



**Darshill Hardware Limited v Kihu & another (Civil Case
376 of 2020) [2025] KEMC 202 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEMC 202 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE 376 OF 2020
PA NDEGE, SPM
JULY 3, 2025**

BETWEEN

DARSHILL HARDWARE LIMITED PLAINTIFF

AND

PATRICK MBAUNI KIHU 1ST DEFENDANT

EVANS WANJALA JUMA 2ND DEFENDANT

RULING

1. The Defendants to the suit herein, Patrick Mbauni Kihu and Evans Wanjala Juma, brought the application herein seeking to set aside the ex-parte proceedings and judgment entered herein against them and all consequential orders arising therefrom, and that this suit be set down for hearing inter partes and be determined on merits and that the statement of defence filed herewith be deemed duly filed and served upon payment of requisite fees. They are further praying that the costs of this application be provided for.
2. The said application is supported by the grounds on the face of the application as well as the affidavit sworn by the 1st Defendant/ Applicant, Patrick Mbauni Kihu. The plaintiff, Darshill Hardware Limited, filed a Replying Affidavit of its counsel on record, Paul Murimi, sworn at Nakuru on 26/05/2025 opposing the application. Parties herein filed, and I do believe, exchanged their written submissions and arguments.

Setting Aside and The Guiding Principles

3. It is a deeply entrenched principle that a court of competent jurisdiction can vary, vacate or set aside ex-parte proceedings and judgment it entered in default pursuant to a number of factors. Also, the power of the court and its discretion to set aside a judgment entered ex parte to allow the hearing of a matter inter partes is unfettered. The court has a wide discretion to set aside such judgments where the defendant failed to enter appearance and/or file a defense. This jurisdiction is exercised



to avoid injustice and hardship resulting mainly from accident, inadvertence or excusable mistake or error. In normal circumstances, courts do lean towards a policy of deciding cases on merits rather than encourage ex parte judgments based on procedural technicalities. There is also a constitutional requirement to that effect.

4. The Court of Appeal in *James Kanyiita Nderitu & Another -v- Marios Philotas Ghikas & Another*[2016] e KLR, expressed itself thus,

In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defense, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defense, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defense raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other... (Emphasis added)

Determination

5. The applicants herein attributed the failure to enter appearance and file defense to lack of service. They contend that the affidavits of service relied on herein are false and hence perjuries. In my humble view, and as correctly argued by the learned counsel for the plaintiff/ respondent, this explanation advanced is rather lame as they have not sought to cross-examine the process server and the deponents of the affidavit of service as to the correctness of the averments therein.
6. That notwithstanding, I am supposed to look at whether there is any defence raising a triable issue. I however found that no draft defence has been properly adduced herein. The draft defence that has purportedly been referred to in the application herein has not been stamped, marked, sealed and executed by a Commissioner for Oaths as required. A reading of Rule 9 of the Oath and Statutory Declaration Rules, which is the guiding provision of the law, provides thus: 'All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.'
7. Any unmarked and unsealed annexures such as the draft defence herein are therefore of no value to the application to which they relate in view of the fact that an Affidavit and the annexures attached thereto constitute evidence. To qualify as evidence, such annexures must be marked and sealed by a Commissioner for oaths as required by Rule 9 of the Oaths and Statutory Declarations Rules.
8. Hayanga J in the case of *Abraham Mwangi v S. O. Omboo & Others* HCCC N0. 1511 of 2002 held:

“Exhibits to affidavits which are loose fly sheets for identification attached to them and do not bear exhibits marks on them directly must be rejected. The danger is so great. These exhibits are therefore rejected and struck out from the record. That being the case the application fails and is dismissed.”
9. Similarly, in *Francis A. Mbalanya v Cecilia N. Waema*[2017] eKLR, the court held:

“The law that requires the sealing and marking of annexures with serial letters is in mandatory terms and must be complied with... in the instant case, the law has provided in mandatory



terms the manner in which evidence by way of annexures can be received by court. The failure to comply with that law, like in the instant case can only lead to one thing, the striking out of the offending documents. However, considering that the supporting affidavit in itself complies with the law, it is only the annexures that can be expunged from the record, and not the supporting affidavit and the application."

10. As seen above, the Rule about exhibits to Affidavits is a mandatory one to the effect that such exhibits be securely sealed under the seal of the commissioner, and marked with serial letters of identification. The import of the mandatory nature of the Rule is that when a person takes an oath, he/she is (supposed to be) bound by it in its entirety. Thus, whatever depositions of solemnity that the deponent makes if supported by documentary evidence should be proven before the person who is administering the oath or commission so that the one making the oath can be bound fully by them. So much so that in case the documents are found to be untrue, the person who took the oath about them can be held to account on perjury and other consequences. If the documents are referred to and annexed separately to the oath taken by way of Affidavit, nothing would deter the deponent from disowning the documents and escaping responsibility over them.
11. I will further quote the authority of *Solomon Omwega Omache & Another v Zachary O Ayieko & 2 Others*[2016] eKLR that held:

"Although the point was not taken up by the plaintiffs, the court has a duty to uphold the sanctity of the record noting that this is a court of record. Before the court is a replying affidavit with annexures which are neither marked nor sealed with commissioner's stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wake-up call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to counsels or their assistant's lack of attention and due diligence."
12. Relying on the authorities cited above, it is my view that the purported draft defence does not form part of the Affidavit and hence the instant application. Therefore, the Court cannot base its findings on the draft. There is thus no draft defence to be considered herein and the application herein.
13. Having found that the ex-parte judgment was regularly entered; and there being no draft defence properly annexed herein for me to consider, I do find that this application therefore fails in its entirety and is hereby dismissed with costs to the plaintiff/ respondent.

RULING DATED, SIGNED AND DELIVERED AT NAKURU THIS 03RD DAY OF JULY, 2025

ALOYCE-PETER-NDEGE.

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: Mwenda

Defendants' Counsel: n/a

1st Defendant/ Applicant: n/a

2nd Defendant:

