



**International Air Transport Association & another v Tusmo Travel
Tours & Cargo Limited & 2 others (Civil Case E419 of 2020)
[2021] KEHC 391 (KLR) (Commercial and Tax) (9 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 391 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E419 OF 2020
WA OKWANY, J
DECEMBER 9, 2021**

BETWEEN

INTERNATIONAL AIR TRANSPORT ASSOCIATION 1ST PLAINTIFF

SAHAM ASSURANCE COMPANY KENYA LIMITED 2ND PLAINTIFF

AND

TUSMO TRAVEL TOURS & CARGO LIMITED 1ST DEFENDANT

ABDIRAHIM ADASN WEHILIYE 2ND DEFENDANT

AMIR FILSAN HASSAN 3RD DEFENDANT

RULING

1. The ruling is in respect to the application dated 19th April 2021 wherein the applicant seeks the following orders to stay and set aside the execution of the Decree dated 31st March 2021 pending this application. The applicant also seeks the costs of the application.
2. The application is brought under Article 159 (2), (a), Article 50(1) of The *Constitution*, Order 9 Rule 8 & 11, Order 18 Rule 2 Order 22 Rule 22 and Order 51 Rule I of *Civil Procedure Rules* and other enabling provisions of the law.
3. The application is supported by the affidavit of the 2nd defendant, Mr. Abdirahim Adan Wehiliye, and is based on the following grounds; -
 - 1) THAT in the decree dated 31st March 2021 this court gave a judgment against me and the other Defendants without the Defendants having been given any notice of hearing or the notice of



judgment and therefore did not anticipate this judgment and were not given a chance to be heard.

- 2) THAT prior to the issuance of the Decree the Court gave a Judgment dated 5th March 2021 finding the defendant liable to pay Kshs. 5, 911,140.91 and USD.338, 855.79 together with interest, being damages payable to the Plaintiffs.
 - 3) THAT we were not aware of the issuance of this Judgment and no Judgment Notice had been served to them.
 - 4) THAT our previous Advocates Messers BARE & BALQESA ADVOCATES were given sufficient instructions and they failed to file a defence and slugged the whole prosecution of the case leading to the Judgment which is subject to this Application.
 - 5) THAT in trusting their case to the Advocates above we expected them to conduct the case diligently and therefore expected them to have been aware of all the stages of the case, all the notices and hearing dates which they did not and therefore jeopardized the Defendants rights to be heard.
 - 6) THAT it is a Fundamental Right of the Defendants to be heard and in this instance the impending execution will deal a great blow of injustice to the Defendants therefore the Court ought to not pay undue regard to technicalities and the non-vigilance of the previous advocate to work to a party's disadvantage.
 - 7) THAT the Defendants risks losing their business if the execution proceeds, their means of livelihood and therefore this Court Should be pleased to grant this Application to save the Defendants from losing their business in such circumstances that would beat the precincts of Justice and Fundamental Rights.
 - 8) THAT the 2nd Defendant has undertaken to prosecute the case in person to remedy the complacency of the previous Advocate and therefore also intends to apply for a review seeking the matter to be reheard on merit.
 - 9) THAT if the Plaintiffs are certain that their case has merit then they should be able to overlook these inconvenience meted upon the Defendants and let justice take its course and so that both parties can have the chance to prosecute their case on merit and not getting Judgments with undue advantage.
 - 10) THAT this apparent error in the face of record would culminate to a miscarriage of Justice in the subsistence of the Judgment issued thereof.
 - 11) THAT this Application is made in good faith and it will not in any way prejudice the rights of the Plaintiffs.
 - 12) THAT the Defendants should not be left to suffer such injustice because of the mistake by their Advocates who they trusted to conduct the case accordingly and notify them of its progress.
 - 13) THAT if the Judgment moves to execution the rights of the Defendants will be grossly prejudiced.
 - 14) THAT it is in the interest of Justice that this Application be allowed.
4. The respondents opposed the application through the replying affidavit of the 2nd Plaintiff's Company Secretary Ms. Karen Njagi. She states that copies of the pleadings were duly served on the defendants' advocates who failed to enter appearance or file a defence thereby leading to the entry of judgment



against the defendants. She further states that the defendants have not laid a basis for grant of the orders sought.

5. The application was canvassed by way of written submissions which I have considered. Main issue for determination is whether the applicant has made out a case for the granting of the order sought in this application.
6. The applicants seek to stay and set aside the decree dated 31st March 2021 stayed and set aside. It is the applicants' case that their advocates did not enter appearance or file a defence despite being given sufficient instructions thereby leading to the entry of judgment against them. They stated that they expected their advocates to conduct the case diligently which they failed to do thus jeopardizing their case.
7. In a rejoinder, the plaintiffs/respondents maintained that the pleadings were duly served on the defendants' advocates who have not explained why they did not enter appearance or file a defence. The respondents also observed that the defendants did not attach a draft defence to the application so as to enable this court to ascertain if it raises triable issues.
8. In *Shah vs Mbogo & another [1967] E.A.* it was held that: -

“The court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused.”

9. Order 10 Rule 4 (1) and (2) of the Civil Procedure Rules, 2010 provides as follows: -

“4(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

10. Further, Order 10, Rule 11 of the Civil Procedure Rules, provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside, it reads as follows: -

“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.”

11. The above cited cases espouse the principle that the court has discretion to set aside the default judgment. In the case of, *Patel vs EA Cargo Handling Services Ltd (1974) EA 75*, the Court held that: -

“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 condition on itself or fetter wide



discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

12. The applicants attributed the failure to file a Memorandum of Appearance and defence to the mistake on the part of their advocates. In *Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nair 236 of 2009* the court observed that a litigant should not suffer because of the mistake of a counsel.
13. I find that the even though the reasons advanced by the applicants for failing to file the defence on time or at all appear plausible, the defendants did not attach a draft copy of their intended defence to this application so as to satisfy this court that the defence raises triable issues. Courts have taken the position that failure to annex a draft defence to an application to set aside a default judgment is fatal to such an application. I am guided by the decision in *Harun Rashid Khator suing as the representative of Rashid Khator (Deceased) v Sudi Hamisi & 11 Others [2014] eKLR* wherein it was held that: -

“Failure to annex a draft defence on an application to set aside a regular ex-parte judgment is fatal to such an application.”
14. My finding is that in the circumstances of this case, the least and the most prudent action that the defendants ought to have taken should have been to present a draft defence to this court in order to justify the application to set aside the judgment. I find that no credible reason has been advanced for the failure to file a draft defence and that without a defence, there would be no basis upon which this court can hold that there are triable issues that would warrant the granting orders to set aside default judgment. To my mind, such setting aside will be in vain.
15. For the above reasons, I find that the instant application is not merited and I therefore dismiss it with costs to the respondents/plaintiffs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 9th day of December 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Kithinji for Kiguta for Plaintiffs/Respondents.

Court Assistant: Margaret

