Silakho v BM (Suing through next friend & father DSM) (Civil Appeal E096 of 2024) [2026] KEHC 3115 (KLR) (5 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3115 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E096 OF 2024

REA OUGO, J

MARCH 5, 2026

BETWEEN

GODFREY SILAKHO ..... APPELLANT

AND

BM (SUING THROUGH NEXT FRIEND & FATHER DSM) ..... RESPONDENT

(Being an appeal from the ruling and order of Hon. R.B.N Maloba SPM delivered on the 30/5/2024 in Bungoma CMCC No. 267 of 2020)

JUDGMENT

1. The respondent obtained a default judgment against the appellant on 21/10/2020; however, the appellant claimed that he had not been served with notice of any proceedings leading up to the said default judgment and only became aware of it when auctioneers sought to execute the court orders.

2. The appellant thus sought to have the default judgment set aside, and by a ruling delivered on 16/11/2023, the trial court set aside the default judgment and granted the appellant leave to file his defence within 7 days and to pay the thrown-away costs of Kshs. 20,000/- within 30 days of the ruling.

3. The 30 days passed without the appellant complying with the court orders of 16/11/2023, and the respondent obtained fresh warrants to attach the appellant's property. The appellant again moved the court via an application dated 19/1/2024, seeking to set aside the default judgment entered on 21/10/2020, stay the execution of the resulting order, and be granted leave to file his defence.

4. The appellant attributed his failure to comply with the orders of 16/11/2023 to his advocate, whom he alleged he had sent the requisite funds to enable him to pay and comply with the court directions but who failed to make the said payments.

5. In its ruling delivered on 30/5/2024, which is the subject of this appeal, the trial court, in dismissing the appellant's application, stated that the appellant could not rely on the mistake of his advocate as a

defence for non-compliance, as he had a duty to ensure that his defence was filed within the time set by the court.

6. Being dissatisfied with the said ruling, the appellant lodged this appeal vide the Memorandum of Appeal dated 12/6/2024 and raised eight (8) grounds of appeal as follows: -

   a. That the trial court erred in law and fact by failing to find that there were sufficient reasons warranting the setting aside of the exparte judgement issued in favour of the respondent.

   b. That the trial court erred in law and in fact by failing to find that the appellant had raised sufficient reasons for failing to comply with the court orders dated 16/11/2021.

   c. That the trial court erred in law by disregarding the appellant's evidence in support that he had exercised all due diligence to ensure that the throw away costs were paid and defence was filed by his advocates on record.

   d. That the trial court erred in law and in fact by finding that it is unclear whether the money sent by the appellant to his advocate was fees or throw away costs.

   e. That the trial court erred in law and fact by failing to find that the defence filed by the appellant raised triable issues which would entitle the court to grant the appellant lave to defend the suit.

   f. That the trial court erred in law and fact by punishing the appellants due to the mistakes of a qualified officer of the court.

   g. That the trial court erred in law and fact by failing to find that injustice would be occasioned on the appellant if the respondent was allowed to proceed with the execution exercise without hearing the appellant's defence.

   h. That the trial court erred in law and fact in arriving at a decision that was wholly against the weight of the evidence and law.

7. The appeal was canvassed by written submissions. The appellant contended that his counsel was at fault for not filing the defence on time, as he had already provided the funds for it. Therefore, the mistake of counsel should not be attributed to the client, as established in the cases of Lee G. Muthoga v Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nair 236 of 2009, Winnie Wambui Kibinge & 2 Others v Match Electricals Limited Civil Case No. 222 of 2010, and Phillip Chemwolo & Another v Augustine Kubede [1982–88] KLR. Article 159 (2) (d) of *the Constitution* stresses the importance of courts prioritising substantive justice over dismissing cases solely based on technicalities. Furthermore, Article 50 (1) affirms a party's right to a fair trial. The appellant argued that he did not neglect his rights but actively monitored the progress of the case with his counsel via WhatsApp messages and phone calls.

8. The respondent argued that the claim the appellant's former advocate failed to pay its costs is baseless, as after becoming aware of the judgment's execution, the appellant chose to file an application instead of settling the costs. The alleged monetary or debt issue between the appellant and his advocate cannot justify filing an application for a stay nor serve as a basis for failing to comply with a court order. If misconduct or a mistake occurred on the part of the advocate, then the proper course is to pursue legal action against the advocate. Article 159 (2) (d) is not a panacea to cover all infringements, as was held in the case of Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR & M'Mwongera Miruri v Nancy Kanugu Mbaya (Legal Administratix of the Estate of Ayub Mbaya Mwongera) [2011] eKLR.

Analysis And Determination

9. As this is a first appeal, the Court is obliged to re-evaluate the evidence from the trial afresh and come to its own independent findings and conclusions but at all times having in mind that it did not have the advantage of seeing the witnesses testify. See Selle & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.

10. I have reviewed the record. It is clear that in the application leading up to the impugned ruling, the appellant requested the trial court to exercise its discretion again to stay the default judgement entered on 21/10/2023 and allow him to file his defence.

11. The record shows that the trial court exercised its discretion in its ruling of 16/11/2023 in favour of the appellant, setting aside the default judgment and allowing him to file his defence conditional upon the payment of thrown-away costs of Kshs. 20,000/-. The appellant attributed his failure to comply with the 16/11/2023 ruling to a mistake by his counsel.

12. It is my view that mistakes made by advocates, even if they are errors, should not be visited upon the clients if the issue can be rectified through costs. In the case of Lucy Bosire v Kehancha Div. Land Dispute Tribunal & 2 Others [2013] eKLR, the court held the following: -

> " It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits."

13. However, not every mistake made by an advocate serves as grounds for setting aside court orders. In Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002, Kimaru J (as he then was) stated: -

> " Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the dismissal."

14. Similarly, in the case of Eldoret Grains Limited v Gilbert Kiptoo Kipkoech & 14 Others (Civil Application 108 of 2019) [2021] KECA 273 (3 December 2021) (Ruling), the Court of Appeal cited with approval the case of Rajesh Rughani v Fifty Investment Ltd & Another (2005) eKLR and held: -

> " It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction that is not excusable mistake which the court may consider with some sympathy."

15. In Bains Construction Co. Ltd v John Mzare Ogowe (2011) eKLR, the Court of Appeal observed: -

> " It is to some extent true to say mistakes of counsel as in the present case should not be visited upon a party but it is equally true when counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences."

16. In the present case, the appellant argued before the trial court and this court that he was a diligent litigant because he regularly checked with his advocate on the progress of his case via WhatsApp messages and phone calls. He also stated that he sent his advocate money to comply with the orders issued on 16/11/2023, but his advocate failed to remit the same.

17. The appellant requested the trial court to exercise its discretion in his favour. The power is discretionary and should be exercised judicially upon demonstrating good cause. Factors to consider include the duration of the delay, the reason for the delay, the extent of prejudice the respondent may suffer, and the principle that justice should be administered without undue regard to procedural technicalities and should not be delayed. (see Njeri Njoroge v Joseph Maina Gichuhi & another [2018] eKLR)

18. Having considered the explanation provided by the appellant, it is my view that the appellant has shown a clear intention to defend himself. The delay in submitting his defence was caused by inadvertence and negligence on the part of counsel. It is a well-established principle that the mistakes of counsel should not be visited upon an innocent litigant who has acted diligently in pursuing his legal remedies.

19. Furthermore, a fundamental principle of natural justice is that no party should be condemned without an opportunity to be heard. All parties appearing before a court of law or quasi-judicial body should be given the chance to present their case and be listened to. Article 50 of *the Constitution* addresses the right to have a dispute fairly resolved by a court or an impartial tribunal.

20. In the circumstances and in the interest of justice, I hereby set aside the ruling of the trial court delivered on 30/5/2024.

21. I hereby order the appellant to file his defence within 14 days of this ruling and to pay the respondent's costs awarded on 21/10/2020 by the close of business on the date of this ruling. Failure to do so will result in his defence being dismissed. Each party to bear its own costs It is so ordered.

DATED, SIGNED AND DELIVERED IN BUNGOMA ON THIS 5TH DAY OF MARCH 2026.

R. OUGO

JUDGE

In the presence of:

Miss Mideva - For the Appellant

Miss Kinyanjui - For the Respondent

Brendah - C/A