Ngángá v Delta Automobile Limited & 2 others (Civil Case E233 of 2022) [2024] KEMC 28 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEMC 28 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CIVIL CASE E233 OF 2022

CN ONDIEKI, PM

MAY 2, 2024

BETWEEN

MARGARET VICTORIA NYAMBURA NGÁNGÁ ..... PLAINTIFF

AND

DELTA AUTOMOBILE LIMITED ..... 1ST DEFENDANT

KAMONGO WASTE PAPER KENYA LIMITED ..... 2ND DEFENDANT

STEPHEN WAMBUA JOHN ..... 3RD DEFENDANT

RULING

Part i: Introduction

1. The remedy of setting aside ex parte proceedings, decisions or orders, is available to a party who has been condemned ex parte by an irregular proceeding, decision or order (without notice to the aggrieved party) or if regular (done with notice to the aggrieved party), the aggrieved party was hampered to attend by some sufficient cause (an accident or inadvertence or an excusable mistake or an excusable error) or that notwithstanding the fact that the aggrieved party had notice and actually failed to attend Court, the nature of the subject matter is so solemn (like land, fraud, et alia) that it will occasion grave injustice and hardship to the aggrieved party, if the order is not granted. The legal principles which govern setting aside interlocutory or ex parte Judgments and ex parte proceedings or orders are the same.[1] In this regard, the aggrieved party is entitled to move the Court with a view of having such a decision vacated and the suit or Application heard on merit. Whenever it is found that the aggrieved party had not notice, the aggrieved party is entitled to an order of setting aside ex debito justitiae. On the other hand, if the aggrieved party had notice but failed, the order of setting aside will depend on the discretionary power of the Court which ordinarily gravitates on the fulcrum of sufficient cause or the nature of the subject.

[1] See Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited [2014] eKLR, per Havelock, J.

Part ii: The 2nd Defendant/applicant's Case

2. On 29th February 2024, the 2nd Defendant/Applicant (hereinafter "the Applicant") filed a Notice of Motion of even date primarily seeking Orders that: (i) the Judgment of this Court dated 23rd November 2023 be set aside and the suit be re-opened and heard de novo. (ii) the Warrants of Attachment and Sale which were issued to First Choice Auctioneers be lifted; (iii) motor vehicle registration numbers KCB 914M and KCH 885B be released to the applicant.

3. This Application is predicated on the grounds advanced on the face of the said Notice of Motion and facts deposed in the Affidavit in support of the Motion sworn by the Applicant on 27th February 2024 and filed together with the Motion; and a Further Affidavit sworn on 26th March 2024 and filed on eve date.

4. In the said Notice of Motion, it is averred that the service of the process was not effected at all upon the applicant.

5. However, in paragraph 5 of the said Further Affidavit, the applicant admits that indeed a copy of the Plaint and Summons to Enter Appearance were served "upon one of the 2nd Defendants staff members and the same was thereafter forwarded to the true owners of Motor Vehicle Insurance company together with instructions to pursue the claim on 22nd July 2022, i.e Kenindia Insurance Company which had insured the true owners motor vehicle."

6. In his written Submissions dated 26th March 2024 and filed on even date, learned counsel Mr. Sahil instructed by the Firm of Messieurs O&M Law LLP Advocates representing the Applicant, has rehashed the grounds set out in the Motion, Supporting Affidavit, and Further Affidavit, staking reliance upon Mbogo & another vs. Shah [1968] 1 EA 93; Joseph Obiero vs. Stephen Kosgei Kwanbai & 4 others [2019] eKLR; *Winnie Wambui Kibinge & 2 others vs. Match Electricals Limited Civil Case No. 222 of 2010*; Kenya Commercial Bank Ltd vs. Nyantage & another [1990] KLR 443; Rayat Trading Co. Ltd vs. Bank of Baroda & Tetezi House Ltd [2018] eKLR; Rahman vs. Rahman [1999] LTL 26/11/9; Sebei District Administration vs. Gasyal & others [1968] EA 3000; and Tree Shade Motor Limited vs. DT Dobie Co. Ltd CA No. 38 of 1998.

Part iii: The Plaintiff/Respondent's Case

7. This Application is opposed. In his Replying Affidavit dated 6th March 2024 and filed on 8th March 2024, the Plaintiff/Respondent (hereinafter "the Respondent") deposes that this Application is actuated by mala fides, vexatious, frivolous and an abuse of the process of this Court and a waste of time aimed only at scuttling the fruits of her judgment. It is deposed that service of the process was effected personally by a process server called Gideon Kimatia upon an employee of the 2nd Defendant named Benjamin on 22nd July 2022. In this regard, an affidavit of service has been exhibited marked MVNN 1.

8. In her written Submissions dated 29th March 2024 and filed on even date, learned Counsel Ms. Maina instructed by the Firm of Messieurs Eboso & Company Advocates representing the Respondent largely rehashes the Replying Affidavit. It is submitted that in the circumstances of this case where the Applicant was served, the Applicant cannot benefit from the discretionary power of this Court.

9. It is submitted that the Judgment is regular, placing reliance upon Mbogo & another vs. Shah [1968] 1 EA 93.

10. It is submitted further the execution process is not irregular since both the decree and notice of entry of judgment were served.

Part iv: Issues for Determination

11. Commending themselves for determination gleaning from the said Notice of Motion; the Further Affidavit; the Replying Affidavit; and the rival written Submissions, are two questions as follows:

    i. First, whether this Application has met the threshold for setting aside the Judgment dated 23rd November 2023 and any consequential decree(s) or order(s) - including the Warrants of Attachment and Sale which were issued to First Choice Auctioneers and attachment of motor vehicle registration numbers KCB 914M and KCH 885B - and re-open the suit for hearing de novo.

    ii. Second, which party should shoulder the costs of this Application?

Part v: Analysis of the Law; Examination of Facts; Evaluation of Evidence and Determination

12. This Court now embarks on analysis of the law, examination of facts, evaluation of evidence and determination of each of the two questions, seriatim.

(i) Whether this Application has met the threshold for setting aside the Judgment dated 23rd November 2023 and any consequential decree(s) or order(s) - including the Warrants of Attachment and Sale which were issued to First Choice Auctioneers and attachment of motor vehicle registration numbers KCB 914M and KCH 885B - and re-open the suit for hearing de novo

13. Whereas Order 10 of the Civil Procedure Rules (hereinafter "the CPR") houses the consequences of non-appearance after being served with a Memorandum of Appearance; failure to file a Defence after being served with a Memorandum of Appearance and failure to serve a Memorandum of Appearance and Plaint, Order 12 of the CPR provides the procedure to be adopted in circumstances where the Defendant has entered appearance and filed a Defence and the consequences of non-attendance by either the Plaintiff or the Defendant.

14. Section 1A of the *Civil Procedure Act* enacts the overriding objective of the *Civil Procedure Act* and the Rules thereunder which is to facilitate the just, expeditious, proportionate, and affordable resolution of the civil disputes governed by the *Civil Procedure Act*. The text states thus: "(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1). (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court."

15. Section 1B of the *Civil Procedure Act* enacts the duty of the Court in respect to the overriding objective which is to handle all matters presented before the Court with a view of attaining a just determination; efficient disposal of the business of the Court; efficient use of the available judicial and administrative resources; timely disposal of the proceedings at a cost affordable by the respective parties; and use of suitable technology. The text reads thus: "(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims— (a) the just determination of the proceedings; (b) the efficient disposal of the business of the Court; (c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and (e) the use of suitable technology."

16. Even as the Court trains its eye on the foregoing procedural edict, it should be construed in the context of the command of the supreme law and in particular Article 50 (1) of *the Constitution* of Kenya, which guarantees every person's right to have any dispute determined fairly and that every person be afforded an opportunity to be heard. The text thereof reads: "50. (1) Every person has the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body."

17. What then are these principles which govern setting aside of interlocutory or ex parte Judgments? Broadly speaking, interlocutory or ex parte Judgments or Rulings or orders or proceedings which have made or entered irregularly are inevitably amenable to setting aside, ex debito justitiae or as Ringera J (as he was then) put it in Mwalia vs. Kenya Bureau of Standards [2001] 1 EA 151, that such should be set aside "bila maneno."

18. Put differently, irregular proceedings or orders or decisions must be set aside as a matter of right or of course. In such circumstances, a Court is stripped of discretionary power to determine whether or not an order of setting aside can be granted. See Mbogo & another vs. Shah [196 7] E. A. 116; Mbogo and another vs. Shah [1968] 1 EA 93; Mwalia vs. Kenya Bureau of Standards [2001] 1 EA 151; Francis Kipkemoi Ruto vs. Jeremiah Langat, Simon Kipngetich Kitur, Kipkemoi Tele & Charles Tele [2004] eKLR; Pithon Waweru Maina vs. Thuku Mugiria [1983] KLR 78; Kenya Ports Authority vs. Kustron (K) Ltd C. A. Civil Appeal Number 142 of 1995 (unreported); Jesse Kimani vs. McConnel [1966] E.A. 547; Sebei District Administration vs. Gasyali [1968] EA 300; and Jamnadan Sodha vs. Gordhandas Hemraj [1952] 7 ULR.

19. What is test of a regular or irregular ex parte Judgment? The simple test is notice. The crux of impeaching ex parte decisions or proceedings is typically the absence of notice of the proceedings on the part of the Applicant which absence then renders the ex parte proceedings and decisions irregular by grossly offending the right to fair trial as protected by Article 50 of *the Constitution*. In Fidelity Commercial Bank Limited vs. Owen Amos Ndungu and Another, H.C.C. Number 241 of 1998, the Court drew the following parallels between a regular and irregular judgment: "...Where summons to enter appearance has been served, and there is default in entry of appearance, the ex parte judgment in default is regular. But where the ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the summons to enter appearance, such judgment is irregular, and the affected Defendant is entitled to have it set aside as of right."

20. In determining whether the proceedings or order or decision is irregular or irregular, therefore, the principal guiding ray is what justice demands and the broad-based test is whether in all the facts and circumstances both prior and subsequent to the said decision, it would be just and reasonable to set aside or vary the order. In Kimani vs. McConnell [1966] E.A. 547, Harris, J. (as he then was) dealing with the question as to the circumstances to be borne in mind by a Court in Application of this nature said at page 555 that "...in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment, if necessary, upon terms to be imposed."

21. The factors which have been enunciated to fall under this banner (of the facts and circumstances both prior and subsequent and of the respective merits of the parties) include whether service was effected and whether there is delay in making the Application to set aside. The two factors clearly came out in the now timeless cause celebre and locus classicus precedent in matters discretion namely Mbogo and another vs. Shah [1968] 1 EA 93, where Sir Charles Newbold P, while adverting to the test enunciated

by Harris, J. in Kimani vs. McConnell ([1966] E.A. 547), said that "This is a very broad statement of the matters to be considered by a Judge on such an Application and I agree with it. Here, as the Vice-President has already said, there were factors on each side. On the one side, it seems to me the most relevant factor is that the insurance company had always made it clear that on the story it had received of the accident there was no negligence on the part of its insured, and thus no liability on the part of the insurance company to the injured person. On the other side the most material factor, it seems to me, was the fact that inasmuch as the insurance company had a contractual right to take over the conduct of any suit and obviously would do so for its own protection, yet having been offered an opportunity to accept service in a letter dated August 5, 1965, from the Advocates for the Plaintiff, it in effect refused that offer by a letter from its Advocates dated September 1, 1965. ...The Judge also referred to other factors. Delay and its possible effect in relation to witnesses are, of course, factors to be borne in mind in determining whether, looked at as a whole, the justice to the case requires that the case be re-opened so as to try it on its merits. But I think, by and large, the main factor which decided the Judge not to re-open the case was this act of the insurance company in refusing to accept service of the proceedings, which act was the direct reason why this case came to Judgment ex parte and not after consideration of contested facts. One must not forget that justice looks both ways and very often a Judge has to draw a line between two rather conflicting cases, each of which has some justice on its side. Now that is what the Judge did in this case." Also, in the Judgment of Law JA, in the same Mbogo and another case, His Lordship rendered himself thus: "It was in my view clearly relevant that the insurance company refused to accept service of the summons on behalf of the Defendants, and that only a month before the plaint was filed a notice was served on the company informing them that a suit was being instituted. These are all matters which the Judge was entitled to take into consideration, as he did, in deciding whether the interests of justice required him to allow the company to re-open the case by setting aside the ex parte Judgment obtained by the Respondent. The Courts' power to set aside a Judgment under O. 9, r. 10, is an unconditional discretionary power, and this Court will not interfere with the exercise of such a discretion unless clearly satisfied that the Judge was wrong. I can only say that I am not so satisfied and I would accordingly dismiss this appeal." In the Judgment of Sir Clement De Lestang V-P, His Lordship also agreed that service having been effected the high Court "... refused it, however, on the ground, as I understand his Judgment, that while the Court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to obstruct or delay the course of justice which, in his view, the company had done in the present case...The principal matters against his decision are first, the fact that the company was not notified of the actual filing of the suit against the appellants. It was merely notified about a month previously of the intention to file the suit and second the fact that from the very beginning the company let the Respondent know that it wanted to defend the action, disclosed its defence and gave all the information which the Respondent sought and did not delay the filing of its Application to set aside the Judgment. The principal matters supporting the decision are the fact that a notice of intention to sue was served on the company and its refusal to accept service on behalf of the appellants, and its failure to give any explanation for so doing in its Application to have the Judgment set aside. In the normal course of things the company would have had to defend the action if it really wanted to avoid liability and it is difficult to understand, without any explanation, why it adopted that attitude. Obviously this latter factor greatly influenced the learned Judge and led him to conclude, when taken together with the conduct of the company as a whole, that it was trying, as he put it, to obstruct or delay the course of justice."

22. The main concern of the Court is to do justice to the parties. See Orders 10 and 12 of the CPR. Order 10 rule 11 provides that "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." A similar provision is found in Order 12 rule 7 of the CPR which provides that "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." Further, see Patel vs. East Africa Cargo Handling Service [1974] EA 75, per Duffus, V.P. Similarly, in Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, it was held that "The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."

23. Having come to a conclusion that the proceedings and consequential orders were irregular, in setting them aside in Mwalia vs. Kenya Bureau of Standards [2001] 1 EA 151, Rinegera, J. (as he then was) had the following to say: "All in all, I think this is a case where the interests of justice demand that the default judgment be set aside so that both parties can approach the judgment seat with the merits of their respective cases. The only issue is on what terms. In having come to the unequivocal view that the judgment herein was irregular, I am of the opinion that it should be set aside ex debito justitiae and bila maneno. And for the speedy progression of the action, I will direct that both an appearance and defence be filed and served expeditiously on the Plaintiff. The upshot of this matter is that I order the default judgment entered herein on 9 August 2000 and all consequential orders set aside with costs to the Plaintiff. I also order that the Defendant do file and serve on the Plaintiff a memorandum of appearance and a defence within ten days from today."

24. What then are the key considerations? The nature of the action should be considered, the Defence if any should also be considered; and so, should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a Court. See Sebei District Administration vs. Gasyali and others (1968) 1 E.A. 300, per Sheridan, J.

25. The reason for failure to attend should be considered. See Esther Wamaitha Njihia & 2 Others vs. Safaricom Ltd (2014) eKLR; and Wachari Karani vs. Bildad Wachira [2016] eKLR.

26. Where for instance, an Applicant was accorded an ample opportunity to defend himself but failed to do so for no sufficient cause until he was threatened with attachment, the Defendant cannot later be allowed to inflict undue hardship to the claimant who has been diligently pursuing his case. *The Constitution* requires that every person is given an opportunity to defend itself but does not require the Court to bend backwards to accommodate a party who after being given an opportunity to defend itself, deliberately fails to do so, as is the case herein. The Claimant has a right to enjoy the fruits of his Judgment. See Kennedy Makasembo vs. Kenya Union of Post Primary Education Teachers [2017] eKLR, per M. Onyango, J.

27. An ex parte Judgment should be set aside ex debito justitiae if the sufficient cause is shown. What constitutes sufficient cause? In the Ugandan case of Captain Philip Ongom vs. Catherine Nyero Owota (Civil Appeal No. 14 of 2001) [2003] UGSC 16, Odoki C.J., Oder, Tsekooko, Mulenga, and Kanyeihamba JJ.S.C. reasoned as follows: "It is evident from this provision, that for an Application under this rule to succeed, the Court must be satisfied about one of two things, namely: - either that the Defendant was not properly served with the summons, or that the Defendant failed to appear in Court at the hearing, due to sufficient cause. It is also evident from the same provision, that once the Defendant satisfies the Court on either, then the Court is under duty to grant the Application and make the order setting aside the ex parte Decree, subject to any conditions the Court may deem fit. The modes of effecting service of summons are clearly set out in the rules of procedure, so that a Defendant who is not served in accordance with one of the modes, will be entitled to an order under the rule. However, what constitutes "sufficient cause", to prevent a Defendant from appearing in Court,

and what would be "fit conditions" for the Court to impose when granting such an order, necessarily depend on the circumstances of each case. In the instant case, the appellant (Defendant) did not dispute service of summons. In his Application, he sought to satisfy the Court that for "sufficient cause" he did not file a defence and was prevented from attending Court on the hearing day. It follows that the primary concern of the Court in considering that Application was to determine whether the "cause" put forward by the appellant, was "sufficient cause". The appellant presented his former Advocate's defaults as the cause that prevented him from filing defence, and from appearing in Court on the hearing day. In a nutshell, what the appellant averred in the Affidavit in support of his Application, was to the effect that he instructed one Walter Okidi Ladwar, an Advocate, to defend him in the suit, but that despite assurances by the said Advocate to the contrary, the Advocate did not file the defence, and though the Advocate was served with a hearing notice, he did not tell him of the hearing date. These averments were not disputed, and both Courts below believed them, hence their common view that the appellant could obtain relief from the former Advocate for professional negligence. For the purposes of Order 9 Rule 24, the cause that prevented the appellant from appearing at the hearing was that he was not aware of the hearing date, because his former Advocate who was served with the hearing notice did not disclose the date to him. Although in law service of the notice on the Advocate constituted valid service on the appellant, I would not consider the Advocate's failure, in the instant case, to comply with the notice, as failure by the appellant who did not know the contents of the notice. It is an elementary principle of our legal system, that a litigant who is represented by an Advocate, is bound by the acts and omissions of the Advocate in the course of the representation. However, in applying that principle, the Court must exercise care to avoid abuse of the system and/or unjust or ridiculous results. To my mind, a proper guide in applying the principle is its premise, namely that the Advocate's conduct is in pursuit of and within the scope of what the Advocate was engaged to do. In light of that, in my view, a litigant ought not to bear the consequences of the Advocate's default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give to the Advocate due instructions. There is no reason to suggest that the appellant in the instant case was privy or otherwise responsible for his former Advocate's default. On the contrary, throughout, the Advocate misled him that he was defended when he was not, and ultimately failed to inform him when the suit was due for hearing. Obviously, he could not appear in Court (in person or by Advocate) when he did not know the hearing date, and his Advocate neglected to appear for him. He was therefore prevented from appearing by "sufficient cause". In my view, that "cause" cannot be any less sufficient by reason of the fact that it also resulted from the Advocate's gross professional negligence, as appears to be implicit in the Judgment of the Court of Appeal and in Mr. Walubiri's Submissions in this appeal. Whether or not the appellant has a cause of action against his former Advocate, is immaterial and irrelevant to the issue whether he was prevented by "sufficient cause" from appearing in Court."

28. The tenor of "sufficient cause" was also elucidated in the decision of Court of Appeal of Tanzania in The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others (Civil Appeal No. 482 of 2017) [2019] TZCA 298, the Court had this to say: "It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant."

29. Similarly, the Court of Appeal in the case of Daphne Parry vs. Murray Alexander Carson [1963] EA 546 had the following words to say about what constitutes sufficient cause: "Though the Court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the Court must guard itself against the danger of being led away by sympathy..."

30. However, in the decision rendered by the Supreme Court of India in Parimal vs. Veena [2011] 3 SCC 545, the Court came closest to certitude about the meaning of sufficient cause in the following words: "Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party 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" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously."

31. And so, in Daphne Parry vs. Murray Alexander Carson [1963] EA 546, it was held that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles. If the appellant had a good case on the merits but is out of time and has no valid excuse for the delay, the Court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.

32. The orders sought by the Applicant are discretionary. The principles governing the exercise of judicial discretion to set aside an ex-parte judgement or proceedings is well settled. The discretion is free and the main concern of the Court is to do justice. See Patel vs. E.A. Cargo Handling Services Ltd (1974) EA 75, where Duffus, V.P. (as he then was) reasoned that "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." See also the Court of Appeal decisions in Baraka Apparel EPZ (K) Ltd vs. Rose Mbula Ojwang T/A Faida 2002 Caterers (2007) eKLR; Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd (2014) eKLR; Branco Arabe Espanol vs. Bank of Uganda (1999) 2 EA 22; and Joseph Njuguna Thairu vs. City Council of Nairobi (2015) eKLR.

33. Speaking of discretion, Lord Halsbury L.C., in the case of Sharp vs. Wakefield (1891) 64 L.T Rep. 180 Ap. Ca.173 held that "When it is said that something is to be done within the discretion of the authorities, that thing is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. It must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself."

34. In Kenya Commercial Bank Ltd vs. Nyantange & Another (1990) KLR 443, Bosire J. (as he then was) held that "1. Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the Court to set aside or vary an ex-parte Judgment entered in default of appearance or Defence and any consequential Decree or order upon such terms as are just. 2. The discretion is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice."

35. In Richard Ncharpi Leiyangu vs. Independent Electoral Boundaries Commission & 2 Others (2013) eKLR and CMC Holdings Ltd vs. James Mumo Nzioka (2014) eKLR, the Court of Appeal holds a view that a party should not punished, and discretion should be applied to ensure that a litigant does not suffer injustice or hardship as a result of an excusable mistake, inadvertence, accident or error. See

also the Court of Appeal decision in Baraka Apparel EPZ (K) Ltd vs. Rose Mbula Ojwang T/A Faida 2002 Caterers (2007) eKLR.

36. The exercise of discretion should be in the direction of avoiding 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 cause of justice. See the locus classicus in setting aside an interlocutory Judgment and granting the Defendant leave to Defence namely the High Court decision in Shah vs. Mbogo & Anor (1967) EA 470 and its Court of Appeal rendition in Mbogo and another vs. Shah (1968) 1 EA 93. In the Court of Appeal timeless, cause celebre and now locus classicus precedent in matters exercise of discretion in Mbogo and another vs. Shah (1968) 1 EA 93, which was heard and determined by Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA, (as they then were) Sir Clement De Lestang V-P, (as he then was) rendered himself as follows: "...while the Court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to obstruct or delay the course of justice which, in his view, the company had done in the present case....Obviously this latter factor greatly influenced the learned Judge and led him to conclude, when taken together with the conduct of the company as a whole, that it was trying, as he put it, to obstruct or delay the course of justice."

37. In Rooke's case, 5 Rep. 99b (1598), cited in approval by Mativo, J. in Republic vs. Public Procurement Administrative Review Board & 2 others (2018) eKLR, the Court attempted a definition of discretion as follows: "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by *the Constitution* entrusted with."

38. In yet another Court of Appeal decision in Christopher Kiprotich vs. Daniel Gathua & 5 others (1976) eKLR, Wambuzi, P., (as he then was) held that "Although the Court's discretion in these matters is unfettered, it must nevertheless be exercised judicially. I would not say that this was the case here. In the circumstances of this case I would approve of the principle in Jamnadas V Soda v Gordhandas Hemraj, 7 ULR 7 that: Where a Defendant though in default appears before the Court and indicates that he has a Defence and shows the Court what that Defence is, then if the Defence discloses some merits, and the Plaintiff can reasonably be compensated by costs for the delay, it is proper for the Court to take steps to try the case upon the merits, both sides being given a hearing. And if I may borrow the expression used before in these Courts, procedural rules are intended to serve as the handmaidens of justice, not to defeat it."

39. In *Pharmaceutical Products Ltd vs. Development Bank of Kenya & 2 others, HCC No. 572 of 2003*, Waweru, J. held that the Court must also remember that to shut a litigant out of the Court should be the Court's last resort.

40. Regarding the borderlines of the said wide discretion, in Pithon Waweru Maina vs. Thuka Mugiria (1983) eKLR, Potter and Kneller, JJA, (as they then were) and Chesoni, Ag. JA, (as he then was), said that "7. A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (Smith v Middleton [1972] SC 30) 8. The Respondent could have been compensated by costs for the delay occasioned by his Advocate's dilatoriness and the Appellant should not have been denied a hearing because of his Advocate's mistake even if it amounted to negligence, in the circumstances of this case...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: Patel v EA Cargo Handling Services Ltd [1974] EA 75, 76 BC. 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: Shah v Mbogo [1969] EA 116,123 BC Harris J."

Determination

41. I have no doubt in my mind that this Court is reposed with discretionary power to set aside an ex parte Judgment plus all consequential proceedings, orders and/or Decrees. Further, in my mind, I entertain no doubt that although this Court is reposed with the unfettered discretionary power, the said power should be deployed in the direction of avoiding injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not in the direction of aiding a litigant who deliberately sought to obstruct or delay the course of justice. The fundamental precept laid in *the Constitution*, under Article 50 read with Article 159(2)(d) thereof, is that Courts are enjoined to serve substantive justice to all the parties. It should be borne in mind, therefore, that the precepts enshrined in Article 159(2)(d) of *the Constitution* of Kenya and the overriding objective of the civil procedure now housed in section 1A of the *Civil Procedure Act* apply to all the litigants both as a shield and as a sword.

42. My exposition of the law on setting aside ex parte or interlocutory Judgments is that first, the power to do so is discretionary in nature. Second, hearing of a suit on merit is the norm, hearing ex parte the exception. Administration of justice requires that the substance of all disputes be heard and decided on merit and this reverence, inadvertence, accidents, errors, mistakes, and lapses are excusable and cannot be permitted to oust this avowed principle. In this light, to deny a litigant a hearing should be the last resort of any Court driven by necessity. In this regard, if the ex parte or interlocutory Judgment was entered irregularly, then the Applicant is entitled to an order of setting aside the said Judgment ex debito justititiae, in which event the Court is stripped of discretion to consider otherwise. However, in the event the ex parte or interlocutory Judgment was entered regularly, the Court reserves the discretion to consider whether or not to set it aside if for example the non-attendance was occasioned by inadvertence or accident or error or mistake or lapse which is excusable. Third, a Court of law should train its eye on substantive justice over undue technicalities. Fourth, even where an Application is brought under provisions which may not support the Application and where there are no express provisions applicable to the situation at hand, the ends of justice demands that a Court makes such orders in exercise of its inherent powers to meet the ends of justice. Fifth, the main concern of this discretionary power is to do justice which includes but not limited to considering the magnitude of delay occasioned and its possible effect in relation to witnesses and whether the justice to the case requires that the case be re-opened and heard on merits. In this sense, while the Court should exercise it discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, the discretion should not be deployed if it would amount to assisting a person who has deliberately sought to obstruct or delay the course of justice. Sixth, if the only prejudice is that which can be compensated by costs, that should be the justice of the case. Seventh, the reason for failure to attend should be considered too. If found to be excusable mistake, error, inadvertence, or lapse, it should so be excused. Eighth, but where an Applicant was accorded an ample opportunity to defend himself but failed to do so deliberately, the justice of the case requires that the case not to be re-opened.

43. Do circumstances in this case entitle the 2nd Defendant/Applicant to an order of setting aside the Judgment dated 23rd November 2023? In line with the design enunciated in in the Ongom case (supra) that before setting aside an interlocutory decision or proceedings, a Court must be satisfied about one of the two things namely that either that the Defendant was not properly served or if the Defendant was

properly served, if there is a sufficient cause which prevented the Defendant from entering appearance and filing a Defence or attending the hearing hereof.

44. Therefore, in order to answer this question abundantly, I will first seek to establish whether the Applicant was on notice of the proceedings that led to the said Judgment. In this regard, the burden rests on the party which affirms, the Respondent in this case.

45. What was initially disputed in the Motion and the Affidavit in support thereof is that the Memorandum to Enter Appearance and a copy of the Plaint were not served upon the Applicant. However, the applicant made a U-turn in paragraph 5 of the Further Affidavit by admitting that indeed a copy of the Plaint and Summons to Enter Appearance were served "upon one of the 2nd Defendants staff members and the same was thereafter forwarded to the true owners of Motor Vehicle Insurance company together with instructions to pursue the claim on 22nd July 2022, i.e Kenindia Insurance Company which had insured the true owners motor vehicle."

46. In the circumstances, the personal mode of service asserted by the Respondent is thus found unshaken by the Applicant.

47. It is on the foregoing basis that this Court reaches a conclusion that that the Applicant was on notice.

48. This Court now makes a step further by interrogating whether there is a sufficient cause which prevented the Applicant from attending the hearing hereof. In this regard, the Applicant merely lamented that it "forwarded to the true owners of Motor Vehicle Insurance company together with instructions to pursue the claim on 22nd July 2022, i.e Kenindia Insurance Company which had insured the true owners motor vehicle." In other words, after forwarding, the applicant leaned back knowing so well that there is a suit in court in which it is named a 2nd Defendant. This attitude is nonchalant to say the least, and it bears uncanny resemblance with the attitude of the applicant in Mbogo and another vs. Shah (1968) 1 EA 93. This court thus reaches a conclusion that this explanation has failed to surmount the test of sufficient cause.

49. Which propels this Court to the second logical step. Whenever an ex parte Judgment is found to be regular, the grant of an order to set aside the Judgment will be dependent on the discretionary power of the Court (of course dictated by the principles of exercise of discretionary power) swayed by inter alia the nature of the subject matter, honesty, justice, full and frank disclosure and of course the doctrines of equity. In this connection, whenever an ex parte Judgment is found to be regular, in exercise of its discretionary power, a Court can only set aside it aside under the circumstances which were enunciated in the Court of Appeal decision namely James Kanyiita Nderitu And Another vs. Marios Philotas Ghikas and Another [2016] eKLR, which are as follows: "(a) Reason for failure of the Defendant to file his Memorandum of Appearance or defence; (b) The length of time that has elapsed since the default judgment was entered; (c) Whether the intended Defence raises triable issues; (d) The respective prejudice each party is likely to suffer; and (e) Whether, in the whole, it is in the interests of justice to set aside the default judgment."

50. What are some of the specific subject matters which can tilt exercise of the discretionary power in cases where the ex parte Judgment is found regular? The notable cases are those involving sensitive matters like land and fraud. In Re Solomon M'irura Mathiu [2012] eKLR, where J.A. Makau, J. rendered himself as follows: "I have taken into consideration that the subject matter of the suit is land which is very sensitive and in most cases the only source of livelihood for most of the people especially in rural areas. The rural lands is what most of the people call home and go to after all hope is lost and have nowhere else to go. Our Constitution is very clear that, in so far as possible, that justice be administered without undue regard to procedural technicalities (See Article 159(2) (d) of

the Constitution of Kenya,2010. *The Constitution* is against depriving any party his/her property or any interest in or right over any property arbitrarily. Everyone has a right to have any dispute resolved by Application of law in a fair trial. I have noted the Applicant's intended suit is predicated on allegation of fraud. The delay since discovery of fraud in 2000 is not inordinate and the reason for delay have been explained. I do not find that it would be in the interest of justice to shut the Applicant out of the corridors of justice especially in a claim for recovery of land. It is imperative that the Applicant be allowed to ventilate his case by establishing or otherwise the allegation of fraud against the intended Respondent by allowing the matter to be heard and determined on merits." Similarly, in Philip Kimutai Langat P/A Kiplangat Maina vs. Job Kibet Maina [2007] eKLR, the same precautionary principle was invoked and L. Kimaru, J. reasoned as follows: "However, I have taken into consideration that the subject matter of the suit is land. The Court of Appeal has directed Courts to hear and determine matters dealing with disputes involving land, in so far as possible, on its merits and not on technicalities. In the present case, the fact that the Plaintiff did not plead the time which he discovered the fraud is not fatal to his case. He can plead such a time after amending his pleadings. As earlier stated in this ruling, the Plaintiff's suit is predicated on allegations of fraud. It is imperative that the Plaintiff be allowed to ventilate his case by establishing or otherwise the allegations of fraud against the Defendant. In the circumstances of this case therefore, I hold that the preliminary objection lacks merit and is hereby dismissed with costs. Although the Plaintiff's suit is for the recovery of land, the substance of the suit is the allegations of fraud raised by the Plaintiff. Those allegations should be heard and determined on merits."

51. Having considered first, the nature of this subject matter which does not fall with the exceptional matters afore-discussed; and second, taking into account the fact the Applicant was less than candid in the grounds set out in the Motion regarding the question whether it was served and used the material non-disclosure to secure ex parte orders undeservedly; and third, considering that a party or Advocate is enjoined by section 1A and 1B of the *Civil Procedure Act* to assist the Court in expeditious, just, proportionate and affordable determination of this matter, the Applicant is found guilty of not only inordinate delay but also actuated by mala fides, and this Court is thus unpersuaded that the Applicant deserves exercise of its discretion in his favour. Again, the conduct of the applicant mimics the circumstances the High Court and Court of Appeal encountered in Mbogo and another vs. Shah [1968] 1 EA 93. The hallowed discretionary power of this Court cannot, in the undesirable circumstances of this Application, avail to the Applicant who evidently squandered an opportunity to defend itself, failed its obligation under sections 1A & 1B of the CPA and who deliberately delayed the course of justice.

(ii) Which party should shoulder the costs of this Application?

52. The law on costs as I discern it is that first, an award of costs and interest is discretionary. Second, save where costs and interest are compromised, the Court retains the discretion thereon. See Morgan Air Cargo Ltd vs. Everest Enterprises Ltd (2014) eKLR, Gikonyo, J. Third, even where a suit has been compromised without including costs and interest in the compromise, the discretion of the Court aforesaid remains unscathed. See Rose Kaume & Another vs. Stephen Gitonga Mbaabu & Another [2016] eKLR, per C. Kariuki, J. How then is this discretion exercised? Discretion is not the same thing as carte blanche. Beacons demarcating how discretion is exercised are as follows.

53. In this Application, this Court has found no good cause to depart from the general proposition of the law that costs should follow the event.

Part vi: Disposition

54. Wherefore this Court finds the Application without merit and dismisses it with costs to the Respondent.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 2ND DAY OF MAY, 2024

.....

C.N. Ondieki

Principal Magistrate

Advocate for the Plaintiff/Respondent:.....

Advocate for the 1st and 3{{^rd}Defendants:.....

Advocate for the 2nd Defendant/Applicant:.....

Court Assistant:.....