Tata Africa Holdings (Kenya) Limited v ACE Africa Limited (Civil Appeal 36 of 2019) [2025] KECA 1032 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KECA 1032 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 36 OF 2019

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

JUNE 5, 2025

BETWEEN

TATA AFRICA HOLDINGS (KENYA) LIMITED ..... APPELLANT

AND

ACE AFRICA LIMITED ..... RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Eldoret (S. M. Githinji, J.) delivered on 22nd October 2018 in HCCC No. 8 of 2018)

JUDGMENT

1. The simple question to be answered in this appeal is whether the trial judge exercised his discretion properly in setting aside the ex parte judgment that had been entered in favour of the appellant.

2. The facts are uncontested and we shall set them out in summary.

   By a plaint dated 25th April 2018, the appellant filed suit against the defendant for a liquidated claim of Kshs. 17,989,855.41 & USD 32,960.00 together with interest at 18% from the date of the invoices until payment in full. The respondent was served with the summons and subsequently entered appearance on 4th May 2018. Upon entering appearance, the respondent was required to file a defence within 14 days. It failed to do so. In the resulting circumstances, the appellant requested for interlocutory judgement on 21st May 2018. On 22nd May 2018, the Deputy Registrar entered interlocutory judgment against the respondent.

3. On 23rd May 2018, one day after the interlocutory judgement was entered, the respondent filed an application seeking a stay of execution, an order to set aside the ex parte judgment, leave to file the defence out of time and that the draft defence annexed to its application be deemed as duly filed. The

application was opposed by the appellant. After hearing the application, the learned judge allowed the application in the following terms:

> " In this case the applicant entered appearance in time but just failed to serve. Interlocutory judgment was entered a day after expiry of allowed time to file a defence. The current application was filed a day after. There is a draft defence attached to it. The swiftness in which the proceedings herein have been undertaken by both parties demonstrates enthusiasm in defending or asserting their position in court. The draft defence raises triable issues and the delay can be compensated by way of costs. I for the reasons find the application merited and is granted as prayed."

4. The appellant is dissatisfied with those findings. It filed a notice of appeal dated 23rd November 2018 and a memorandum of appeal dated 6th March 2019. The appellant raised 6 grounds impugning those findings which we have summarized as follows: that the learned judge did not apply the correct law, tests and principles; that the learned judge exercised his discretion whimsically and arbitrarily; that the learned judge erred in holding that the draft defence raised triable issues and that the leaned judge erred in failing to assess the thrown away costs to the appellant.

5. In view of the foregoing, the appellant prayed that the appeal be allowed by setting aside the ruling and order of the trial court and be substituted with an order dismissing the respondent's application dated 23rd May 2018.

6. The appeal was heard virtually on 11th March 2025. Present and representing the appellant was learned counsel Mr. Muma, Advocate and the respondent was represented by Mr. Otieno, Advocate.

7. The appellant relied on its written submissions, list of authorities and case digest, all dated 26th May 2022. Citing a number of authorities, the gist of the submissions was that the learned judge did not exercise his discretion properly. On its part, the respondent relied on its written submissions dated 10th June 2022. There is no dispute as to the applicable principles on the exercise of discretion by a judge in an application for setting aside an ex parte judgment. Therefore, we need not rehash the submissions but we shall refer to them, where necessary.

8. We have carefully considered the parties' written submissions, examined the record of appeal and analyzed the law. The locus classicus decision of Mbogo vs. Shah [1968] EA page 93 succinctly elucidated our role when invited to interfere with the discretionary powers exercised by the trial court:

> I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

9. It is clear that this appeal will succeed or fail on only one issue: whether the learned judge exercised his discretion properly in setting aside the ex parte judgment. As already noted, the facts in this case are not in dispute. The respondent entered appearance on time and was only late by one day in filing its defence. The application for setting aside the ex parte judgment was filed a day after the interlocutory judgment had been entered. The respondent also filed a draft defence annexed to the application. The record shows that the learned judge considered the application and the submissions that were filed by the parties. It was his finding that the delay was not inordinate and that the proposed defence raised triable issues.

10. We have considered of all 6 grounds of appeal. It is clear that they only show that the appellant is dissatisfied with how the judge exercised his discretion. With respect to the appellant, that is not the test, as in an adversarial system, it is normal for one party to be unhappy with a decision. The test is also not whether we would have made a different decision from the judge. The test is now well settled and the path well-trodden. The oft cited case of Mbogo vs. Shah (Supra) has withstood the test of time, that a judge has unfettered discretion to set aside an ex parte judgment, which discretion should be exercised judiciously. As submitted by the respondent, the principles that guide a court on whether to set aside an ex parte judgment or not are also well elaborated in the case of Karatina Garments Ltd vs. Nyanarua (1976) KLR 94 where the Court expressed itself as follows: "We would like to state from the outset that rule 10 of order IX of the Civil Procedure Rules, then in force, gave power to the Court to set aside or vary a judgment given ex parte upon such terms as may be just. The power was discretionary and unqualified."

11. Having considered the record of appeal, the submissions and the authorities cited, we note that the learned judge considered the length of the delay, the reasons given for the delay and that the respondent has annexed a draft defence, which in his view raised triable issues. We are satisfied that the learned judge exercised his discretion properly and we find no reason to interfere with the learned judge's findings.

12. The upshot of our above findings is that the appeal herein lacks merit. It is dismissed with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 5TH DAY OF JUNE 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR