



REPUBLIC OF KENYA



**Kenya Pipeline Company Limited v Mwangemi (Appeal E159 of 2021)  
[2022] KEELRC 12740 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12740 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E159 OF 2021  
MA ONYANGO, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**KENYA PIPELINE COMPANY LIMITED ..... APPELLANT**

**AND**

**PATTERSON MWANGEMI ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. L. B. Koech, Principal Magistrate at the Chief Magistrates Court at Milimani delivered on the 10th November 2021 in CMEL No. 308 of 2019 – Patterson Mwangemi v Kenya Pipeline Company Limited)*

**JUDGMENT**

1. This is an appeal from the ruling of Hon L B Koech dismissing the appellant’s application seeking to set aside an *ex parte* judgment delivered against the appellant.
2. The facts giving rise to the instant appeal are that the respondent who was the claimant in the suit before the Hon Magistrate filed a memorandum of claim dated February 20, 2019 in which he sought the following reliefs against the appellant: -
  - a. An order compelling the respondent to compensate the claimant for the first three months of working for a higher rank by payment of duly allowances at a rate of 25% of the claimants monthly basic salary totaling Kshs 34,1.34.75/-.
  - b. An order compelling the respondent to compensate the claimant for the remaining period of two (2) years and three months that the claimant, performed the duties of a higher rank by payment of salaries and allowances at the scale of the rank less amount he was paid during the period as follows;
    - i. Basic salary (Kshs 107,400 – 43,513) x 27 months Kshs 1,670,949
    - ii. House allowance (Kshs 44,000 – 24,000) x 27 months Kshs 540,000



- iii. Commuter allowance (Kshs 10,000 – Kshs 6,000) x 27 months Kshs 108,000
  - iv. Responsibility allowance Kshs 12,000 x 27 months Kshs,324,000
  - v. Allowance for security, patrol with police officers for 915 days Kshs 754,875
    - a. Costs and interests of this cause.
3. The appellant was served but failed to enter appearance or file defence. Judgment was entered in default and the matter went for formal proof. Judgment was entered for the respondent in the sum of Kshs 1,107,600/- with costs and interest. The respondent thereafter commenced the process of execution. It was only after auctioneers proclaimed the property of the appellant that it filed an application dated March 22, 2021 seeking stay of execution, setting aside of the proceedings before the trial court and leave to file response/defence to the claim out of time. The application was opposed by the respondent.
  4. Upon hearing the application, the learned magistrate dismissed the same on grounds that the appellant was duly served with summons to enter appearance and defence to the claim but failed to respond to the same. The learned magistrate held that judgment was regular and that the appellant had not given the court sufficient reason to set aside the said judgment.
  5. It is this decision that triggered the filing of the instant appeal. The grounds of the appeal are as follows:
    - a. The learned magistrate erred in law and in fact by ruling that the notice of motion dated March 22, 2021 lacked merit
    - b. The learned magistrate, erred in law and in fact by disregarding the evidence adduced by the appellants, which evidence clearly illustrated that the appellant, had a credible defence that raised triable issues warranting the granting of the orders sought
    - c. The learned magistrate erred in law and in fact by disregarding the evidence adduced by the appellants, which evidence clearly illustrated that appellant was not aware of the existence of CMEL 308 of 2019 up until it was served with a copy of the decree in this matter by the respondent herein
    - d. The learned magistrate erred in law and in fact by disregarding the evidence adduced by the appellants, which evidence clearly illustrated that the warrants of attachment issued in. CMEL 308 of 2019 were based on an erroneous decree and certificate of costs as no interest was awarded on the principal amount.
    - e. The learned magistrate erred in law and in fact by disregarding of evidence adduced by the appellants, which evidence clearly illustrated that the respondent did not comply with the requirements of order 21, rule 9A of the Civil Procedure Rules before applying for the certificate of costs in CMEL 308 of 2019.
    - f. The learned magistrate erred in law and in fact by failing to consider the points raised by the appellants in its submissions.
    - g. The learned magistrate arrived at her ruling contrary to the facts given in the application against the law and based its findings on insupportable basis.
    - h. The learned magistrate's decision occasioned a miscarriage of justice.
  6. The appellant seeks the following reliefs that: -



- a. This appeal be allowed
  - b. The entire ruling of Hon L B Koech in the Chief Magistrates Court at Milimani delivered on November 10, 2021 in CMEL 308 of 2019 be set aside
  - c. The application dated November 22, 2021 by the appellant herein in CMEL 308 of 2019 be allowed in its entirety
  - d. The costs of this appeal be borne by the respondent.
7. Given the urgency of the matter the appellant filed a notice of motion application dated December 1, 2021 under certificate of urgency seeking *inter alia* stay of execution of the lower court's ruling delivered January 22, 2020 and the unconditional release of Motor Vehicle Registration Number KAY 202V that had been attached in execution of the decree.
  8. This court upon consideration of the application ordered the conditional stay of the lower court ruling and release of the said motor vehicle KAY 202V upon the appellant issuing a bank guarantee from a reputable bank for settlement of the entire decretal sum and payment of the auctioneers fees either upon agreement or taxation.
  9. Upon compliance with the directions of the court the parties agreed to dispose of the appeal by way of written submissions.

### **Appellant's Submissions**

10. In its submissions the appellant states that this court has unfettered discretion to set aside a default judgment in line with the provisions of order 10 rule 11 of the [Civil Procedure Rules](#). To buttress this argument, the Appellant relied on the decisions in the cases of [Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal](#) (2014) eKLR, [Securicor Courier \(K\) Ltd v Owino](#) (1993) eKLR and [Shah v Mbogo](#) (1967) EA 116 at 123B where the courts emphasized the court's discretion to set aside ex-parte judgment to avoid injustice and/or hardship.
11. The appellant further submits that it has met the threshold for setting aside of default judgments as set out in the cases of [Rayat Trading Co Limited v Bank of Baroda & Tetezi House Ltd](#) (2018) eKLR and [Thorn PLC v Macdonald](#) (1999) CPLR 660 where the grounds to be considered while exercising discretion were elaborated.
12. It is further the appellant's submission that the setting aside of the default judgment in CMEL 308 of 2018, will not prejudice the respondent in any way that cannot be compensated by way of costs. It argues that in the contrary, it is the respondent who would suffer irreparable loss should it not be allowed to defend this suit. For emphasis the appellant relied on the case of [Signature Tours Travel Limited v National Bank of Kenya](#) (2018) eKLR where the court in allowing an application to set aside judgment, relied upon the Ugandan decision in the case of [Sebei District Administration v Gasyati & Others](#) (1968) EA 300 where the court held that a subject ought not be denied a hearing but should instead be ordered to pay costs to compensate the Plaintiff for the delay occasioned by the setting aside and be permitted to defend.
13. The appellant further submits that it has a good defence that raises triable issues which ought to be heard on merit. For emphasis the appellant relied on the court in the case of [Sammy Maina v Stephen Muriuki](#) (1984) eKLR where the Court in allowing a similar application cited the case of [Patel v EA Cargo Handling Services Limited](#) (1974) EA 75 where the court opined that courts will not set aside judgment unless satisfied that there is a defence on merit that raises triable issues which should go to trial.



14. The appellant submits that it was not aware of the existence of this suit as it inadvertently misplaced the summons to enter appearance as a result of management change in its legal department and thus was unable to file its defence within the requisite timelines. The appellant urged this court not to use this unfortunate inadvertence to punish it thus denying the appellant its constitutional right to be heard. For emphasis the appellant cited the court of appeal decision in the case of *CMC Holdings Ltd v James Mumo Nzioka* (2004) eKLR where it held that a court ought not to turn its back on a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.
15. The appellant further submitted that it remains desirous to defend this suit at trial and should therefore not be condemned unheard in line with the provisions of article 25, 50 (1) and 159(2)(d) of the *Constitution of Kenya, 2010*. To fortify this argument the appellant relies on the case of *James Kanyiita Nderitu & Another v Marios Philotas Gbikas & Another* (2016) eKLR on the right of parties to be heard of parties.
16. The appellant further argues that the decree issued on February 10, 2021 ought to be set aside on the ground that it is erroneous and did not stem from the court's judgment delivered on January 22, 2020 in violation of the provisions of order 21 rule 7 of the *Civil Procedure Rules, 2010*.
17. In conclusion the appellant urged this court to be guided by the authorities cited and find its appeal merited and allow it as prayed.

### **Respondent's Submissions**

18. The respondent on its part submits that the appellant failed to meet the threshold for setting aside of the default judgment entered by the learned trial magistrate as it did not provide plausible reasons to warrant the setting aside of the default judgment. For emphasis the respondent relied on the court findings in the cases of *Jomo Kenyatta University of Agriculture v Musa Ezekiel Oebal* (2014) eKLR, *James Kanyiita Nderitu & Another v Marios Philotas Gbikas & Another* (2015) eKLR and *Prime Bank Ltd v Paul Otieno Nyamodi* (2014) eKLR all on setting aside of default judgment.
19. The respondent further submits that the trial court acted in accordance with the law in its ruling of November 10, 2021 when it found the appellant's application dated 22<sup>nd</sup> January without merit and the decision should therefore not be interfered with by this court.
20. The respondent maintains that the draft defence as filed did not raise any triable issues to warrant the court to exercise its discretion in setting aside the judgment entered in his favour. He maintained that the draft defence contains only mere denials and is only meant to delay him from enjoying the fruits of the judgment entered in his favour. To fortify this argument the respondent cited the case of *David Kiptanui Yego & 134 Others v Benjamin Rono & 3 Others* (2021) eKLR where the Court in citing the case of *Tree Shade Motor Limited v DT Dobie Co Ltd* CA 38/98 held that a court while setting aside an ex parte judgment should look at the draft defence to see if it contains a valid or reasonable defence.
21. With regard to the appeal, the respondent submits that no grounds have been given by the appellant to warrant the exercise of this court's discretion in allowing the same. For emphasis the respondent cites the cases of *Anne Wanja Mwangi v Samson Muriithi Muriuki* (2019) eKLR, *Board of Management St Augustine Secondary School v Chambalili Trading Co Ltd* (2021) eKLR and *Kridha Limited v Peter Salai Kituri* (2020) on the exercise of the court's discretion on appeal.
22. The respondent submitted that should this court be inclined to set aside the ruling and judgment of the trial magistrate, the appellant be ordered to pay throw away costs to the respondent. To fortify this position, the Respondent relies on the findings in the cases of *Rayat Trading Co Ltd v Bank of*



*Baroda & Tetezi House Limited* (supra) and *Elizabeth Kavere & Another v Lilian Atho & Another* (2020) eKLR.

23. In conclusion the respondent urged this court to find the appeal without merit and to dismiss it with costs to the respondent or in the alternative allow it with an order for the appellant to pay the respondent throw away costs.

### **Analysis and Determination**

24. I have considered the appeal, the evidence annexed to the record of appeal and the submissions by the parties. I have further considered the authorities relied upon. The issues for determination are: -
- a. Whether the default judgment entered in CMEL 308 of 2019 should be set aside;
  - b. Whether the Appellant should be granted leave to defend its case.

### **Whether the default judgment entered in CMEL 308 of 2019 should be set aside**

25. That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt. The discretion is intended to be exercised so as to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah v Mbogo & Another* (supra).
26. In this case the grounds upon which the application before the lower court to set aside the judgement was anchored are two fold. First the appellants admitted having been served with the summons to enter appearance but the same was misplaced within its offices prior to filing its defence in court. Secondly, that it was only until February 2021 that it became aware of the judgment in default. The appellant maintains that it has a good defence and should not be condemned unheard.
27. The Court of Appeal in *CMC Holdings Ltd v Nzioki* (supra) held as follows: -

“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. The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The court has wide discretion in such cases to set aside ex parte judgement. What the Trial court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was



raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs."

28. The appellant has explained the reasons for its failure to defend the suit in the lower court. It is stated that there were changes of personnel in the appellant's legal department in the year 2019 which led to the lapse in filing appearance and defence. The appellant has further filed a draft defence that is not frivolous as it raises very pertinent issues which ought to be examined by the court.
29. The only circumstances where a party would be found undeserving of the court's wide discretion to set aside exparte judgments would be where the party deliberately seeks by evasion or otherwise, to obstruct or delay the course of justice as was held in *Shah v Mbogo* (supra).
30. As was held in Sebei District Administration (supra), the court should not solely concentrate on the poverty of the applicant's excuse for not entering appearance or filing defence, but on the defence if it has been brought to the notice of the court, the question whether the Plaintiff can reasonably be compensated by costs and that denying the applicant a hearing should be the last resort of a court.
31. Taking into account the reasons adduced for failure to enter appearance and file defence in this suit, it is my view that this was a genuine mistake that should not lock the appellant out of the seat of justice. The right to be heard before an adverse decision is made against a party is enshrined in the bill of rights in our constitution and should be denied only under very rare circumstances where the applicant is found to be underserving of the exercise of the court's wide discretion in its favour.
32. For the foregoing reasons, I find merit in the appeal and make the following orders:
  - a. That the proceedings and judgement entered against the respondent/applicant on January 22, 2020 in CMEL No. 308 of 2019 be and are hereby set aside.
  - b. That the respondent/applicant be and is hereby granted leave to file its statement of response/ defence out of time within 14 days from date herein.
33. The appellant shall bear the costs of the appeal herein as wells the costs of the application in the lower court.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2022**

**MAUREEN ONYANGO**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



**MAUREEN ONYANGO**  
**JUDGE**

