



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ochieng v Dida (Commercial Civil Case 10 of 2020)  
[2022] KEHC 11343 (KLR) (Commercial and Tax) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11343 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CIVIL CASE 10 OF 2020**

**WA OKWANY, J**

**MAY 26, 2022**

**BETWEEN**

**MARGARET OKOTH OCHIENG ..... PLAINTIFF**

**AND**

**EDIN WARIO DIDA ..... DEFENDANT**

**RULING**

1. The applicant/defendant herein seeks the following orders through the application dated 5<sup>th</sup> March 2021: -
  - 1) Spent.
  - 2) Spent.
  - 3) That this Honourable Court be pleased to set aside the default interlocutory judgment issued against the Defendant/Applicant on 2<sup>nd</sup> July 2020.
  - 4) That the Defendant/Applicant's Statement of Defence, List and Bundle of Documents all dated 6<sup>th</sup> April 2020 and filed on 19<sup>th</sup> May 2020 be deemed as properly on record.
  - 5) That the costs be provided for.
2. The application is supported by the affidavit of Ruth Wanjiru Ndichu and is based on the following grounds:-
  - a. The Defendant/Applicant herein was served with the Summons to Enter Appearance in this suit on 2<sup>nd</sup> February 2020 and eventually via his Advocate,



Ochieng<sup>6</sup> Walukwe & Associates, a Memorandum of Appearance was duly filed on 17<sup>th</sup> February 2020.

- b. In the process of filing the Statement of Defendant and List and Bundle of Documents. The Covid-19 pandemic struck the country and via a Judiciary Notice, the Courts were indefinitely closed in March 2020.
  - c. That due to the foregoing and uncertainties surrounding the operations of the court the Defendant/Applicant was not able to file its Statement of Defence and accompanying documents at that particular time.
  - d. That the Judiciary e-filing platform was rolled out for purposes of filing and transacting with the Courts online. Unfortunately the matter at hand was not registered and thus it did not reflecting in the Court's system making assessment of our pleadings impossible.
  - e. That it is after incessant follow up and pleadings with the Court registry to key in the file into the system that we were able to file our Statement of Defence and List and Bundle of Authorities on 19<sup>th</sup> May 2020.
  - f. On 14<sup>th</sup> September 2020 when we were in the process of inviting the Plaintiff/Applicant for a virtual Court registry session to pick a mention date, they received the invitation under protest and mentioned that there was an interlocutory judgment on record.
  - g. That since the Judiciary e-filing platform did not show any interlocutory judgment we embarked on inquiring from the court registry on the status of the physical file. It is at this juncture we learnt that there was indeed an interlocutory judgment which was entered on 2<sup>nd</sup> July 2020 and later on serendipitously learnt that formal proof has been scheduled to take place on 17<sup>th</sup> March 2021
  - h. The Defendant/Applicant's Statement of Defence dated 6<sup>th</sup> April 2020 is concrete and has raised bona fide triable issues and failure to admit they said Defence will be tantamount to condemning the Defendant/Applicant unheard.
  - i. The Defendant/Applicant is very much desirous of prosecuting this suit on merit and seeks this Honourable Court's indulgence in order to have justice dispensed accordingly.
  - j. That unless this Honourable Court sets aside the default interlocutory Judgment, the Defendant/ Applicant will be condemned unheard which is against the rules of natural justice.
  - k. This Application has been timeously brought without unreasonable delay in the sole interest of justice and fairness.
  - l. The Plaintiff/Respondent will not suffer any prejudice whatsoever if the orders sought herein are allowed.
3. The plaintiff opposed the application through her replying affidavit dated 20<sup>th</sup> April 2021 wherein she states that the defendant entered appearance on 17<sup>th</sup> February 2020 and therefore ought to have filed



his defence on or before the 3<sup>rd</sup> March 2020. She further states that the defendant filed his defence out of time without leave and that the defence should therefore be struck out.

4. I have considered the application, the plaintiffs' response and the submissions by counsel. The main issue for determination is whether the applicant has made out a case for the setting aside the default judgment entered on 2<sup>nd</sup> July 2020.
5. Order 10 Rule 4 (1) and (2) of the [Civil Procedure Rules](#), 2010 provides as follows:-

“ 4

- (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
- (2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

6. Order 10, rule 11 of the [Civil Procedure Rules](#), reads as follows:-

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

7. The applicant's case is that he entered appearance upon service with the Summons to Enter Appearance on 2<sup>nd</sup> February but that as he was in the process of filing a defence, Covid 19 pandemic struck the country thus leading to the closure of courts. The applicant attributed the delay in filing the defence to Covid 19.
8. The plaintiff, on the other hand, stated that the defendant had ample time to file the defence following the directives issued by the Chief Justice's on court operations during the Covid 19 period.
9. In [James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another](#), Civil Appeal No. 6 of 2015 eKLR (Msa), the learned Judges of Appeal stated: -

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the [Civil Procedure Rules](#), to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to



set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shab (supra)*, *Patel v EA. Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another v Kubende* [1986/ KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).

10. In *Prime Bank Ltd v Paul Otieno Nyamodi* [2014] eKLR it was held that: -

“Ordinarily, the Court will not set aside or vary Interlocutory judgment because it would essentially be setting back the Plaintiff’s progress in prosecuting its case causing it to suffer prejudice. The Court must therefore be satisfied that the Defendant offered a very plausible explanation as to why he failed to file his memorandum of appearance and Defence within the prescribed period under CPR 2010 before such judgment can be set aside and/or varied.”

11. In the instant case, it is not disputed that the defendant entered appearance but did not file a defence. The judgment entered herein was therefore a regular judgment.

12. The defendant admitted that he filed the defence out of the prescribed timelines but attributed the delay to the Covid 19 pandemic. I take judicial notice of the fact that court operations were halted, albeit temporarily, following the onset of the Covid 19 pandemic. The delay in filing the defence cannot however be wholly attributed to the Covid 19 pandemic as directions were issued on the virtual filing of pleadings following the closure of court operations.

13. I have perused the draft defence, and I am of the view that it raises triable issues. I find that it will be in the interest of justice to admit the defence on record so that the case can be heard on merit.

14. For the above reasons I allow the application and set aside the default judgment entered on 2<sup>nd</sup> July 2020 in the following terms: -

- i. The Defendants statement of defence shall be deemed as properly filed and served upon payment of the requisite Court filing fees.
- ii. The Applicant shall serve the statement of defence and counter claim within 14 days from the date of this order.
- iii. In default of compliance with orders given in (i) and (ii) hereinabove, the order vacating the interlocutory judgment shall automatically lapse without further reference to the Court.
- iv. I award the costs of the application to the plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF MAY 2022.**

**W. A. OKWANY**

**JUDGE**

In the presence of:-

Ms Mwaura for Walukwe for Applicant.

Mr.Chasia for Ochieng Opiyo for Plaintiff.



Court Assistant- Sylvia

