

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. E028 OF 2024

NIMBU		AGENCIES
	LIMITED	PLAINTIFF
	VERSUS	
M		GAS
	LIMITED	D
	DEFENDANT	

RULING

1. The notice of motion application dated 14.2.2025 brought by the Defendant/Applicant seeks for orders:
 1. **The Honourable Court be pleased to set aside the default judgment entered in this matter in the interest of justice.**
 2. **The Honourable Court be pleased to deem the Memorandum of Appearance dated 25th November 2024 and Statement of Defence & Counterclaim dated 20th December filed in this matter as being properly on record.**
 3. **The Honourable Court be pleased to grant the Defendant further leave to file its supporting documents and witness statements out of time.**
 4. **The costs of this Application be in the cause.**

2. The application is premised on the grounds on the face of it and the affidavit of AFFLINE AOKO the Defendant/Applicant’s counsel. The application is opposed by the replying affidavit of NICHOLAS M. MBUTA, who is the Director of the Plaintiff/Respondent.

3. The parties filed written submissions in arguing the application which I have read and considered. This is a simple application seeking to set aside interlocutory judgement entered against the Defendant in the matter for failing to enter appearance and file a defence to the suit within the prescribed time.

4. The Defendant admits that it was aware that the Plaintiff instituted this suit against it vide a Plaint dated 14th November 2024 as

depicted by the pleadings herein. It is confirmed that the Defendant was served at its head office on 20th November 2024 and the receipt of summons acknowledged. Upon receipt of summons, the Defendant swiftly filed a Memorandum of Appearance dated 25th November 2024 on 2nd December 2024 and served the Plaintiff on even date.

5. The Defendant asserts that the process for preparing the Statement of Defence began in earnest but due to delays in provision of information by the relevant internal department for which this suit relates, the defence was filed out of the timelines stipulated by law.
6. That they only found out that the matter had been fixed for formal proof hearing a day to the court date and that a default judgment had been entered. Upon proper perusal it was realised that they had mistakenly left out a letter on the Plaintiff's Counsel email which explains why he did not receive our documents.
7. The Defendant states that the failure and/or delay in entering appearance and filing a Statement of Defence was not intentional but occasioned by pure inadvertence and mistake of counsel should not be meted on an innocent litigant.
8. That the circumstances of the subject suit are such that there is need to try the matter on merit in the interest of justice and unless the ex-parte interlocutory judgment is stayed and ultimately set aside and determined on merits, the Defendant will suffer unmerited financial loss to the tune of over Kshs. 30,000,000.
9. The Defendant avers that this application was brought promptly as soon as the remiss was discovered and in good faith and that they have paid the thrown away costs as ordered.
10. The Defendant submits that it has an arguable defence and unless the prayers sought are granted, they will be driven from the seat of justice unheard, thus it is in the interests of justice and fairness that this Honourable Court intervenes to allow the Defendant to have their day in court.
11. The Plaintiff/Respondent on his part states that the interlocutory judgment was entered regularly and the Defendant has not provided sufficient reason for it to be set aside.

12. That the Defendant on discovering that there would be delay in preparing the Statement of Defence ought to have filed an application for extension of time to file its Defence. This failure depicts a level of levity and laxity in the handling of the matter and the court ought not to provide leave to a Defendant who deliberately seeks to evade, delay or obstruct the course of justice.
13. That the claim by the Defendant that it found out that the matter had been fixed for formal proof hearing a day to the court date is equally shocking as the hearing notice for the formal proof hearing was served on the Defendant on 31st January 2025, five days before the hearing, and the Defendant acknowledged receipt.
14. The Plaintiff submits that the failure by the Defendant to file its Statement of Defence in time was therefore occasioned by negligence and the court ought not to set aside the judgment.
15. I agree with the Plaintiff that the Defendant has not provided any convincing reason for the delay in entering appearance and filing defence in the matter. The counsel for the Defendant has at paragraph 5 of the supporting affidavit deponed that the process for preparing the Statement of Defence began in earnest but due to delays in provision of information by the relevant internal department for which this suit relates, the defence was filed out of the timelines stipulated by law. Clearly, the mistake was purely by the Defendant and not by counsel who now submits that the mistake of counsel ought not to be visited upon the Defendant.
16. However, taking all matters into consideration and in the interest of administration of justice and given the early stages that this matter is at and the subsequent defence and counterclaim filed by the Defendant; it is only proper for the interlocutory judgement to be set aside under the provisions of Order 10 Rule 11 and under exercise of this Court's discretion. This will enable the parties herein to file their respective responses to the pleadings, witness statement and documents so that the matter is only listed for hearing after all steps have been complied with. This will also allow that matter to be heard on merit.
17. Consequently, I shall allow the application in terms of prayers (1, (2) and (3)) of the motion. I also give directions that in view of the fact that the Plaintiff has already seen a copy of the defence and counterclaim, he is given 14 days from the date of this ruling to file and

serve his response to the Defence and Counterclaim with corresponding leave to the Defendant to file and serve as rejoinder if any.

18. This court observes that on 04/02/2025 it had ordered the Defendant to pay to the Plaintiff and his counsel the adjournment costs of that day of Kshs.7,500 which the Defendant submits to have paid.
19. Following the outcome of this ruling, this court orders the Defendant to pay to the Plaintiff throw away costs on the application of Kenya Shillings twenty thousand (Kshs.20,000/=) before the next court date of this suit.
20. The case will be mentioned on **26/11/2025** for confirmation of compliance with order 11 of the Civil Procedure Rules and for further directions on the hearing of the suit.
21. Orders accordingly.

RULING WRITTEN, SIGNED & DATED AT MACHAKOS THIS 18TH SEPTEMBER 2025

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 18TH SEPTEMBER 2025

In the presence of :

Ms. Dave..... for Plaintiff/Respondent

Mr. Mutinda..... for Defendant/Respondent

Millygrace..... Court Assistant