



**Sciommeri v Tasmac Limited & 4 others (Civil Suit E006 of 2023)  
[2024] KEHC 12260 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12260 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL SUIT E006 OF 2023  
SM GITHINJI, J  
OCTOBER 9, 2024**

**BETWEEN**

**RUGGERO SCIOMMERI ..... PLAINTIFF**

**AND**

**TASMAL LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MOHAMED ABDI MOHAMED ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 3<sup>RD</sup> DEFENDANT**

**NASSAU LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**HANNINGTON BARAZA WANJALA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. On 6/10/2023, the honourable deputy registrar, Hon N. Makau, entered interlocutory judgment against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants for failure to enter appearance and or file a defence within the prescribed time. This prompted the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to file a notice of motion application dated 14/11/2023 and which was later amended on 18/7/2024, for the following orders: -
  1. Spent.
  2. That the honourable court be pleased to set aside the interlocutory judgment entered on 6/10/2023 in favour of the plaintiff pending hearing and determination of this application.
  3. That the honourable court be pleased to stay and or arrest the intended formal proof proceedings by the Plaintiff pursuant to the interlocutory judgment entered on 6/10/2023 pending hearing and determination of this application.



4. That the honourable court be pleased to grant the defendants unconditional leave to file their statement of defence, list of documents, list of witnesses and witness statements out of time to defend the case presented against themselves by the Plaintiff.
  5. That the honourable court be pleased to deem the annexed statement of defence as duly filed.
  6. That costs be provided for.
2. The motion which was brought under section 3A and 63 (e) of the *Civil Procedure Act*; Order 10 rule 11, and Order 22 rule 52 of the Civil Procedure Rules was premised on the grounds listed at its foot and supported by the affidavit sworn by the 2<sup>nd</sup> Defendant on an even date, wherein he stated that he is a director in the 1<sup>st</sup> Defendant company. He deposed that interlocutory judgment was erroneously entered since the 1<sup>st</sup> Defendant filed a memorandum of appearance, notice of appointment of advocate and preliminary objection as early as 3/7/2023. That the matter was active in court with directions issued on 20/7/2023 for parties to respond to the preliminary objection and compliance of the same to be determined on 7/11/2023. It was on that date when the Defendants learnt of the interlocutory judgment.
  3. According to the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants will be prejudiced and unfairly condemned unheard, should the suit proceed in its current state since a substantial sum of Kshs. 1, 500,000,000/- is at stake. He added that the delay in filing a defence was occasioned by the contested representation of the 4<sup>th</sup> Defendant by three advocates, an issue which has now been resolved.
  4. Opposing the application, the Plaintiff swore a replying affidavit on 1/3/2024, stating that the suit was filed on 9/6/2023 and served upon all the parties by 21/6/2023. That the Defendants failed to file a defence within the statutory period hence the Plaintiff moved to request for judgment on 31/8/2023, a period of over 60 days from the date of service and entry of appearance. He noted that on 20/7/2023, the Defendants sought time and were granted 14 days to file their respective documents but yet failed to do so. To the Plaintiff, failure to file a defence was by design and not a mistake hence interlocutory judgment entered was a regular one. He added that the Defendants' failure to annex a draft defence in their application, leaves the court with no basis for consideration in exercise of its discretion.
  5. Pursuant to this court's directions issued on 18/7/2024, the application was canvassed by way of written submissions, which I have keenly considered.
  6. The authority to set aside interlocutory judgment is founded on Order 10 Rule 11 of the Civil Procedure Rules which empowers the court to set aside an ex parte judgment for default of appearance and filing of defence.
  7. The principles applicable under this rule were laid down by the Court of Appeal in *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR and restated in *Toshike Construction Company Limited v Harambee Co-operative Savings & another* [2019] eKLR as follows:
    - “(a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E
    - (b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by



evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* [1955] 22 EACA..."

8. The principle that emerges therefrom is that the discretion of a court to set aside ex-parte judgment entered in default of appearance or filing of defence is a wide one and is intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. This position was adopted in *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR where the court listed the factors to be considered as follows: -
  - i. the defendant has a real prospect of successfully defending the claim; or
  - ii. it appears to the court that there is some other good reason why; the judgment should be set aside or varied; or the defendant should be allowed to defend the claim.
9. Similarly, the Court of Appeal in *Thorn PLC v Macdonald* [1999] CPLR 660, highlighted the following guiding principles: -
  - i. while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
  - iii. any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
  - iv. the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and
  - v. prejudice (or the absence of it) to the claimant also has to be taken into account.
10. It is also relevant to distinguish between the two types of interlocutory judgments; that is, one entered regularly and that entered irregularly. This distinction was settled by the Court of Appeal in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR.

The court explained as follows: -

“In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence



raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment.”

11. Going by the above explanation, it is clear that the impugned judgment was regularly entered. It was not disputed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were duly served with the plaint and summons to enter appearance on 15/6/2023 and 21/6/2023 respectively. The firm of Mogaka Bwongaki & Company Advocates entered appearance on 3/7/2023 for the 1<sup>st</sup> Defendant. He later filed a notice of preliminary objection on 17/7/2023. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants however, did not file a defence within the stipulated period thereby precipitating the respondents’ request for default judgment on 31/8/2023 which judgment was entered on 6/10/2023.
12. It follows therefore that the court must interrogate whether the Applicants have met the conditions aforementioned in setting aside a judgment regularly entered.
13. From the onset, it is clear that it took the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/applicants at least 5 months, from the date of service with the pleadings, to file the instant application. My finding is that the 5 months’ delay is not only inordinate but has also not been explained.
14. The applicants blamed the deputy registrar for failing to observe that they had entered appearance and filed a PO that was pending determination. They also stated that failure to file a defence was occasioned by the dispute in representation of the 4<sup>th</sup> Defendant. My considered opinion is that the reasons advanced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are not plausible and have no merit, in view of the fact that filing of a PO and whether or not the same had been heard, is not an excuse for not filing a defence within the statutory limits.
15. Further, I do not see how the issue of representation of the 4<sup>th</sup> Defendant was a hindrance in filing a defence for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. This has not been explained.
16. As to whether the draft defence raises triable issues, this court interrogated both the Plaintiff’s claim alongside the draft defence annexed in the supporting affidavit of the amended application.
17. Briefly, the Plaintiff’s claim is that he purchased 480 shares, being 48% of the 4<sup>th</sup> Defendant’s shares, for a consideration of Euros 450,000. The said agreement and transfer of shares which he exhibited were dated 27/11/2014 and 16/12/2014 respectively. That this transaction was duly noted and registered at the Companies Registry. The Plaintiff claims that, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently connived with the 3<sup>rd</sup> Defendant to revert the shares to the 1<sup>st</sup> Defendant, despite the existence of unsuccessful attempts by the 1<sup>st</sup> Defendant to sue the Plaintiff regarding the same shares. Those suits were identified as criminal case no. 981 of 2018 which was said to have been dismissed for want of evidence, and the appeal thereto withdrawn on 9/9/2022; and Malindi HCCC No. 17 of 2019 (OS) which was also said to have been dismissed vide a ruling dated on 26/2/2021. That in addition, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have removed the Plaintiff as director of the 4<sup>th</sup> Defendant company, and in his place appointed the 2<sup>nd</sup> Defendant, and the 5<sup>th</sup> Defendant as the company secretary.
18. In their intended defence, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants denied the allegations raised in the Plaint. They stated that the 1<sup>st</sup> Defendant has never transferred its shares to the Plaintiff and that the said Lydia Moraa Ondieki who signed both the agreement and transfer did not have such authority. To me, this defence is neither here nor there given that it is not even denied that the said Lydia was at one time the 1<sup>st</sup> Defendant’s attorney.
19. Notably, the draft defence also raises issues of the suit being sub judice and res judicata, issues which were determined in the ruling delivered by this court on 8/5/2024.



- 20. In the foregoing, I am not persuaded that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/applicants have made out a case worthy granting of the discretionary orders to set aside the interlocutory judgment entered herein. In any case, a cursory glance at the face of the application, shows the prayer sought of setting aside was interim in nature pending determination of the application and thus can be said to be spent. The effect of this finding therefore, is that the other prayers sought are untenable.
- 21. The outcome is that the amended notice of motion application dated 18/7/2024 is hereby dismissed with costs.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9<sup>TH</sup> DAY OF OCTOBER, 2024.**

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**S.M. GITHINJI**  
**JUDGE**

In the Presence of; -

- 1. Mr Kilonzo Aziz for 4<sup>th</sup> Defendant and 1<sup>st</sup> Interested Party
  - 2. Mr Mogaka is for 1<sup>st</sup> and 2<sup>nd</sup> Defendants
  - 3. Mr Ndambuki holding brief for Mr Wafula for the Plaintiff
  - 4. 3<sup>rd</sup> and 5<sup>th</sup> Defendants were unrepresented
- Mr Ndambuki; We can have a hearing date. Hearing 5/3/2025.

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**S.M. GITHINJI**  
**JUDGE**

**9/10/2024**

