Kiburu v Boma Mart Ltd & 2 others (Civil Appeal E628 of 2021)
[2025] KEHC 11472 (KLR) (Civ) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11472 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E628 OF 2021

AC MRIMA, J

JULY 31, 2025

BETWEEN

JOSEPH KIBURU ..... APPELLANT

AND

BOMA MART LTD ..... 1ST RESPONDENT

BEDAN KUBAI GATHUKU ..... 2ND RESPONDENT

IRENE WAIRIMU GICHUGA ..... 3RD RESPONDENT

RULING

1. Through an application by way of a Notice of Motion dated 30th September 2024, the Applicants sought the following orders: -

    1. ..... Spent

    2. .....Spent

    3. That this honourable court be pleased to set aside the ex-parte judgement entered on the 30th July, 2024 plus all the consequential orders issued therein and the Applicants' submissions annexed hereto be deemed as duly filed and be considered by the Court.

    4. That costs of this application be borne by the Appellant.

2. The application was supported by the grounds on the face of it and the supporting affidavit sworn on 30th September 2024 by the Applicants' Counsel one Mr. Peter Gichuki King'ara. The application arose out of the ex parte judgment rendered on 30th July, 2024. The Applicants were aggrieved that they had not filed their submissions as at the time the judgment was delivered. The Applicants averred that their failure to file submissions was caused by an inadvertent error on the part of their firm of

Advocates which had designated the matter to an Associate, but who left the firm without notice. They averred that due to this error, they were condemned unheard and prayed to be given an opportunity to argue their defence. They further averred that the Record of Appeal was not ready for hearing as it was fatally defective for lacking a decree and as such, the judgment was irregular and ought to be set aside. In praying that the application be allowed, they averred that the Respondent will suffer no prejudice if the orders sought are granted as they can be compensated by way of costs.

3. The application was strenuously opposed by the Respondent through his Replying Affidavit which he swore on 29th October 2024. He averred that the application was bad in law, incompetent and fatally defective for reasons that it was brought under the wrong provision of law, was not supported by a competent affidavit as it was sworn by their Advocate yet the affidavit raises numerous contentious issues and further because an application for re-hearing of an appeal can only be made under Order 42 Rule 23 of the Civil Procedure Rules. Additionally, the Respondent averred that the Applicants have not advanced any excusable reason for their failure to file submissions, and further that the annexed submissions do not raise any triable issues capable of changing the Court's decision. In praying that the application be dismissed with costs, the Respondent averred that he would be greatly prejudiced if the application were to be allowed as the Applicants' action only seeks to further delay the settlement of this matter.

4. As per the directions of this Court, the application was canvassed by way of written submissions. The Applicants' submissions were dated 29th November 2024 where they regurgitated their case and cited a plethora of decisions in urging this Court to allow the application. The Respondent's written submissions were dated 9th December 2024. For the purposes of this decision, the gist of the parties' submissions will be ingrained in the latter part of this ruling.

5. Having considered the application, the response, the submissions and the decisions referred to by the parties, two issues stand out for determination being competency of the application and, if found competent, whether it is merited.

6. As to whether the application is competent, the Respondent faulted the Applicants' application, as captured above, for being bad in law for reasons that it was brought under the wrong provision of law and that the supporting affidavit, which raised contentious issues, was sworn by the Applicants' Counsel and as such, made the application untenable, incompetent and fatally defective.

7. The application was brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 10 Rule 11, Order 22 Rule 52, Order 22 Rule 52 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all the other enabling provisions of the law. According to the Respondent, none of these provisions support the application since the correct provisions were Order 42 Rule 23 of the Civil Procedure Rules. Whereas the Respondent is right in citing the correct provisions under which the application was to brought under, that error is not fatal to the application. I say so for two reasons. The first reason is that Order 10 Rule 11, Order 22 Rule 52 as well as Order 42 Rule 23 of the Civil Procedure Rules variously deal with setting aside of ex-parte orders and proceedings, the only difference being that Order 42 Rule 23 centres on appeals.

8. The second reason is that Article 159[2][d] of *the Constitution* vouches for substantive justice as opposed to reliance on procedural technicalities. Whereas the legally-entrenched procedures cannot be disregarded for they serve a very cardinal purpose in ensuring certainty, order and decorum in the administration of justice and that parties must be penalized for non-observance thereof, in instances where such procedures lean more towards laying emphasis on technicalities, they must definitely pave way to substantive justice. That was the case in this matter since at the heart of the application is the Applicants' quest to be accorded a fair hearing, being a constitutional imperative.

9. There was also the contention that the supporting affidavit to the application was instead sworn by Counsel for the parties. Whereas the Respondent is generally right, the jurisprudence on this matter has now culminated on the position that a Counsel is competent to swear an affidavit in a matter on behalf of a client if the matters deposed to are not controversial and the Counsel can positively attest to the issues raised and has, in appropriate cases, clearly disclosed sources of the information. Having perused the affidavit in issue, this Court finds that the Counsel was the correct person to swear the affidavit since the matters that led to the ex-parte hearing of the appeal occurred within the Counsel offices and the Applicants may not have even been privy to.

10. On a consideration of the two preliminary items raised in the first issue, this Court finds and hold that the application is competent. The next consideration is, therefore, whether the application is merited.

11. Setting aside of a judgment is a judicial discretion that must be exercised judiciously to advance substantive justice to all parties. An Applicant must, however, demonstrate 'sufficient cause' to warrant exercise of this discretion in its favour. What amounts to 'sufficient cause' was discussed by the Supreme Court of India in Parimal v Veena where the Court held 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"

12. On the discretion to be exercised by a Court, the Court of Appeal in CMC Holdings Ltd v James Mumo Nzioka [2004] eKLR stated as follows: -

> " .... The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a 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"

13. Additionally, in Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR) the Court posited that: -

> " ... 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...."

14. Returning to the matter at hand, the reasons given for the Applicants' failure to participate in the hearing of their appeal were on the part of their Counsel. They included the inadvertent error on the

Associate Counsel who left the firm without proper handing over and at a time when Mr. Gichuki King'ara Advocate was tending to his ailing wife. That, by the time Counsel finally resumed, judgment had already been entered in the matter. As the facts were not controverted, and this Court has no reason to doubt Counsel, the Court finds the explanation satisfactory and sufficient to warrant exercise of this Court's discretion in favour of the Applicants. In doing so, the Applicants will be accorded an opportunity under Article 50(1) of *the Constitution* to present their cases.

15. Having said as much, it is this Court's finding and holding that the application is merited. As such, the following final orders hereby issue: -

    (a) The judgment of this Court dated 30th July 2024 be and is hereby set aside. The appeal shall then be heard afresh.

    (b) Since the Appellant's/Respondent's submissions are already on record, the Respondents/ Applicants' submissions dated 16th July 2024 be and are hereby deemed to be properly on record as well.

    (c) The Appellant is hereby granted leave to file and serve supplementary submissions, if need be, within 14 days of this ruling.

    (d) The matter to be fixed for highlighting of submissions on a date to issue.

    (e) Costs of the application to be jointly and severally borne by the Applicants/Respondents.

16. Orders accordingly.

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

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Odel, Learned Counsel for Appellant.

Amina/Michael – Court Assistants.