



River Bank Solutions Limited v County Government of Kisumu (Civil Suit 11 of 2019) [2025] KEHC 14991 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 11 OF 2019
JM OMIDO, J
OCTOBER 9, 2025**

BETWEEN

RIVER BANK SOLUTIONS LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU DEFENDANT

RULING

1. The Defendant’s Notice of Motion application dated 16th January, 2025 is expressed to be brought under Article 159(2) of *the Constitution* of Kenya, 2010, Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 10 Rule 8, Order 45 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law and seeks the following orders:
 - a. [Spent].
 - b. That the judgement delivered on 25th October, 2024 (Hon. Lady Justice M.S. Shariff) against the Defendant be set aside and the Defendants be granted unconditional leave to defend the matter.
 - c. [Spent].
 - d. That the Honourable Court be pleased to allow the Defendant’s Advocates (to) properly come on record.
 - e. That the Honourable Court be pleased to issue further orders as shall meet the ends of justice.
 - f. That costs of this application be provided for.
2. The grounds upon which the motion is premised are in precis that: The Defendant’s erstwhile Advocates ceased acting before the matter was concluded and that the Defendants did not therefore participate in the suit during the defence case due to a breakdown of communication from its erstwhile



- Advocates. That the Defendant seeks an opportunity to be heard and that it stands to suffer immense prejudice if the orders sought are not granted.
3. The application is supported by the affidavit of Jane A. Odhiambo, Advocate, sworn on 16th January, 2025 in which the said deponent expounds on the above grounds.
 4. In particular, the said deponent states on oath that the previous Advocates for the Defendant withdrew from acting and there was a breakdown of communication on that fact to the Defendant, and as a result, the matter proceeded and no evidence was tendered during the defence hearing.
 5. The deponent further states that the statement of defence that was filed by the Defendant's former advocates was a holding defence and that no witness statements were filed. The deponent adds that the Defendant has a valid and tenable defence to the Plaintiff's case and should be allowed to be heard and present the same.
 6. The application is opposed and to that end the Plaintiff filed a replying affidavit sworn by Sylvia N. Matasi on 12th February, 2018.
 7. In her affidavit, the said deponent states that a default judgement was entered against the Defendant on 28th May, 2019 and was set aside by consent on 5th November, 2019 and the Defendant given 7 days within which to file a defence, which the Defendant did, on 8th November, 2019. The matter was thereafter fixed for pretrial directions and was confirmed and certified as ready for hearing on 27th September, 2023 and a hearing date set for 27th February, 2024.
 8. The deponent proceeds to state that the matter proceeded for hearing on 27th April, 2024 and that the Defendant's Advocate then on record attended and participated in the trial. The Defendant did not call any witnesses and the defence case was closed, subsequent to which directions and timelines were issued on the filing of submissions. The application to cease acting was filed by the Advocates after the closure of the defence case.
 9. That when the application to cease acting was placed before the court, both the Defendant's erstwhile Advocates and Ms. Jane A. Odhiambo (the deponent of the supporting affidavit) were present in court and that the latter was therefore aware of the former's application. The matter was thereafter slated for judgement on 17th September, 2024 but was eventually delivered on 25th October, 2024.
 10. The application proceeded by way of brief oral submissions which I have considered. From the record, I discern the issue for determination to be whether there has been placed before the court sufficient grounds for the order of setting aside judgement to be granted and the Defendant to be allowed to file a defence.
 11. I have perused through the record and what is clear to me is that after the consent to set aside the default judgement was recorded on 5th November, 2019, the Defendant filed its defence dated 8th November, 2019 on even date, obviously in compliance with the consent order that dictated that the same be filed within 7 days. Nowhere was it indicated that the defence was a "holding defence".
 12. It is also clear from the record that the Defendant's Advocate was in court on 27th September, 2023 when the matter was given a hearing date for 27th February, 2024.
 13. On 27th February, 2024, the matter proceeded and the Plaintiff's case was closed. The Defendant was represented by Counsel, who informed the court that there was an intention to file an application to cease acting. However, no reason was given as to why the application had not been filed. The Defendant's case was also closed.



14. Notably, the Defendant did not file any witness statement and that at no time did the Defendant's Counsel inform the court that the defence that had been filed was one that would be amended. In any event, no application for leave for amendment of the defence was filed.
15. Guided by the authorities of *Jane Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR; *Bouchard International (Services) Limited v M'Mwereia* [1987] KLR 193; *Remco Limited v Mistry Jadva Parbat & Company Limited & 2 others* [2002] 1 EA 233; *Gulf Fabricators v County Government of Siaya* [2020] eKLR; and *Baiywo v Bach* [1987] KLR 890, where there is no or no proper service of summons, or where the summons served are invalid, the ensuing judgement that may be entered in default of appearance and/or defence upon formal request by a Plaintiff is an irregular one.
16. It then conversely follows that where the service of valid summons is properly effected upon a Defendant who fails to enter appearance and/or file a defence, the judgement that is entered in default, upon formal request by a Plaintiff is a regular one.
17. From the above authorities, I am guided that an irregular judgement is set aside, upon application by a party as a matter of right, or *ex debito justitiae* and unconditionally while a regular judgement may on application by a party be set aside by the court in exercise of its discretion, whereby the court may attach terms and/or conditions to the order setting it aside.
18. The Defendant readily admits that it was served with summons. Being clear that the issue of service of summons is not disputed, it then means, as we have seen from the above authorities, that the default judgement that had been entered and that was set aside by the consent of the parties was a regular one.
19. Firstly, it is to be recalled that the period that was granted for the filing of the defence was by the parties' own consent, which has never been reviewed. That then means that any defence that was to be filed after that consent, without first reviewing the consent to extend or expand the time within which to file the defence would have been invalid. I say so because a consent is a contract between the parties which can only be set aside on the same grounds that would warrant the setting aside of a contract, by way of review (see *Flora N. Wasike v Destimo Wamboko* [1985] KECA 149 (KLR)).
20. Secondly, it is clear from the record that there was indeed a statement of defence filed. The matter proceeded to full hearing and the Defendant was represented by Counsel. It is therefore not true that the matter proceeded in the absence of the Advocate for the defendant.
21. Thirdly, the Defendant did not file any witness statement. That then obviously meant that the Defendant had no intention of calling any witnesses. The information to the court that the former Advocates intended to bring an application to cease acting for the Defendant would not therefore change the position that the Defendant had no witness to call. In my view then, there was nothing left of the defence case and the matter was ripe for closure of the defence case and for directions on submissions. The ensuing judgement was therefore a regular one.
22. Fourthly, it has been demonstrated by the Plaintiff that the Defendant was aware of the intended application for withdrawal by its Advocates well before the judgement was entered but took no action on the same. The delay from the time of such knowledge to the time of the application subject of which this ruling is predicated remains unexplained.
23. Fifthly, notwithstanding the four observations above, the Defendant, vide the instant application states that it has a good defence to the Plaintiff's case. The Defendant did not annex to the affidavit in support of the application the draft defence and witness statement of the witness it alleges it intends to call. The only way to demonstrate that there is a good defence to a claim is by annexing to the affidavit in



support of an application for setting aside judgement a draft defence. Thus then, there is nothing to show that there is a tenable defence to the Plaintiff's case.

24. The result of the foregoing is that I reach the persuasion that no valid grounds have been presented by the Defendant to upset the regular judgement that was entered for the Plaintiff. I proceed to dismiss the application dated 16th January, 2025 with costs to the Plaintiff.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 9TH DAY OF OCTOBER, 2025.

JOE M. OMIDO.

JUDGE

For Applicant: Ms. Matasi.

For Respondent: No Appearance.

Court Assistants: Mr. Ngoge & Mr. Juma.

Ms. Matasi: I seek a mention before the Deputy Registrar as there is a pending bill of costs for taxation.

Court: Mention before the Deputy Registrar on 29th October, 2025. A mention notice to be served.

