dated 10<sup>th</sup> March 2020. The application was served, but no response was filed, and the appellant did not attend court, when the same came up for hearing.



That application was allowed on 3<sup>rd</sup> November 2020, and the ex parte judgment of 14<sup>th</sup> July 2016 was reinstated. Costs were assessed, and a decree was prepared.

4. The appellant then filed a Motion, dated 7<sup>th</sup> July 2021, seeking leave for new Advocates to come on record for it, stay of execution, the setting aside of the order reinstating the interlocutory judgment of 14<sup>th</sup> July 2016, and leave to comply with the conditions of 19<sup>th</sup> December 2016. That application was canvassed, and a ruling was delivered on 30<sup>th</sup> September 2022, allowing that application, on condition that the throwaway costs, imposed on 19<sup>th</sup> December 2016, be paid within 30 days, and the entire decretal sum be deposited in court within 90 days.
5. The appellant was aggrieved by the orders of 30<sup>th</sup> September 2022; hence it filed the instant appeal, principally arguing that the conditions imposed were onerous.
6. Directions were given on 5<sup>th</sup> February 2024, for canvassing of the appeal, by way of written submissions. As at 16<sup>th</sup> September 2024, when I was allocating a date for delivery of judgement, none of the parties had filed written submissions.
7. This is a case where the appellant has largely taken the court, and its processes, for granted. It was properly served with court process, and acknowledged service by appending a signature to the documents. Yet, it did not do the right thing, of entering appearance and filing a defence within the given timelines. The 1<sup>st</sup> respondent, within its rights, sought and obtained ex parte judgment. It was a regular judgment, for there had been proper service. When execution proceedings began to loom, the appellant moved the court to have the interlocutory judgment set aside. The court exercised discretion in favour of the appellant, by setting aside the judgment, by its order of 19<sup>th</sup> December 2016. The appellant was given 14 days to file a defence, and it was stated that the setting aside was conditional on payment of throwaway costs of Kshs. 10,000.00.
8. Was there compliance with the orders of 19<sup>th</sup> December 2016? Not quite. A defence was filed on 10<sup>th</sup> January 2017, which was within the timelines, given that there was a Christmas break. However, the filing of the defence was conditional on payment of throwaway costs. Naturally, where such a condition is attached, the payment of the throwaway costs must be done simultaneously with the filing of the defence. The throwaway costs of Kshs. 10,000.00 were not paid on 10<sup>th</sup> January 2017, when the defence was being filed, and were never paid at all thereafter. The appellant ignored that limb of the order of 19<sup>th</sup> December 2016, and went about as if the court never made that order.
9. For avoidance of doubt, the orders of 19<sup>th</sup> December 2016 were in the following terms:

“I therefore allow this application in terms that the judgement entered exparte on 14<sup>th</sup> July 2016 together with all consequential orders be and are hereby set aside. Leave be and is hereby granted to the defendant to file and serve its defence within 14 days from the date of this order, conditional to payment of Kshs. 10,000 being thrown away costs to mitigate steps undertaken by the plaintiff/respondent so far.”
10. Despite the court exercising its absolute discretion, to set aside a regular judgment, entered despite proper service, and where the appellant did not even present any reasons for not filing defence on time, the appellant chose to ignore the condition attached to the setting aside order, and the leave to file defence. It was stated, in *James Kanyita Nderitu & another vs. Marios Philotas Ghikas & another* [2016] eKLR (Makhandia, Ouko & M’Inoti, JJA), that the court has “unfettered discretion,” in determining whether or not to set aside a regular default judgment. Where it decides to set aside, it has the unfettered discretion to impose such terms as it deems fit.



11. The appellant chose not to pay those throwaway costs, yet the setting aside, and the opportunity to defend, was pegged on them. The setting aside and leave to defend were conditioned to the costs. So that without payment of the costs, the setting aside and the leave to defend could not stand.
12. Following that blatant non-compliance with or disobedience of a court order, the respondent decided to move the court on 10<sup>th</sup> March 2020, which was 3 years and 3 months after the orders of 19<sup>th</sup> December 2016, to ask the court to practically set aside those orders of 19<sup>th</sup> December 2016, and reinstate the ex parte judgment of 14<sup>th</sup> July 2016. That application, of 10<sup>th</sup> March 2020, was served on the appellant, but, again, the appellant ignored it, for it neither replied to it, nor attended court when it came up for hearing on 3<sup>rd</sup> November 2020, and the same was allowed unopposed..
13. The appellant got to work again, when the 1<sup>st</sup> respondent sought to enforce the decree extracted thereafter, by seeking reinstatement of the order of 19<sup>th</sup> December 2016, and leave to pay the throwaway costs out of time. The court very graciously allowed that application. It is surprising, that the appellant, who had, no doubt, approached the court with unclean hands, would be unhappy with the court bending backwards to accommodate it, would have the temerity to challenge the favourable orders granted to it, by way of appeal. The orders of 30<sup>th</sup> September 2022 granted to the appellant all the prayers it had sought, but the court quite properly attached conditions, for the appellant was an unserious litigant, bent on taking the court and the other parties around in circles.
14. A party cannot choose which orders to comply with, and which ones to disregard or disobey. A party should not be allowed to keep the other parties at ransom, by delaying court processes, through failing to act timeously, only to come back filing applications to set court processes back. The circus has to stop, and must get out of town.
15. There is absolutely no merit in the appeal herein, for the appellant was the author of its own misfortune, through lethargy and sloth. I hereby dismiss the appeal, with costs. The trial court records shall be returned to the relevant registry. The appeal file shall be closed. Orders accordingly.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 22<sup>ND</sup> DAY OF OCTOBER 2024.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Advocates

Messrs. Morgan Musundi Law Firm Advocates, Advocates for the appellant.

Mr. Shihemi, instructed by Maloba & Company, Advocates for the 1<sup>st</sup> respondent.

