

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. E120 OF 2025

ANDREW KITUYI WAFULA

T/A THE ROSSYLAND HOTEL.....APPELLANT

VERSUS

FAMILY BANK LIMITED.....RESPONDENT

RULING

BACKGROUND

1. On 27.10.2025, the Appellant’s notice of motion dated 22.10.2025 came up for directions on the mode of canvassing it and I then directed that it be argued orally on the same day as it had been cause-listed as a hearing of the application.
2. Mr Mua Wambua for the Appellant then prosecuted the application in the absence of the Respondent’s advocates, who according to an affidavit of service sworn by one Raphael Wambua Kigamwa, had been duly served via their email address infor@ashitivaadvocates.com on 23.10.2025 at 1641 hours. I then reserved the ruling for 28.10.2025 and on that date I duly delivered the same in the presence of Mr Mua Wambua the Appellant and Mr Erick Mugo for the Respondent.
3. Immediately after the delivery of the said ruling, allowing the Appellant’s said application, Mr Erick Mugo lamented that no notice of hearing nor mention had been served upon them. I then directed Mr Erick Mugo to move the court in the manner that the Respondent deems fit.

4. On 29.10.2025 the respondent filed a notice of motion of even date supported by an affidavit of Wambani Sylvia Deya, It's legal manager. The Respondent craves for the following orders: -
 - i. The Honourable court be pleased to set aside the Ruling and consequential orders issued on the 28th of October 2025 and re-fix the application dated 22.10.2025 for hearing.
 - ii. In alternative to prayer 1, this Honourable court be pleased to review the ruling delivered on 28th October 2025 by considering the Replying Affidavit dated 24th October 2025 and filed on 27th October 2025 which was within the timelines issued by Lady Justice Rose Ougo.
 - iii. The costs of this application be provided for.
5. The gist of this application is that the Respondent whereas the Respondent had been served with the directions made by Justice Rose Ougo on 23.10.2025; the said directions did not give a date for either a mention for compliance nor a hearing but only directed the respondent to file it's response by 27.10.2025 and that the respondent duly complied within the given timelines but was shocked to establish from the CTS that the Appellants' application had been cause-listed for hearing on 27.10.2025 yet no hearing notice was ever served upon it.
6. The Appellant has resisted this application vide a replying affidavit sworn by Andrew Kituyi Wafula on 29.10.2025. It is the Appellant's reply that the Appellant was alive to the fact that his application was coming up before me on 27.10.2025 but opted not to attend court wherefore it is estopped from claiming that it was not accorded a fair hearing. The Appellant has

also alluded to matters that formed the basis of his application dated 22.10.2025 and I would not therefore dwell on the same.

7. This application was canvassed by way of oral submissions with each party's advocate aligning himself to the facts deposed to in their respective client's affidavit.
8. I have duly considered the application herein, the affidavit in support thereof and in response thereto and the oral submissions of parties. Further, I have considered the authorities cited in support and in opposition of the application and the sole issue that emerges for determination herein is whether the applicant has met the threshold for setting aside my ruling as delivered herein on 28th October 2025.
9. The Operative Order 51 Rule 15 of the Civil Procedure Rules vests in the court, the power to set aside orders made ex-parte.
10. This court has unfettered discretion to vacate ex-parte orders on terms that are just. This discretion must be exercised judiciously based on sufficient cause and not capriciously.
11. The classical case of *Shah vs Mbogo* (1967) E. A set out the principles to be considered in a setting aside application; that the court's discretion in setting aside an ex-parte order is geared towards avoidance of injustice or hardship emanating from an accident, inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice.
12. In the present scenario, the court that issued directions at the ex-parte stage on 23.10.2025 to the Appellant's notice of mention dated 22.10.2025 omitted to give a date for either a mention or a hearing but went ahead

and updated the CTS with a hearing date for the said application before me on 27.10.2025.

13. This omission by the court, in the first instance is what has in the outcomes that are the subject of this application. It is factual therefore that the directions sent to the Respondent's counsel did not bear a mention nor a hearing date of the 27.10.2025. This is thus an error apparent on the face of the record.

14. Given the above finding, I will not dwell on any other matters save to hold that the Respondent has demonstrated sufficient cause to warrant the setting aside of the orders made on 28.10.2025. I thus find that this application is well merited and I allow it and make the following orders.

- 1) The orders made on 28.10.2025 are hereby set aside.
- 2) The Appellant's notice of motion dated 22.10.2025 shall be re-fixed for hearing de novo.
- 3) An order of interim injunction is hereby granted in terms of prayer No... of the appellant's said application until the same is heard and determined.
- 4) Each party shall bear its own costs of this application by the Respondents.

Dated and delivered at Bungoma this 6th day of November 2025

M.S. SHARIFF

JUDGE