



**EpcO Builders Limited v Kabuito Contractors Limited (Civil Suit 422 of 2009)  
[2025] KEHC 8999 (KLR) (Commercial and Tax) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8999 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 422 OF 2009  
H NAMISI, J  
JUNE 26, 2025**

**BETWEEN**

**EPCO BUILDERS LIMITED ..... PLAINTIFF**

**AND**

**KABUITO CONTRACTORS LIMITED ..... DEFENDANT**

**RULING**

1. By Notice of Motion dated 28 June 2024, the Plaintiff/Applicant seeks the following orders:
  - i. Spent
  - ii. That the Honourable Court be pleased to set aside the proceedings of 19 June 2023 together with all subsequent ex parte proceedings and order that the defence be heard de novo;
  - iii. That in the alternative to prayer (ii) above the Honourable Court expunges all the documents that were purportedly produced on the 19 June 2023 by a person not being the maker thereof. To wit;
    - a. Letter dated 9 November, 2006 Ministry of Public Works addressed to the Defendant referring to the removal of concrete panels with failed strength;
    - b. Letter dated 9 November, 2006 Ministry of Public Works addressed to the Defendant referring to cracked panels;
    - c. Observations from the Resident Engineer dated 25 October, 2006 on the Concrete;
    - d. Observations from the Resident Engineer dated 25 October, 2006 on the Surface Texture, Cracks, Humps and Dips;



- e. Observations from the Resident Engineer dated 25 October, 2006 on the removal of cracked panels;
  - f. Instructions from the Resident Engineer dated 17 October, 2006 on the removal of Ramp at KM 2+ 850 LHS INNER LANE.
  - g. Instructions from the Resident Engineer dated 9 October, 2006 on the removal of cracked panel KM 1 + 587 LHS INNER LANE;
  - h. Instructions from the Resident Engineer dated 20 November, 2006 on the removal of panels failed concrete strength LHS Carraigeway Outer Lane Km 2+210 And KM 2+272 TO 2+286;
  - i. Summary of Concrete Test Results 400 Kg Cement;
  - j. Letter dated 9th November, 2006 from the Ministry of Public Works addressed to the Defendant referring to repair and rehabilitation of Mbagathi-way Contract No RD 043;
  - k. Letter dated 29th May from 2006 Ministry of Public Works addressed to the Defendant referring to repair and rehabilitation of Mbagathi-way Contract No RD 0431;
  - l. Instructions from the Resident Engineer dated 24th May, 2006 on the concrete consistency failures (Slump) RHS Carriageway;
  - m. Instructions from the Resident Engineer dated 15th May, 2006 on the cracked Panels- Section KM 2 + 345 TO KM 2 + 120 Inadequate Supervision;
  - n. Letter dated 28 November, 2006 from the Ministry of Public Works addressed to the Defendant referring to repair and Rehabilitation of Mbagathi-Way Contract No. RD 0431 Removal of Concrete Panels of Failed Strength KM 1+ 882.9 TO 1 +931.8 LHS Outer Lane;
  - o. Letter dated 22 November, 2006 from the Ministry of Public Works addressed to the Defendant referring to repair and rehabilitation of Mbagathi —way Contract No RD 0431 Removal of Cracked Panels-Sl. NO. 167;
  - p. Letter dated 15 October, 2007 from the Ministry of Public Works addressed to the Defendant referring to the repair and Rehabilitation of Mbagathi Contract No. RD 0431 proposal on the Remedying of the Cracked Panels;
  - q. SNAG LIST of remedial and outstanding works as at 28 August, 2007.
2. The Application is premised on the grounds on the face of it and supported by the Affidavit and Further Affidavit sworn by Okwach, Advocate for the Plaintiff/Applicant. Counsel avers that the matter first proceeded on 6 October 2022, when the Plaintiff presents its case to conclusion. The matter was then scheduled for defence hearing on 1 March 2023. Unfortunately, counsel for the Plaintiff/Applicant was indisposed on the material day and requested another Advocate to hold his brief and request an adjournment. The matter was adjourned to 19 June 2023, but the counsel holding brief failed and/or neglected to inform Okwach Advocate of the date.
3. It is Counsel's position that he was unaware of the new date since he was still indisposed and had not returned to work by the time of the next Court date. Consequently, and out of his indisposition and



lack of knowledge of the date, the hearing proceeded ex parte without the participation of the Plaintiff. Additionally, the Defendant did not serve any notices of the new dates, contrary to the standard practice of court proceedings.

4. Mr. Okwach averred that he only came to know about the court attendance after being served with a Mention Notice by the Court itself when the matter came up before Hon. Justice Mabeya in November 2023.
5. Further, the Applicant averred that on 6 October 2022, when the Defendant's counsel indicated that they intended to call one witness, Mr. Okwach personally raised concern that this proposition would be problematic on the basis that the documents intended to be relied on by the Defendant were from more than one maker, some of which authenticity was in issue. In spite of this, the Defendant proceeded to call one witness, a director of the Defendant, who purported to produce the documents and the same were allowed by the Court, contrary to section 35 of the Evidence Act.
6. According to the Applicant, the proceeding of the matter ex parte caused untold prejudice to the Plaintiff as the documents in dispute are the premise on which the entire dispute gravitates. Consequently, allowed the documents to be admitted into evidence without the Plaintiff having an opportunity to cross examine the maker thereof or to scrutinize the same at all sounds a death-knell to the Plaintiff's case without affording the Plaintiff a right to fair hearing.
7. The Defendant/Respondent filed its Replying Affidavit, vehemently opposing the Application on the basis that the same is frivolous, an afterthought and lacks merit. The Respondent averred that the hearing date of 19 June 2023 having been given by consent, the Applicant is yet to meet the threshold and principles of setting aside consent orders. The Respondent argued that the Applicant is guilty of gross delay since the proceedings sought to be set aside are those of June 2023, yet it took the Plaintiff/Applicant a year to make the instant application.
8. It was the Respondent's view that the Plaintiff/Applicant has resorted to taking wanton advantage of the Defendant/Respondent's magnanimity and goodwill as in the past, the Plaintiff's suit has been dismissed for want of prosecution and the Defendant conceded to its revival. Further, the Respondent averred that no evidence of the Plaintiff's Counsel's alleged illness had been presented and it was not clear when exactly Counsel recovered for him to plead the same as an excuse for not taking action since 19 June 2023 to 28 June 2024.
9. The Application was canvassed by way of written submissions, though the Respondent did not file any. The Applicant relied on the case of Valji Jetha Kerai & Anor -vs- Julius Ombasa Manono & Anor [2019] eKLR, which cited with approval the Court of Appeal decision of Mohamed Musa & Anor -vs- Peter M. Mailanyi & Anor, Civil Appeal No. 243 of 1998. Relying on the case of Joswa Kenyatta vs Civicon Ltd [2020] eKLR, the Applicant submitted that the Respondent would not suffer any prejudice which cannot be mitigated by way of costs.
10. Additionally, Counsel highlighted their submissions orally.
11. Mr. Oketch for the Applicant reiterated that the non-attendance of the Plaintiff's counsel was as a result of the fault of the counsel holding brief. In relying on Articles 50 and 50(2) of The Constitution, Mr. Oketch contended that it follows that the law envisages circumstances where Advocates commit mistakes or omissions that affect the rights of a party.
12. It was the Applicant's submission that at no particular time did the Defendant service notice for the Plaintiff's Advocate to attend. The Advocate only came to learn of it the next day. He further argued that the documents produced without their makers being in Court ought to be expunged.



13. Mr. Kinyanjui, for the Respondent, vehemently opposed the Application on the basis that the same has no merit. He noted that no evidence of Applicant’s counsel’s ailment had been produced and that there was a contradiction of the explanation of the Plaintiff’s counsel’s absence on the day. Further, he noted that a similar situation arose on 10 September 2010, exactly 14 years earlier.
14. It was Mr. Kinyanjui’s contention that since no action had been taken by the Applicant from 2023 to June 2024, then the guillotine of Order 17, Rule 2(1) of the Civil Procedure Rules would in fact have taken effect. He argued that Order 15(1) cuts both ways.

### **Analysis & Determination**

15. One preliminary issue that has been raised by the Defendant/Respondent is the competence of the Affidavits sworn by Noel N. Okwach, counsel for the Plaintiff. The Respondent argued that an Advocate should not depose to matters that are deeply contentious, thus descending into the arena. Conversely, the Applicant’s Advocate asserted the Affidavits’ competence, maintaining that their contents relate purely to procedural matters and court proceedings, which are well within the Advocate’s personal knowledge and, therefore, admissible.
16. The legal framework governing Affidavits sworn by Advocates is primarily found in Order 19 Rule 3(1) of the Civil Procedure Rules, and Rule 9 of the Advocates (Practice) Rules. Order 19 Rule 3(1) stipulates that Affidavits should be confined to facts that the deponent can prove from their own knowledge, with a provision allowing for statements based on information and belief in interlocutory proceedings, provided the sources and grounds are disclosed.
17. Rule 9 of the Advocates (Practice) Rules generally prohibits an Advocate from appearing in a matter where they may be required as a witness on contentious issues, but it expressly carves out an exception for formal or non-contentious matters of fact.
18. The general principle, as noted in *Simon Isaac Ngugi vs Overseas Courier Services (K) Ltd* [1998] eKLR, cautions against Advocates deposing to evidentiary facts, particularly contentious ones. More recent pronouncements have refined this stance. In *Habiba Ali Mursai & 4 others v Mariam Noor Abdi*, ELC 126 OF 2019 [2021] eKLR, Justice Mboya clarified that “where an advocate swears an Affidavit relating to contentious evidential facts or issues, such an Advocate runs the risk of being invited into the witness box and thereafter be subjected to cross-examination. For coherence, such an invite, shall, if it does occur, expose the concerned advocate to the vagaries of litigation, including but not limited to cross-examination.”
19. The Court further stated that:

“.....an Advocate can still swear an Affidavit in the matter where same is engaged, provided the Affidavit relates to issues that are born out of the record of the court, issues which have been pronounced upon, issues that the court is to take Judicial notice of, settled issues of law and/or issues that are admitted by the adverse party, either in the subject proceedings or any other proceedings, namely previous proceeding, between same parties.”
20. Similarly, in *Kwacha Communications Limited & another v Pindoria Holdings Limited & another* [2022] eKLR, the Court affirmed that an Advocate’s Affidavit is not inherently defective if it is limited to fact which he/she is capable of proving on his knowledge and does not disclose any issue necessitating his/her cross examination.
21. In the present case, Mr. Okwach’s Affidavits primarily detail his personal knowledge of proceedings, the circumstances surrounding his non-attendance and the procedural objections raised regarding



document production. These matters fall squarely within the realm of the Court record, procedural history and the Advocate's direct involvement in the case. Such facts are typically considered formal and non-contentious within the interpretation provided in the cited cases. The Respondent's objection does not, in the Court's view, fundamentally undermine the substance or competence of the Affidavits, especially given the broader principles governing Advocate Affidavits on procedural matters.

22. Turning to the Application, the Applicant seeks to set aside ex parte proceedings of 19 June 2023, contending that their absence was due to their Advocate's indisposition and inadvertence, compounded by an alleged failure of the Defendant to serve proper notification of the hearing date.
23. The Court's discretion to set aside proceedings is guided by Article 50(1) of *The Constitution* which guarantees every individual the right to a fair and public hearing, which right extends to civil cases and encompasses the right to be heard, adduce evidence and to legal representation. This discretion, though wide and unfettered, must be exercised judiciously, ensuring that it serves its primary purpose which is to prevent injustice or hardship resulting from accident, inadvertence or excusable mistake or error. At the same time, it must be delicately balanced so as not to aid deliberate obstruction or delay.
24. In exercising its discretion and deciding whether to grant the orders sought, this Court is guided by the principle of whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the application is allowed. The burden is on the Applicant to prove that he had sufficient cause for not attending court. The reason given by the Applicant for failing to attend court must, therefore, be considered.
25. In this instance, the reason advanced by the Applicant's Counsel is that he was indisposed on the day that the new hearing date was set and the Advocate holding his brief did not inform him. However, there is no reasonable, or any, explanation advanced as to why, even after learning of the progress herein in November 2023, it wasn't until June 2024 that the Applicant's advocate filed the instant application. Undoubtedly, equity aids the vigilant and not the indolent. The shield provided by Article 50 (1) applies to both the protagonist and antagonist. It would be unfair to the Defendant/Respondent that one year after concluding its case, the matter is reopened simply because the Plaintiff woke up from slumber and now wants to exercise its right to be heard.
26. Having considered the Application, the averments in the Affidavits and the submissions by parties, I find that this case is undeserving of the Court's discretion and, therefore, I decline the invitation to exercise the same. I find that the Application lacks merit and dismiss the same, with costs.

**DATED AND DELIVERED AT NAIROBI THIS 26 DAY OF JUNE 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For Applicant: Oketch h/b Mr. Okach for the Applicant

For Respondent: Kinyanjui for the Respondent

Libertine Achieng ..... Court Assistant

