



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oparanya v Mutende (Commercial Case E002 of 2025)  
[2025] KEHC 13799 (KLR) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13799 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
COMMERCIAL CASE E002 OF 2025  
S MBUNGI, J  
OCTOBER 2, 2025**

**BETWEEN**

**WYCLIFFE AMBETSA OPARANYA ..... APPLICANT**

**AND**

**MARTIN MUTENDE ..... RESPONDENT**

**RULING**

1. The notice of motion application dated 17<sup>th</sup> July 2024 seeks a stay of execution of the orders against the applicant issued on 8<sup>th</sup> July 2024 by Honorable Kemei J.
2. He avers that the respondent had filed a notice of motion application dated 30<sup>th</sup> May 2024, which was set to be mentioned before High Court 2 on 8/7/2024 for directions. The applicant's counsel asserts that he logged into the Honorable Justice Ouga's court session and remained logged in until the end of the call. Upon inquiry, he was informed that the matter had already been proceeding before Hon. Kemei, and directions had been issued for mention on 18<sup>th</sup> July 2024.
3. He claims that when he checked the CTS in preparation for the mention, he learnt that the court had already issued orders on 8<sup>th</sup> July 2024 in the absence of all the parties and that they were not given an opportunity to be heard.
4. The counsel prays that the orders issued be set aside in the interest of justice, that their client should not be denied an opportunity to be heard, as they would suffer a great prejudice, as some of the claims that the respondent had raised were time-barred.
5. In their submissions dated 23rd July 2024, they raised one issue for determination, being whether the court should vacate, set aside, and or vary the orders made on 8<sup>th</sup> July 2024, and aver that the court had issued a substantive order during mention which should not have been the case. He claimed that none of the parties' counsel was in court during the making of the orders and hence there was no consent and quoted the case of Floriculture International Limited vs. Central Kenya Limited & 3 others (1995)



eKLR and the court of appeal case of Mrs. Rahab Wanjiru Evans vs. Esso Kenya Ltd (Civil Appeal No. 13 of 1995) where the court in these cases held that a court cannot make substantive orders during a mention unless with the consent of the parties.

6. He further held that the orders made on 8<sup>th</sup> July 2024 were an entry of judgment against the defendant in the absence of an application, and, as such, the orders made had no existence in law.
7. He avers that they had applied to seek leave to file a statement of defence, which he claimed raised triable issues of law that the court ought to determine, and claimed that they made an inadvertent mistake on 8<sup>th</sup> July 2024 when they logged in to a session before Ho. Ougo J, as opposed to Hon. Kemei J., who had already called out the matter and direction issued in the absence of the parties. He relied on the case of Geoffrey Oguna & Another vs. Mohammed Yusuf Osman & 2 others (2022) eKLR. In support of his case that a mistake of an advocate should not be visited on the client, they relied on the case of Bank of Africa Kenya Limited vs. Put Sarajevo General Engineering Co. Ltd & 2 others (2018) eKLR and Philip Chemwolo & another vs. Augustine Kubede (1982-88) KLR 103.
8. In conclusion, they pray that this court allow their application dated 17<sup>th</sup> July 2024 and vacate and set aside the orders made on 8<sup>th</sup> July 2024.
9. The respondent did not file a replying affidavit nor submissions in opposition.

### **Analysis and Determination**

10. This court has identified the following issues for determination:
  - a) Whether the orders issued on 8th July 2024 by Hon. Kemei J. should be vacated, set aside, or varied.
  - b) Whether the Applicant should be granted leave to file a statement of defence.
11. On whether the Orders of 8th July 2024 should be vacated, set aside, or varied, the applicant submits that the orders issued on 8th July 2024 were made during a mention, without the consent of the parties, and in their absence, rendering them irregular.
12. The Applicant relies on the case of Floriculture International Limited v. Central Kenya Limited & 3 Others [1995] eKLR and Mrs. Rahab Wanjiru Evans v. Esso Kenya Ltd (Civil Appeal No. 13 of 1995) [1995] eKLR, where the Court of Appeal held that substantive orders should not be made during a mention unless with the consent of the parties.
13. The Applicant further argues that the orders amounted to an entry of judgment without a formal application, rendering them a nullity in law. In Geoffrey Oguna & Another v. Mohammed Yusuf Osman & 2 Others [2022] eKLR, the Court of Appeal set aside orders issued in the absence of parties, noting that such orders violate the principles of natural justice, particularly the right to be heard as enshrined under Article 50(1) of *the Constitution* of Kenya, 2010.
14. The court notes that the Respondent has not controverted the Applicant's assertions regarding the circumstances under which the orders were made. The absence of a replying affidavit or submissions suggests that the Respondent does not dispute the procedural irregularity alleged by the Applicant.
15. It is a fundamental tenet of natural justice that no party should be condemned unheard (*audi alteram partem*). The issuance of substantive orders during a mention, without notice to or the presence of the parties, undermines this principle. In *Shah v. Mbogo* [1967] EA 116, the court held that the discretion to set aside *ex parte* orders is intended to prevent injustice or hardship resulting from accident, inadvertence, or excusable mistake.



16. The Applicant's counsel attributes the failure to attend the correct court session to an inadvertent mistake, as they logged into a session before Hon. Ougo J. instead of Hon. Kemei J. The Applicant relies on *Bank of Africa Kenya Limited v. Put Sarajevo General Engineering Co. Ltd & 2 Others* [2018] eKLR and *Philip Chemwolo & Another v. Augustine Kubede* (1982-88) KLR 103, where the courts held that a mistake by counsel should not be visited upon the client. In *Bank of Africa*, the Court of Appeal emphasized that where a party demonstrates a genuine mistake by counsel, the court should exercise its discretion to avoid punishing the litigant for errors beyond their control.
17. This court finds that the Applicant has demonstrated a procedural irregularity in the issuance of the orders on 8th July 2024. The orders were made during a mention, in the absence of the parties, and without their consent, contrary to established judicial practice. Furthermore, the mistake by the applicant's counsel in logging into the wrong virtual court session constitutes an excusable error that should not prejudice the Applicant's right to a fair hearing.
18. On the second issue raised by the applicant of whether the applicant should be granted leave to file a statement of defence, the applicant submits that their proposed statement of defence raises triable issues, including the contention that some of the Respondent's claims are time-barred under the *Limitation of Actions Act* (Cap. 22). The applicant argues that denying them the opportunity to file a defence would occasion great prejudice, as they would be unable to contest the Respondent's claims.
19. In *Pithon Waweru Maina v. Thuku Mugiria* [1983] KLR 78, the Court of Appeal held that a defence that raises triable issues, even if not guaranteed to succeed, warrants the granting of leave to defend. A triable issue raises a prima facie case requiring determination by the court. Similarly, in *Gupta v. Continental Builders Ltd* [1978] KLR 83, the court emphasized that where a defendant shows a bona fide defence, they should not be denied the opportunity to be heard.
20. The Applicant's assertion that some of the Respondent's claims are time barred constitutes a triable issue, as it involves questions of law and fact that require judicial determination. The Respondent's failure to oppose the application further supports the Applicant's case for leave to file a defence.
21. The court's inherent jurisdiction under Section 3A of the *Civil Procedure Act* (Cap. 21) and the overriding objective under Section 1A and 1B of the same Act require the court to facilitate the just, expeditious, and proportionate resolution of disputes. Denying the Applicant, the opportunity to file a defence would contravene these principles and result in an injustice.
22. Having considered the Applicant's notice of motion, the supporting affidavit, and the submissions, as well as the cited authorities, this court finds that the orders issued on 8th July 2024 were irregular and issued in violation of the principles of natural justice. The Applicant has also demonstrated a prima facie case for leave to file a statement of defence.
23. In the interest of justice, the court exercises its discretion under Order 45 Rule 1 of the Civil Procedure Rules, 2010, to set aside the orders of 8th July 2024 and grants the Applicant leave to file a statement of defence.
24. Accordingly, the court makes the following orders:
  - a. The orders issued by Hon. Kemei J. on 8th July 2024 are hereby vacated and set aside.
  - b. The Applicant is granted leave to file a statement of defence within 14 days from the date of this ruling.
  - c. Costs of this application shall be in the cause



- d. Mention 29.10.2025 to confirm compliance and for further directions of the main suit.
- e. Right of Appeal 30 days explained.

**DATED SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 2<sup>ND</sup> DAY OF OCTOBER, 2025.**

**S.N. MBUNGI**

**JUDGE**

In The Presence of;

C/A: Angong'a

Mr. Wachakana for the Plaintiff present online.

Mr Maribe holding brief for Dr. Nyaundi for the Defendant present online.

