



Narok County Government v Kibiniko Enterprises Ltd (Civil Appeal 10 of 2019) [2023] KECA 1102 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1102 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 10 OF 2019
F SICHALE, FA OCHIENG & WK KORIR, JJA
SEPTEMBER 22, 2023**

BETWEEN

NAROK COUNTY GOVERNMENT APPELLANT

AND

KIBINIKO ENTERPRISES LTD RESPONDENT

(An Appeal from the Judgment of the High Court at Narok (J.M. Bwonwong'a, J.) dated and delivered on 17th May 2018 in HCCC No. 17 of 2014 (As consolidated with HCCC No. 18 of 2017)

JUDGMENT

1. The appellant, the Narok County Government, is dissatisfied with the ruling of J.M. Bwonwonga, J. dated May 17, 2018 in Narok HCCC No 17 of 2014 as consolidated with Narok HCCC No 18 of 2017. In its memorandum of appeal dated March 7, 2019, the appellant raises grounds of appeal that the learned judge: misconstrued section 7 of the Magistrates' Courts Act thereby taking over a dispute that fell within the lower court's jurisdiction; failed to take cognizance that the dispute herein ought to have been the subject of arbitration; did not hear the suit on merits; ignored relevant and pertinent facts of the dispute; erred in making an award of public funds without formal proof and in disregard to the constitutional principles on public finance; and, misapplied the law to the detriment of the appellant.
2. In the ruling dated May 17, 2018, the learned Judge granted prayers 2, 3 and 4 of the appellant's notice of motion dated March 27, 2018. The orders were to the effect that the default judgment entered on March 15, 2018 was discharged on condition that the appellant deposits security of Kshs. 12,177,481.00 in a joint interest earning account with the respondent within 40 days. In default, the discharge orders would lapse.
3. During the hearing of this matter, it came out clearly that the appellant's appeal was limited to the issue of the order to deposit security. Similarly, in our view, this being an interlocutory appeal, it is advisable



that our interrogation be limited to the order directing the deposit of security. Indeed, we observe that should this appeal succeed the other grounds of appeal raise matters that might find their way back before this Court after the hearing of the matter before the High Court on merit.

4. When this matter came up for hearing, Mr. Marete appeared for the appellant while Mr. Onsando was for the respondent, Kibiniko Enterprises Limited. Mr. Marete in his two sets of submissions, which he also highlighted orally, pointed out that the condition imposed by the learned Judge posed an impossible hurdle for the appellant to surmount. Counsel argued that the money involved was public money and the condition imposed curtailed the right of the appellant to have its case heard and determined on merit. To buttress his arguments, counsel relied on the decision of the Supreme Court in *Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others* [2023] KESC 11 (KLR) (hereinafter referred to as the Westmont Holdings case).
5. Mr. Onsando on his part started off by stating that decision in the *Westmont Holdings case* is not applicable as the facts in that case are distinguishable from those of the present appeal. Counsel pointed out that the appellant herein had no justifiable grounds for setting aside the default judgment. Counsel held the view that the condition set by the High Court was not a condition for setting aside the default judgment but was imposed because the appellant had squandered all the opportunities accorded to it to prosecute its case. Counsel further asserted that the appellant did not respond to their application for default judgment therefore the appellant deserved no orders vacating the default judgment. Mr. Onsando therefore urged us to dismiss the appeal with costs.
6. In our view, the question that calls for our determination in this appeal is whether the trial Judge can be faulted for imposing a condition on the order setting aside the default judgment entered against the appellant. The power granted to the courts under order 10 of the *Civil Procedure Rules*, 2010 is discretionary. In *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR, this Court spoke to the discretionary power of the trial court as follows:

“We are fully aware that in an application before a court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate Court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts. This is trite law and there are many decided cases in support of the proposition.”

7. It therefore follows that before we can set aside the condition imposed on the order setting aside the ex parte judgement, we must bear in mind that we can only interfere if it is proved that in its decision, the trial court misdirected itself or that it acted on matters on which it should not have acted upon or that it failed to take into consideration matters which it should have taken into consideration. The question as to whether the setting aside of the ex parte judgment was warranted is not before us. The only issue for our determination is whether the learned Judge exercised his discretion judiciously by imposing a condition precedent to the setting aside of the default judgment.
8. In *CMC Holdings Ltd v James Mumo Nzioki* (supra), the Court observed that in exercising discretion under order 10 of the *Civil Procedure Act*, the court should ensure that a litigant does not suffer an injustice or hardship. In that regard, it was stated that:

“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant



who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.”

9. On the imposition of security for costs before a court can give audience to a party, the Supreme Court in the *Westmont Holdings case* was of the view that:

“Having considered the various legal provisions in Kenya and noting the jurisprudence elsewhere, this is what we make of it: the imposition of security for costs by a court is in itself constitutional; there are no clear guiding principles on what a court considers when making an order for security for costs; at times the amount payable is left to the discretion of the court; in other times, the amount payable is set out in statute or regulations; in other times, although the amount payable is prescribed by legislation or regulation, the court has the discretion of reducing or enhancing the same or even waiving payment of the same; a suit maybe dismissed for non-payment of security for costs; and a dismissed suit may be reinstated upon the appellant or plaintiff showing cause for the non- payment of ordered costs. We are also cognizant of the fact that different courts in our judicial system have crafted their own rules of procedure to govern them including those of security for costs. However, there are no standard guidelines on factors to be considered whilst making an order for security for costs.”

10. The Supreme Court went ahead to establish the factors to be taken into consideration when making an order for security for costs as follows:

“Thus, in determining whether it is appropriate to make an order that a party gives security for costs, the court may have regard to the following matters and such other matters as it considers relevant in the peculiar circumstances of each case: –

- i. the prospects of success or merits of the proceedings,
- ii. the genuineness of the proceedings,
- iii. the impecuniosity of the plaintiff,
- iv. whether the plaintiff's impecuniosity is attributable to the defendant's conduct,
- v. whether the plaintiff is effectively in the position of a defendant,
- vi. whether an order for security for costs would stifle the proceedings and/or impede access to justice,
- vii. whether the proceedings involve a matter of public importance,
- viii. whether there has been an admission or payment in court,
- ix. whether delay by the plaintiff in commencing the proceedings has prejudiced the defendant,
- x. the costs of the proceedings,
- xi. whether the security sought is proportionate to the importance and complexity of the subject matter in dispute,
- xii. the timing of the application for security for costs,



- xiii. whether an order for costs made against the plaintiff would be enforceable within the republic of Kenya,
- xiv. the ease and convenience or otherwise of enforcing a Kenyan court judgment or order in the country of a non-resident plaintiff or appellant.
- xv. if the plaintiff is a natural person, an order for security for costs cannot be made merely on account of his or her impecuniosity.
- xvi. security for costs is to be given in such manner, at such time and on such terms (if any) as the court may by order direct.
- xvii. if the plaintiff fails to comply with an order under this rule, the court may order that the proceeding on the plaintiff's claim for relief in the proceedings be dismissed.
- xviii. the provisions of any Act under which the court may require security for costs to be given such as the *Elections Act*.
- xix. a second motion for security for costs will not succeed unless there is an unforeseen and material change in circumstances since the first order for security. An example of an unforeseen and material change in circumstances might be where a plaintiff has come into a sum of money sufficiently large that they could no longer make an impecuniosity argument.
- xx. the defendant seeking increased security bears the onus of demonstrating a significant gap between the security ordered and the actual expenses which were not foreseeable and that in hindsight the original request for security for costs was based on an assessment of the complexity of the case which hindsight has established was not realistic.
- xxi. the jurisdiction to increase or decrease the amount of security already ordered should not be exercised lightly or be used to second guess the court that made the original order, whether on consent or otherwise, unless the gap between what was ordered and what later appears to be necessary is significant.”

11. We are of the view that the condition imposed on the appellant in the instant appeal is akin to imposition of security for costs and the holding of the Supreme Court in the cited case is relevant. Nevertheless, it is apparent that the effect of setting aside a default judgment is to vacate any responsibilities or rights of parties accruing from the judgment so set aside. Once a judgment is set aside, parties are restored to their original positions as prevailed prior to the recording of the judgment. Apart from the statement that it was in the interest of justice to impose an order for the deposit of security, there is no explanation whatsoever in the impugned ruling as to how the learned judge arrived at the condition for the deposit of kshs. 12,177,481.00 before the appellant could benefit from the order setting aside the ex parte judgment. Even if it was in the interest of justice to impose the condition, the learned judge did not tender any explanation as to how he arrived at the security amount. We cannot avoid observing that the security amount is almost equivalent to the claimed amount of kshs.12,177,451.30 as it exceeds that amount by a paltry kshs.29.70. One cannot help having the impression that the learned judge had in his mind already passed judgment against the appellant notwithstanding the order setting aside the ex parte judgment that preceded the condition for deposit of security.



12. In our view, the exercise of discretion by the learned Judge in these circumstances does not conform to the standards set in *CMC Holdings Ltd v James Mumo Nzioki* (supra) and the Westmont Holdings case. Such exercise of discretion stifles and impedes the appellant's right to access justice by subjecting it to such a hardship not backed or rationalized by any evidence. The learned Judge having set aside the default judgment would have let parties prosecute their respective cases on a level playing ground without setting an unfavourable hurdle which if not surmounted by the appellant, then its right to access justice would be denied. Further, an explanation as to how the learned Judge arrived at the condition ought to have been provided in the absence of which the exercise of discretion is whimsical. In view of the foregoing, we find that it is within our jurisdiction to interfere with the exercise of discretion by the learned Judge in as far as the condition set is concerned.
13. The upshot of the foregoing is that we hereby allow the appeal to the extent that the condition that the appellant deposit Kshs. 12,177,481.00 as security is hereby set aside. The other grounds of appeal touching on the merits of the case are hereby dismissed as they touch on issues that should be canvassed before the trial court and which might eventually find themselves before this Court on appeal. We therefore decline to enter that arena at this moment in time.
14. In respect to the issue of the costs of the appeal, we note that the parties still have some litigation ahead of them. We also observe that the respondent had not asked the learned Judge for the imposition of an order of security against the appellant. As such, we direct each party to meet own costs of the appeal.
15. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2023

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

