



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**CIVIL APPEAL NO. 45 OF 2020**

**(FORMERLY ELDORET CIVIL APPEAL NO. 111 OF 1996)**

**FRED M. MUYIA.....APPELLANT**

**VERSUS**

**MARTIN SHIKUKU WANYAMA.....RESPONDENT**

**(An appeal from the Ruling and Order of Hon Injene Indeché (SPM)**

**in Bungoma SPMCC No. 238/1996 delivered on 8/11/1996)**

**RULING**

The appellant filed an application dated 5<sup>th</sup> September, 1996 seeking to set aside an *ex parte* judgement and to have the matter heard on merits and the draft defence be deemed duly filed.

The application was predicated on the grounds that the appellant instructed counsel on time who then prepared the memorandum of appearance and defence and presented to court for filing. The documents were returned to them on the ground that the parties were different. It turned out the case number was wrong.

The suit thus proceeded without the defence and judgement was entered against him and execution was due.

The application was heard and by a ruling of the court, the trial magistrate allowed the appellant leave to defend the suit on condition that the decretal sum was deposited in court within 7 days from the date of the ruling.

The appellant was dissatisfied thus the instant appeal anchored on the following grounds.

- 1. The learned magistrate erred in law and in fact when he made orders that the judgement entered would only be set aside on condition that the whole decretal amount be deposited in court within 7 days .***
- 2. The learned trial magistrate failed to realize that the defendant had been guilty of no fault so as to warrant imposing conditions upon him to deposit large sums of money in court.***
- 3. The learned magistrate failed to exercise his discretion to set aside the *ex parte* judgement judiciously and by imposing hard conditions has applied wrong legal principles.***

The appeal was disposed of by way of written submissions. Only the respondent complied.

The respondent submits basically that the trial court had a discretion to set aside the *ex-parte* judgement with conditions. That the *ex parte* judgement being a monetary decree the trial court was properly guided in ordering that the appellant deposits the decretal sum in court.

It is submitted that the trial court noted that the appellant was using delay tactics in prosecuting its application and therefore the order for deposit was to ensure expedited hearing. Counsel relies on the authorities in *Kingsway Tyres Automart vs Rafiki Enterprises Ltd Civil Appeal No. 220 of 1995* and *Shanzu Investment Ltd Vs The Commissioner of Lands Civil Appeal No. 100 of 1993*.

The appeal herein arises from an order of the subordinate court which struck out the appellant's defence. The issue then that arises for the court to determine is whether upon review of the evidence on record, the trial magistrate erred in granting a conditional leave to defend the suit.

Under Order 10 Rule 11 of the Civil Procedure Rules 2010 which is at par with Order IXA, Rule 10 of the retired Rules, it is provided;

***Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.***

In several authorities of this court, it is accepted that discretion ought to be exercised judiciously. In ***Pithon Waweru Maina V Thuka Mugiria [1983] eKLR, Kneller JA*** observed:

***The court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgment is varied it must be done on terms that are just.***

In ***Shah Vs Mbogo [1969] EA 116,123***, it was held;

***This discretion is intended to be exercised to avoid injustice or 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.***

In ***James Kanyiita Nderitu & Another Vs. Marios Philotas Ghikas & Another (2016) eKLR***, the Court of Appeal restated the distinction aforementioned and held:

***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 others.***

In granting conditional stay, the trial magistrate noted that the application was filed after an inordinate delay and that the appellant had been jolted into action by execution despite being in court on the day the matter proceeded by way of formal proof.

The court notes that the civil procedure rules gives the court a discretion to impose terms that are just. I have noted nothing erroneous with the imposition of the condition by the court. The trial magistrate exercised discretion properly and

In result therefore, the appeal is without merit and is hereby dismissed. Costs to the respondent.

**DATED AT BUNGOMA THIS 5TH DAY OF NOVEMBER, 2021**

**S. N. RIECHI**

**JUDGE.**