



REPUBLIC OF KENYA



Chania Gardens Limited & another v Kingdom Bank Limited & another (Commercial Case E072 of 2022) [2025] KEHC 13510 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E072 OF 2022
MN MWANGI, J
SEPTEMBER 18, 2025**

BETWEEN

**CHANIA GARDENS LIMITED 1ST PLAINTIFF
GWEKA LIMITED 2ND PLAINTIFF**

AND

**KINGDOM BANK LIMITED 1ST DEFENDANT
AL-HILAM AUCTIONEERS 2ND DEFENDANT**

RULING

1. The defendants/applicants filed a Notice of Motion application dated 4th July 2024 brought under the provisions Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 7 Rule 1, Order 10 Rule 11, Order 36 Rule 7 and Order 51(1) of the Civil Procedure Rules, 2010 and all other enabling provisions of law. The defendants pray for orders –
 - i. That this Honourable Court be pleased to grant leave to the defendants to file a statement of defence out of time;
 - ii. That the draft defence annexed to the application be deemed as duly filed upon payment of the requisite Court fees and
 - iii. That the costs of this application be in the cause of the suit.
2. The application is premised on the grounds in support of it and an affidavit sworn on 4th July, 2024 by Mr. Jackson Kimathi, the Head of Legal Department at the 1st defendant (formerly known as Jamii Bora Bank Limited).



3. He deposed that sometime on or around 7th March 2022, the plaintiffs filed suit against the Bank (1st defendant) and the 2nd defendant, and that they simultaneously filed an application seeking injunctive relief over the parcel of land known as Land Reference Number 10884/4 off Thika Gatanga Road, in Murang'a County.
4. Mr. Kimathi further deposed that on 10th March 2023 the Court delivered a Ruling on the plaintiff's application and granted an interlocutory injunction restraining the defendants from dealing with or disposing of the suit property pending the hearing and determination of the suit. He stated that vide a Request for Judgment dated 13th March 2023, the plaintiffs sought an interlocutory judgment against the defendants for want of a defence, and an interlocutory judgment was entered but it was set aside on the application of the defendants vide a Ruling dated 15th May 2024.
5. He averred that the defendants have a viable defence to the suit, which they would like placed on record, as per the draft statement of defence to their affidavit.
6. Mr. Kimathi stated that his Advocate had advised him that the defendants needed to seek leave of the Court to file their statement of defence out of time and/or to have the time within which the statement of defence ought to be put on record enlarged. He urged this Court to exercise its unfettered discretion and grant the defendants the leave being sought.
7. He stated that the plaintiffs would not suffer any prejudice or injustice since they currently enjoy injunctive orders and the subject matter of the suit is well preserved. He averred that the plaintiffs will have a chance to present their case at trial and test any evidence presented by the defendants. He asserted that substantive justice ought not to be sacrificed at the altar of strict adherence to procedural Rules. He urged this Court to balance the rights of all parties appearing before it.
8. He contended that the lapse of time within which a defence ought to have been filed was not occasioned by a willful defiance of the rules of procedure, but rather, by the defendants' apprehension that Summons had not been properly extracted or served upon them, which question of law was settled by this Court in its Ruling of 15th May 2024. He stated that the defendants ought not be punished for holding such legitimate apprehension.
9. He deposed that it would be manifestly unfair to deny the defendants the opportunity to exercise their right to defend themselves, especially when their delay in filing the defence was due to a legitimate objection regarding the extraction and service of Summons, which objection was duly upheld by the Court in its Ruling.
10. To oppose the application, the plaintiff filed a replying affidavit sworn on 17th July 2024 by Mr. Gabriel K. Gathumbi Advocate. He averred that the defendants were served with a plaint, verifying affidavit, witness statement, list of documents, Summons to enter Appearance on 9th March 2022 via email and that they were also served physically. He also averred that the law firm of KRK Advocates LLP filed and served a Memorandum of Appearance dated 15th March, 2022 but they failed to file a statement of defence within 14 days and to effect service of the same. He deposed that as at the date of the replying affidavit in this application, which was 2 years and 4 months since the Memorandum of Appearance was filed, the defendants had failed to file and serve any statement of defence.
11. Mr. Gathumbi stated that this Court in its Ruling of 15th May 2024, observed that the defendants in their application dated 28th July 2023 in which they sought the setting aside of the interlocutory Judgment, neglected to seeking leave of this Court to file a defence out of time. He stated that the instant application seeking leave to file a defence has been filed over 2 years after the time set out in the law has elapsed, which delay amounts to serious laches and gross delay that is inexcusable.



12. Mr. Gathumbi contended that nowhere in the supporting affidavit have the defendants attempted to advance any sufficient reasons for the delay occasioned in filing and serving the defence or demonstrated any incapacity and/or inability to do so.
13. He further contended that any misapprehension or misinterpretation of the law is not a reason for this Court to depart from the set out law and/or apply its discretion in such a way as to favour a litigant to avoid the adverse effects of such misinterpretation. He stated that any other interpretation would be a mockery of the law for the reason that they misunderstood, misinterpreted and/or were ignorant of the said law. He also stated that this Court in its Ruling of 15th May 2024 at paragraph 35 already determined the issue in regard to Summons.
14. Mr. Gathumbi expressed the view that allowing the defendants' application will be prejudicial to the plaintiffs as the 1st plaintiff on or about 22nd October 2021 paid the total sum of Kshs.76,849,696.26 to the 1st defendant, being the amount due under the loan inclusive of accrued interest, but the said defendant has declined, refused and/or neglected to discharge the charge over the suit property but instead, it opted to exercise its statutory power of sale in respect to non-existent loan arrears after it represented that the amount due on the loan account was the sum of Kshs.66,860,175.52 as at 30th June 2020, which continues to attract interest at the rate of 13% per annum until payment in full.
15. Mr. Gathumbi deposed that based on the foregoing facts, the plaintiffs have inter alia, sought a declaration that the loan has been repaid in full and for the suit property to be discharged from the existing charge.
16. Further, that the plaintiffs will suffer prejudice if the orders being sought are granted as it has been 2 years and 7 months since the 1st plaintiff alleged to have paid off the loan in full and during the said period, the 1st defendant has continued to enjoy a security (charge) over the suit property in respect of a non-existent debt.
17. He stated that if the plaintiffs were to be successful in their case, the 1st defendant will have wrongfully had the double benefit of the loan repayment and the retention of the security over the property in respect of a non-existent loan, to the detriment, damage and injury to the plaintiffs, which is not easily measurable or compensable by an award of damages.
18. He further stated that in the unlikely event that any amount is deemed to be due on the loan account as at 22nd October 2021, the plaintiffs are apprehensive that they will be liable to pay the accrued interest on such amount at the stated rate of 13% as from that date, which shall occasion the plaintiffs loss and damage.
19. Mr. Gathumbi contended that either way, the delay occasioned by the defendants in filing their purported defence, in lodging the instant application and the resultant delay in the expeditious hearing and determination of this matter is extremely prejudicial to the plaintiffs. He urged this Court not to allow the defendants' application.
20. He contended that the defendants in their supporting affidavit had not stated the triable issues that warrant this Court to exercise its discretion in their favour.
21. The defendants through KRK Advocates LLP filed written submissions dated 24th September 2024 in support of their application. The firm of Gathumbi & Company Advocates filed written submissions dated 22nd October 2024 on behalf of the plaintiffs.



22. The defendants' learned Counsel, Mr. Kuria, relied on the provisions of Section 1B of the [Civil Procedure Act](#) which mandates Courts to handle proceedings fairly by ensuring that justice is done to litigants.
23. He stated that justice and the right to be heard are core principles of the Kenyan Judicial system best captured by the maxim audi alteram partem (no one shall be condemned unheard).
24. Mr. Kuria referred to this Court's Ruling which overturned the interlocutory judgment. He submitted the Summons served were not sealed and signed by the Court, which fact this Court noted, and could not be held against the plaintiffs. He stated that it would be unjust to penalize the defendants for their reluctance to participate in proceedings lacking valid Summons.
25. He submitted that the defendants' failure to file a defence in good time was not due to neglect, but as a result of the legal contestations surrounding the validity of the Summons and the interlocutory judgment and it was not a disregard for procedural rules.
26. Counsel stated that since this Court had determined that the matter cannot be resolved through interlocutory judgment and the fact that the defendants have presented a draft statement of defence outlining substantial triable issues, the defendants should be granted an opportunity to be heard and the case decided on its merits. He relied on the case of *Patel v E.A. Cargo Handling Services Ltd.* [1974] E.A 75, to support his submissions. He stated that under Order 10 Rules 10 and 11 of the Civil Procedure Rules, 2010, the Court has a wide discretion to make orders that ensure that justice is served.
27. Mr. Kuria contended that the defendants' draft defence reveals substantive triable issues, clear contestations of fact and law, which must be resolved via production and examination of evidence before the plaintiffs can obtain the orders they seek. Counsel added that in the draft defence, the defendants have demonstrated that the plaintiffs are in default of their contractual obligations and are undeserving of the permanent injunctive and declaratory reliefs sought. He added that the defendants' argument is that the plaintiffs are attempting to abuse the Court process to avoid their contractual obligations and unjustly rewrite the terms of their contract, which are triable issues.
28. Mr. Kuria referred the decision in *Mugunya General Stores v Peplo Distributors Ltd.* [1987] eKLR, where the Court of Appeal stated that mere denials do not constitute a defence and that if it appears to the Court that any defendant has a good defence, then he may be allowed to defend its case.
29. Counsel submitted that considering the significant sums involved, there is a risk of unjust deprivation of property should the case be determined without hearing the defendants, as Article 40(3)(b)(ii) of [the Constitution](#) safeguards against arbitrary deprivation of property.
30. He concluded his submissions by stating that if the Court grants the orders sought in the plaint without giving the defendants an opportunity to present their case, they will have been unconstitutionally deprived of their ability to recover Kshs.31,093,272.10 rightfully owed to the 1st defendant by the plaintiffs.
31. He prayed for the defendants' application to be allowed and for costs to be in the suit, as prayed in the application.
32. The plaintiffs' learned Counsel, Mr. Gathumbi submitted that having served the defendants with the pleadings in this case and Summons to enter appearance on 9th March 2022, under Order 7 Rule 1 of the Civil Procedure Rules, the defendants were required to file their statement of defence within 14 days, being on or before 29th March 2022, but 2 ½ years later, the defendants had not filed their statement of defence.



33. Counsel contended that the defendants had not provided any sufficient reason why they had failed to file their defence within 14 days as required under the provisions of the Civil Procedure Rules after the filing of the Memorandum of Appearance on 15th March 2022.
34. Mr. Gathumbi referred to this Court's Ruling of 15th May 2024 and stated that since the defendants participated in these proceedings and filed a Memorandum of Appearance, they ought to have filed a defence. He expressed the view that their failure to do so was deliberate and an intentional omission by them, and not unintentional or inadvertent, but conscious, deliberate, shrewd and mischievous.
35. He expressed the view that if the plaintiffs' allegations in the suit are sustained, the 1st defendant will have enjoyed a charge over the property in respect of a non-existent loan for the last 3 years and for such other time as may be required to conclude this case, and in the event that they are unable to prove their case, they will be liable to pay any balance due on the loan together with any interest accruing therefrom from October 2021.
36. Counsel contended that the delay in the hearing and disposition of this matter greatly prejudices the plaintiffs and the effect of such delay is not easily quantifiable or compensable in damages.
37. Counsel submitted that the defendants' deliberate acts or omissions were based on their miscalculations or misapprehension of the law, which cannot be a sufficient reason or ground for this Court to exercise its discretion in favour of such a litigant.
38. The plaintiffs' Counsel opined that the defendants' intention was to vigorously oppose the plaintiffs' application for an interlocutory injunction, which they did, albeit unsuccessfully on the calculation that should the said application be disallowed, the issues in the main suit would have been substantially compromised as the defendants would have been at liberty to exercise their statutory power of sale and dispose of the suit premises thereby negating the plaintiffs' cause of action. He contended that the defendants were not interested or were at least reluctant to file their defence and advance the hearing of the main suit so as to enable the issues in dispute canvassed and determined on their merits, which was meant to steal a march on the plaintiff.
39. Mr. Gathumbi relied on the case of *Power Plant Engineers Limited v Business Partner International* [2019] KEELC 2732(KLR) which quoted the case of *Shah v Mbogo* (supra) to support his argument that the defendants by their deliberate action of not filing a defence within the prescribed time undertook a calculated risk and are now victims of their own designs and default, and are undeserving of this Court's discretion.
40. It was submitted by the plaintiffs' Counsel that there has been inordinate delay by the defendants in the lodging of the instant application as they filed their Memorandum of Appearance on 15th March 2022 but did not file the instant application until 4th July 2022 being over 2 years later. Counsel added that even in their previous application to set aside the interlocutory judgment, they inexplicably failed to seek this Court's leave to file their defence. He submitted that the period of delay in filing the instant application is inordinate and no sufficient reasons had been provided for the delay.
41. On the issue of the prejudice to be occasioned to the plaintiffs by the instant application, Mr. Gathumbi stated that the plaintiffs' cause of action in this suit is centred on the allegation that despite paying the loan granted by the defendant in full in the month of October 2021, the 1st defendant has illegally failed, declined and/or refused to discharge the suit premises from the charge.
42. Mr. Gathumbi submitted that whether or not the defendants file a defence, the plaintiffs still bear the burden of proving that the loan with the 1st defendant has been fully repaid and that will entail an



examination of the loan and other financial statements tendered by the defendants, which are in the plaintiffs' bundle of documents and form part of the Court Record.

43. He further submitted that the defendants' proposed defence which consists of a mere denial that the loan has been fully repaid does not raise any new or additional triable issues that are not already before this Court for hearing.
44. Counsel stated that any prejudice occasioned to the defendants in the event that the orders sought in the instant application are declined is as a result of their own authorship and is greatly outweighed by the prejudice suffered by the plaintiffs in the delay of the hearing and disposition of this matter.
45. He concluded the plaintiffs' submissions by stating that the requirement for this Court to do justice must be measured against the deliberate acts and omissions of the defendants in mischievously and intentionally disregarding the rules of procedure. He prayed for the defendants' application to be dismissed with costs.

Analysis And Determination

46. Having read the application and its supporting affidavit, the replying affidavit and the written submissions filed by Counsel for the parties, the issue for determination is if the defendants should be granted leave to file their statement of defence out of time.
47. The prayers that are being sought by the defendants rest on this Court's exercise of its discretion. Order 7 Rule 1 of the Civil Procedure Rules, 2010 provides for the filing of a statement of defence. It stipulates as follows –

Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the Court, file his defence within fourteen (14) days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen (14) days from the date of filing the defence and file an affidavit of service.

48. In this matter, the defendants' explanation for failing to file a statement of defence even after they filed a Memorandum of Appearance on 15th March 2022, is that it was not due to neglect, but rather as a result of legal contestations surrounding the validity of the Summons and the interlocutory judgment, but not as a result of disregard for procedural rules.
49. The defendants asserted that their draft statement of defence discloses triable issues hence they should be given a chance to be heard and for the case to be determined on its merits, as in the said defence, they have demonstrated that the plaintiffs are in default of their contractual obligations and are undeserving of the permanent injunctive and declaratory reliefs sought.
50. The plaintiffs' contestation is that the defendants deliberately and willingly refused to comply with the filing of their statement of defence within 14 days of filing of their Memorandum of Appearance. The plaintiffs argued that failure for them to serve Summons should not have held the defendants from complying with the provisions of the Civil Procedure Rules.
51. The plaintiffs also contended that the instant application was filed way too late, as late as 2 ½ years after the defendants filed their Memorandum of Appearance. The plaintiffs also contended that they will be occasioned injustice if the defendants are granted leave to defend the suit as they have repaid the loan, yet the 1st defendant continues to hold onto their security, and it has refused to discharge the charge. The plaintiffs asserted that since the interlocutory judgment entered against the 1st defendant was set aside, their case can still proceed to formal proof even though the defendants will not be given



an opportunity to file their statement of defence and accompanying documents. In the plaintiffs' view, the draft defence raises no triable issues as it only contains mere denials.

52. In this instance, I do agree with the plaintiffs that the prayers in the present application should have been sought together with the prayers that were in the application dated 28th July 2023 in which the defendants prayed for the interlocutory judgment to be set aside. The defendants' argument for failing to do so ostensibly is because service of Summons had not been effected upon the 1st defendant.
53. It is clear to me that the 1st defendant had its position which it believed to be legally correct although vide the Ruling of 15th May 2024, this Court held differently. In the said circumstances, I will consider if there was inordinate delay in filing of the instant application from the date of the said Ruling. I note that the instant application is dated 4th July 2024 and it was filed on 5th July 2024. As such, there was no inordinate delay in the filing of the instant application after the Court rendered its Ruling of 15th May 2024.
54. The 1st defendant asserted that its draft defence raises triable issues and it should not be kept off the seat of justice by being denied an opportunity to be heard. What constitutes a bona fide triable issue was addressed in the case of *Job Kilach v Nation Media Group Ltd., Salaba Agencies Ltd & Michael Rono* [2015] eKLR, by the Court of Appeal as follows –
- What then is a defence that raises no bona fide triable issues? A bona fide triable issue is any matter raised by the defendant that would require further/interrogation by the Court during a full trial. The Black's Law Dictionary defines "triable" as, "subject or liable to judicial examinations and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.
55. Having looked at the orders being sought by the plaintiffs they comprise declarations to be made by the Court, an order of estoppel, and a prayer for a permanent injunction, a prayer for the taking of accounts in respect to the 1st plaintiff's loan account held with the 1st defendant from 30th June 2020, and an order compelling the 1st defendant to execute a discharge of charge and release of the original title documents in respect of the suit property to the 2nd plaintiff. The plaintiffs also seek costs and any other orders the Court may deem fit.
56. I have gone through the draft defence annexed to the defendants' affidavit and having done so, I am persuaded that it raises bona fide triable issues that call for the defendants to be given an opportunity to defend the case filed by the plaintiffs.
57. Contrary to the plaintiffs' contention that the draft defence is a mere denial, that is far from the truth. The draft defence is detailed and the averments therein speak of the several opportunities given to the plaintiffs to pay off the loan after being given a rebate of Kshs.56,005,122.33 on two occasions, subject to the plaintiffs making the payments specified at each occasion. According to the defendants, the plaintiffs failed to meet the deadlines, the rebate was reinstated, and the interest was reviewed.
58. The defendants contend that sporadic payments were made by the 1st plaintiff and that a bullet payment of Kshs.56,037,599.44 was made on 8th October, 2021 resulting in clearance of the loan on account No. XXXXXXXXXXXXX.
59. The defendants however contend that a debt of Kshs.35,075,307.43 was left outstanding on account No. XXXXXXXXXXXXX as at 30th October 2021 and the 1st plaintiff was given up to 24th November 2021 to settle the said amount, but it was not settled leading to the 1st defendant instructing the 2nd defendant to sell the property by way of public auction.



60. In regard to the plaintiffs' allegation that the 1st plaintiff has repaid the loan in full, the defendants deny the said allegation and assert that the total outstanding amount of loan on account No. XXXXXXXXXXXXXXX stood at 37,093,272.10 as at 10th March 2022 and that the 1st plaintiff has failed, refused and/or neglected to settle the same, which sum continues to accrue interest at the contractual default rate.
61. In the face of all the averments that I have reproduced in the preceding paragraphs, I am persuaded that the defendants' draft statement of defence raises triable issues.
62. I am also persuaded that if they are not given an opportunity to defend the case against them, they will have been denied an opportunity to adduce evidence to rebut the plaintiffs' allegations against them, which will be highly prejudicial to them as the only evidence that will be on record will be adduced at formal proof by the plaintiffs. Although at formal proof the defendants would have an opportunity to cross-examine the plaintiffs, the two parties would however not be acting at a level playing field as the defendants would not have an opportunity to articulate their case.
63. That said, I hereby exercise my discretion in the defendants' favour by allowing the application dated 4th July 2024. I make the following orders-
- i. The defendants are hereby granted fourteen (14) days to file and serve their statement of defence;
 - ii. The plaintiffs will within fourteen (14) days of service file and serve a reply to the amended statement of defence, if need be; and
 - iii. Costs of this application shall be borne by the defendants since they are the ones who have sought leave to file their statement of defence out of time.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Jaleba holding brief for Mr. Kuria for the defendants/applicants

Mr. Gachanja holding brief for Mr. Gathumbi for the plaintiffs/respondents

Ms B. Wokabi – Court Assistant.

