



**Ndutire v Kariuki (Originating Summons E032 of 2023)
[2025] KEHC 14845 (KLR) (Civ) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14845 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

ORIGINATING SUMMONS E032 OF 2023

PM NYAUNDI, J

OCTOBER 23, 2025

BETWEEN

RUTH NJERI NDUTIRE APPLICANT

AND

SAMUEL KARIUKI RESPONDENT

RULING

Introduction

1. This ruling is with regard to Notice of Motion Application dated 2nd December 2024 presented pursuant to Article 50 of the *Constitution* of Kenya 2010, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 9, Order 10 Rule 10 and 11, and Order 51 Rules 1 and 15 of the Civil Procedure Rules, 2010. In the Application, the Applicant seeks the following orders:
 - a. Spent.
 - b. Spent
 - c. That the Respondent's Advocates Sang & Kimutai Company Advocates be granted leave to come on record after Judgment.
 - d. Spent
 - e. That the Court be pleased to set aside the Judgment and the orders made on 18th October 2024 in its entirety and the Respondent be granted leave to file and serve its Replying Affidavit out of time.
 - f. That the Court be pleased to make Orders and it deems mete and just.



- g. That the costs of this Application be provided for.
2. The Application was supported by an affidavit of even date sworn by the Applicant. A bundle of documents was annexed to the affidavit in support including a draft replying affidavit to the Originating Summons dated 30th March 2023.
 3. The Respondent filed a self-sworn replying affidavit dated 24th February 2025 in response to the Application and annexed a bundle of documents.
 4. The matter proceeded undefended as the Respondent herein did not file defence. On 18th October 2024 the Honourable Court rendered its judgment, finding that the suit property Plot Number FB/2000 Mihang'o Utawala was matrimonial property and that it should be sold and the proceeds shared in the proportion of 75:25 in favour of the Respondent.
 5. The Application was canvassed via written submissions.

Applicant's Submissions

6. The Applicant filed written submissions dated 30th April 2025 and enumerated three (3) issues for determination: Whether the overriding principle of audi alteram partem advanced an opportunity to have the Applicant's Replying Affidavit filed out of time? Did the draft Replying Affidavit raise triable issues to warrant the setting aside the ex-parte judgment? Will the respondent suffer irreparable harm if this Honourable Court grants the Applicant an opportunity to be heard?
7. On Issue One, the Applicant submits that the principle of audi alteram partem, a fundamental tenet of natural justice, guarantees the right of every party to be heard. This principle, now enshrined under Article 25(c) and Article 50(1) of the Constitution as part of the right to a fair hearing, should guide the court in balancing strict procedural rules with substantive justice.
8. The Applicant acknowledges that this principle does not override established procedures but emphasizes that it empowers the court to exercise discretion in the interest of justice. He submits that he has demonstrated both inadvertence and lack of malice in failing to file the Replying Affidavit on time, and that the draft Replying Affidavit raises triable issues deserving of judicial consideration. The Applicant relied on the decisions in *Thayu Kamau Mukigi v Francis Kibaru Karanja* (2013) eKLR where the court emphasized examining whether a draft defence raises triable issues and *Richard Ncharpi Leiyagu v IEBC & 2 others* [2013] eKLR which reiterated the paramountcy of the right to be heard and proportionality in judicial decisions.
9. On the second issue, the Applicant submits that the draft Replying Affidavit raises several substantive and triable issues, particularly contesting the Respondent's version of events regarding the acquisition and financing of the suit property. He also explains that his failure to attend the hearing was due to a mix-up involving the change from physical to virtual court appearance, compounded by his layman status and lack of proper guidance. The Applicant relies on the following authorities: *Moi University v Vishva Builders Ltd* [2010] eKLR, *Kingsway Tyres & Automart Ltd v Rafiki Enterprises Ltd* [1996] eKLR, *Tree Shade Motors Ltd v D.T. Dobie & Co Ltd* [1998] eKLR, *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR, *Postal Corporation of Kenya v I.T. Inamdar & 2 others* [2004] eKLR
10. On the final issue raised by the applicant, he submits that the respondent would not suffer irreparable harm if the replying affidavit is allowed to be filed out of time. While acknowledging that some inconvenience or prejudice may occur, the Applicant argues such prejudice is compensable by costs, and thus not irreparable.



11. He stresses that denying a party the right to be heard should be a measure of last resort and is only justified in extreme cases, which this is not. The Applicant further contends that the seriousness of the issues raised in the replying affidavit outweighs any inconvenience to the Respondent. He relied on decisions in *Richard Murigu Wamai v Attorney General & another* [2018] eKLR, *Beatrice Wanjiru Kamuri v John Kibira Muiruri* [2016] eKLR.

Respondent's Submissions

12. The respondent filed her submissions on 16th May 2025 and submitted two (2) issues for determination: Whether the judgment entered on 18th October 2024 is irregular and whether the judgment should be set aside.
13. On the first issue, the Respondent submits that the Applicant was fully aware of the proceedings and was granted ample opportunity to participate. He was served with court orders as early as 6th April 2023, appeared in court on 17th May 2023, and was granted 14 days to file responses, but he elected not to file any documents. The Respondent argues that the Applicant's rights under Article 50(2)(b) and (c) (the right to be informed of charges and to have adequate time and facilities to prepare a defence) were not violated.
14. The Respondent states that the Applicant had no plausible explanation for his inaction and failure to participate in the proceedings. She relied on the case of *James Kanyita Nderitu v Marios Philotas Ghika & Another* [2016] eKLR, where the court held that whether a judgment is regular or irregular is a factual issue and that a party duly served but failing to appear cannot claim irregularity. They further relied on *Langer v Mutambu & another (Civil Case 303 of 2011)* [2023] KEHC 25792 (KLR) where the court found that failure to attend court, despite proper service, does not render a judgment irregular.
15. On the second issue, the Respondent submits that setting aside a regular ex-parte judgment is a matter of judicial discretion and not an automatic right. The court must be satisfied that there is a valid explanation for the delay, that there is no undue prejudice, and that there exists a defence on the merits. The Respondent relies on the case of *Shanzu Investments Ltd v Commissioner of Lands* [1993] eKLR.
16. The Respondent argues that the Applicant failed to give any reasonable explanation for the delay or failure to attend court, failed to file any documents during the proceedings despite being given multiple opportunities, and the Replying Affidavit filed by the Applicant only contains vague assertions, lacking clarity and precision, and does not disclose any triable issues.
17. On the issue of prejudice, the Respondent argues that it is the Respondent who would suffer prejudice if the judgment is set aside, as the Applicant has not demonstrated any substantial loss. She relies on the decision in *Samvir Trustee Limited v Guardian Bank Limited Nairobi (Milimani)* HCCC 795 of 1997.
18. Lastly, the Respondent cites *Nature Pharmacy Ltd & another v Gichuhi (Civil Appeal 245 of 2016)* [2022] KECA 827, to argue that ignorance of the law or being a layman is not a defence to procedural default.
19. The Respondent urged the court to dismiss the application on the basis that the judgment of 18th October 2024 was regular, that no sufficient reason has been given to warrant setting it aside, and that the Applicant has not demonstrated any triable issues capable of reopening the case.

Analysis and Determination

20. In light of the foregoing the issues for determination are



- a. Whether this Court should set aside the Judgment of 18th October 2024
 - b. Who should pay costs
21. Order 10 Rule 11 of the Civil Procedure Rules, 2010 empowers the Court to set aside or vary a default judgement entered under Order 10 (in default of Appearance or Defence) and any consequential decree or Order upon such terms as are just. It 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.
22. In the case of James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another [2016] KECA 470 (KLR) the Court of Appeal stated thus:
-From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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 defence, 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 defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence 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.
23. In the case of Patel v East Africa Cargo Handling Services Ltd (1974) EA 75 the court held 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 judgement as is the case here the court will not usually set aside the judgement 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.
24. In Waweru v Maina (Civil Appeal 59 of 2019) [2025] eKLR, Hon. Justice (Prof) Joel Ngugi, JA in his judgment opined that:
28. This obviates the need for this Court to delve into the question whether the proposed defence by the appellant raised any triable issues. Were I to do so, however, I would have concluded that it did. In doing so, it is important to recall that a triable issue is not one that has high or real prospects of succeeding at trial; it is one which is prima facie arguable. The requirement is not to raise a sufficiently forceful defence which is likely to succeed at trial; the requirement is to raise at least one issue which ought to be adjudicated at trial.
25. The Applicant avers that since he was served with the Originating Summons dated 30th March 2023, he has diligently attended court virtually until 30th April 2024, when an oral application was made for the matter to be heard in open court. The court granted this request and scheduled the hearing for 23rd July 2024 in open court. He contends that the failure to file his defence at the required time is due to



lack of a consistent source of income since Covid-19 hit that would enable him to engage an Advocate for purposes of legal representation and or advice as to what to do or the documents to file in defence he was served with the Originating summons.

26. The reasons given by him for his nonattendance in Court when the matter came up for hearing are plausible however his reasons for failing to file the replying affidavit on time are as lame as they come. Having found that the draft replying affidavit meets the threshold of raising a triable issue, I am constrained to allow the application and Order as follows-
- a. The Judgment of 18th October 2024 is set aside.
 - b. Leave granted to the Applicant to file Replying affidavit out of time. The draft Replying affidavit is deemed to be duly filed on payment of requisite filing fee.
 - c. The Plaintiff is granted leave to file further affidavit within 7 days.
 - d. The Applicant will meet the costs of this application assessed at Kshs 50000 payable within 30 days.
 - e. The matter will be mentioned on 26th November 2025 to confirm compliance and take directions.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF OCTOBER 2025.

P. M. NYAUNDI

JUDGE

In the Presence of:

Fardosa Court Assistant

Kinyua for Plaintiff/Respondent

