



JM (Suing on Behalf of a Minor MS) v MN & another (Cause 028 of 2022) [2024] KEHAT 1481 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHAT 1481 (KLR)

**REPUBLIC OF KENYA
IN THE HIV AND AIDS TRIBUNAL
CAUSE 028 OF 2022
CAROLYNE MBOKU, CHAIR
OCTOBER 17, 2024**

BETWEEN

JM (SUING ON BEHALF OF A MINOR MS) CLAIMANT

AND

MN 1ST RESPONDENT

BOG NPS 2ND RESPONDENT

RULING

1. Before us for determination is a Notice of Motion dated 28th August, 2024, filed by the Respondent (hereinafter referred to as the applicants) seeking orders inter alia that: -
 - a. That pending the hearing and determination of this Application inter partes, this Honourable Tribunal be pleased to grant an Order of Stay of Execution of the interlocutory judgment delivered on 3rd May, 2024 and the Decree therefrom, together with all consequential orders thereto;
 - b. That pending the hearing and determination of this Application inter partes, the Claimant be and is hereby restrained, either by herself or by her agents, servants, employers, assigns or any person claiming through them from executing, in any manner whatsoever, the interlocutory judgment delivered here on 3rd May, 2024;
 - c. That this Honourable Tribunal be pleased to issue an order to vary, rescind and/or set aside the interlocutory judgment and decree entered in favour of the Claimant against the Respondents upon such terms as are just;
 - d. That consequent to prayer (c) herein being granted, this Honourable Tribunal be pleased to grant leave to the 1st and 2nd Applicant to defend this suit as per the annexed draft Statement of Response and the same be deemed as duly filed and served



- e. That costs be provided for.
2. The application is expressed under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules 2010. The Applicant also relied on Articles 50 and 159 (2) (b) of the Constitution of Kenya.
 3. The application is grounded on the grounds stated on the face of the application and the annexed affidavit by Mohamed Ibrahim Noor. Essentially the grounds relied upon by the applicant are inter alia that: -
 - i. that the Applicant instructed the firm of Messrs. Abdullahi Yussuf & Company Advocates to enter appearance on their behalf and to defend them in the suit
 - ii. that the aforementioned law firm never entered appearance and failed to file its Statement of Response thereby compromising the good defence the applicants had against the claim herein.
 - iii. That hearing proceeded ex parte for non-attendance of the applicant and judgement was entered.
 - iv. That the Applicants will suffer great prejudice if the judgement remains and is executed.
 - v. That the Applicants are ready to proceed with the hearing of this matter on merits and have a valid and cogent Statement of Response which raises triable issues that ought to be determined at full trial on the merits
 4. In opposition to the application, the Ms. Mercy Muriuki, an advocate on record for the Claimant filed a Replying Affidavit sworn on 17th September, 2024, in which she avers that the Applicants had not taken up tangible steps at following up with their matter as it is their responsibility to do so, that this being a court that deals with cases of stigma and discrimination arising of HIV/AIDS, it would be prejudicial to the Claimant herein to be subjected to the trial process again which the Claimant cannot be adequately compensated by way of costs, that the Applicants only came to court after judgment had been rendered and had been reported but have not explained their reason for delay to promptly apply for setting aside the judgment which was entered in May, 2024
 5. Both advocates filed written submissions in support of their opposing positions.
 6. Mulla, The Code of Civil Procedure has illuminated the grounds for setting aside an ex parte decree and what constitutes sufficient cause for setting aside an ex parte judgement/decree. Essentially, setting aside an ex parte judgement is a matter of the discretion of the court. In the case of EWN & two others vs. Safaricom Ltd [2014] eKLR the court citing relevant cases on the issue held inter alia:-

"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice(see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali.) It also goes without saying that the reason for failure to attend should be considered."



7. Counsel for the Applicants referred to the case of *Shah vs Mbogo* (1968) 1 EA 93. where the court held inter alia that the court must be satisfied about one of the two things namely:-

- (a) either that the defendant was not properly served with summons;
- (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.

8. It's important for us to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before us:-

“Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions”

9. The Applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others* Civil Appeal Number 147 of 2006 discussing what constitutes sufficient cause had this to say: -

“It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant” (Emphasis added)

10. In *Daphene Parry vs Murray Alexander Carson* (1963) EA 546 the court had the following to say: -
“Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy,

11. Examining the provisions relating to setting aside ex parte judgements, Justice Adoyo of the High Court of Uganda in *Trans Africa Assurance Co Ltd vs Lincoln Mujuni* HCCS Number 16 of 2013 stated that:-

“The rationale for this rule lies largely on the premise that an ex parte judgement is not a judgement on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing”

12. The well-established principles of setting aside interlocutory judgements were laid out in the case of *Patel vs East Africa Cargo Handling Services* (1974) EA 75 where Duffus,V.P. stated;

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where



it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication".

13. The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the Applicants have demonstrated "sufficient cause" to warrant the exercise of the court's discretion in their favour.
14. . We are reminded that 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 judgement 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.
15. The Applicants have in our view offered a candid and frank explanation as to why they did not defend this claim. They have adduced evidence to show that immediately they were served with summons to enter appearance, they forwarded the same to their advocate to represent them but their advocate did not take any action towards executing the Applicants' instructions.
16. We find that the reason given by the Applicants for failing to enter appearance and defend the claim is candid and excusable and that this is a proper case for the court to exercise its discretion in favour of the Applicants. In this regard, we find useful guidance in the Court of Appeal decision in the case of Richard Nchapai Leiyangu vs IEBC & 2 others [2013] eKLR where the court expressed itself as follows:-

"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice"
17. We find the reason offered to be reasonable and excusable. We hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case. The court in the above cited case of Richard Nchapai Leiyanguvs (Supra) proceeded to state as follows:-

"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"
18. Section 3A of the *Civil Procedure Act*, provides that 'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'



19. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside.
20. In conclusion, having considered the facts of this case, the Affidavits filed by both parties, the submissions by both counsels and the relevant law and authorities, we find that this is a proper case for this court to exercise its discretion in favour of the Applicants. Accordingly, we hereby set aside the *ex parte* judgement delivered on 3rd May, 2024 and all the consequential orders and order that this suit proceeds for hearing afresh as a defended case. The Respondent shall have a throw away costs of Kshs. 20,000/= to be paid within fourteen (14) days from the date hereof. We further order that the Applicants do serve immediately their Statement of Response and witness statements within seven (7) days hereof.
21. . Noting the concerns raised in the Claimant's submissions that the application herein is a scheme by the Applicants to delay the enjoyment of their fruit of judgment, we direct the parties, with the help of the Secretariat of this Tribunal, to fix the matter for early pre-trial conference and a hearing within 60 days from the date hereof.
22. Each party shall bear its own costs for this application.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER, 2024.

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CAROLYNE MBOKU - CHAIRPERSON

DELIVERED VIRTUALLY in the presence of:

HON. NELSON. W. OSIEMO - MEMBER

HON. BRIAN. O. YOGO - MEMBER

HON. PROF.WALTER. G. JAOKO - MEMBER

HON. JANE. N. NGOIRI - MEMBER

HON. DR. SOLOMON. K. MUSANI - MEMBER

HON. DR. IRENE. N. MUKUI - MEMBER

Mosioma H/B for Katee, counsel for the Claimant.

Omondi, counsel for the Respondent.

Yasmin, Court Assistant.

