



Stephen Oddiaga t/a Stephen Oddiaga & Company Advocates v Mwakibibo (Miscellaneous Application E191 of 2023) [2024] KEHC 10341 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KEHC 10341 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E191 OF 2023**

F WANGARI, J

APRIL 26, 2024

BETWEEN

**STEPHEN ODDIAGA T/A STEPHEN ODDIAGA & COMPANY
ADVOCATES APPLICANT**

AND

HAMADI JUMA MWAKIBIBO RESPONDENT

RULING

1. The Notice of Motion by the Respondent/ Applicant dated 13/10/2023 seeks to set aside the judgment delivered on 27/9/2023 entering judgment for costs awarded at Kshs. 3,700,742 with interest. Costs were also awarded to the Applicant/ Respondent.
2. The Applicant in the Supporting Affidavit stated that the certificate of costs and judgment were irregular as no service had been done and the Applicant was not aware of any taxation proceedings. The Applicant sought to have the judgment set aside so that he can file an objection and a taxation reference against the ruling on taxation.
3. The Respondent filed a Replying Affidavit dated 31/10/2023. It was deponed that the Applicant was aware of the taxation proceedings but did not object to the same. subsequently when this suit was filed for purposes of execution, the Applicant was served but still did not file any response to the same. The Application ought to be dismissed with costs to the Respondent.
4. The parties were directed to file written submissions. Both parties complied by filing submissions in support of their rival positions.



Analysis

5. The issue in this case is whether the court should set aside the judgement dated 27/9/2023. It is a fact that the application dated 1/7/2023 was unopposed and judgment entered in favour of the Applicant/ Respondent.
6. 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.”
7. Order 51 Rule 15 of the [Civil Procedure Rules](#) provides as follows;

“The court may set aside an order made ex-parte”
8. The Applicant thus has the burden to prove reasons to justify setting aside of the judgment. On 27/9/2023, the application dated 10/7/2023 came up for hearing. The Applicant who is the Respondent in the matter had not filed a Replying Affidavit. The Counsel for the Applicant admitted that he had been served with the application on 12/7/2023 but did not file a response. He prayed for time to file a response and the prayer was denied, and judgment entered as prayed in the application, which is the subject of this application.
9. The setting aside of judgment entered under Order 12 Rule 7 of the [Civil Procedure Rules](#) is typically a matter of discretion. The Applicant has to demonstrate that the trial court fettered its discretion and acted contrary to justice. This discretion has to be exercised judiciously, as was stated the case of *Shah v Mbogo* (1979) EA 116 quoted with approval in the case of [John Mukuba Mburu v Charles Mwenga Mburu](#) [2019] eKLR:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”
10. The wording of Order 12 Rule 17 requires sufficient cause to shown or demonstrated as a consideration for setting aside the judgment.
11. Sufficient Cause was defined by the Supreme Court of India in *Parimal v 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”

12. 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)

13. From the proceedings of 27/9/2023, there was no justification given by the Respondent/ Applicant as to why it took over 2 months after service, and yet no response had been filed. The counsel admitted that it was an ‘inordinate delay’ on their part. I still find no reason to exercise this court’s discretion in setting aside the judgement as prayed.

14. For the reasons stated above, I am inclined to disallow the Application.

Determination

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

- a. The Notice of Motion dated 13/10/2023 is hereby dismissed.
- b. Accordingly, in exercise of the powers granted to the Court under Section 27 of the [Civil Procedure Act](#), I direct that costs be awarded to the Applicant/ Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024

F. WANGARI

JUDGE

In the presence of;

M/S Mwanzia Advocate for the Applicant

M/S Akinyi Advocate for the Respondent

Barile, Court Assistant

