

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL DIVISION
CIVIL SUIT NO. E223 OF 2024

LEDAMA SULTAN
PLAINTIFF

VERSUS

THE NAIROBI ASSOCIATION T/A
NAIROBI

HOSPITAL.....1ST

DEFENDANT/APPLICANT

THE OFFICE OF DIRECTOR OF
PUBLIC

PROSECUTION.....2ND

DEFENDANT/APPLICANT

RULING

1. The Applicant herein, the **1st Defendant, by its motion dated 14/04/2025** seeks for:-

- 1) *Leave of court for the law firm of Ondaba & partners Advocates LLP to come on record for the 1st Defendant/Respondent;*
- 2) *An order of stay of execution of the Interlocutory Judgment entered on 2/04/2025 including all consequential orders emanating therefrom;*
- 3) *An order to set aside the ex-parte Interlocutory Judgment entered on 2/04/2025; and*
- 4) *Leave to defend the suit.*

2. The application is grounded on the supporting affidavit sworn by Gilbert Nyamweya, the Company Secretary of the Applicant/1st Defendant and grounds on its face, and upon provisions of **Order 9 Rule 9** of the **Civil Procedure Rules (CPR)** and **Section 1A, 1B and 3A** and the **Civil Procedure Act (CPA)**.
3. The deponent posits that upon filing a Memorandum of Appearance by its internal legal Department, he instructed external advocates to take over conduct of the case, in the name of Ondaba & Partners Advocates LLP, but the same was not done in good time hence the application and reasons stated therein.
4. The Respondent/Plaintiff opposes the application by way of his replying affidavit sworn on 19/05/2025. His disposition is that the Applicant was duly served with summons a fact not in dispute as it appended its signature and stamp to the summons; that it entered appearance on 15/12/2024 through Kelvin Onguka Advocate by memorandum of appearance and served; but no defence was filed as prescribed under the law necessitating entry of default judgment on 2/04/2024.
5. It is further averred that the Applicant willfully neglected to file its defence and that the motion is an afterthought citing no reasons for the negligence and urges that the orders sought be denied.

6. The Applicants reasons for its failure to file its defence on time are stated in the supporting affidavit of the 1st Defendants Legal Secretary that after filing the Memorandum of Appearance by its Internal Legal Department due to internal management issues he issued instructions to the Advocates seeking to come on record on 2/04/2025 (exh.. TNH-1) but that before the advocates could do so, two days later interlocutory judgment was entered.
7. The Applicant posits that denial of the orders sought would place the Applicant in grave danger and irreparable damage against principles of natural justice stating that the Plaintiff will not be prejudiced if the orders are granted.
8. The court has considered the affidavit material provided by both parties and their submissions.

Under **Order 10 Rule 11 CPA** the court is empowered to set aside or vary a judgment or decree or order upon terms it may deem fit, upon exercise of its judicial discretion as captured in the cases of **James Kanyiita Nderitu & Another v. Marios Philoctas Ghikas & Abnother [2016] eKLR**, and **Charterhouse Investment Limited V. Charo & 5 Others [2023] KEELC 16889 (KLR)**.

9. The general holding across the decisions is that the courts emphasized that the main concern of the court is to do justice to the parties; that if it is a regular judgment as it is in

this instant matter, the court will not usually set aside the judgment unless it is satisfied that there is a defence that raises a triable issue that should go to trial for adjudication.

10. Here, the Applicant has attached a draft statement of defence. I have looked at it. It indeed raises material with triable issues; including being a stranger to allegations stated in the plaint; denying allegations of loss of salary and damages that need to be proved upon hearing on merits alongside others as stated in the draft defence.
11. It is a constitutional imperative at **Article 50** that a party should be allowed to exercise its right to fair hearing by not being denied an opportunity if circumstances demand so, as doing so would clearly be a violation of natural justice. It is the power to set aside an interlocutory judgment is purely discretionary as stated in the court of appeal case of **Charo & 5 Others v. Mwaro & Another [2025] KECA 7701 (KLR)**, wherein similar situation where the applicant's advocates failed to file defence within the statutory period, and further considering the principles for setting aside interlocutory judgments cited the case of **CMC Holdings Ltd v. Nzioki [2004] KLR 173** the court exercises its discretion upon reasons provided by the Applicant.
12. The court further held that a litigant should not suffer injustice or hardship as a result of amongst others an excusable mistake or error; that it would be not proper use of

such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or errors and proceeded to allow the Applicant to defend its case.

13. In this case, I am persuaded that the Plaintiff should not suffer undue hardship and loss for the excusable mistake of its legal counsel/secretary, for failure to issue instructions to counsel to file a defence after an appearance had been made.

On prejudice that the defendants may suffer as a result of allowing the application, other than being stated, no substantiation of the alleged loss has been done. An award of costs would be sufficient in my view to compensate any loss if any to the Respondent.

14. I shall allow the application but upon conditions that:-

a) The interlocutory judgment dated 02/04/2025 is hereby set aside.

b) That the law firm of Ondaba v. partners Advocates LLP is permitted to come on record for the 1st Defendant

c) The Applicant shall file its statement of defence interms of the draft defence and serve within 7 days of this ruling.

d) The 1st Defendant shall pay to the plaintiff throw away costs in the sum of Kshs. 30,000/- to be

paid within 30 days of this ruling and costs of the application.

Orders accordingly.

Delivered Dated and Signed at Nairobi this 30th day of October, 2025.

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JANET MULWA.

JUDGE

ORIGINAL