



REPUBLIC OF KENYA



**Kenya Commercial Bank v Western Mareba Agencies Limited & another (Commercial Case E458 of 2023) [2025] KEHC 3394 (KLR) (Commercial and Tax) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3394 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E458 OF 2023  
BK NJOROGE, J  
MARCH 13, 2025**

**BETWEEN**

**KENYA COMMERCIAL BANK ..... PLAINTIFF**

**AND**

**WESTERN MAREBA AGENCIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**RAGE SURIYE KHALIF ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of an application by way of a Notice of Motion dated 3<sup>rd</sup> May, 2024. It is the Defendants/Applicants' Motion.
2. It seeks the following orders;
  - a. That the Honourable Court be pleased to stay the proceedings in HCCOMM E.458 of 2023 pending the hearing and determination of this application.
  - b. That this Honourable Court be pleased to set aside the interlocutory judgment entered against the Defendants on 12<sup>th</sup> February, 2024 by the Honourable Magistrate Stephany Bett (Ms.) Principal Magistrate and all other consequent orders against the Defendants/Applicants pending the hearing and determination of this application.
  - c. That the Defendants/Applicants be granted leave to file their defence to this suit and be allowed to fairly participate in the proceedings and be granted a chance to ventilate their defence on merit.
  - d. Spent.



3. The application is professed to have been presented pursuant to Order 51 Rules 1, Order 10 Rule 11 of the *Civil Procedure Act* and all other enabling provisions of the law. It is supported by the affidavits of Purity Waikwa and Rage Shuriye all sworn on 3/5/2024.
4. The application is opposed by the Plaintiff through a replying affidavit sworn by Justus Wambua on 21/5/2024.

### **The Background Facts**

5. The Defendants were served with Summons to Enter Appearance in this suit. They appointed Counsel who filed a Memorandum of Appearance within time. However, no Statement of Defence was filed subsequently. This led to the Plaintiff successfully applying for a default judgment.
6. An interlocutory judgment was entered for sum of Ksh.51,456,020.30. It is this judgment that the Defendants/Applicants seek to set aside. They also seek leave to file a defence as per the draft defence attached to the application.

### **The Defendants/Applicants Case**

7. The Defendants' case is that they entered an appearance to this suit on time but failed to file a Statement of Defence within time.
8. The Counsel for the Defendant depones that a Memorandum of Appearance was filed on 3/11/2023. Thereafter, efforts to contact the 2<sup>nd</sup> Defendant for purposes of receiving instructions on the defence were unsuccessful.
9. The Advocates proceeded for their December holidays and resumed work on 20/1/2024.
10. The 2<sup>nd</sup> Defendant depones that he could not contact his Counsel during the month of December 2023 as the offices were closed.
11. He next got in touch with his Advocates in the month of April, 2024. This is when he visited the offices of his Counsel to get an update on the case.
12. That failure to file a defence on time was caused by this breakdown between Clients and Counsel, due to the Christmas vacation.
13. A draft defence is attached to the application. The Defendants pray that they be allowed to defend this suit on merits.

### **The Plaintiff/Respondent's Case**

14. The Plaintiff depones that the Defendants were validly served with Summons and proceeded to appoint Counsel who entered an appearance.
15. The default judgment arose from the Defendants' failure to file a Statement of Defence within 14 days from the date of entering an appearance. This is as per Order 7 Rule 1 of the Civil Procedure Rules.
16. The Plaintiff therefore maintains that the interlocutory judgment entered was regular. The Defendants are to blame for their own delay. As at the time the Court endorsed the request for judgment, no defence had been filed.
17. The Plaintiff urges this court to exercise its discretion in favour of the Plaintiff as the delay is inordinate.



18. The Plaintiff's claim arose out of a loan advanced to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant is a guarantor to the 1<sup>st</sup> Defendant. The Plaintiff maintains that the draft defence raised no triable issues.
19. Directions were given that the application be disposed of by way of written submissions. The Court has seen and read the Defendants/Applicants' written submissions dated 14/6/2024. The Court has also read the Plaintiff/Respondent's written submissions dated 2/6/2024. The Court has taken note of the authorities cited by the Counsel for the parties.
20. The Court frames two (2) issues for determination as follows;
  - a. Whether the interlocutory judgment entered herein ought to be set aside.
  - b. What reliefs lie from the application before the Court?
21. When it comes to setting aside the interlocutory judgment, it calls for the exercise of discretion of this Honourable Court. In *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at page 76, Sir William Duffus P held:

“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 it by the rules.”
22. The Court proceeds to analyze the two issues as follows;

**Whether the interlocutory judgment entered herein ought to be set aside.**

23. The Court notes that a Memorandum of Appearance was filed on 3<sup>rd</sup> November, 2023. Fourteen days lapsed on 17<sup>th</sup> November, 2023, yet no Statement of Defence was filed.
24. The Defendants own up to paying a visit to the Advocate in April 2024. That is passage of a very long time to leave a matter in the hands of an Advocate, without following up.
25. A case belongs to the parties and not to the Counsel representing the parties.
26. The Court is not entirely convinced that the reasons advanced by the Defendants would automatically warrant the setting aside of the interlocutory judgment. The delay was clearly on the Defendants' party.
27. The Court has also looked at the draft statement of defence. It consists of a general denial of the claim. The issue of interest charged on the Murahaba Financing is also challenged. At this point the Court has no evidence before it that any interest was charged. That would be perhaps an issue for trial and production of accounts. The Defendants also cite frustrations that lead to the breach of contract. They blame Safaricom PLC which they wish to seek indemnity from, as a third party in the suit. These are issues that need to be determined through a trial

**What reliefs lie from the application before the Court?**

28. The Court is minded to allow the application so as to allow the Defendants ventilate their case. As to costs, the Defendants were guilty of delay. They are condemned to pay thrown away costs of Kenya Shillings Thirty Thousand (Kshs.30,000/=) to the Plaintiff.

**Determination**

29. The Defendants' application by way of the Notice of Motion dated 3rd May, 2024 is allowed in the following terms,



- a. The Interlocutory Judgement entered against the Defendants on 12th February, 2024 in default of a Statement of Defence is hereby set aside.
- b. The Defendants are granted leave to file a Statement of Defence within the next Fourteen (14) days from the date of this order.
- c. The Plaintiff is awarded thrown away costs of Kenya Shillings Thirty (Kshs30,000/=) to be paid within the next Fourteen (14) days from the date of this order.
- d. In default of compliance with any of the orders, the interlocutory judgement be reinstated forthwith.

30. It is so ordered.

**SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS 13<sup>TH</sup> DAY OF MARCH 2025**

**NJOROGE BENJAMIN**

**JUDGE**

In the presence of:

Miss Muriuki for Applicants

Miss Mbithe for Respondent

Mr.Luyai- Court Assistant

