



REPUBLIC OF KENYA



KENYA LAW
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**Musyoka v Mutunga (Civil Suit E154 of 2024)
[2025] KEMC 46 (KLR) (18 February 2025) (Ruling)**

Neutral citation: [2025] KEMC 46 (KLR)

**REPUBLIC OF KENYA
IN THE KITUI LAW COURTS
CIVIL SUIT E154 OF 2024
D MBURU, CM
FEBRUARY 18, 2025**

BETWEEN

JAIRUS MULEI MUSYOKA APPLICANT

AND

JEDIDAH MARGARET MUTUNGA RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion dated 9th September 2024 filed by the defendant/applicant seeking the following orders:
 - i. Spent
 - ii. Spent
 - iii. That the exparte judgement entered against the defendant/applicant on 3rd September 2024, the exparte proceedings and any subsequent orders be varied, vacated and/or set aside.
 - iv. That the honourable court be pleased to enlarge time within which the defendant/applicant is to file his defence, witness statements and list of documents to rely on.
 - v. That the court be pleased to admit the draft defence attached herein and the same be deemed as duly filed.
 - vi. That the costs of this application be in the cause.
2. The application is premised on grounds outlined on the face of the application and the Supporting Affidavit of Jairus Mulei Musyoka sworn on 9th September 2024.
3. In response, the plaintiff/ respondent filed a replying affidavit sworn by Jedidah Margaret Mutunga dated 16th September 2024 opposing the said application.



4. The application was canvassed by way of written submissions.
5. I have carefully considered the application, the replying affidavit, and the parties' respective submissions. The issue that arises for determination is whether the application meets the threshold for setting aside a default judgment.
6. Setting aside an *ex parte* judgment is a matter of discretion of the court.
7. Order 10 Rule 11 of the Civil Procedure Rules 2010 empowers the court to set aside an *ex parte* judgment for default of appearance and defence.
8. The principles applicable in this rule were laid down in the case of *Pithon Waweru Maina v Thuka Mugiria* [1998] eKLR and restated in the case of *Toshike Construction Company Limited v Harambee Cooperative Savings Limited* [2019] eKLR to be:
 - i. There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on terms that are just. The main concern of the court is to do justice to the parties and not to impose conditions on itself to fetter the wide discretion given by its rules.
 - ii. The discretion is intended to be exercised to avoid injustices or hardship resulting from accident, inadvertence, or excusable mistake or error.
 - iii. The discretion is not exercised to assist a party who has deliberately sought whether by evasion or tactics to delay the obstruction of justice.
 - iv. That the Court of Appeal will not interfere with a judge's discretion unless it is convinced that the court has misdirected itself on some matter and ended up arriving at the wrong decision.
9. I find that the decision being challenged herein was a regular default judgment. In a regular default judgment, the defendant will have been duly served with summons to enter appearance but for one reason or another, he failed to enter appearance or file a defence. In this case, the defendant alludes to mistake of counsel for the failure to file defence in time.
10. In the case of *James Kanyita Nderitu v Marios Philotas Ghika* [2016] eKLR the court held that in setting aside a regular default judgment, the court has unfettered discretion and it will look into the following factors among others:
 - a. The length of time that has elapsed since the default judgment was entered.
 - b. Whether the intended defence raises triable issues.
 - c. The respective prejudice each party is likely to suffer.
 - d. Whether in the whole, it is in the interest of justice to set aside the default judgment.
11. In the case of *Esther Wamaitha Njihia & two others v Safaricom Ltd* [2011] the court stated as follows regarding the issue of setting aside a judgment:

"The discretion is free and the main concern of the courts is to do justice to the parties before it. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice"



12. Similarly in *Patel v East Africa Cargo Handling Services* [1974], the court stated as follows:
- “The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”
13. Furthermore, the court is obligated to serve the wider interest of justice. In the recent case of *Richard Nchapai Leiyangu v IEBC & 2 others* [2016] the court expressed itself as follows:-
- “We agree with the noble principles which go further to establish that the court’s discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”
- Additionally, the right to a hearing has always been well-protected in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice, and at the end of the day there should be proportionality”
14. For the court to exercise its discretion in an application for setting aside a default judgment, the applicant’s defence ought to raise triable issue.
15. A 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 a triable issue as one that would require judicial examination and trial.
16. The defendant’s proposed defence in my view cannot be termed as a mere denial. I am alive to the fact that a defence raising triable issues need not convince the court that it will succeed but should raise issues which ought to go to trial for adjudication. The right to a fair trial is a fundamental right under Article 50 of *the Constitution* of Kenya 2010 and is non-derogable.
17. It is trite law that no party should be penalized just because there was a blunder by his or her advocates where sufficient reasonable explanations are given.
18. In the case of *Republic v Speaker Nairobi City County Assembly* [2017] eKLR the court held as follows:
- “Blunders will continue being made and that just a mistake has been made, a party does not mean that he should not have his case heard on merit”
19. Similarly, in the matter of *Kenya Pipeline Company Limited v Mafuta Products Limited* [2014] eKLR the court held as follows:
- “ No party should be shut from ventilating its defence, that a court may set aside an interlocutory judgment if the party raises triable issues and that at all times, cases ought to be heard on merit”



20. Guided by the above authorities, I find that the application herein is for allowing and consequently set aside the default judgment entered on 3rd September 2024 and all other consequential orders.
21. In conclusion, I set aside the default judgment entered on 3rd September 2024 on the following conditions:
- a. That the defendant file and serve their statement of defence within 14 days from the date hereof.
 - b. That the defendant pays throw away costs of Kshs. 30,000/= to the plaintiff within 14 days from today's date.
 - c. In default of compliance with clauses (a) or (b) above the order setting aside the default judgment shall lapse without any further reference to the court.

DAVID MBURU

CHIEF MAGISTRATE

18/2/2025

DATED, SIGNED, AND DELIVERED IN OPEN COURT THIS 18TH DAY OF FEBRUARY 2025.

