



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muinde v Mwilu & another (Civil Case E041 of 2022)  
[2025] KEMC 176 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEMC 176 (KLR)

**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
CIVIL CASE E041 OF 2022  
YA SHIKANDA, SPM  
JULY 31, 2025**

**BETWEEN**

**ALRED MUTUA MUINDE ..... PLAINTIFF**

**AND**

**DAVID MUTINDA MWILU ..... 1<sup>ST</sup> DEFENDANT**

**GL WILLIAMS CONSULTING LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**The Application**

1. The application for determination is dated 28/4/2025 brought by the 2<sup>nd</sup> defendant. The application was filed pursuant to the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 10 rule 11, Order 22 rule 22(1) and (2) and Order 40 rule 1(a) and (b) of the *Civil Procedure Rules*. The application seeks the following main prayers, others having been spent:

1. That this Honourable court be pleased to review and set aside its judgment and decree passed against the 2<sup>nd</sup> defendant/applicant on 19/2/2024;
2. That the ex parte judgment on record be set aside and the 2<sup>nd</sup> defendant/applicant be granted unconditional leave to defend this suit;
3. That the 2<sup>nd</sup> defendant/applicant be granted leave to file a statement of defence to defend itself in this suit;
4. That directions be given by this Honourable court as to an early hearing date;
5. That the costs of this application be provided for.

The application is supported by the affidavit sworn by one Billy Anjele Indeché and is premised on the following general grounds:



- a. That the 2<sup>nd</sup> defendant/applicant was never served with summons to enter appearance and the pleadings;
  - b. The 2<sup>nd</sup> defendant/applicant or its principal officers were never served with the 10 days' notice of entry of judgment and as such, the consequential judgment and decree in favour of the plaintiff is irregular;
  - c. The 2<sup>nd</sup> defendant/applicant was not aware of the existence of the suit until when they were served with the decree, warrants of attachment and sale and proclamation notice by Milan Auctioneers;
  - d. David Mutinda Mwilu is a stranger to the 2<sup>nd</sup> defendant and is not a Director of the 2<sup>nd</sup> defendant as was averred by the Process server;
  - e. The 2<sup>nd</sup> defendant/applicant was not accorded a chance to present their case and failure to present its defence was not due to fault on their part;
  - f. The 2<sup>nd</sup> defendant/applicant stands to be condemned unheard if the prayers sought are not granted;
  - g. The 2<sup>nd</sup> defendant has an arguable defence with high probability of success;
  - h. There has been no delay in making the application and no prejudice will be suffered by the plaintiff that cannot be remedied by way of costs;
  - i. The 2<sup>nd</sup> defendant will suffer irreparable loss if the prayers sought are not granted;
  - j. It is in the interest of justice to allow the application as prayed.
2. In the affidavit in support of the application, the 2<sup>nd</sup> defendant reiterated the grounds on the face of the application and attached supporting documents.

### **The Plaintiff's Response**

3. The plaintiff opposed the application by filing a Replying affidavit sworn by himself on 16/5/2025. The plaintiff deposed that the 2<sup>nd</sup> defendant was served with summons to enter appearance through the 1<sup>st</sup> defendant whom the plaintiff claimed was a senior officer of the 2<sup>nd</sup> defendant. That the 1<sup>st</sup> defendant was the driver of the motor vehicle belonging to the 2<sup>nd</sup> defendant and cannot therefore be a stranger to the applicant. The plaintiff maintained that summons were served at the 2<sup>nd</sup> defendant's offices and were duly stamped and that the 2<sup>nd</sup> defendant has not denied the location of its physical offices as indicated in the affidavit of service.
4. The plaintiff averred that notice of entry of judgment was served upon the 2<sup>nd</sup> defendant at their offices. That the affidavit in support of the application contains falsehoods and the defence does not raise any triable issue. The plaintiff argued that setting aside of the judgment would cause further and unnecessary delay yet the court was satisfied that the 2<sup>nd</sup> defendant had been served. The plaintiff attached documents in support of his position.

### **Main Issues or Questions for Determination**

5. Having perused the application as well as the response by the Plaintiff, together with the parties' submissions, I find that the main issues or questions for determination are as follows:



- i. Whether there are sufficient grounds to warrant setting aside of the Judgment in default entered herein;
- ii. What other orders should the court make if need be?
- iii. What orders should the court make with respect to costs of the application?

### **The 2<sup>nd</sup> Defendant's Submissions**

6. The parties agreed to dispose of the application by way of written submissions which were duly filed. The 2<sup>nd</sup> defendant relied on the provisions of Order 5 rule 3 and submitted that the 2<sup>nd</sup> defendant was not served as per the law. That the plaintiff appears to have served a stranger on behalf of the 2<sup>nd</sup> defendant and the plaintiff did not demonstrate that he made attempts to serve a Principal Officer of the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant relied on and quoted several authorities but did not bother to annex copies thereof. The 2<sup>nd</sup> defendant further reiterated the grounds relied upon and urged the court to allow the application.

### **The Plaintiff's Submissions**

7. The plaintiff submitted that the 2<sup>nd</sup> defendant was duly served and that the judgment was regular. The plaintiff relied on his replying affidavit. The plaintiff argued that the applicant has no defence to the suit. That the accident clearly occurred, the vehicle was registered in the name of the applicant and the plaintiff was a lawful passenger in the vehicle. The plaintiff further argued that the damages awarded are clearly within the average awards in similar cases and probably on the lower side. That it would serve no purpose to set aside the judgment only to end up with a similar outcome years later. The plaintiff submitted that the reason advanced by the applicant for failure to enter appearance was incredible. That a long period of time has lapsed since judgment was entered. That the proposed deference does not raise any triable issue and that the plaintiff stands to suffer disproportionate prejudice noting that he still carries injuries requiring future medical care. The plaintiff prayed that the application be dismissed with costs.

### **Analysis and Determination**

#### **The Legal Provisions**

8. Order 6 rule 1 of the *Civil Procedure Rules* states that:

“Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons”.
9. Order 7 rule 1 of the *Civil Procedure Rules* provides that:

“Where a defendant has been served with summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service”.
10. Order 10 rule 6 provides that where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such



defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

11. Order 10 rule 11 provides as follows:

“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”.

12. Section 1A of the [Civil Procedure Act](#) provides as follows:

“(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.

13. Section 1B provides thus:

“(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims— (a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology”.

14. Section 3A provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.

15. Articles 159(2)(b) and (d) of the [Constitution](#) provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities and justice shall not be delayed.

16. I have carefully considered the application as well as the plaintiff’s response. I have further considered the submissions made on behalf of the parties. From the provisions of Order 10 rule 11 of the [Civil Procedure rules](#), it is clear that the power to set aside a judgment entered in default of appearance or



defence is within the discretion of the court. In the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 the Court of Appeal per Duffus President of the Court stated thus:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules.....the principle obviously is that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any of the rules of procedure.”

17. In *Shah v Mbogo* [1967] E.A 116 at 123, Harris J, held as follows;

“I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgement obtained ex parte. This 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

18. In the case of *Smith v Middleton* [1972] SC 30, it was held that discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. The principles to be considered by the court in an application of this nature were well articulated in the case of *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR. In the said case, the Court of Appeal held that the principles governing the exercise of judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon the failure of either party to attend the hearing are:

1. There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just;
2. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice;
3. The court has no discretion where it appears there has been no proper service;
4. The power to set aside judgment does not cease to apply because a decree has been extracted;
5. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed;
6. The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered;
7. The question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered;



8. It should be remembered that to deny the subject a hearing should be the last resort of a court.
19. I have perused the record. It shows that a joint summons to enter appearance was issued to both defendants. The procedure requires that each defendant be served with a separate summons to enter appearance. Order 5 rule 7 of the *Civil Procedure Rules* provides that save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant. I have further perused the affidavit of service sworn by one James Muchiri Gachoki on 22/12/2022, a licenced Court process server. The affidavit of service indicates that the process server served the 1<sup>st</sup> defendant at the offices of the 2<sup>nd</sup> defendant. The affidavit further indicates that the 1<sup>st</sup> defendant accepted service as the Director of the 2<sup>nd</sup> defendant. Indeed, the returned copy of summons to enter appearance bears a stamp impression with the name of the 2<sup>nd</sup> defendant.
20. The plaint describes the 2<sup>nd</sup> defendant as a company duly registered under the *Companies Act*. It is clear that the 2<sup>nd</sup> defendant enjoys distinct legal personality separate from the 1<sup>st</sup> defendant. The law provides how a corporation is to be served with summons to enter appearance and plaint. Order 5 rule 3 of the *Civil Procedure Rules* stipulates that:
- Subject to any other written law, where the suit is against a corporation the summons may be served—
- (a) on the secretary, director or other principal officer of the corporation; or
  - (b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—
    - (i) by leaving it at the registered office of the corporation;
    - (ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
    - (iii) if there is no registered office and no registered office or physical address of the corporation, by leaving it at the place where the corporation carries on business; or
    - (iv) by sending it by registered post to the last known postal address of the corporation.”
21. The plaintiff alleges that the 1<sup>st</sup> defendant was (is) a Director of the 2<sup>nd</sup> defendant. The plaintiff did not furnish evidence to prove that fact. On the contrary, there is evidence from the 2<sup>nd</sup> defendant negating the fact that the 1<sup>st</sup> defendant was (is) a Director of the 2<sup>nd</sup> defendant. It is thus my finding that the 2<sup>nd</sup> defendant was not properly served as required by law. Whoever was served on behalf of the 2<sup>nd</sup> defendant was neither a Secretary, Director nor Principal officer of the 2<sup>nd</sup> defendant. The mere fact that the 1<sup>st</sup> defendant could have been an employee of the 2<sup>nd</sup> defendant does not mean that he could be served on behalf of the 2<sup>nd</sup> defendant. The law is specific as to who may be served on behalf of a corporation.
22. In the authority of *Fanuel Onyango t/a Urania Technologies v Dominion Farms Limited* [2018] KEHC 9287 (KLR), the court held that when the law stipulates the manner in which a Corporation is to be served, and when the law provides specific alternative modes of effecting service, parties are required to comply. There is a litany of authorities indicating that service upon a corporation must be in the manner prescribed by law. What is the effect of serving an unauthorized person on behalf of a



corporation? In the authority of *Bakaki 101 Travellers Sacco Ltd v Wambugu & another* [2024] KEHC 7602 (KLR), the Court held:

The law is that service of summons upon a corporation maybe effected on the company secretary, director or other principle officer of the corporation. This is expressly provided for under provisions of Order 5 rule 3(a) of the civil procedure rules. The appellant has expressly denied that the person served one Mr Fredrick Karanja Mwangi was their chairman, but the purchaser of the suit motor vehicle and therefore the beneficial owner thereof. The fact therefore remains that the appellant's chairman Mr Joseph Chege Njuguna of cell phone Number 0726070138 and secretary one Mr Joseph Waichuhi Gathuku of phone Number 0722723871, were never served with summons and without much ado, the subsequent interlocutory judgment must be held to be irregular and be set aside *ex debito justitiae*."

23. My finding is that the 2<sup>nd</sup> defendant was not properly served. On that ground alone, the application must of right succeed. There is also no acceptable evidence to prove that the 2<sup>nd</sup> defendant was served with a notice of entry of judgment as required by Order 22 rule 6 of the *Civil Procedure Rules*. The draft defence by the 2<sup>nd</sup> defendant raises triable issues. The court cannot decline to set aside judgment merely because it may reach the same conclusion after hearing both parties. In this case, it is not a matter of the court's discretion on whether or not to set aside the judgment. The judgment must of necessity be set aside *ex debito justitiae*. The 2<sup>nd</sup> defendant deserves a chance to defend the suit. To deny them a hearing is not an option that this court is prepared to take. The interlocutory judgment entered herein as well as the final judgment were irregular. Any execution proceedings based on an irregular judgment are equally irregular and must be set aside.

### **Disposition**

24. Consequently, I proceed to make the following orders:
- a. The application dated 28/4/2025 is hereby allowed as of right;
  - b. The interlocutory judgment entered against the 2<sup>nd</sup> defendant on 13/1/2023 as well as the final judgment delivered on 19/2/2024 are hereby set aside as against the 2<sup>nd</sup> defendant;
  - c. The warrants of attachment and sale of movable property have since expired. I do not see the need to set aside what has already expired. However, for avoidance of doubt, no execution proceedings shall be carried out as against the 2<sup>nd</sup> defendant, pursuant to the default judgment;
  - d. If there are any charges to be paid to Milan Auctioneers, the same shall be paid by the Plaintiff;
  - e. The 2<sup>nd</sup> defendant is granted leave to defend the suit. To this end, the 2<sup>nd</sup> defendant shall file and serve a statement of defence together with all relevant documents (if any) within 14 days from today;
  - f. The plaintiff shall file a reply to defence within 14 days from the date of service of the statement of defence upon him;
  - g. As the error was on the part of the plaintiff and the court, there shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 31<sup>ST</sup> DAY OF JULY, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

