Lempushuna v Mutabari & another (Civil Case E001 of 2022)
[2025] KEMC 90 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KEMC 90 (KLR)

REPUBLIC OF KENYA

IN THE MARALAL LAW COURTS

CIVIL CASE E001 OF 2022

AT SITATI, SPM

MAY 9, 2025

BETWEEN

DANIEL LEMPUSHUNA ..... PLAINTIFF

AND

DENIS MUTABARI ..... 1ST DEFENDANT

HENRY MWENDA ..... 2ND DEFENDANT

RULING

1. On 31st January, 2025 the defendants/judgement debtors lodged a Notice of Motion application dated 22nd January 2025, supported by an affidavit of similar date praying for:

    1. That this Honourable Court be pleased to issue an order of stay of execution of the judgement and decree herein pending the hearing and determination of this application.

    2. This Honourable Court be pleased to set aside judgement and decree herein.

    3. This Honourable Court be pleased to set aside the ex parte proceedings of 17th October, 2024.

    4. This Honourable Court be pleased to order a fresh hearing of both the Plaintiff/Respondent case and the Defendant's/Applicant's cases in the interest of justice.

    5. The costs of this application be in the cause.

    12 grounds as appeared on the face of the motion on notice were relied on but these could be condensed into 3 main grounds:
    The court proceeded ex parte in the absence of the defence after the plaintiff had presented his case;The defence counsel was unable to log in on the date of defence hearing because they had logged into the wrong link which never started its session causing the advocate to get the impression that that court would not be sitting;The defence had a triable defence and should

be granted the opportunity to cross-examine the plaintiff on merit;The parties had recorded a consent on liability in the ratio 85:15 but this was not reflected in the judgement.

2. It was brought under a certificate of urgency by Ms. Terry King'ayi Advocate instructed from the firm of L.A. Chemeli Advocates LLP who represented the applicant.

The Plaintiff's/respondent's Responses

3. The application was opposed by way of Grounds of Opposition dated 17th February, 2025 setting out 11 grounds challenging the application. These could be summarized into 4:The plaintiff prosecuted and closed his case whereupon the court marked as closed the defence case on account of the absence of the defendant and their advocates;The judgement rendered by the court took into account the pleadings lodged by both the plaintiff and the defendants;The advocate and his clients absented themselves from the trial on the scheduled date of hearing hence the resultant ex parte proceedings.It would be unfair and unjust to set aside a judgement on merit.

4. In the result, the respondent prayed for the dismissal of the application. Kihoro Kimani Associates represented the respondent.

5. The court directed the parties to canvass the application by way of written submissions.

The Applicant's Submissions Dated 17th March, 2025

6. It was submitted that the prayer for re-opening of the case was merited since the court had unlimited inherent power to do all that was necessary for the ends of justice or to prevent the abuse of the process of the court under section 3A of the *Civil Procedure Act*. Reliance was placed on the authority of *Patel –v East Africa Cargo Handling Services LTD.* (1974) EA 75 cited with approval in the authority of *Stephen Wanyee Roki –v- K-rep Bank Limited & 2 Others* (2018) eKLR where it was held that:

> " There are no limits or restrictions on the judge's discretion to set aside or vary an ex parte judgement except that if he does vary the judgement, 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 to it by the rules. The principles obviously, is that unless the court has pronounced judgement upon the 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."

7. Placing reliance on the authority of *Patel* (*supra*), the applicant submitted that they had a duly instructed advocate on record and that the said counsel the committed the mistake of using the wrong link to log in to the court session only for the counsel to discover that it was a wrong link long after the court had heard the plaintiff in the absence of the defendants who were desirous of defending the suit.

8. The defendants/applicants submitted that the advocate's mistake should not be visited on an innocent client as was held in *Edney Adaka Ismail –v- Equity Bank Limited* (2014)eKLR where the plaintiff had applied to have the order dismissing his application to set aside on account of an error on the part of his advocates and the learned Judges in determining the application held that the mistake of the advocate should not be visited upon the client and found merit in the plaintiff's application and reinstated his earlier application.

9. The applicant also relied on *Bank of Africa Kenya Ltd –v- Put Sarajevo General Engineering Co. Ltd. & 2 Others* (2018) eKLR where it was argued that the court balanced the weighted rights of the plaintiff who had judgement in his favour against the defendant to have his case heard and determined on the

merits in allowing an application seeking to set aside an ex parte judgement on the ground that the firm of advocates instructed by the applicant therein did enter appearance in the matter but failed to file a defence within the stipulated time. Further reference was made to *Belinda Murai & 9 others –v- Amos Wainaina* (1978) eKLR where it was held as follows:

> " A mistake is a mistake, it is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of a junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice do dictate. It is known that courts of justice themselves make mistakes which is politely referred as erring in their interpretation of laws and adoption of a legal point of view which Courts of Appeals sometimes overrule."

10. In their concluding submissions, the applicants urged the court to consider their bona fide defence on record which raised triable issue. On the authority of *Kiai Mbaki & 2 Others –v- Gichuki Macharia & Another* (2005) eKLR where it was held that

> " The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

11. Further decisions relied on were:*Richard Ncharpi Leiyagu –v- Independent Electoral & Boundaries Commission & 2 Others* (2013)eKLR where it was held that the right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law and courts have inherent jurisdiction to dismiss suits as long as it is done in circumstances that protect the integrity of the court process from abuse that would amount to injustice.*Peter Ng'ang'a Muiruri –v- Cooperative of Bank Limited & 2 Others* (2012)eKLR where it was held that it is the defendant who knows the weight of its defence or how eighty it intends to make it.*Hassan Hashi Shirwa –v- Swalahudin Mohamud Ahmed* (2011) eKLR where it was held that a court has a duty to find out the truth by unearthing any mystery which may assist the court to arrive at a just decision.

The Respondent's Submissions Dated 3rd April, 2025

12. It was submitted that the court did not enter an ex-parte judgement but a regular judgement following the non-appearance of the defendants at the scheduled hearing and that the said hearing date was well known by the absent counsel and her clients. Reliance was placed on Order 12 rule 2 of the *Civil Procedure Rules* explaining the consequences of the non-attendance by a defendant on the date of hearing:-

> Order 12 rule 2. When only plaintiff attends
>
> If on the day fixed for hearing, after the suit has been called on or hearing outside the court, only the plaintiff attends, if the court is attends satisfied —
>
> (a) that notice of hearing was duly served, it may proceed ex parte;
>
> (b) that notice of hearing was not duly served, it shall direct a second notice to be served; or

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing

13. The argument of the respondent was that if it was true that the defence counsel used the wrong link, how come the 2 defendants were not in court for their sessions. To further buttress this point, the respondent pointed out that the defence counsel had been using the correct link in previous sessions and could not turn around and plead that they had the wrong link. The last point raised was that the court had not limited the hearings to virtual sessions and the parties had the liberty to appear physically which they did not do without lawful excuse.

14. In further submissions, the respondent urged the court to dismiss the application since the defendants had a regular defence on record which was considered in the body of the judgement when the court rendered its decision as follows:-

> " The defendants opposed the suit by filing a statement of defence dated 22nd June, 2022 denying all liability, pleading contributory negligence and praying for the dismissal of the suit."

15. The respondent asked the court to exercise its discretion in determining the application under Order 12 rule 7 of the *Civil Procedure Rules* providing thus:

> 7. setting aside judgement or dismissal.
>
> Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

Issues for Determination

16. The only issue to be determined is whether or not a case for the setting aside of the judgement has been made out by the applicant.

Determination

17. From the record, the court notes that the defence did not attend the hearing on the scheduled date of 17th October, 2024. Thereupon, the court proceeded to mark the defence case as closed and set down the case for judgement which was duly delivered on 9th December, 2024. The defendant then filed the application for setting aside on 31st January, 2025 which was about 6weeks after the judgement had been delivered.

18. In the court's view, this was not inordinate delay in the filing for the setting aside taking into account the December holiday. As has been held by the superior court in *Blinda Murai* (*supra*), a mistake is a mistake if it is genuine. The utilization of a wrong link by the counsel which prevented them from attending the hearing is a genuine mistake. This is notable due to the fact that on the previous date, the counsel who appeared for the defendant i.e. Mr. Kipkorir only held brief for the actual counsel instructed in the matter i.e. Miss Macharia indicating that on that date Miss Macharia had a medical appointment and gave an indication that on the rescheduled date the defence was lining up 2 witnesses. This was on 5th September, 2024 when . This showed that the defence was genuinely interested in defending the suit.

> - In the court's considered view, there was a real chance that when the matter was called out on new date, the counsel instructed in the matter and who failed to appear was probably

using a wrong link as pleaded since as of this date of 17th October, 2024, the undersigned magistrate had just been newly deployed to this station and the issue of the correct Microsoft Teams link of the previous station had not been fully resolved and probably aggravated the confusion of the correct link. The delivered judgement, consequently, was a one-sided matter since the plaintiff's testimony was not tested by cross-examination and the defence evidence was not presented and not similarly tested by cross-examination. The parties had recorded a consent on liability in the ratio 85:15 but this was not reflected in the judgement.

19. That being so, the court finds merit in the application and orders as follows:

    1. The judgement delivered as a result of an ex parte hearing occasioned by the excusable non-attendance of the defence counsel and his clients is hereby set aside.

    2. The resultant decree and orders are also set aside.

    3. The case shall be re-opened for the Plaintiff to be cross-examined on his evidence and thereafter the defence to proceed to give their defence.

    4. Thereafter, the matter shall be rescheduled for judgement.

    5. The costs of this application shall be in the cause.

    Right of appeal is 30 days.

DATED, READ AND SIGNED AT MARALAL LAW COURTS THIS 9TH DAY OF MAY 2025

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

Present

Lemuya Court Assistant

Kihoro Kimani Advocate for the Plaintiff/respondent.

Mr. Kimani: Pray for mention on 15th May, 2025 to fix a mutually convenient hearing date

Court Mention: Mention 15th May, 2025