



Tata Africa Holdings Kenya Ltd v Premier Care Diagnostics Narok Ltd (Environment & Land Case E004 of 2023) [2024] KEELC 4536 (KLR) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4536 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E004 OF 2023
CG MBOGO, J
JUNE 6, 2024**

BETWEEN

TATA AFRICA HOLDINGS KENYA LTD APPLICANT

AND

PREMIER CARE DIAGNOSTICS NAROK LTD RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion Application dated 21st February, 2024 filed by the defendant/applicant and it is expressed to be brought under Sections 1A,1B, 3A of the Civil Procedure Act and Order 10 Rule 11, Order 22 Rule 22 of the Civil Procedure Rules seeking the following orders: -
 1. Spent
 2. Spent
 3. Spent
 4. That the judgment in default/decree entered on 20th December, 2023 be set aside and the defendant be granted leave to defend the suit in terms of the statement of defence dated 14th February, 2024.
 5. That time for filing a statement of defence be and is hereby enlarged and the statement of defence attached hereby deemed to be properly on record.
 6. That the costs of this application be in the cause.
2. The application is premised on the grounds inter alia that the failure to enter appearance and file a defence in time was not deliberate but occasioned by the failure of the instructed advocate to enter appearance and file the defence.



3. The application was supported by the affidavit of Stephen Ojwang sworn on even date. The defendant/ applicant deposed that upon being served with the summons in this suit, they instructed their previous advocates Khayesi, Njambi & Khayesi Advocates to enter appearance on their behalf but the advocates failed to do so on account of their legal fees.
4. The defendant/ applicant further deposed that they were shocked to receive a letter from the plaintiff's/ respondent's advocate informing them that judgment had been delivered in the matter. Further, it was deposed that the failure to enter appearance and file a defence in time was not deliberate but it was partially occasioned by the inordinate refusal of their previous advocate to enter appearance. He deposed that they should not be punished for the fault of the instructed advocates to enter appearance and file the defence as they had initially agreed.
5. The defendant/ applicant deposed that it has a bona fide defence in law against the claim which discloses reasonable defence in law that raises triable issues which should be admitted on the court record and the matter ought to be heard and determined on merit without undue regard to technicalities.
6. The application was opposed vide the replying affidavit of the plaintiff/ respondent sworn on 6th March, 2024 by Andrew Masyula, the plaintiff's/ respondent's Deputy Finance Controller. The plaintiff/ respondent deposed that the reason advanced by the defendant/ applicant does not fall within the preview of the reasons of setting aside a regular judgment, namely excusable mistake, inadvertence, accident or error. The plaintiff/ respondent went on to depose that the defendant's/ applicant's failure to defend the case was deliberate and intended to frustrate the plaintiff/ respondent from recovering the debt. It was also deposed that the statement of defence is without evidence and lack bona fides.
7. The plaintiff/ respondent deposed that in an application of this nature, the defendant/ applicant must demonstrate that it has a reasonable defence which prima facie, raises triable issues worth going for trial, and that the present application is intended to deliberately frustrate them or delay the cause of justice.
8. The application was canvassed by way of written submissions. The defendant/ applicant filed its written submissions dated 17th May, 2024 where it raised two issues for determination as follows: -
 - a. Whether the judgment should be set aside and applicant given leave to defend the suit.
 - b. Whether there is triable issues.
9. On the first issue, the defendant/ applicant submitted that they have been keen on defending the suit, and that the delay or failure was not intentional, but it was attributable to an oversight on the part of their previous advocates. While relying on the cases of *Mbogo & Another v Shah* (1968) 1 EA 93, *Patel v EA Cargo Handling Services Limited* (1974) EA 75, and *Thorn PLC v Macdonald* [1999] CPLR 660, the defendant/ applicant submitted that the discretion of a court to set aside or vary ex-parte judgment in default of appearance or defence is a free one, and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.
10. On the second issue, the defendant/ applicant submitted that the amount entered in the judgment does not reflect the true figure of the indebtedness to the plaintiff/ respondent. It was also submitted that for this reason, the defence annexed to the application raises triable issues with facts that need to be addressed. The defendant/ applicant relied on the cases of *Kimani v MC Connell* (1966) EA 545 and *Tree Shade Motor Limited v DT Dobie Co. Limited* CA 38/98.



11. The plaintiff/respondent filed its written submissions dated 24th May, 2024. While relying on the case of *James Kanyita Nderitu & Another v Marios Philota Ghikas & Another* [2016] eKLR, the plaintiff/respondent submitted that the summons to enter appearance were duly served upon the defendant/applicant on 25th August, 2023 and that the default judgment entered herein is a regular judgment.
12. The plaintiff/respondent further submitted that the failure to enter appearance was not deliberate but was occasioned by the instructed lawyer who failed to enter appearance and file defence. The plaintiff/respondent further submitted that the defendant/applicant has not offered any reason why they failed to sufficiently instruct their advocate, and that failure to pay the legal fees cannot fall in any of the categories in the *Shah case*. To buttress on this submission, the plaintiff/respondent relied on the case of *Patel v E.A Cargo Handling Services Limited* (1973) EA 76, and submitted that the defendant/applicant has not demonstrated any excusable mistake committed by his previous lawyer, and that he has not shown tangible steps he took in following up his matter or file a notice to act in person.
13. They submitted that the defendant/applicant has fallen short of his duty as a litigant, and that the plaintiff/respondent will not be made to suffer from enjoying the fruits of his judgment. They relied on the case of *Neeta Gobil v Fidelity Commercial Bank* [2019] eKLR.
14. It was further submitted that despite claiming to have paid the balance of the purchase price, the defendant/applicant has not provided evidence as proof of the same to show how payment was made and whether it was received. The plaintiff/respondent went on to submit that the draft defence lacks bonafides and they urged the court to find that the defendant/applicant has not disclosed a defence with triable issues. They relied on the cases of *Job Kilach v Nationa Media Group Limited, Salaba Agencies Limited & Michael Rono* [2015] eKLR and *Rayat Trading Company Limited v Bank of Baroda & Tetezi House Limited* [2018] eKLR.
15. I have considered the application, replying affidavit and the written submissions as well as the authorities cited by both parties. In my view, the issue for determination is whether this court, in the circumstances, ought to set aside the judgment entered on 20th December, 2023, and grant the defendant/ applicant leave to enter appearance and file a defence.
16. Order 10 Rule 4 (1) and (2) of the *Civil Procedure Rules*, provide as follows:

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- (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
- (2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.



17. Order 10, Rule 11 of the [Civil Procedure Rules](#), provides as follows:
- “Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
18. It is not in dispute that this court entered judgment in favour of the plaintiff/respondent on 20th December, 2023. The plaintiff/respondent filed a request for judgment pursuant to Order 10 Rule 10 of the [Civil Procedure Rules](#) dated 11th September, 2023 and filed in court on 13th September, 2023. This court upon being satisfied that the defendant/ applicant had been served with the plaint and the summons to enter appearance, entered judgment in favour of the plaintiff/ respondent. The defendant/applicant also admits to service of the plaint and the summons to enter appearance. The judgment entered was therefore a regular judgment.
19. However, the failure to enter appearance and file a defence was attributed to failure by the counsel whom the defendant/applicant had instructed to file the same. The defendant/applicant annexed copies of email communication between them and the firm of Khayesi Njambi & Khayesi Advocates LLP. From the email communication, it is clear that the defendant/applicant intended to defend the suit. However, they seem not to have agreed on the legal fees payable to enable the law firm proceed to act on its instructions.
20. This court having determined that the judgment was regular, the decision of whether or not to set aside the judgment is an exercise of discretion which should be done on terms that are just and fair. In [Shanzu Investments Ltd v Commissioner of Lands](#) [1993] eKLR, it was held,
- “The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party’s favour, depends, on a large measure, on the facts of each particular case. The tests for the exercise of this discretion are these: - First, was there a defense on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay.”
21. In the case of [Yooshin Engineering Corporation v Aia Architects Limited](#) (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment), the Court of Appeal held that
- “Even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the court decides to set aside the judgement, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the plaintiff and the defendant.”
22. From the above authorities, it can be seen that the discretion of the court to set aside a regular *ex parte* judgment is wide but the discretion must be exercised judiciously and any conditions to be imposed must be just to both parties, the plaintiff and the defendant.
23. I have perused the defence annexed to the application. The defendant/applicant in his defence disputed the amounts owed to the plaintiff and stated that the same does not attract interest or default penalty. In my analysis, the defence raises triable issues and whether successful or not, or whether the same ought to be substantiated by evidence, is not for this court to determine at this stage.



24. Having considered the application, and the submissions by both parties, I am mindful of the overriding objective of this court which is to uphold substantive justice. This also includes ensuring that a party is given a chance to defend itself when called upon to do so. The reasons adduced by the defendant/applicant are in my view excusable. I do also note that the application has been made without delay and that the defence raises triable issues. In a nutshell, this court finds there is reason to exercise discretion in favour of the defendant/applicant.
25. In the interest of justice, this court finds merit in the notice of motion dated 21st February, 2024, and grants the following orders: -
- i. That the judgment entered on 20th December, 2023 is hereby set aside.
 - ii. The statement of defence dated 21st February, 2024 is deemed as filed and properly on record subject to payment of the requisite filing fees, which should not be later than 7 days from the date hereof.
 - iii. The defendant/applicant to bear the costs of the application.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL this 6TH day of JUNE, 2024.

HON. MBOGO C.G.

JUDGE

06/06/2024.

In the presence of: -

Mr. Meyoki Pere – C. A.

