



**Jumunathi Sacco v Kingori (Tribunal Case 56 (E031) of 2022)  
[2024] KECPT 1725 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KECPT 1725 (KLR)

**REPUBLIC OF KENYA  
IN THE COOPERATIVE TRIBUNAL  
TRIBUNAL CASE 56 (E031) OF 2022  
BM KIMEMIA, CHAIR, JANET MWATSAMA, VICE CHAIR, B SAWE,  
F LOTUIYA, P. GICHUKI, M CHESIKAW & PO AOL, MEMBERS  
OCTOBER 3, 2024**

**BETWEEN**

**JUMUNATHI SACCO ..... CLAIMANT**

**AND**

**DANIEL KINGORI ..... RESPONDENT**

**RULING**

**Notice Of Motion Application**

1. The Notice of Motion Application dated 23<sup>rd</sup> October, 2023 and filed on 26<sup>th</sup> October, 2023 is brought under Order 10 Rule 11 and Order 51 Rule 15, Order 21 Rule 22 ( 1), 22(2) of Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil procedure Act seeking among others orders:
  - a. Spent
  - b. That the Honourable Court do issue a temporary stay of warrants of arrest pending the hearing and determination of the application interparties.
  - c. That the Honourable court be set aside judgment entered and consequential orders.
  - d. That the Respondent be allowed to file Defence to the out of time as the same raises triable issues.
  - e. That the Claimant be compelled to deposit in the Tribunal the sum of Kshs. 55,000/= already paid by Claimant to the Respondent till determination of the suit.
2. The Application was supported by the annexed Affidavit of Daniel King'ori on the grounds:
  - a. That the Claimant obtained ex-parte judgment against the Respondent.



- b. That the Respondent was never served with the statement of claim and summons to enter appearance so as to respond.
- c. That the Claimant never served Decree, ten (10) days' notice and the notice to show cause and only came to know about the case.
- d. That the Respondent has never taken a loan with the Claimant nor paid any monies to warrant liability of any nature.
- e. That the Respondent was the chairman governing the Sacco with other six (6) other management committee members.
- f. That the Respondent was detained in civil jail till when he raised Kshs. 50,000/= before he earned his freedom.
- g. That the alleged unaccounted amounts if any, ought to be the responsibility of all management committee members after the commissioner for cooperatives has undertaken inspection and inquiry.
- h. That the Respondent's Defence raises triable issues with high probability of success.
- i. That it is in the best interest of justice that the Honourable court issues stay of execution pending hearing and determination of the application.
- j. That unless the stay of execution is granted, the Application will be rendered nugatory and of no value.

3. This Tribunal made orders on 16<sup>th</sup> January, 2024 for the application to be canvassed through written submissions.

The Respondent filed his written submissions on 12<sup>th</sup> July, 2024 raising among others issues that:

- a. That Tribunal has unfettered and wide discretion to set aside or vary judgments.
  - b. That he was not served or if he was served them it was not done properly and as such the default judgment of 16<sup>th</sup> May, 2023 is irregular.
  - c. That if the default judgment is not set aside and he is allowed to file his Defence, he would have been condemned unheard.
  - d. That his statement of Defence raises triable issues.
  - e. That the claim being liquidated, the Claimant can reasonably compensate the Respondent.
  - f. That the default judgment dated 16<sup>th</sup> May, 2023 should be set aside ex debito justitiae
4. The Claimant on his end filed his submissions on 17<sup>th</sup> July, 2024 raising among others issues that:
- a. The nature of the prayer the Respondent is seeking is an equitable remedy, and as such, the Respondent need to approach the coat with clean hands.
  - b. That the default judgment was a regular judgment as the respondent was served and was aware of the proceedings and as early as 22<sup>nd</sup> April 2021, the Respondent had been served with a proclamation notice.
  - c. That the Respondent has not denied receiving the initial court papers which were served on him via WhatsApp through his number 0721726382.



- d. That there is an affidavit of service on record by a process server by the name Benson Kalelo Nzioka which is clear to the effect that the Respondent was served where he was operating his boda boda business but he refused to sign.
  - e. That the Respondent was served with 10 days' notice of entry of judgment on the 11<sup>th</sup> May 2022 which he ignored or neglected.
  - f. That the Respondent ignored the matter even after proclamation and despite being served with a Notice to Show Cause he still ignored or neglected to appear in court.
  - g. That the Respondent has been arrested twice over this case and in the first arrest the court granted him an opportunity to file his Defence within a stipulated period but he still neglected or ignored to file.
  - h. That the Respondent is indolent and cannot be aided through any legal means and/or equitable relief.
  - i. That even though the law grants a court of law a wide discretion in granting orders in its role of dispensing justice, that discretion must be dispensed with a view of granting all parties justice.
  - j. That there was an inordinate delay in filing the application and that the Respondent has not only ignored to file their Defence but has also taken the court for granted hence his application must be dismissed.
2. We have considered the application and the written submissions filed and the only question remaining for determination is as to whether this Tribunal should grant the prayers sought.

### **Should The Tribunal Grant The Prayers Sought?**

Just to restate the Respondent's prayers are for a temporary stay of warrants of arrest and the setting aside of the judgment of this court of 16<sup>th</sup> May, 2023.

The starting point in this ruling is to differentiate between a regular judgment and an irregular judgment. In a regular judgment, there is evidence of service of summons for a party to enter appearance and file their Defence. In a case where there is evidence of summons having been served, courts are duly bound to exercise their discretion to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

- 6. In an irregular judgment, the service of summons has not been effected and there is no initiating process and as such the only option available to the court is to take steps to set aside the judgment *ex debito justitiae*.
- 7. In this particular case, there is uncontroverted evidence to confirm that the Respondent was served and he was aware of the existence of this suit for whatever reason he decided not to defend the claim or challenge action of auctioneers to proclaim on his property. It is only the warrant of arrest, which was being issued for the second time that has now made him come to court.
- 8. We are not persuaded that setting aside or staying of the warrants is in the interest of justice in this matter. The Respondent was given time to have his case heard, which he did not take up, and it will be a case of grave injustice to make the Claimant to wait longer more than the two years they have waited this case was filed in 2022 to have their justice.



**Final Orders**

- i. The Notice of Motion Application dated 23<sup>rd</sup> October, 2023 is dismissed in its entirety with costs.
- ii. File closed

**RULING SIGNED, DATED AND DELIVERED *VIRTUALLY* AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER, 2024.**

**HON. B. KIMEMIA CHAIRPERSON SIGNED 3.10.2024**

**HON. J. MWATSAMA DEPUTY CHAIRPERSON SIGNED 3.10.2024**

**HON. BEATRICE SAWE MEMBER SIGNED 3.10.2024**

**HON. FRIDAH LOTUIYA MEMBER SIGNED 3.10.2024**

**HON. PHILIP GICHUKI MEMBER SIGNED 3.10.2024**

**HON. MICHAEL CHESIKAW MEMBER SIGNED 3.10.2024**

**HON. PAUL AOL MEMBER SIGNED 3.10.2024**

**Tribunal Clerk Mutai**

No appearance by parties

Delivered in absence of parties.

**HON. J. MWATSAMA DEPUTY CHAIRPERSON SIGNED 3.10.2024**

