



REPUBLIC OF KENYA



KENYA LAW
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**Ngugi v Miheso (Civil Appeal 177 of 2023)
[2025] KEHC 5542 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 177 OF 2023
SC CHIRCHIR, J
APRIL 29, 2025**

BETWEEN

MARGARET WAMBUI NGUGI APPELLANT

AND

PAMELA MIHESO RESPONDENT

((Being an Appeal from the judgment of Hon. J. Ndururi (PM) delivered on 19th October 2023 in Kakamega chief Magistrate's court Civil suit No. E 236 of 2021))

JUDGMENT

1. The Respondent sued the Appellant in the lower court, seeking for a sum of ksh. 370,000 being the balance of the purchase price of some named stocks . The transaction took place at Kakamega town. It was the respondent's case that he sold textiles worth ksh. 900,000 to the Appellant for which the Appellant had paid ksh. 530,000 leaving the above stated balance ; that the Appellant had failed to pay , despite demand. She then prayed for : (i).A declaratory order against the appellant for the breach of contract; (ii).An order for the appellant to clear the debt balance of Kshs. 370,000= with interest of 11% within 14 days of the date of the suit;(iii). Costs of the suit; and (iv).any other relief deemed fit to be granted by the court.
2. The appellant filed a defence denying owing the debt while stating that she had made substantial payment and was only remaining with ksh. 37,000 as the balance.
3. The hearing began on 26th January,2023,when the respondent testified and closed her case. The hearing was adjourned to 1372023 when the defence case was to be heard, but on the due date the defence counsel informed the court that the Appellant was indisposed. The hearing was further adjourned to 792023.
4. On 7th September,2023 the defence counsel informed the court that his client was again sick. The court declined to adjourn the hearing on grounds that there was no medical evidence showing that



the Appellant was unwell and the defence was seeking an adjournment for the second time in a row. The case was closed and scheduled for judgment . The parties was given a chance to file submissions in the interim.

5. Judgment was delivered on 19/10/2023 wherein it entered judgment in favour of the respondent. In the judgment the trial Magistrate remarked that the Appellant had not entered defence and therefore the suit was undefended.
6. Being aggrieved by the said decision, the appellant filed the instant appeal and has set out the following grounds:
 1. That the Honorable trial court erred in law and fact in entering a judgement in favor of the respondent based on contradicting evidence.
 2. That the Honorable trial court erred both in law and fact by failing to accord the appellant a right to be heard and subsequently ignoring her submissions.
 3. That the Honorable trial court erred in law and fact in entering a judgment without providing his reasoning on the same.
 4. That the Honorable trial court misdirected himself by making the finding that the appellant pays the respondent Kshs. 370,000= together with interest from 1st January,2021, which finding was unsubstantiated, excessive and unjustified.
7. The appeal was canvassed by way of written submissions pursuant to the directions given on 22nd January,2024.

Appellant's Submissions.

8. It is the Appellant's submission that judgment was entered on the basis of contradictory evidence of the respondent. That during her cross-examination she was referred to her own WhatsApp message, an extract of which is among the appellant's list of documents, where she denied her own words of having received more than $\frac{3}{4}$ of the full amount.
9. Further, the counsel submitted that the trial court fell into error by determining that the appellant neither entered appearance nor filed her defence in the matter, which was a fundamental error in the judgment that occasioned the appellant huge injustice.
10. It was the counsel submission that the trial court did not accord the appellant the right to be heard despite explanation from her counsel..
11. It was also the appellant counsel submission that the appellant had already paid the sums owed save for Kshs. 37,000= being owed at the time of the institution of the trial suit. The counsel relied on the case of Kenya Breweries Limited vs Abraham Lain, Kisii HCCA No.23 of 2023 citing Court of Appeal decision in Mohamed *Musa & Anor vs Peter M. Mailanyi & Another, Civil Appeal No. 243 of 1998*; where Hon. Musinga J held that: " Litigants must bear in mind that even in prosecuting cases ex-parte, the required standards of proof must be observed, particularly where there is denial of material pleadings by any opposing party"

Respondent's submissions.

12. The respondent submits that the evidence tendered established sufficient proof that the debt was owing. The counsel further submits that despite the several adjournments granted to the appellant, she failed to show up for the hearing of her defence and therefore her evidence remained uncontested.



Determination.

13. This being a first appeal, this court is mandated to review the evidence as tendered in the court below, evaluate it and arrive at its own findings. In the case of *Selle Vs Associated Motor Boat Company Ltd.* [1968] EA 123.), the court set out the mandate as follows: “This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammad Sarif – Vs – Ali Mohammed Solan* (1955, 22 EACA 270).”
14. There are two issues arising in this Appeal. The first is whether the Appellant was denied the right to be heard, and the second is whether the respondent proved her claim on a balance of probabilities.

Whether the Appellant was denied the Right to be heard.

15. What transpired in the course of the hearing of the lower suit is as I have stated in paragraphs 3 to 5 of this judgment. The hearing proceeded *ex parte* due to the trial’s court refusal to allow further adjournments on the part of the defence. A perusal of the judgment however showed that as far as the court was concerned, the Appellant had not filed her defence. That observation was factually wrong as there is a defence on record filed on 22nd October 2021.
16. Nevertheless the Appellant failed to present her defence due to her absence in court. The trial magistrate exercised his discretion not to allow the adjournment.
17. In determining whether or not the trial court ought to have granted the adjournment, it is important to note that the trial court was exercising judicial discretion vested on him. That discretion, being a judicial discretion had to be exercised judiciously and not capriciously or arbitrarily. The magistrate agreed with the sentiments of the plaintiff that the adjournments was an attempt to delay the conclusion of the suit. The magistrate therefore exercised his discretion in favour of a quick disposal of the suit. In so doing he was adhering to the constitutional right to fair trial which encompasses expeditious disposal of suits
18. However the right to be heard is also an element of fair trial and in my view, this right far outweigh the right to quick disposal of cases. It is the duty of the court, when exercising discretion, to carefully weigh the competing interest and make a determination on what is best, in the interest of substantive justice. In the case of *Equity Bank Limited Vs West Link MBO Ltd*, Civil App No. 782011: the court held: “courts of law exist to administer justice and in so doing they must of necessity balance between the competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met....”
19. Further it has been held that, cases belong to parties, who must be given opportunities to put forth the best of their sides of the cases. In the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75 and *CMC Holdings Limited v James Mumo Nzioki* [2004] eKLR, the courts observed that a court must not only consider why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which raises triable issues.
20. In the present case it was the Appellant’s defence that she had paid the debt save a balance of ksh. 37,000. That, is a triable issue which the Appellant ought to have been given a chance to table the evidence in support.



21. In view of the foregoing and of the considered view that the interest of justice demanded that the adjournment be allowed and the respondent compensated by way of costs.
22. The principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are set out in the case of *Python Waweru Maina V Thuka Mugiria* [1983] e KLR where the court stated as follows:

“ Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just ... The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at 76 C and E b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48. c) Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93”

23. The Appellant had filed a defence and as earlier stated , her defence raises a triable issue. Further the delay in the prosecution of the suit was not inordinate .The trial period took 9 months , and the adjournment that was denied was the 2nd one. It cannot be said that the Appellant was in the business of delaying or attempting to obstruct the course of justice.
24. For the foregoing reasons , I find that this appeal is meritorious . Consequently , I hereby order as follows:
 - a. The judgment of the trial court delivered on 19102023 and all consequential orders or proceedings arising therefrom are set hereby set aside.
 - b. The case is to be re-opened and the defendant’s testimony and her witnesses if any, to be taken .
 - c. The defendant to deposit ksh. 370,000 in court within 45 days from the date of this judgment. The sum will be held in court pending the hearing and determination of the suit.

DATED , SIGNED AND DELIVERED VIRTUALLY AT ISIOLO THIS 29TH DAY OF APRIL 2025.
S. CHIRCHIR
JUDGE .

