



Mogaka v Attorney General & 2 others (Constitutional Petition E021 of 2022) [2024] KEHC 14001 (KLR) (11 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CONSTITUTIONAL PETITION E021 OF 2022**

FR OLEL, J

NOVEMBER 11, 2024

BETWEEN

JOSEPHAT KIBAGENDI MOGAKA APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

**INSPECTOR GENERAL OF THE NATIONAL POLICE SERVICE 2ND
RESPONDENT**

DIRECTOR OF PUBLIC PROSECUTION 3RD RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 25th January 2024 brought pursuant to provisions of Rule 3(2)(3)(4) & (5) 162 and 19 of the Constitution of Kenya (protection of rights and fundamental freedoms) Practice and procedure rules, Order 9B rule 8 of the Civil Procedure Rules and all other enabling provision of law. The applicant seeks for orders that;
 - a. Spent.
 - b. Spent
 - c. That the judgement of this honourable court dated 21st September 2023 be and is hereby set aside.
 - d. That the applicant be granted leave to file a response to the petition.
 - e. That the Costs of this Application be in the cause.



2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the 3rd respondent prosecuting counsel, Mr. Joshua Jamsumba dated 25th January 2024. He acknowledged that directions issued by the court were received at their office in Machakos by one Ms Faith Njeru who at that particular time was proceeding on transfer to Tharaka Nithi County. She caused the petition and the direction issued to be placed on his desk but unfortunately, before he diarized the same, the file was inadvertently taken away from his desk by a support staff, without his knowledge, and misfiled amongst concluded matters hence the lapse in responding to this petition.
3. Due to this inadvertent lapse, they failed to attend to the direction given, and/or to attend court on the judgment date, and it was not until late December 2023, that they got information that an adverse judgment had been delivered by the Honourable court. This triggered an internal inquiry as to what may have occurred and on retrieving the file they noticed the error that occasioned their non-attendance.
4. The 3rd respondent/applicant further urged the court to grant them a chance to respond to the petition, as they had perused the pleadings filed and noted that the supporting affidavit of the petitioner contained blatant falsehood and concealment of material facts, which they needed to respond to, and interrogate to enable the court to reach a just decision.
5. The respondents were state institutions and it was therefore in the public interest that before public funds are committed in settling the decree, the arguable grounds raised in the annexed replying affidavit be looked at and a decision reached on merit. The applicant also apologized to the court and all parties for the inconvenience caused and urged the court to find that their non-attendance to the matter was caused by an excusable mistake and that the court's discretion should therefore be exercised in their favour.
6. This application was strenuously opposed by the respondent, who filed his comprehensive replying affidavit dated 19th February 2024, raising the following grounds;
 - a. That the judgement dated 21st September 2023 was regular as the 3rd respondent was properly served with all the pleadings and notices in this case but had deliberately failed to enter appearance and/or file a response in time or at all, and thus the judgment subsequently entered as against them was regular.
 - b. That on 09.02.2023, the trial court did give direction as to how the petition would be heard and directed the petitioner's counsel to extract the order and service it upon all respondents who were absent and this was done on 15.02.2023. Even after the service of directions of the court on all the respondents, there was no response received from them.
 - c. The 3rd respondent/applicant did not file grounds of opposition and/or replying affidavit to oppose the petition and further despite service of the submissions to all respondents, no response to the petition or submissions were received within the time prescribed by the court.
 - d. That from the chronology of events, they had demonstrated that the 3rd respondent had been served with all the court documents regarding the petition and had full knowledge of the existence of the suit a fact that is not disputed.
 - e. That the failure by the 3rd respondent to file a response to the petition was a result of its own negligence and inexcusable disregard of the legal proceedings and further the delay in applying setting aside the judgement demonstrates lack of diligence on its part.



- f. That the draft replying affidavit did not raise any triable issues that would warrant the court to set aside the judgment.
 - g. That the judgement was entered in consideration of the merits of the case and there was no concealment of facts as stated by 3rd respondent.
 - h. That granting the orders sought would prejudice the decree-holder after enduring delays and incurring expenses. Litigation should therefore come to an end.
 - i. That the application was merely an afterthought and there is no just cause to warrant the court to set aside the judgement.
 - j. Lastly the application is ill-founded, unmerited and brought for the sole purpose of depriving the respondent of the fruits of a properly obtained judgement and should be dismissed with costs
7. This application was disposed off by way of written submissions.

Analysis & Determination

8. I have considered all the pleadings filed, the submissions filed by the parties, herein and the authorities relied upon in support thereof.
9. That the decision on whether or not to set aside ex parte judgement is discretionary and is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah vs. Mbogo & Another* [1967] EA 116 & *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75.
10. Secondly, the legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside the ex-parte decision or proceedings. In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:
- “Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”
11. The Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal vs Veena Bharti* (2011) also observed that:
- “Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently ...’
12. In *Remco Limited vs. Mistry Jadva Parbat & Co. Ltd. & 2 Others Nairobi* (Milimani) HCCC No. 171 of 2001 [2002] 1 EA 233 the Court set out the principles guiding setting aside ex parte judgements as follows:
- i. If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside ex debito justitiae (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in



the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.

- ii. If the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules.
13. Again in the case of *CMC Holdings Limited -vs- James Mumo Nzioki* [2004] eKLR, the Court stated:

“The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.” (Emphasis theirs)
 14. Finally, in determining such applications, the court is obligated to observe all the facts and circumstances both prior and subsequent, and of the respective merits of the case of the parties to guide the Court as to whether to exercise its discretion or not. *Crystal Motors (K) Ltd vs. Occidental Insurance Company Limited* (2007) eKLR.
 15. The judgement the 3rd respondent/applicant seeks to set aside is regular. The petitioner did serve all the respondents with the pleadings and notice of directions on 23rd November 2022 and 18th January 2023, respectively, after which he caused his process server to file his return of service dated 20th January 2022. Despite service, the 3rd respondent did not file any response to this petition.
 16. On 9th February 2023, this matter came up for directions and once given, the court in its wisdom directed that the orders issued on how the petition was to be disposed of, be extracted by the petitioner's counsel and cause the same to be served upon all the respondent. As directed, this was done and again the 3rd respondent was served with the said order, which they stamped in receipt on 15th February 2023.
 17. The 3rd respondent did not file a response within the time prescribed and the petitioner's counsel proceeded to file their submissions, which they again served on the said 3rd respondent on 28th March 2023. Both physical delivery of service of the court directions/order of 9th February 2023 and submissions filed were confirmed by the affidavit of service dated 5th March 2023 and 18th April 2023 sworn by one Henry Mutundu, the court process server.
 18. The 3rd respondent submitted that they had demonstrated that their failure to participate in the proceedings was due to internal management lapses and inadvertent mistakes, for which they were sorry. It was further submitted that the court should find that the mistake of counsel in the matter was inadvertent and excusable and the court should therefore exercise discretion in its favor.
 19. As plausible as the applicant's reasons are, they are not convincing. The applicant was served physically with the pleadings, which included the petition, mention notice, directions of 9th February 2023, and the petitioner/respondent submissions. This was done over a period of four months. Unfortunately, they did not file their response to the petition.
 20. It is common practice in law firms and state law offices that when pleadings are received, even where the primary file is missing, a skeleton file is expected to be opened to deal with issues arising. Thus, even if the file containing the original petition and direction of 9th February 2023 was missing or misfiled, the petitioner's submissions were served 28th March 2023 and this ought to have aroused the applicant's attention and made them move with speed to protect their interest. Unfortunately, this did not happen. Without proper explanation, no discretion can fall in the applicant's favour.



21. Secondly, the Applicant did aver that they have a good defence as the petitioner deponed to falsehood and concealed material fact, which they needed to respond to and allow the court to make a just decision. I have extensively considered the issues raised in the draft replying affidavit. The proceedings in Mavoko CMCR No 226 of 2015, as read with the findings of Hon L.J Jessie Lesiit in Nairobi Criminal (Murder) Case No 57 of 2016 letters of Witness protection Agency to the ODPP, clearly show that even after being notified of the ulterior motive of sergeant Leliman, in filing the criminal case as against the petitioner, the 3rd respondent failed to act diligently by not taking appropriate and expeditious administrative action within a reasonable time to terminate the criminal case filed as against the petitioner herein.
22. This court in arriving at its decision to find all the respondents liable extensively relied on the court proceedings of Mavoko CMCR No 226 of 2015, as read with the findings of Hon L.J Jessie Lesiit in Nairobi Criminal (Murder) Case No 57 OF 2016 and letters of Witness protection Agency to the ODPP. Under provisions of section 84 of the Evidence Act, court proceedings are conclusive proof of the evidence adduced therein. Therefore, the issue of falsehood and/or Misrepresentation of fact does not arise as fair administration action was not taken, resulting in infringement of the petitioners' rights to fair trial.
23. Finally, in determining such applications, the court is also obligated to consider the “oxygen rules”. Section 1B of the Civil Procedure Act, provides for; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings at a cost affordable by the respective parties.
24. The petitioner was initially charged in court at Mavoko CMCT No 266 of 2015 on 13th April 2015, and eventually discharged under section 210 of the Criminal Procedure Code on 28th June 2018. He filed the petition herein in November 2022 and subsequently judgment was entered in his favour on 21st September 2023. It is my finding and holding that he would be most prejudiced if these proceedings were to be set aside and the matter to start afresh. Litigation has to come to an end and the petitioner be allowed to rest the psychological skeletons acquired given the history of this matter.

Disposition

25. The upshot is that having considered the issues raised in this application, I find that the Notice of Motion Application dated 21st January 2024 has no merit and dismissed the same with no orders as to costs.
26. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 11TH DAY OF NOVEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 11TH DAY OF NOVEMBER, 2024.

In the presence of: -

Ms. Kihuria for Petitioner/Respondent

Mr. Mangare/Ms Otulo for 3rd Respondent/Applicant

Susan/Sam Court Assistant

