



**Nanga v Gusii Water & Sanitation Company Limited (Cause  
E003 of 2021) [2022] KEELRC 3795 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3795 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E003 OF 2021  
CN BAARI, J  
JULY 28, 2022**

**BETWEEN**

**ORSBORN OBAIGWA NANGA ..... CLAIMANT**

**AND**

**GUSII WATER & SANITATION COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. Before court is the respondent's application dated March 29, 2022, brought pursuant to order 12 rule 7 and order 22 rule 22 of the [Civil Procedure Rules](#). The respondent seeks orders that:
  - i. Spent
  - ii. Spent
  - iii. spent
  - iv. The court be pleased to set aside the *ex parte* judgment delivered herein on February 24, 2022 and allow the claim to be heard on merit.
  - v. Costs of the application abide the outcome.
2. The application is supported by the grounds and affidavit of Edward Aboki Begi, counsel on record for the respondent/applicant. The basis of the application is that the matter herein proceeded to hearing on the 8<sup>th</sup> day of December, 2021, *ex parte* without the participation of the respondent.
3. The respondent argues that although a hearing date was served upon its counsel, it escaped the attention of the Advocate handling the matter and as such the matter proceeded *ex parte*. He further avers that the respondent has a defence to the claim and a counter-claim against the claimant's claim.
4. The counsel further avers that in terms of article 50(1) of the [constitution](#), the respondent has a right to be heard, and which right has been compromised by mistake of counsel.



5. The application is opposed *vide* the claimant's replying affidavit sworn on May 10, 2022. The claimant states that the application is brought in bad faith and is merely calculated to deny him the fruits of his judgment.
6. The claimant further avers that the applicant has not offered any reason or reasonable explanation as to why the honourable court should stay execution of the judgment or set the judgement aside.
7. The claimant avers that on 8<sup>th</sup> day of November, 2021 he attended court for the hearing when the matter was called out and confirmed for hearing by the Judge at 11a.m. It is his case that on the same day at about 9.29a.m his advocate wrote a message to the deponent requesting him to log into ELRC Kisumu Court for the hearing, which he did not and the matter proceeded for hearing as scheduled.
8. The claimant avers that his Advocate prepared, filed and served submissions upon the respondent on December 17, 2021. The claimant states that judgment was delivered on February 2, 2022 and the respondent informed about the judgment and only upon being served with the claimant's bill of costs on March 11, 2022, that the respondent became interested in the matter.
9. The claimant states that the respondent is guilty of non-disclosure of material facts relevant to this application and prays that the application be dismissed.
10. Parties sought to canvass the application by way of written submissions. The claimant filed submissions. The respondent did not.
11. The claimant's submissions have been duly considered.

### **Determination**

12. I have considered the motion, grounds, affidavits and the claimant's submissions.
13. It is not in doubt that the decision of whether or not to set aside an *ex parte* judgment is discretionary. This discretion must however be exercised in the interest of justice and to avoid hardship and not to assist a person who has deliberately sought to obstruct or delay the course of justice. The Court of Appeal in *CMC Holdings Ltd vs Nzioki* [2004] KLR 173 stated:
 

“In an application for setting aside *ex parte* judgement, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such 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 be wrong principle.”
14. The failure by the applicant/respondent to participate in this suit has been attributed to the mistake of counsel. The counsel for the respondent has through the affidavit in support of the application, admitted being served with the hearing notice, but which he states escaped his mind resulting in the case proceeding to hearing *ex parte* and the judgment sought to be set aside delivered.
15. Although the hearing date was taken in the absence of the respondent and their Advocates, hearing notice was served and the notice has been acknowledged to have been received. The claimant in his replying affidavit contend that his counsel served the respondent with the submissions filed subsequent to the hearing and the decree therein.



16. The issue for determination is whether this level of mistake and/or inadvertence by counsel is excusable so as to warrant both stay and the setting aside of the *ex parte* judgment. The Court of Appeal in *Murai vs Wainaina* (No 4) [1982] KLR 38 held that:

“.....The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.....”

17. It has generally been held that a litigant should not suffer for mistake of counsel. In *Lee G Muthoga v Habib Zurich Finance (K) Ltd & Another*, Civil Application No Nair 236 of 2009 the court held as follows:

“It is widely accepted principle of law that a litigant should not suffer because of his advocate’s oversight.”

18. In the case *Mohamed & Another v Shoka* (1990) KLR 463 the court set out the factors that a court should consider in setting aside interlocutory judgment to include:

- i) Whether there is a regular judgment;
- ii) Whether there is a defence on merit;
- iii) Whether there is a reasonable explanation for any delay;
- iv) Whether there would be any prejudice.

19. The judgment herein, is a regular judgment in the sense that the claimant proved service of the hearing notice through an affidavit of service filed before court. The court further allowed the respondent two chances to defend their case and although orders were issued directing the Deputy Registrar to serve notice of the hearing on the respondent, I have not come across the notice in the court record. Nonetheless, the claimant proved having issued the notice therefore the prayer to set aside can only be granted in the discretion of the court. In *Mwala v Kenya Bureau of Standards*; EA LR (2001) 1 EA 148, the court stated;

“To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but *ex debito justitiae* for a court should never countenance an irregular judgment on its record.”

20. The court notes that the respondent/applicant had filed a response to the statement of claim and further put in a counter-claim. A glimpse at both the response to the memorandum of claim and the



counter claim, indicate that the two raise triable issues. In *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede* (1982-1988) KAR, the Court held:

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”

21. Considering that the respondent had filed a defence and counter claim in this matter, and the fact that application herein arose out of the mistake of the Advocates representing the respondent/applicant, it would be in the interest of justice, that parties are heard fully on the merit.
22. Consequently, the court makes orders as follows:
  - a) That the *ex parte* judgment delivered herein on February 24, 2022, be and is hereby set aside and the claim allowed to be heard on merit.
  - b) The costs of the application shall be borne by the respondent/applicant.
  - c) That the matter be fixed for directions on priority basis.
23. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28<sup>TH</sup> DAY OF JULY, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:-**

**Mr. Ombachi present for the claimant**

**N/A for the Respondent**

**Ms. Christine Omollo C/A**

