



Republic v Betting Control and Licencing Board & another; Outdoor Advertising Association of Kenya (Exparte) (Judicial Review 142 of 2019) [2024] KEHC 14891 (KLR) (Judicial Review) (4 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW 142 OF 2019
JM CHIGITI, J
NOVEMBER 4, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

BETTING CONTROL AND LICENCING BOARD 1ST RESPONDENT

NAIROBI COUNTY GOVERNMENT 2ND RESPONDENT

AND

OUTDOOR ADVERTISING ASSOCIATION OF KENYA EXPARTE

RULING

1. The Application that is before this court is the one dated 10th June 2024 wherein the Applicant seeks the following orders: -
 1. ...spent.
 2. That in the interim there be a stay of any further proceedings in this matter pending the hearing and determination of this instant application.
 3. That the Orders issued by Hon. Justice Chigiti on 6th October, 2023 re-instating the Ex-Parte Judgment by The Hon. Justice Mativo dated 28th May 2019 be set aside.
 4. That the 1st Respondent's Replying affidavit dated 2nd July 2019 and 20th May 2020 deemed as duly filed.



5. That the Certificate of Order for Costs against the Government dated 3rd May 2024 and the Certificate of Costs dated 17th April, 2024 be and is hereby set aside.
6. That the all the consequential orders flowing therefrom be and are hereby set aside and that this case to proceed afresh as a defended case.
7. That costs of this application be in the cause.
2. The Application is supported by the Affidavit of Ms Annette Nyakora who believes that this Honourable Court has the jurisdiction to set aside its orders ex-debito justitiae.
3. This was filed on 7th May 2019 after which it proceeded Ex-Parte culminating in a Judgment against the Respondents on 28th May, 2019.
4. According to her, The 1st Respondent issued instructions to the Office of the Attorney General on 27th May 2019.
5. This led to the filing of the Application dated 2nd July, 2019 and filed on 3rd July, 2019 and an Amended Notice of Motion dated 26th July, 2019, on 2nd August, 2019 that was determined by Justice J. Mativo on 7th May 2020 with directing as follows:
 - a. That the judgment delivered by this court on 28th May 2019 and all the consequential orders flowing therefrom be and are hereby set aside and that this case shall proceed afresh as a defended case.
 - b. That the 1st Respondent be and is hereby granted 14 days from the date of this ruling to file and serve its Replying affidavit to the substantive application.
 - c. That the Ex-Parte applicant be and is hereby granted leave to file a further affidavit (if need be) to address any new issues after which parties shall move the court for directions on the hearing of the substantive application.
 - d. Each party shall bear its own costs for this application.
6. A response was thereafter prepared and signed by Cyrus Maina, the chairman of the Betting control and licensing boards and filed with the deputy registrar during the covid period through the official emails furnished by the court being contactjudicialreview@gmail.com. The same was copied to asunachristine51@gmail.com.
7. At the time of forwarding the documents to the Deputy Registrar the Court tracking system had not been fully operationalized and as such the 1st Respondent and documents would be sent to the Deputy Registrar for printing and filing in the Court file.
8. The court registry was not accepting any hardcopies of documents due to the covid 19 protocols and as such a hard copy was not placed on the court file.
9. Unfortunately, according to her, when the matter was fixed for hearing by counsel for the Ex-Parte Applicant the State Counsel handling the matter at the time of the hearing was on transfer and as such the matter proceeded undefended and without the court considering the 1st Respondents response dated 20th May 2020.
10. It was not until 7th May 2024 when the Attorney General was served with a Certificate of Order for Costs against the Government that the 1st Respondent became aware that the matter had been concluded. She believes that mistake of counsel should not be visited upon a litigant.



11. The 1st Respondents replying affidavit, unfortunately, was not placed in the court file and as such the matter proceeded undefended.
12. It is its case that the responses by the 1st Respondent's dated 2nd July 2019 and 20th May 2020 raises triable issues as demonstrated by the replying affidavits of Cyrus Maina.
13. She posits that the instant matter is one of public interest and touches on public policy affecting all Kenyan and ought to have an input from the government Legal Advisor.
14. On 17th April 2024, the Ex-Parte Applicant was granted Orders by this Honourable Court, based on the Judgement dated 28th May 2019, which was set aside vide a ruling delivered by Justice J. Mativo dated 7th May,2020.
15. She argues that once the matter was set aside, all the orders that had been granted prior would not be enforceable unless and until an application to reinstate the same had been made and heard by the Court with the involvement of the 1st Respondent.
16. She believes that it is in the interest of Justice that the Orders issued by Honourable Justice Chigiti on 6th October 2023 reinstating Justice Mativo's Judgement be set aside and the 1st Respondent's replying affidavits dated 2nd July 2019 and 20th May 2020 be deemed as duly filed and be considered by this Honourable Court. It is her case that it is unconstitutional for any person to be condemned unheard.

The Respondents Case;

17. In opposing the application, the Respondent relies on the Affidavit of Nelson Havi.
18. According to him The 1st Respondent seeks in the main, the setting aside of the Judgment delivered in this matter on the ground that the hearing preceding the Judgment was conducted without hearing the 1st Respondent and/or considering the 1st Respondent's Replying Affidavit sworn on 20th May,2020 by Cyrus Maina.
19. It is further claimed by the 1st Respondent that Annette Nyakora who had the conduct of this matter was on transfer when the matter proceeded for hearing, returned on 5th June, 2023 and that it was not until 7th May,2024 that the 1st Respondent learned that a Judgment was delivered on 6th October,2023.
20. There was no appearance by Annette Nyakora or anyone from the office of the Attorney General on 7th May, 2020 when the Judgment delivered by Justice John M Mativo on 28th May, 2019 was set aside, despite the Ruling date having been taken in the presence of Annette Nyakora.
21. No Replying Affidavit by the 1st Respondent was filed in Court and/or served as directed by Justice John M Mativo on 7th May, 2020.
22. The 1st Respondent argues that Annette Nyakora who has the conduct of this matter was on transfer when the matter proceeded for hearing, returned on 5th June, 2023 and that it was not until 7th May,2024 that the 1st Respondent learned that a judgment was delivered on 6th October,2023.
23. There was no appearance by anyone from the office of the Attorney General on 5th June,2023 whereafter the Ex-Parte Applicant's Notice of Motion dated 14th May,2020 was adjourned to 12th July,2023 and a Hearing Notice served upon the Attorney General as shown in the Affidavit of Service for the Hearing Notice.



24. There was no appearance by anyone from the office of the Attorney General on 12th June, 2023 nor was there in the Court record the Replying Affidavit sworn on 20th May, 2020 by Cyrus Maina. The Court reserved its decision for delivery on 6th October, 2023.
25. There was no appearance by Annette Nyakora or anyone from the office of the Attorney General on 6th October, 2023 for the delivery of the Judgment despite Notice of Judgement having been served upon the Attorney General as borne by the Affidavit of Service for the Judgment Notice.
26. It is his case that on 16th October, 2023 he wrote to the Attorney General forwarding the draft Decree arising from the Judgement of 6th October, 2023 for his approval as demonstrated in his letter and the forwarding email.
27. On 27th October, 2023 he served the Attorney General with the Decree, Bill of Costs and Notice of Taxation fixing the Bill of Costs for taxation on 13th November, 2023.
28. He also served the Attorney General with physical copies of the Decree, Bill of Costs and Notice of Taxation fixing the Bill of Costs for taxation on 13th November, 2023.
29. There was no appearance by Annette Nyakora or anyone from the office of the Attorney General on 13th November, 2023 and all subsequent dates when the Bill of Costs was listed for mention or ruling despite service of the Notice of Taxation.
30. On 7th May, 2024 he served the Certificate of Costs against the Government upon the Attorney General.
31. Annette Nyakora has not indicated or produced any evidence that she was on transfer and could not therefore have attended to this matter.
32. Through the Notice of Motion dated 10th June, 2024 the 1st Respondent seeks in the main, the setting aside of the Judgment delivered in this matter on 6th October, 2023 on the ground that the hearing preceding the Judgment was conducted without hearing the 1st Respondent and/or considering the 1st Respondent's Replying Affidavit sworn on 20th May, 2020 by Cyrus Maina.
33. It is further claimed by the 1st Respondent that Annette Nyakora who has the conduct of this matter was on transfer when the matter proceeded for hearing, returned on 5th June, 2023 and that it was not until 7th May, 2024 that the 1st Respondent learned that a Judgment was delivered on 6th October, 2023.
34. The Ex-Parte Applicants case that the Notice of Motion by the 1st Respondent is sustained by false claims and deliberate lies by Annette Nyakora, and the same do not warrant the grant of any of the orders sought by the 1st Respondent.
35. There is evidence that the office of the Attorney General was served with Hearing Notices and Mention Notices for all appearances in this matter but refused or failed to attend Court.
36. It is for the second time that the 1st Respondent seeks to set aside the Judgment on account of its dereliction. There has to be an end to litigation.
37. The remedies sought in the Notice of Motion are discretionary. The Court should not exercise its discretion in this case where the request by the 1st Respondent is based upon false claims and deliberate misrepresentations by Counsel who had the conduct of the matter.
38. He urges the Court to dismiss it with costs.



Analysis And Determination:

39. That the decision whether or not to set aside Ex-Parte judgement is discretionary is not in doubt and that the discretion 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.
40. In *Pindoria Construction Ltd vs. Ironmongers Sanyitary ware* Civil Appeal No. 16 of 1976 it was held that:
- “It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the Ex-Parte judgement. The trial Judge’s exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions.”
41. In my view, this position is supported by the holding of Ojwang, J (as he then was) in *Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others* [2004] eKLR where he held that:
- “The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure.”
42. In *Wachira Karani vs. Bildad Wachira* (2016) eKLR as was quoted in the case of *David Gicheru v Gicheha Farms Limited & another* [2020] eKLR the Court held that:-
- “The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter...”
43. In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed.
44. According to The 1st Respondent Annette Nyakora who has the conduct of this matter was on transfer when it proceeded for hearing, returned on 5th June, 2023 and that it was not until 7th May,2024 that the 1st Respondent learned that a judgment was delivered on 6th October,2023.
45. There was no appearance by Annette Nyakora or anyone from the office of the Attorney General on 5th June,2023 whereafter the Ex-Parte Applicant's Notice of Motion dated 14th May,2020 was adjourned



- to 12th July,2023 and a Hearing Notice served upon the Attorney General as shown in the Affidavit of Service for the Hearing Notice.
46. There was no appearance by Annette Nyakora or anyone from the office of the Attorney General on 12th June, 2023 nor was there in the Court record the Replying Affidavit sworn on 20th May,2020 by Cyrus Maina. The Court reserved its decision for delivery on 6th October, 2023.
 47. There was no appearance by Annette Nyakora or anyone from the office of the Attorney General on 6th October, 2023 for the delivery of the Judgment despite Notice of Judgement having been served upon the Attorney General as borne by the Affidavit of Service for the Judgment Notice.
 48. On 16th October, 2023 Mr Havi wrote to the Attorney General forwarding the draft Decree arising from the Judgement of 6th October, 2023 for his approval as demonstrated in his letter and the forwarding email.
 49. On 27th October, 2023 Mr Havi served the Attorney General with the Decree, Bill of Costs and Notice of Taxation fixing the Bill of Costs for taxation on 13th November, 2023.
 50. He also served the Attorney General with physical copies of the Decree, Bill of Costs and Notice of Taxation fixing the Bill of Costs for taxation on 13th November, 2023.
 51. There was no appearance by Annette Nyakora or anyone from the office of the Attorney General on 13th November, 2023 and all subsequent dates when the Bill of Costs was listed for mention or ruling despite service of the Notice of Taxation.
 52. On 25th April, 2024 Mr Havi served the Certificate of Costs upon the Attorney General. The served Certificate of Costs and my letter in that regard.
 53. On 7th May, 2024 he served the Certificate of Costs against the Government upon the Attorney General.
 54. Annette Nyakora has not indicated or produced any evidence that she was on transfer and could not therefore have attended to this matter.
 55. This court is not convinced by the reasons that the Applicant advances to support its application.
 56. The court cannot exercise its discretion favour of an indolent litigant in setting aside the order and in particular in a case where the Applicant has conducted its litigation business in such casual and lopsided manner as demonstrated by the Respondent.
 57. The court is satisfied that the Applicant was given a lot of opportunities to participate in the hearing of the suit at various stages in the litigation as seen in the numerous date stamps.
 58. The Respondent repeatedly informed the applicant whenever there was an activity in court on numerous occasions. It is unfortunate that the applicant chose not to attend court on those occasions.
 59. The applicant cannot be heard to say that it was condemned unheard or denied the right fair hearing under Article 47 and 50 of *The Constitution*.
 60. While exercising, my discretion this court reminds itself of the duty to balance the scales of justice in a manner that does not prejudice the rights of the Respondents who have remained steadfast in their pursuit to justice.
 61. The Applicant has not tendered any evidence to demonstrate that indeed counsel for the applicant had been on transfer at any one given time.



- 62. This court further takes note of the glaring fact that the applicant has elected not to respond to the various entries of service as posted by the Respondent to show that they were notified of the existence of the proceedings.
- 63. The applicant argues that this is the public interest matter. One is left to wonder why then the applicant dropped the ball at such a critical hour just to wake up with too little too late.
- 64. The decree holder has a legitimate expectation that there must be closure to litigation which will be offended if the application is allowed and I so hold.

Disposition;

65. Applicant has not proven its case.

Order;

The application is dismissed with costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF OCTOBER, 2024.

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J. M. CHIGITI (SC)

JUDGE

