



Alibhai v Wandera & 3 others; Evans & another (Interested Parties) (Civil Case E628 of 2021) [2025] KEHC 1377 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E628 OF 2021
PM MULWA, J
FEBRUARY 27, 2025**

BETWEEN

YUSUF ALIBHAI PLAINTIFF

AND

ROBERT WANGIRA WANDERA 1ST DEFENDANT

REGISTRAR OF COMPANIES 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

ANDERSON KOMBE HARE 4TH DEFENDANT

AND

THOMAS EDWARD HUNTLEY EVANS INTERESTED PARTY

BWANYANGE LIMITED INTERESTED PARTY

RULING

1. The Notice of Motion application dated 30th November 2023, filed by the 1st & 4th Defendants and the 2nd Interested Party, is the subject of this ruling. The application is brought under Order 10 Rules 9 & 11, Order 51 Rules 1 & 15 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Article 159(2)(d) of *the Constitution* of Kenya, 2010. The applicants seek a stay of proceedings in this matter, particularly regarding compliance with the court orders of 14th December 2023, pending the hearing of the application. They further seek an order to set aside the interlocutory judgment entered against the 2nd and 3rd Defendants on 8th October 2021, together with all consequential orders. Additionally, they request that the 2nd and 3rd Defendants be allowed to file their defence, list of documents, list of witnesses and statements.



2. The application is grounded on the contents of the record and is supported by the affidavits of Robert Wangira Wandera, the 1st Defendant and a director of Bwanyange Ltd. He purports to apply on behalf of the 2nd and 3rd Defendants. Robert avers that the Plaintiff is not a director of Bwanyange Ltd and lacks the locus standi to bring the current suit. He further asserts that the interlocutory judgment was made in error, as no orders were sought against the 3rd Defendant. Additionally, he contends that the orders sought against the 2nd Defendant were neither for liquidated damages nor for pecuniary damages. As such, he argues that the suit ought to have been set down for hearing.
3. Robert claims that the prayers sought against the 2nd Defendant should have been brought through a judicial review application instead. He contends that Thomas Edward Huntley was not a Kenyan national and only secured a work permit in 2019 and never paid for the shares of the Company. He reiterated the affairs of the Company were only conducted by himself and Anderson Kombe Hare.
4. In response, the Plaintiff filed grounds of opposition dated 16th January 2024, which include the following:
 - i. The interlocutory judgment entered on 8th October 2021 against the 2nd and 3rd Defendants has not been set aside.
 - ii. The 1st and 4th Defendants and the 2nd Interested Party lack the locus standi to seek the setting aside of the judgment against the 2nd and 3rd Defendants.
 - iii. The 4th Defendant and the 2nd Interested Party cannot seek to set aside the judgment after withdrawing the suit that is now being prosecuted by the Plaintiff.
 - iv. The procedural rules should not be applied to allow abuse of the court process, where parties apply for orders, obtain them and later change their capacities and stance.
5. In response to the application, the Assistant Registrar, Ann Kanake, filed a Replying Affidavit on 26th February 2024, asserting that the application was without merit and lacked a proper legal basis. She confirmed that Bwanyange Limited was incorporated on 20th April 2018 with an initial capital of Kshs. 1,000,000.00 divided into 10,000 shares valued at Kshs. 100.00 each. Initially, Anderson Kombe Hare and Robert Wangira Wandera each held 100 shares. On 26th May 2020, Anderson added Thomas Edward Huntley as a director and shareholder, allotting him 9,800 shares. Robert contested this move, alleging it was fraudulent, involving unauthorized changes to company records and the forging of meeting minutes.
6. The dispute further involves claims that Yusuf Alibhai, the alleged true beneficial owner, had used Anderson and Robert as proxy directors, with Thomas holding shares in trust for Yusuf. Following these allegations, the Registrar of Companies expunged fraudulent entries from the records, reversed Thomas's appointment, and mandated corrections to the records. Yusuf Alibhai made several complaints asserting control over the Company, leading to further disputes regarding share allocations and directorship.
7. In 2023, Yusuf applied for an equal distribution of shares between Robert and Anderson, but the Registrar reversed these changes, deeming them irregular. The central issue revolves around the control of the Company, with Yusuf (the alleged beneficial owner) and the legal directors in contention. The final determination of this matter will depend on correcting the company's records to accurately reflect the true ownership and directorship. The plaintiff, Yusuf Alibhai, seeks an order to amend the records, recognizing Thomas Edward Huntley as a shareholder and director from May 2018, and ensuring that proper resignations and share allocations are reflected.



8. The application was heard through written submissions. The 1st & 4th Defendants and the 2nd Interested Party filed their submissions on 7th February 2024. The Plaintiff filed submissions dated 5th May 2024. The 1st Interested Party did not participate in the application.

Analysis and determination

9. I have carefully considered the application, including the prayers sought, the depositions filed by the parties and the written submissions made by the respective counsel. The issue before me is whether the Applicants have presented a reasonable case to justify the setting aside of the interlocutory judgment and the consequential orders issued in this matter.
10. Courts have the discretion to set aside ex parte judgments, with the ultimate aim of ensuring that justice prevails. This discretion however, is not without limits. The Court is not required to delve into the merits of the defence at this stage, but must instead examine the draft defence and accompanying witness statements to determine whether any arguable issues are raised. The Courts in *Patel v E.A. Handling Services Ltd* [1974] EA 75, *Tree Shade Motor Ltd v D.T. Dobie Co. Ltd* [CA 38 of 1998](#) and *Mania v Muriuki* [1984] KLR 407 emphasized that the discretion to set aside judgment should be exercised judiciously to avoid injustice, hardship or error resulting from accident or inadvertence.
11. In *Mohamed & another v Shoka* [1990] KLR 463, the Court laid down factors for consideration when entering interlocutory judgment. These include whether the judgment is regular, whether there is a defence on merit, whether there is a reasonable explanation for any delay and whether there would be any prejudice to the parties.
12. It is imperative to first determine whether the judgment entered was regular or irregular. In this respect, I refer to the legal principles established in *Mwala v Kenya Bureau of Standards* (EA LR 2001 1 EA 148), which draws a critical distinction between regular and irregular ex parte judgments. The Court noted:
- “Where the judgment sought to be set aside is a regular one, then all the considerations regarding the exercise of discretion should be taken into account. However, if the judgment is irregular, such as one obtained without proper service or when a memorandum of appearance or defence is overlooked, the judgment should be set aside not as a matter of discretion, but ex debito justitiae, for a court should never countenance an irregular judgment on its record.”
13. I must now assess whether the judgment in question was regular or irregular. The provisions of Order 10 of the Civil Procedure Rules, 2010, govern default judgments. Rule 4 allows for the entry of an interlocutory judgment in cases where the plaintiff claims pecuniary damages or detention of goods, and Rule 9 permits the Plaintiff to set the suit for hearing if no appearance is entered. Rule 10 ensures that the failure to file a defence will result in the application of the relevant provisions, while Rule 11 empowers the Court to set aside or vary the judgment entered under Order 10.
14. These provisions suggest that an interlocutory judgment may be entered even where the claim is not for pecuniary damages, provided the procedural rules have been followed.
15. Upon review of the facts, I find that the judgment in this case was a regular one. It is undisputed that the summons was properly served, and the 2nd Defendant has not challenged the service or the judgment itself. Therefore, the judgment was entered under the rules and due process, and it is not irregular. As such, the conditions for setting aside an irregular judgment, as outlined in *Mwala v Kenya Bureau of Standards* (supra), are not applicable.



16. This Court must now exercise its discretion in light of the regularity of the judgment and established legal principles. Upon consideration, it is apparent that the application has been brought by a third party who seeks to have the interlocutory judgment against the 2nd and 3rd Defendants set aside. However, it is noteworthy that no defence has been filed on behalf of the 2nd and 3rd Defendants, and this Court is unable to assess whether there is any arguable case in their favour.
17. The Applicants argue that the counsel for the 2nd and 3rd Defendants failed to adequately advise their clients and that it is necessary to move the Court on their behalf. I am not persuaded by this argument. The right to file an application or defence rests solely with the parties concerned or their duly appointed legal representatives. A third party cannot lawfully act on behalf of another unless they have clear legal standing, especially where the party in question is represented by counsel.
18. The 2nd Defendant was aware of the interlocutory judgment issued on 29th September 2021 and participated in the present application. It is clear that the 2nd Defendant understood the implications of the judgment. Additionally, the Plaintiff seeks rectification of the Company register to regain control of the Company. I am inclined to agree with the Registrar's position that the interlocutory orders do not prejudice the Registrar in any material way but instead assist the Plaintiff in regaining control of the Company.
19. The Registrar also argues that failure to address the error on the record would lead to significant economic loss for the Plaintiff, as he is the sole financial beneficiary of the Company. In considering this argument, the Court must weigh the potential harm to the Plaintiff against the potential rectification of the alleged error on the record.
20. Having weighed the facts, the law and the submissions of the parties, I am not satisfied that there is a sufficient basis to set aside the interlocutory judgment. The Plaintiff's right to regain control of his Company and the economic harm he stands to suffer, outweigh the arguments presented in support of setting aside the judgment.
21. In conclusion, I find that the application dated 30th November 2023, is bereft of merit. The same is dismissed with costs to the Plaintiff. I direct that the suit be set down for formal proof hearing.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 27TH DAY OF FEBRUARY 2025.

PETER M. MULWA

JUDGE

In the presence of:

N/A for Plaintiff

Mr. Makau for 1st & 4th Defendants and 2nd Interested Party

Mr. Owiti for 1st Interested Party

Court Assistant: Carlos

