



**Katana v Tarus t/a Tarus & Company Advocates (Civil Suit
E068 of 2023) [2025] KEHC 12298 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E068 OF 2023
F WANGARI, J
JULY 31, 2025**

BETWEEN

JACKSON ZIRO KATANA PLAINTIFF

AND

**JOSEPH KIBORUS TARUS T/A TARUS & COMPANY
ADVOCATES DEFENDANT**

RULING

1. The Plaintiff/ Respondent instituted this suit vide the Originating summons dated 16/08/2023 seeking orders to the Defendant/ Applicant to give account and pay Kshs. 2,720,550/= together with interest being the decretal sum paid to the Defendant on behalf of his client the Plaintiff, in respect to Mombasa CMCC No. 1151 of 2017 and Mombasa HCCA No. E091 of 2021.
2. In default of appearance and filing of defence, Judgment was entered in favour of the Plaintiff/ Respondent. Subsequent to the Judgement, the Plaintiff filed a Part and Party Costs, and there being no response from the Defendant, the Bill was taxed as drawn on 31/10/2023.
3. Pending the ruling on taxation, the Defendant/Applicant filed this Notice of Motion application dated 16/10/2024 pursuant to Section 1A, 2A & 3A of the *Civil Procedure Act*, Order 50 of the Civil Procedure Rules, and all other enabling provisions of the law.
4. The Defendant/Applicant seeks to have the Judgment delivered on 02/05/2024 be set aside and that the Defendant/Applicant is granted unconditional leave to file pleadings in response to and defend the suit, and that costs of the application herein be provided for.
5. The application is premised on grounds on its face and the Supporting Affidavit sworn dated 16/10/2024. It is stated that the Plaintiff/Respondent has obtained an ex-parte judgment and has now scheduled his party and party bill of costs for ruling on 31/10/2024.



6. The Defendant/Applicant stated that he had appointed an advocate to enter appearance and file a reply to the Suit. However, due to innocent and inadvertent mistake on the part of the counsel, no pleading was filed to the detriment of the Applicant. That the Defendant/Applicant ought not be punished for mistakes of his previous advocate. He further stated that he has a valid defence which raises triable issues and that he has been condemned unheard contrary to the rules of natural justice due to errors/ mistakes of his previous advocate.
7. That there is no prejudice and loss to be suffered by the Plaintiff/Respondent if the orders are granted as he can be compensated through thrown away costs, and that the court will arrive at well informed decision based on the testimony and evidence both parties.
8. The Plaintiff/Respondent filed a Replying Affidavit dated 12/11/2024. He stated that the matter herein commenced in year 2023. The Originating Summons and consequent directions were duly served upon the Defendant/Applicant and return of service filed in court.
9. That the Defendant/Applicant has not annexed a letter of instruction, any email or record whatsoever indicating that indeed he took steps to retain legal counsel from the firm of Kirui & Company or any other legal firm to defend this matter. That the Defendant/Applicant having conceded to service of the Originating Summons together with the requisite court documents in 2023, he went to slumber only to be awakened by commencement of execution proceedings.
10. The Plaintiff/Respondent averred that the period between 24/08/2023 and 16/10/2024 has not been explained and that there were no attempts in following up on the case with a view of settling. That it is clear from the Affidavit that the Plaintiff/Applicant has not paid a cent to date despite holding funds in the Plaintiff/Respondent's account from 02/06/2021 when judgment was entered in favour of the Plaintiff/Respondent.
11. That service of the Party and Party Bill of Costs is also admitted by the Defendant/Applicant, the assessment of costs having been done, Certificate of Taxation having been issued on 05/11/2024, the required Notice of Judgment having been served upon the Defendant/Applicant, and the same having not been challenged, the Decree issued by court is deemed correct until set aside.
12. Further, the Plaintiff/Respondent stated that the court ought to disregard the instant application and allow litigation to come to an end pursuant to public interest. That the draft defense merely raises denials, it does not propose any issue capable of being tried and that it does not give any account of the decretal sum. That the court therefore ought to disregard the application herein as it intends to delay determination of the matter where the judgment obtained is a regular court judgment.
13. The court directed that the application be canvassed by way of written submissions. However, as at the time of writing the ruling herein, parties had not complied with the directions.

Analysis

14. Upon perusal of Defendant/Applicant's Notice of Motion application, supporting affidavit and the annexures thereto, and the Replying Affidavit, the issues for determination are;
 - a. Whether the Defendant/Applicant has met the threshold for setting aside of the Judgement delivered on 02/05/2024 and grant of unconditional leave to file pleadings in response to and defend the suit.
 - b. Whether the stay of execution orders should issue
 - c. Who should bear costs



15. On setting aside of court orders, Order 12 Rule 7 of the Civil Procedure Rules provides as follows:

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
16. Further, Order 51 Rule 15 of the Civil Procedure Rules provides as follows;

“The court may set aside an order made ex-parte”
17. The Applicant thus has the burden to prove reasons to justify setting aside of the Judgment. The Applicant, who is an Advocate of the High Court, hence an officer of the court admits to have received the pleadings in this suit through his Whatsapp in the month of September 2023 or thereabout.
18. He thereafter instructed the firm of Kirui & Company Advocates to enter appearance and file a response to the suit. He also admits receiving hearing and mention notices through his Whatsapp, but he was of the belief that this advocate had taken the necessary steps in defending the suit.
19. It is interesting to note that in the attached draft Replying Affidavit to the Originating Summons, the Applicant is the one swearing the Affidavit. If indeed he did give instructions to an advocate, nothing would have been short of annexing a copy of the Replying Affidavit that was signed by himself for purposes of filing if indeed, he signed a Replying Affidavit. That has not been done.
20. Further, the Applicant states that he was served with the Party and Party Bill of Costs in August 2024 and a Notice of Taxation dated 22/08/2024 indicating that the hearing of the Bill of Costs was scheduled on 03/10/2024. He followed up with his advocate but did not receive a reasonable answer on the status of the matter. That is when the current advocate was instructed. The Applicant was then updated on the status of the matter, and that the ruling on the Bill of Costs was scheduled to be delivered on 31/10/2024.
21. The Applicant filed this application about two weeks to the ruling date. He blamed his previous advocates for failing to enter appearance and defend the suit. He stated that he should not be punished for the wrongs of his lawyer as he was an innocent litigant.
22. It has been held that as much as the mistake of an advocate should not be visited upon the client, the litigant also has a duty in following up on the progress of his case. In *Savings & Loan Ltd v Susan Wanjiru Muritu Nairobi Milimani HCC 397/02*, it was held as follows;

“A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.”
23. From the own admission of the Applicant, it has not been explained why he did not follow up on the matter bearing in mind that despite being served with the pleadings in September 2023, receiving hearing and mention notices, being served with the Bill of Costs and the Notice of Taxation in August 2024, the Applicant continued being in slumber and was woken up from his slumber when he was notified of the ruling date scheduled for 31/10/2024, that is when he filed this application.
24. I find that the Applicant has failed to show or demonstrate sufficient cause to warrant this court to exercise its discretion in setting aside of Judgment entered under Order 12 Rule 7 of the Civil Procedure Rules.



25. "Sufficient Cause" was defined by the Supreme Court of India in *Parimal vs Veena* which was cited with approval in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, the Supreme Court elucidated what sufficient cause entails. The apex court stated thus: -

"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

26. The court in the above case added as follows: -

"...While deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause. (Emphasis added)

27. From the above, there was no justification given by the Applicant as to why he took no action in following up his matter until almost 2 years after this suit was filed, which the existence of the suit was well within his knowledge. The prayer to set aside the ex-parte judgment fails and so is the prayer for stay of execution. For the reasons stated above, I am inclined to disallow the Application.

28. On costs, the same follows the event. The suit having been determined and now at execution stage, and the Respondent has been dragged back to the court proceeding, I hereby exercise the discretion of the court and award costs to the Respondent.

Determination

29. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. The Notice of Motion application dated 16/10/2024 has got no merits and is hereby dismissed.
- b. Costs be awarded to the Plaintiff/ Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY, 2025.

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HON. F. WANGARI



JUDGE

In the presence of;

Plaintiff/ Applicant present in person

N/A by the Defendant/ Respondent

Ms. Norah, Court Assistant

