



**Bank of Africa Limited v Abdalla (Civil Case E331 of 2019)
[2025] KEHC 9291 (KLR) (Commercial and Tax) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E331 OF 2019
F GIKONYO, J
JUNE 19, 2025**

BETWEEN

BANK OF AFRICA LIMITED PLAINTIFF

AND

SAID MOHAMMED ABDALLA DEFENDANT

RULING

1. Before me is the defendant's notice of motion dated 30th August 2024, under Order 10 Rule 11 and Order 12 Rule 7 of the Civil Procedure Rules, seeking:-
 1. the setting aside of the judgment dated 29th November 2023 and the decree issued on 24th May 2024, and all other consequential orders
 2. leave to file his statement of defence and other documents to support his case; and
 3. that the matter be set down for hearing.
2. The application is supported by the affidavits sworn by the defendant on 30th August 2024 and 22nd October 2024 and written submissions dated 18th February 2025.
3. The application is opposed by the plaintiff through a replying affidavit sworn by its Manager, Recoveries, Jacqueline Mureithi (Ms. Mureithi) on 19th September 2024 and written submissions dated 21st March 2025.

Applicant's case

4. On 17th July 2023, the court set aside the interlocutory judgment entered on 6th January 2020. The court also directed the defendant to file and serve his defence within 14 days from the date of that



ruling. However, the defendant's previous advocates, T. O. Nangau, Kemunto & Co. Advocates, failed to comply.

5. The defendant deposed that the previous advocates failed to inform him of subsequent dates between 17th July 2023 and 29th November 2023, with regard to the suit. He also deposed that the previous advocates failed to apprise him that the plaintiff filed a request for judgment dated 8th November 2023.
6. The defendant stated that the previous advocates failed to inform him that a judgment in default was entered on 29th November 2023 and the decree issued on 24th May 2024. He averred that he learnt of the judgment when he was personally served with the decree in June 2024. He instructed the firm of Krodha & Macharia Advocates, which filed a Notice of Change of Advocates on 8th July 2024 and the present application.
7. The application is premised on the grounds that:-
 1. the default judgment is based on inaccuracies and non-disclosure of material information by the plaintiff because the defendant does not owe the decretal amount.
 2. the amount in the decree dated 24th May 2024 is reached in an extremely opaque manner as a result of mischief by the plaintiff's agents.
 3. the plaintiff has already been paid and not amount is owing.
 4. the plaintiff irregularly sold the defendant's property because it undervalued it.
 5. there were irregularities in the accrual of interest and the manner the plaintiff conducted the whole transaction.
 6. the defendant is very much interested in defending his case and seeks the protection of his right to be heard by the court.
 7. the failure to comply with the orders of 17th July 2023 was not deliberate and a plausible explanation offered.
 8. an innocent litigant cannot be condemned purely on the errors of the previous advocates.
 9. the defendant has filed a draft defence and counterclaim raising triable issues, specifically on the opaqueness of the final amount sought and the manner the property was sold.
 10. the plaintiff would not be prejudiced if the application is allowed while the defendant stands to suffer great prejudice if the judgment is not set aside and execution proceeds.

Response

8. The plaintiff asserted the application is frivolous, vexatious and designed with malicious intent for the sole purpose of obstructing and/ or frustrating the plaintiff from executing the decree issued on 24th May 2024. It also asserted that Krodha & Macharia Advocates are improperly on record for having failed to comply with Order 9 Rules 9 & 10 of the Civil Procedure Rules.
9. The plaintiff's position is that the present application cannot be sustained because:-
 1. At all material times, the defendant was aware of the court's orders of 17th July 2023, but deliberately failed to comply.
 2. If the application is allowed, the court will be complicit in aiding and rewarding the defendant's breach of its orders.



3. The defendant has not adduced any evidence to show that he constantly followed up the matter with his previous advocates.
 4. The draft defence comprises of mere denials and raises no triable issues.
 5. The application is filed with inordinate delay.
 6. The defendant is indebted to the plaintiff and the debt is not denied or challenged.
 7. It is fair and just that the execution process be allowed to proceed.
 8. The judgment was regularly entered and the decree properly extracted.
10. The plaintiff relied on *James Kanyita Nderitu v Maries Philotas Ghika & Another* [2016] eKLR on the tests for setting aside a default judgment.
 11. The plaintiff submitted that the defendant had a duty to follow up on instructions given to an advocate. It also submitted that it is not enough for a party in litigation to blame advocates on record for all manner of transgressions. It relied on *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR and *Bi-Mach Engineers Limited v James Kahoro Mwangi* [2011] eKLR. It also relied on the maxim that equity aids the vigilant, not the indolent, applied in *Ecobank Kenya Limited v Minolta Limited & 2 others* [2018] eKLR.
 12. The plaintiff relied on *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR to assert that courts do not act in vain and their orders must at all times be obeyed; *Nyukuri & another v Omochar & 5 others (Environment & Land Case 160 of 2015)* [2022] KEELC 2530 (KLR) (21 July 2022) (Ruling), that a defence that is a mere denial is not one that can form the basis for disturbing a judgment, and *M/S Portreitz Maternity v James Karanga Kabia*, Civil Appeal No. 63 of 1997, that it would be prejudicial for the court to return this matter to a never ending cycle of litigation.

Analysis and Determination

13. An irregular default judgment entered against a defendant who has not been served or properly served with summons to enter appearance would be set aside *ex debito justitiae*, as a matter of right. I note that through the ruling of 17th July 2023, Justice Mabeya, found that the interlocutory judgment of 6th January 2020 was irregular and set it aside *ex debito justitiae*.
14. However, a regular default judgment, distinguished from an irregular one, where the defendant was duly served with summons to enter appearance, but for one reason or another, failed to enter appearance or to file a defence may be set aside only for good reason.
15. The present application seeks to set aside the regular default judgment of 29th November 2023.
16. The court has wide discretion to set aside a regular default judgment. However, the discretion must be exercised based on principles.
17. The principles were considered Court of Appeal in *CMC Holdings Ltd v James Mumo Nzioki* (Civil Appeal No. 329 of 2001) [2004] eKLR as follows:-

“The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether



the applicant has reasonable defence which is usually referred as whether the defence is filed already or if draft defence is annexed to the application, raises triable issues.”

18. In this matter, the defendant attributed the non-compliance with the court’s directions to file a defence, to the inaction of its previous advocates.
19. The defendant claimed that he was not made aware of the court dates between 17th July 2023 when the court issued its ruling and gave orders for compliance and 29th November 2023, when the regular default judgment was entered. He also claimed that he was not made aware of the plaintiff’s request for judgment dated 8th November 2023.
20. In *Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002* the court observed that:-

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case.
21. In this matter, the defendant blamed his previous advocates for his failure to comply with court orders after the initial irregular judgment in default was set aside. But, he failed to show any efforts he made to find out the status of his case from the advocates.
22. The present application was filed on 30th August 2024, about nine months after the judgment. It bears repeating that, the defendant neither explained the delay in bringing the application nor showed any efforts made to find out the status of his case from his previous advocates.
23. It should be emphasized that the discretion of the court is to be exercised ‘to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice’. *Shah v Mbogo & another* [1967] EA 116
24. From the material before the court, the applicant did not show any diligence in pursuit of his case. It appears his actions are to obstruct or delay the course of justice.
25. In addition, upon perusal of the draft statement of defence annexed to the application, it is, in my considered estimation, an assembly of mere denial that does not raise any triable issues.

Order 9 Rule 9

26. Before I conclude, the plaintiff questioned whether Krodha and Macharia Advocates are properly on record in view of Order 9 Rule 9.
27. The said Rule stipulates that :-

“9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—



- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

28. The rationale for the rule is “to protect advocates from mischievous clients who will wait until a judgment has been delivered then sack the advocate and either replace him with another advocate or act in person.” S. K. Tarwadi v Veronica Muehlemann (HC Malindi Misc. Civil Appl. No. 6 of 2018) [2019] eKLR
29. Nevertheless, the rule should be seen within the broader constitutional imperative on the right to legal counsel of choice. The expression by Okubasu JA was apt that: -
- “...it is not the business of the courts to tell litigants which advocate should and should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.” (William Audi Odode & Another v John Yier & Another Court of Appeal Civil Application No. NAI 360 of 2004 (KSM33/04))
30. The defendant’s previous advocates have not objected to the appointment of Krodha and Macharia Advocates on account of non-payment of their fees.
31. Krodha and Macharia Advocates stated that they filed a notice of change of advocates on 8th July 2024. However, there is no notice on the Judiciary Case Tracking System or in the physical file.
32. Therefore, I do not think that the previous advocates will be prejudiced by the change in legal representation of the applicant.

Disposal

33. In the upshot, the defendant’s Application dated August 30, 2024 is partially successful.
34. The application, in so far as setting aside of the judgment herein is concerned, is dismissed.
35. Leave is granted to Krodha & Macharia Advocates to come on record for the defendant.
36. Given the result of my analysis, each party shall bear own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 19TH DAY OF JUNE, 2025

F. GIKONYO M

JUDGE

In the presence of: -

Dachi for Plaintiff

Macharia for defendant

CA Kinyua

