



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI COUNTY

COURT NAME: MIGORI HIGH COURT

CASE NUMBER: HCCA/E073/2023

JAMES OMBUI OPORE AND PETER OCHUNGO
OMALA VS

JUDGMENT

An interlocutory judgment was entered against the Appellant herein on the 21/11/2022 for the sum of Ksh. Two Million One hundred and ninety-six thousand, three hundred and Seventy Shillings((Kshs.2,061,070) plus costs and interests to the plaintiff.

The Appellant by a Notice Motion application dated 5th April 2023 sought that the exparte judgment be set aside and that he be granted leave to defend the suit. The application was premised on the grounds that the Appellant was never served with summons to enter appearance and the draft statement of defense raised arguable issues.

3. The trial court in its ruling dated 13/06/2023 allowed the application and set aside the ex parte judgment on condition that the Appellant pay throw away costs of Kshs. 30,000/= to the Respondent within 30 days from the date of the said ruling, failure of which the orders would lapse and the judgment reinstated.

4. The Appellant was supposed to deposit the thrown away costs by 13th July 2023 but had not done so until on 25th July 2023 when his Advocate send an email for collection of cheque to the Respondent's counsel. The said cheque was acknowledged as having been received by the Respondent's Counsel but upon the same being deposited it was misplaced in the bank and was therefore not processed as expected.

5. On the 12/8/2023 the Respondent's counsel informed the Appellant's counsel that they misplaced the cheque at the bank and that the cheque should be cancelled so that a new one is issued.

6. The Appellant later filed an application dated 5/9/2023 under certificate of urgency seeking that the period granted for paying the throw away costs of Ksh 30,000/= be enlarged to enable the Appellant defend the suit.



8. Upon consideration of the application the court dismissed the application in a ruling dated 24/10/23 in which it was stated that the Appellant never complied with the conditions of the ruling of 13/6/23 and the application was automatically dismissed.

9. Being aggrieved by the ruling of the Trial Magistrate the Appellant lodged the appeal herein vide Memorandum of Appeal dated 30th October 2022 on the following grounds:



- i. That the learned magistrate erred in law and fact in failing to consider the explanation provided by the appellant in relation to delay in payment of the throwaway costs
- ii. That the learned magistrate erred in law by exerting his discretion in capricious manner to the detriment and prejudice to the appellant
- iii. That the learned magistrate erred in law and in fact by failing to consider and appreciate the rules of natural justice and applicable principles in dealing with the application dated 5/9/2023.
- iv. That the learned magistrate erred in law and fact by denying the appellant the fundamental right to be heard.
- v. That the learned magistrate erred in fact in failing to consider that the respondent's advocate had received the cheque in payment of throwaway costs only for the same to get lost in the hands of their bank.
- vi. That the learned magistrate erred in law and fact by failing to find that the prejudice the respondent suffered or is likely to suffer could be compensated by way of payment of costs.
- vii. That the learned trial magistrate erred in law and fact in finding that the delay in payment of throwaway costs was solely occasioned by the Appellant.
- viii. That the trial magistrate erred in law and fact in failing to find that the delay in payment of throwaway costs occasioned by both parties outweighed the respondent's fundamental right to be heard.
- ix. That the learned trial magistrate erred in law and fact in failing to find that the matter ought to have been determined on merits on hearing of both parties.
- x. That trial magistrate's decision albeit discretionary one was plainly wrong. REASONS WHEREOF the Appellant prays that:

- (a). The appeal be allowed in its entirety
- (b). The ruling delivered on 24th October 2023 by C.N. Ndegwa SPM vide Migori CMCC No 103 of 2022 be set aside
- (c). The application dated 5th September 2023 seeking to extend time within which to pay throw away costs be allowed with costs.
- (d). That the court orders that the ex-parte judgement and proceedings in Migori CMCC No. 103 of 2022 be set aside and the matter to start de novo.
- (e). that costs of the appeal be borne by the Respondent.

12. The court gave directions for hearing of the appeal by way of written submissions.

The Appellant filed submissions dated 13th February 2024 and submitted that a cheque was forwarded to the Respondent's counsel however it was misplaced by their bank and a request was made for cancellation of the cheque and that a new cheque be issued.

14. That since issuance of a new cheque would take time as both advocate bank and the defendant's insurer bank were to agree to have the cheque cancelled so that a new cheque be issued the Appellant submitted that they filed an application requesting that the ruling dated 13/6/2023 be varied and time enlarged or extended so that they could prepare a new cheque of Ksh .30,000/= in favour of the plaintiff within 30 days.

15. The Appellant submitted that the failure to comply with the ruling dated



13/6/2023 was not their fault as a cheque had already been issued and collected by the Respondent's counsel and it was unfortunately misplaced in the bank.

The Respondent in the submissions dated 21st March 2025 submitted that the Appellant is primarily seeking for enlargement of time to pay throw away costs and for the initial suit in Migori CMCC No. 103 of 2022 to start de novo and yet he had not complied with the orders issued on 13th June 2023 to deposit throw away costs within 30 days. It was further submitted that the impugned cheque was only issued on 25th July 2023 outside the stipulated timeframe and the Appellant had not tendered any explanation as to the delay in complying with the Orders of 13th June 2023 within the strict time



frames set by the Trial Court.

9. The Respondent argued further that when the cheque that had been issued out of time got lost at the bank, the Appellant's Counsels on record were promptly informed to cancel the same and re-issue another one. However, the Appellant has never attempted to cancel the previous cheque and re-issue another one as advised in the email dated 12th August 2023.

10. That the Appellant has not made any precipitate efforts to advise whether the previous cheque was cancelled and another one ready to issue if this Honorable Court allows their subject motion as advised in their email dated 12th August 2023.

11. That the Appellant has also not presented any document to show that a cheque for throw away costs has been drawn in favour of the Respondent to persuade this Honourable Court that they are desirous of being granted the orders sought herein.

12. It was argued that expeditious disposal of cases is a constitutional mandate of this Honorable Court and The Appellant has been caught by laches and as a successful litigant the Respondent ought to be given the opportunity to enjoy the fruits of his judgment.

13. The Respondent contended that the explanation tendered by the Appellant on the failure to comply with the payment of throw away costs within the stipulated time frame does not explain the delay in failing to comply with the orders of 13th June 2023 within the strict timelines.

14. In support of his position the Respondent cited the holding in Nicholas Kiptoo Arap Salat v. Independent Electoral and Boundaries Commission & Ors. (2014) eKLR which gave guidelines on 'the underlying principles that a court should consider in exercise of the discretion to extend time' as follows:

"This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

The Respondent submitted that the Appellant is not a deserving litigant as he has not presented any explanation for the delay in complying with the orders of the Court before the lapse of the 30 days from 13th June 2023 and he has no cogent reason for the total failure to comply within the strict set timelines. It was argued that allowing this Appeal would be prejudicial to the Respondent who is not only a successful litigant but also a litigant who obtained a regular judgment against the Appellant. The Indolence of the Appellant should not



unjustly affect the success of the Respondent in the premise. Analysis and determination:

Since this is the first appeal, this court is enjoined by the provisions of section 78 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) to evaluate and examine the trial court's record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 where the Court



of Appeal outlined the duties of a first appellate court as follows:
[An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect

17. From the grounds of appeal, Records of appeal and submissions rendered herein above the following issues have emerged for determination;

i. Whether the explanation provided by the Appellant in relation to delay in payment of the throwaway costs was considered by the Trial Magistrate.

ii. Whether the learned magistrate exerted his discretion judiciously in refusing to grant orders to enlarge time for payment of throw away costs

iii. Whether the learned magistrate considered and appreciated the rules of natural justice and applicable principles in dealing with the application dated 5/9/2023 and whether the Appellant was accorded the fundamental right to be heard.

iv. Whether grant of orders sought could have occasioned prejudice that could not be compensated by way of payment of costs.

Whether the explanation provided by the Appellant in relation to delay in payment of the throwaway costs was considered by the Trial Magistrate, the ruling of the trial Magistrate did not consider that the Appellant had already forwarded the cheque and that it was the Respondent's bank which misplaced it' It was therefore unjustified to subject the Appellant to the mistake made by the Respondent's bank. The delay of about 13 or so days to forward the cheque to the Respondent was not in the opinion of this court inordinate considering that it had been accepted and misplaced by the Respondent's bank. This court therefore finds that the Learned Magistrate exerted his discretion injudiciously in refusing to grant orders to enlarge time for payment of throw away in the circumstances of this case.

In the ruling dated 13th June 2023 the application dated 5th April 2022 seeking to set aside ex-parte judgement was allowed on condition that the Appellant was to pay throwaway costs to the Respondent. It is instructive to note that the Appellant had shown that he had a defense with triable issues that warranted him to be given audience in court. Failure to comply with order to pay throwaway costs cannot be a reason to deny the Appellant the opportunity to ventilate his defense in court. This court therefore finds that the Learned Magistrate failed to consider and appreciate that the Appellant was entitled to be heard in pursuit of the rules of natural justice.

The Appellant had already forwarded the cheque for throwaway costs though with a little delay and the Respondent had deposited it with his bank which in turn misplaced it and it is admitted that that information was passed to the Appellant vide email dated 12th August 2023. In consideration of the decretal sums involved the delay of 13 days and the misplacement of the cheque in the hands of the Respondent's bank warranted the grant of the orders prayed for and the same could not have occasioned prejudice that could not be compensated by way of payment of costs



29. In consideration of the finding that the Trial Magistrate dwelt on procedural technicalities rather than considering merit of the application this court finds that the appeal has merit and the same is allowed on condition that the Appellant deposits a bank guarantee for the entire decretal sums together with the throw away costs within 30 days. The ex-parte judgement is set aside for expeditious inter-parte hearing before Hon. Okuche SPM. Mention on 6th November 2025 in the Magistrates Court for directions.
DATED, SIGNED, AND DELIVERED AT MIGORI THIS 23rd DAY OF OCTOBER, 2025.



SIGNED BY/FOR:
HON. LADY JUSTICE ANNE ONG'INJO



THE JUDICIARY OF KENYA.
MIGORI HIGH COURT
HIGH COURT DIV
DATE: 2025-11-05 15:46:16

