**Sunday Publishers LImited & another v Nairobi City County (Civil Suit E172 of 2020) [2025] KEHC 14919 (KLR) (Civ) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14919 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT E172 OF 2020**

**JN MULWA, J**

**OCTOBER 23, 2025**

**BETWEEN**

**THE SUNDAY PUBLISHERS LIMITED ..... 1ST PLAINTIFF**

**MELSAV COMPANY LIMITED ..... 2ND PLAINTIFF**

**AND**

**NAIROBI CITY COUNTY ..... DEFENDANT**

**RULING**

1. Before the Court for determination is the motion dated 16/12/2024 filed by Nairobi City County (hereafter the Defendant/Applicant) against The Sunday Publishers Ltd and Melsav Company Ltd (hereafter 1st & 2nd Plaintiff/Respondent) and premised on Section 1A, 1B, 3 & 3A of the *Civil Procedure Act* (CPA), Order 42 Rule 6 and Order 51 Rule 1 & 15 of the Civil Procedure Rules (CPR). The Applicant seeks orders inter alia:

    i. Spent.

    ii. Spent.

    iii. That this honorable Court be pleased to set aside judgment delivered on 08/11/2024 together with all consequential orders.

    iv. That this Court be pleased to grant leave to the Defendant/Applicant to re-open the hearing of its case.

    v. That the costs of the motion be provided for.

2. The motion is premised on grounds at the supporting affidavit of even date sworn by S. W. Ogolla, an employee of the Defendant in its solicitors office. The kernel of his deposition is that the suit was

slated for hearing on 12/03/2024 however the same did not proceed and was thereafter allocated a fresh hearing date which notice was not served upon the Defendant; and that sometime in November of 2024, counsel handling the matter inquired on the status of the matter at the Court registry and was informed that the matter proceeded ex parte on 27/06/2024 with judgment being rendered on 08/11/2024. He maintains that the Defendant never received a hearing notice to enable them to attend the hearing of the suit.

3. The Applicant further depones that later, counsel handling the matter, came upon the hearing notice in the spam folder email whereas the Defendant had at all times been present in the matter and was ready to defend the suit, save for the aforestated technical mishap occasioned upon the Defendant. He goes on to depose that the said error ought not to be visited upon the client whereas on accord of the aforestated error the Defendant was condemned unheard.

4. Additionally, the Defendant posits that being a public institution derives revenue from the public thus it is only fair that it be accorded a chance to defend the suit as the judgment sum will be visited upon taxpayers and by extension residents of Nairobi County. He further deposes that there has been no undue delay in filing the motion whereas the Defendant will suffer irreparable loss and damage if the orders sought are declined. In conclusion he states that it is in the interest of justice and fairness that the motion is granted as sought.

5. The Sunday Publishers Ltd and Melsav Company Ltd (hereafter 1st & 2nd Plaintiffs/Respondents) oppose the motion by way of a replying affidavit sworn on 06/03/2025 by Ayub Savula Angatia an employee of the 2nd Respondent. He takes issue with the fact that the Defendant was at all material times aware of the fresh hearing date, on accord of counsel's knowledge of the proceedings of 12/03/2024, having attended Court. He further takes issue with the Defendant's counsel explanation that the subsequent hearing notice was erroneously spammed on email, yet on 12/03/2024 neither the Defendant and or counsel attended to the matter for hearing despite the date being taken by consent whereas the suit was set down for hearing pursuant to the Rapid Initiative Result (RRI) with directions on the hearing of 27/06/2024 being published on CTS.

6. He goes on to state that the said hearing date was served upon the Defendant through their official email address that they have been communicating from since inception of the matter. That despite the forestated, the Court duly issued notice to the parties upon setting down the matter for hearing meanwhile upon conclusion of the matter the Court further issued a mention notice as well as a judgment notice. He states that, notwithstanding the forestated, his counsel duly served upon the Defendant, the mention notice for 16/07/2024 and their submissions prior to the judgment date, to wit, it was only after judgment that the Defendant moved this Court.

7. The Respondents conclude by stating that the motion is frivolous, a waste of judicial resources and an attempt to deny the Plaintiffs from enjoying the fruits of successful litigation therefore the motion ought to be dismissed with costs.

8. Directions were taken on disposal of the motion by way of written submissions. Only the Plaintiff complied. That said, having duly considered the rival material and submissions on record, this Court postulates that the issues for determination concern-:

    a. Whether this Court ought to set aside the judgment of this Court rendered on 08.11.2024 and re-open the case for hearing and disposal?

    b. Who ought to bear the costs of the motion?

9. Events leading up to the instant motion have in part been captured by the respective rival affidavit material. Saliently, the Defendant's motion invokes inter alia Section 3A of the CPA, which specifically

reserves “the inherent power of the court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court”. That forestated provision was judiciously addressed by the Court of Appeal in Rose Njoki Kingau & another v Shaba Trustees Limited & another [2010] KECA 87 (KLR) and requires no restatement.

10. While the discretion of the Court to set aside its order or a judgment is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court’s discretion in their favor. In the case of Shah v Mbogo & Anor [1967] E.A 116 the rationale for the widen discretion was spelt out as follows: -

> “ The discretion to set aside an ex-part judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

11. The principles enunciated in Shah v Mbogo (supra) were amplified further by Platt JA in Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside ex parte judgments, the principles pronounced therein would apply in equal degree, in this matter, in light of the fact that the judgment rendered on 08/11/2024 conclusively determined the Plaintiffs suit.

12. At this juncture, to contextualize whether I ought to exercise my discretion in respect of the Defendant’s motion, it would be apt to revisit the history of this matter, which is well documented from the record before this Court. The suit was filed in 2020 whereafter the Defendant filed a defence to the Plaintiffs the claim. The earliest attempts at prosecution of the suit by the Plaintiff since its filing was on 27/06/2022 however, it would seem that on the said date the matter did not take off. The matter was thereafter fixed ex parte by the Plaintiff for hearing on 30/05/2023 and likewise on the said date the suit did not proceed to hearing and was rescheduled to 19/09/2023. Once again the hearing of the suit did not take off, as the suit was adjourned at the behest of the Defendant. The court issued directions and slated the matter for hearing by consent of the parties on 12/03/2024.

13. As rightly deposed by the Plaintiffs, on the hearing date 12/3/2024, the Defendant and its counsel were not in attendance however the matter was adjourned by this Court for reasons that were duly communicated to counsel for the Plaintiffs’, who was in attendance. Nevertheless, the Court rescheduled the suit for hearing on 17/09/2024. Prior to the latter date, the suit was identified for disposal under the Judiciary’s RRI and slated for hearing on 27/06/2024, which hearing proceeded exparte in absence of the Defendant counsel resulting in the judgment being rendered on 08/11/2024, and thereafter the instant motion to set aside the said judgment.

14. The Plaintiffs have assailed the Defendant’s explanation -;

> firstly, despite at the outset setting down the matter for hearing by consent on 12/03/2024 neither the Defendant nor its counsel bothered to attend to the matter on the said date or follow up as to what transpired thereafter; secondly, the Defendant was duly notified of the hearing date of 27/06/2024 by both the Court & Plaintiffs’ counsel; and thirdly the defendant was served with a mention notice to confirm filing of submissions yet it failed to attend to the matter in both instances.

15. The Defendant’s riposte was that there was non-service of any directions of the Court whereas the hearing notice served by the Plaintiff was inadvertently sent the spam folder in the Defendant’s email address therefore the latter was condemned unheard.

16. With the above in reserve, while this Court appreciates the frailties of technology and the hitches that come with the same, if may be plausible that the Defendant did not receive the hearing notice from the Plaintiffs' as the same was received and or send to its counsel's email spam folder. The Court appreciates that the latter does occur on rare occasions whereas it is nigh impossible to verify such an omission. Secondly a review of the record before this Court as juxtaposed alongside the Plaintiffs' response, it would seem that upon the suit being identified for RRI, a notice dated 13/05/2024 and 17/05/2024 were issued by this Court to the respective advocates on record, with the former notifying the parties that the matter was scheduled for hearing on 27/06/2024.

17. By the Plaintiffs affidavit material, (Annexure AS-2) the notice dated 17/05/2024 seems to have been duly served upon the Plaintiffs advocate however there is no indication from the record before me that the same was duly served upon the Defendant. An inadvertent omission and or oversight by this Court registry? Probably yes.

18. As such, notwithstanding the Defendant's advocate failure to follow up on the matter since the latter hearing date of 12/03/2024, taken by consent, it would seem that there was no way the Defendant would have known or knew about the hearing of 27/06/2024 save for the Plaintiff's hearing notice served upon the Defendant's counsel on 24/06/2024 (Annexure AS-1), of which, it purports was inadvertently received in the spam folder. Curiously, the Defendant does not address the mention notice for 18/07/2024 on submissions (Annexure AS-3), whether it was equally received and spammed, of which seems to have been duly served upon on it by the Plaintiffs' counsel.

19. It necessitates remainder, as earlier observed, setting aside an ex parte judgment involves exercise of discretion of which is "intended to avoid injustice or hardship resulting from accident, inadvertency or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice." Here, despite the notice of 18/07/2024 and the judgment rendered on 08/11/2024, in the absence of the Defendant or its counsel, admittedly the latter acquiesces to knowledge of the judgment in November and only proceeded to inquire about the matter and or file a Notice of Appeal as against the judgment on 13/12/2024 (Annexure OW-2). Meanwhile, the Defendant proceeded to lodge the instant motion on 17/12/2024, with no no explanation offered for the cumulative delays identified above.

20. It is trite that a party seeking to set aside an order and or reinstate a suit must not be seen to presume on the Court's discretion. Good and sufficient cause is what would unlock the said discretion as Makhandia JA in Patrick Wanyonyi Khaemba v Teachers Service Commission, Board of Management, Kapletingi Mixed Day Secondary School & Francis Tanui [2019] KECA 112 (KLR), exhorted that-;

> " The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained; hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable....."

21. While it is not in dispute that the delay has been insufficiently explained by the Defendant, the same does not appear to be so inordinate. Obviously, from the above set of facts there seems to have been some lethargy on the part of the Defendant in actively keeping abreast of the matter whereas it maybe in all probability be that it was not notified of the hearing on 27/06/2024 and or received the hearing notice served by the Plaintiffs' counsel. That said, by the resultant judgment of this Court on the backdrop of ex parte proceedings, the Defendant was condemned unheard.

22. Despite the above, under the provisions of Section 1A and 1B of the CPA, parties and counsel are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate

the just, expeditious, proportionate, and affordable resolution of disputes. It is equally not lost on the Court that the right of the Defendant to be heard on the merits of his defence is a constitutional right that ought to be safe guarded as much as possible. Corollary to that, however, is the Plaintiffs right to have its suit determined expeditiously. See: - Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR.

23. While I agree with the Defendant that the resultant judgment appertains a colossal amount against a public entity, it is true that taxpayer coffers will have to offset the said award. Importantly, that is not to disregard and or an excuse to deny the Plaintiffs from enjoying their fruits of successful litigation. In any event, the prejudice occasioned to the Plaintiffs by an order of setting aside this Court's judgment can be compensated by an order of costs.

24. Apaloo, J.A. (as he then was) famously stated in Phillip Kiptoo Chemwolo and & Anor. v Augustine Kubede (1986) eKLR that;

> "I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline...."

25. In view of all the foregoing, the Court is inclined to hesitantly allow the Defendant's motion dated 16/12/2024 on condition that that the Defendant compensate the Plaintiffs by payment to the Plaintiff throwaway costs of Kshs. 30,000/- as well as costs of the instant motion in any event.

26. The case shall be listed for directions on 12/11/2025. The parties are hereby duly notified.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 23RD DAY OF OCTOBER 2025.**

**JANET MULWA**

**JUDGE**