



Baraki Interantional Limited v County Government of Turkana (Commercial Case E002 of 2023) [2025] KEHC 2667 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
COMMERCIAL CASE E002 OF 2023
PJO OTIENO, J
MARCH 7, 2025**

BETWEEN

BARAKI INTERANTIONAL LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF TURKANA DEFENDANT

RULING

The Application

1. By the ruling dated 19th August 2024 by Nyakundi J, the Court granted to the plaintiff orders of entry of final judgment in the sum of Kshs 49,567,646.80. The judgment was pursuant to proven failure to file appearance and defence within the time stipulated in the summons to enter appearance.
2. The Applicant was dissatisfied with the said ruling and orders entered against it and filed a Notice of Motion dated 18th November 2024, premised on the provisions of sections 1A,1B and 3A as well as Orders 10 Rule and 52 Rule 1, seeking orders that the interlocutory ruling/order in default be varied and set aside; and, that the Applicant's statement of defence dated 25th June 2024 and the defendant's list of issues, all filed in the said suit, deemed as properly filed and be admitted as part of documents of the suit. The Applicant also seek that it be granted leave for full compliance with the requirements of Order 11 of the Civil Procedure Rules.
3. The Application is supported by grounds set forth on the face of the motion and reiterated in the Supporting Affidavit sworn by Ekal Lokuruka, advocate. In the affidavit of support, the deponent contends that the plaintiff/respondent did not serve it with the copy of the application for judgment in default within seven days pursuant to Order 10, rule 8 of the Civil Procedure Rules, 2010 by virtue of being a County Government. The Applicant further asserts that by the time the ruling was delivered, it had partially complied with Order 11 of the Civil Procedure Rules by filing and serving



upon the plaintiff/respondent a copy of Statement of defence, list of issues, witness statement and list of documents.

Response to the Application

4. The gist of the Replying Affidavit sworn on 30th December 2024 and filed by Yussuf Mohamed Farah, the Respondent's director, is that the Ruling delivered by this Court following the Applicant's violation of Order 11 of the Civil Procedure Rules was in no way prejudicial to the Defendant nor contrary to the principles of natural justice because several notices were duly issued by the Respondent to the Applicant and that the court also gave the Defendant unfathomable grace and latitude which were abused by the Defendant.
5. The Respondent further avers that the instant suit was filed by the Plaintiff on the 24th of October, 2023 and thereafter the pleadings and the summons were served upon the Applicant on 20th November 2023 via their official email and Postal service. Following the Defendant's failure to enter appearance in accordance with the summons to enter appearance, the plaintiff in order to progress the matter, pursuant to Order 10 of the Rules, filed a Notice of Motion dated 13.02.2024 and prayed for leave of the court to enter default judgment for failure to enter appearance and defence.
6. The plaintiff insists that it served the Applicant pursuant to Order 10 of the Civil Procedure Rules with a copy of Notice of Motion Application dated 13th February 2024 through their official email, info@turkana.go.ke, on the 13th February 2024 at 4:10pm. Thereafter the plaintiff wrote to the Deputy Registrar the letter dated 15th February 2024 requesting direction on the said Application leading to a mention date being set for 3rd April 2024.
7. It is the Respondent's case that the defendant only entered appearance on the 3rd of April 2024 and was thereafter given leave on multiple occasions to comply with Order 11 of the civil procedure rules but chose not to comply with the Court's directions. The Respondent further asserts that the Applicant was given the last adjournment by the Court on 21st May 2024 to effect compliance within 14 days, the latest date being the 4th of June 2024, failure to which the Court would allow the application dated 13th February, 2024 and enter judgement as prayed in the Plaintiff's plaint. On this assertion, I have read the court file and noted that on that date, the court simply said:

“In this regard, I exercise inherent jurisdiction. Hg on 11.06.2024”
8. The Respondent further asserts that the Applicant similarly disregarded the Court's directions on the last adjournment leaving the Court with no otherwise but to enter judgement in favour of the Plaintiff as prayed in line with the issued conditions for non-compliance with the said directions.
9. The two counsel attended court on the 15.01.2024 and urged the application by way of oral submissions.
10. In his address to court, the counsel for the Defendant /Applicant stressed the assertion that order 10 Rule 11 was never complied with hence the entry of judgment was irregular for failure to serve the application upon the defendant. The counsel tacitly conceded to the service alluded to by the plaintiff but contended that the same was not an adequate service for the sole reason that there had not been filed an affidavit in compliance with Rule 30(3) of the High Court Administration and Organisation Rules.
11. It was also highlighted that since appearance had been entered by the 15.01.2024, the application ought to have been for judgment on default of defence and not appearance. It was also highlighted that a defence was filed on the 06.08.2024 whose delay of seven months is assigned to the bureaucracy in



government. The delay was described as excusable, even of not justifiable, owing to the need to get the documents. There was emphasis that the need for service is a substantial matter not merely procedural for it goes to the root of the right to fair hearing and failure to serve is actually a clog on the right.

12. For the plaintiff/respondent, the submissions offered was to the effect that the foremost consideration is whether the judgment entered was regular and in tandem with Order 10 of the Rules. The counsel reiterated that the application was properly served and that while counsel for the defendant had on the 3.4.2024 informed the court that appearance had been entered on the 15.01.2024, the CTS shows that it was in fact uploaded on the 12.04.2024.
13. On filing the affidavit of service, the counsel graciously conceded that none was filed but added that when shown evidence, the judge was satisfied in terms of Order 5 Rule 22B and allowed the application to proceed. That satisfaction, to the plaintiff, makes the resultant judgment regular and not amenable to setting aside. It is added that the court held back hearing of the application to give to the defendant indulgence on five occasions to file a defence to no avail.
14. On the need to disclose and arguable defence, the plaintiff asserts and submits that the defence filed is just but a sham and ought not to attract the judicious discretion of the court. It is pointed out that the subject contract and its execution is admitted hence no triable issue is disclosed.
15. The plaintiff identifies the next point for consideration to be whether any prejudice would be occasioned to either party, the plaintiff submitted that the contract was entered into in the year 2016 and works completed in 2018 when the payment was expected but the same has been pending since thus exposing the plaintiff to grave prejudice in its finances and operations.
16. On the duty to explain the delay, the plaintiff submits that there is no explanation for the delay to file the appearance and defence just as there is no explanation for the delay of three months between the date of the judgment and the date of filing the application for its setting aside. The allegation of bureaucracy as the reason for delay, the plaintiff submits that a party cannot rely on its own inefficiency to justify delay and subversion of the court process. Counsel urged that the application be dismissed.
17. In his rejoinder, the defendant's advocate urged the court not to consider the merits of the defence as that would be prejudicial to the defendant and that the judgment here is irregular subject to being set aside without regard to the disclosed delay.

Analysis and Determination

18. Order 10 Rule 11 of the Civil Procedure Rules empowers the court to set aside an interlocutory judgment for default of appearance provided that the court is satisfied that the entry of judgment was irregular or that the judgment was indeed regular but the defendant has demonstrated a triable issue to go to trial. A triable issue is however not a defence that must succeed.
19. A judgment is irregular when the service of summons was deficient in which event the court exercises no discretion but must set aside the judgment *ex debito justitiae*. However, where the judgment is regular, the court has discretion to exercise depending on the explanation given by the defendant and whether a triable issue is disclosed to go to trial
20. In this matter, the service of the summons to enter appearance is not in dispute. Even the service of the application for entry of default judgment was not disputed. All the defendant asserts is that even though the application was served by way of email, there was never an affidavit sworn and served in accordance with Rule 30(3).
21. For clarity purposes, that Rule provides: -



30.

- (1) Where under these Rules a document is to be served on a person, the service may in addition to any other form of service permitted under the law, be effected with the leave of the Court—
 - (a) through a licensed courier service provider approved by the Registrar or, as a last resort, by registered post;
 - (b) on a person entitled to appear on that person's behalf;
 - (c) by electronic means in accordance with the Practice Directions; or
 - (d) in such other manner as the Registrar may direct and certify or as permitted under the law.
- (2) All pleadings, affidavits or other documents filed under this rule shall be served on all parties in accordance with this rule.
- (3) Proof of service shall be by affidavit in the prescribed form.

22. The defendant does not dispute receipt of the application but insists that proof of service is only by way of an affidavit of service. With the admission that the email address is indeed that for the defendant and that the document even though received was not effectively served due to the lack of affidavit of service, the court finds that the defendant was duly and effectively served. To the court, the purpose of service is to notify the party served of the existence of the litigation against him. Whether or not an affidavit of service is filed, it takes the court to be satisfied as to the efficacy of service of the process. It has been asserted by the plaintiff, without rebuttal that, the judge sought and received a satisfactory explanation before proceeding with the application. It is thus the finding of this court that there was service of the summons and subsequently the application for judgment on default for which reason the judgment on record is a regular judgment by the court.
23. That determination drives the court to the consideration when a regular judgment may be set aside. The remedy of setting aside is designed to aid the right to be heard where a judgment has been obtained on account of some explicable or excusable mistake or inadvertence but it is never intended to reward the litigant who has by design or indolence set out to subvert, delay or abuse the court process.
24. Where the judgment is regularly entered, plaintiff is entitled to the benefit thereof as a decree but the court equally retains a wide discretion to set it aside where there is a plausible explanation for the delay which should not be inordinate and where there is satisfaction on the part of the court that there is a triable issue which raises a prima facie defence which should go to trial. In such a case, the judgment is set aside but on terms. See *Chemwolo vs Kubende* [1986] eKLR 492
25. On the facts of this case, the Court notes that the suit was filed on 24th of October 2023 and the pleadings and the summons were served upon the Applicant on 20th November 2023. However, no appearance was entered till the 21.01.2024, according to the court stamp and on 12.04.2024 according to the CTS. The defence was only filed on the 25.06.2024.
26. The dates disclose a delay of over four months between the date appearance was entered and the filing of defence. The appearance even when so filed was never served upon the plaintiff. The records further show that during that time there was representation on the part of the defendant by an advocate who gave one reason after the other for failure to file a defence in time. One of the reasons advanced was



that owing to bureaucracy within its ranks, the defendant needed more time to collect its documents and file a defence.

27. For this court equality before the law and the need for zero discrimination are constitutional values all must adhere to. In fact, the defendant being government, a creature of *the constitution* must lead the way on observing and protecting such constitutional values. The defendant cannot come to court, fail to comply with the law and invoke its being government as the sole reason for failure to abide by the law. When the government is sued, it becomes a party like any other only subject to explicit provisions of the law as contained in *Government Proceedings Act* and limitation on default judgment under order 10, Civil Procedure Rules. It has no right to given preferential treatment unless it seeks to be excused from its obligations under articles 10, 27 and 232 of *the constitution*. The court finds that the delay was both inordinate and wholly unexplained in a plausible manner.
28. Even without plausible explanation, all is not lost. The court still has to interrogate the defence availed and however availed. If the defence discloses even a single triable issue, which issue must not be a defence that must succeed, the court has the duty to set aside but on terms.
29. The court has executed the mandate to interrogate the defence and notes that it is pleaded that the work was never satisfactorily completed and had to be completed by a third party. The court considers that point arguable and meriting a chance at the hearing. On that point alone, and even with utmost displeasure of the court on how casual the defendant has taken its obligation to court, the court sets aside the judgment dated 29.08.2024 but on terms that: -
 - a. The defendant must file and serve all witness statements as well as list and copies of all documents, to be used at trial, within 14 days from the date hereof.
 - b. The defendant shall pay to the plaintiff thrown away costs of Kshs 20,000 within 14 days from the date hereof.
 - c. If there are any pleadings already filed but not served, the same be served within 14 days from the date hereof.
 - d. Time is of essence in that if there shall be a default to comply with any of the conditions set above by the 21st of March 2025, the order for setting aside shall lapse and the judgment will sand reinstated.
 - e. Matter is now stood over to 24.3.2024 for case conference.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 7TH DAY OF MARCH, 2025.

Patrick J O Otieno

Judge

