



Imperial Surgical Company v Global Consortium Investment Limited & 2 others (Commercial Case E090 of 2023) [2025] KEHC 14703 (KLR) (Commercial and Tax) (16 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E090 OF 2023**

PM MULWA, J

OCTOBER 16, 2025

BETWEEN

IMPERIAL SURGICAL COMPANY PLAINTIFF

AND

GLOBAL CONSORTIUM INVESTMENT LIMITED 1ST DEFENDANT

HEALTHY PLUS LIMITED 2ND DEFENDANT

AIR FRANCE LLC NAIROBI OFFICE 3RD DEFENDANT

RULING

1. Imperial Surgical company (the plaintiff) filed this case against the Defendant herein in a bid to recover money owed in breach of an agreement by a plaint dated 27th February 2023. Despite service of summons and the plaint the 2nd Defendant failed to file his defence within the requisite period and consequently the plaintiff sought and interlocutory judgment was entered in default of defence against the defendants on 8th August 2023.
2. The 2nd Defendant filed a statement of defence on 7th August 2023 when the matter was scheduled for formal proof on 8th May 2025, the 2nd Defendant filed the instant application dated 6th February 2025 seeking to set aside the interlocutory judgment and the statement of defence, list of witnesses, witness statement, list and bundle of documents dated 7th august 2023 be deemed to be properly on record.
3. The 2nd defendant supported that application by the affidavit of David Adoli sworn on even date. He deponed that he is the advocate in conduct of the matter, instructions were received from the 2nd Defendant and appearance was entered on 1st August 2023. He contends the delay in filing the defence was not inordinate and that it is grave injustice to condemn a party unheard. That the defence raises



triable issues and that the 2nd Defendant be granted unconditional leave to defend the suit. And the Plaintiff will suffer no prejudice.

4. The Plaintiff opposed the application through the replying affidavit of its advocate on record Ernest Kibuthi sworn on 12th March 2025. By that affidavit the plaintiff stated that the defendant's application is without merit, brought in bad faith, and ought to be dismissed with costs. That interlocutory judgment was entered in the presence of the 2nd Defendant and thus their application has been brought late in the day after a period of 1 year 6 months. In default of any appearance within the requisite period the interlocutory judgment was regular. And that the defence as filed raises no triable issues.

Analysis and determination

5. The following issues arise for determination:
 - i. Whether the interlocutory judgment entered against the 2nd Defendant was regular; and
 - ii. Whether the 2nd Defendant has met the threshold for the Court to exercise its discretion to set aside the default judgment.
6. Order 10 Rule 4(1)(2) of the Civil Procedure Rules, provides as follows:
 - (1) Where the plaintiff makes a liquidated demand only, and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
 - (2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest as provided by sub rule (1) and costs, and the suit shall proceed as if it had been filed for the other claim only; and in respect of that claim the plaintiff may set down the suit for hearing.
6. The law is clear that where a defendant fails to enter appearance or file defence within the prescribed time after service of summons, the court is entitled, upon request, to enter judgment in default. The evidence before this Court demonstrates that the 2nd Defendant was properly served but failed to respond as required.
7. In *James Kanyita Nderitu v Marios Philotas Ghikas & Another* [2016] eKLR, the Court of Appeal drew a distinction between a regular and an irregular default judgment, holding that:

“In a regular default judgment, the defendant will have been duly served with summons to enter appearance but failed to respond, resulting in judgment. In such a case, the court has unfettered discretion to set aside the judgment if sufficient cause is shown.”
6. On the basis of the evidence of service and the 2nd Defendant's inaction, I find that the interlocutory judgment entered on 8th August 2023 was regular.



7. On whether the Court should exercise discretion to set aside the default judgment, the Court’s power to set aside judgment is anchored in Order 10 Rule 11 of the Civil Procedure Rules, which provides that:

“Where judgment has been entered under this Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

11. The guiding principles were restated in *James Kanyiita Nderitu (supra)*, where the Court held that in determining whether to set aside a regular default judgment, the Court must consider: the reason for the failure to file defence on time; the length of delay; whether the defence raises triable issues; the prejudice to each party; and whether it is in the interest of justice to set aside the judgment.

Reason for delay and length of delay

12. The 2nd Defendant has not given any plausible reasons for the delay and there is no explanation given as to why the defence was not filed within the stipulated timelines. The record reveals that the Defendant was served as early as April 2023 yet only entered appearance in August 2023, and filed the present application one and a half years later. Such delay is manifestly inordinate and has not been satisfactorily explained.
13. As held in *Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Ltd [2013] eKLR*, the discretion to set aside a judgment is not intended to assist a party who has deliberately sought to obstruct or delay the cause of justice. The conduct of the 2nd Defendant herein reflects precisely that, an indolent litigant seeking to undo the consequence of his own inaction.

Whether the defence raises triable issues

14. The Court has perused the 2nd Defendant’s statement of defence dated 7th August 2023. It contains general denials of indebtedness without setting out any coherent factual or legal defence. A triable issue must be one that merits judicial interrogation, not a bare denial.
15. In *Ecobank Kenya Ltd v Bobbin Ltd & 2 Others [2014] eKLR*, the Court held that a defence consisting of mere denials and calculated to delay fair trial is an abuse of process. The present defence falls squarely within that description. It does not raise any bona fide triable issue deserving of trial.

Prejudice and interest of justice

16. The Plaintiff has been in court since February 2023, diligently prosecuting its claim and awaiting formal proof. To set aside the interlocutory judgment at this stage would not only delay the conclusion of the matter but also prejudice the Plaintiff by depriving it of the fruits of a regular judgment.
17. I agree with the plaintiff on the equity maxim that equity aids the vigilant, not the indolent. The procedural rules exist to ensure order and fairness in the administration of justice
18. From the foregoing, I find and hold that the interlocutory judgment entered on 8th August 2023 was regularly entered. The 2nd Defendant has failed to provide any plausible or satisfactory explanation for the inordinate delay in filing a defence. The statement of defence on record discloses no bona fide triable issue warranting a full hearing. On the other hand, the balance of justice tilts in favour of the Plaintiff, who has diligently and promptly prosecuted its case and is entitled to the fruits of a regular judgment.



19. Accordingly, the Notice of Motion dated 6th February 2025 is dismissed with costs to the Plaintiff/ Respondent. The interlocutory judgment entered on 8th August 2023 shall stand. The matter shall proceed to formal proof.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF OCTOBER 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Muraguri for Plaintiffs/Respondents

Court Assistant: Carlos

