

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMM NO. E301 OF 2024**

ELECSTER

KENYA

LIMITED.....PLAINTIFF

-VERSUS-

ONWARD CARGO SYSTEMS COMPANY LIMITED.....DEFENDANT

**RULING**

1. The plaintiff filed a request for judgment dated 26<sup>th</sup> June 2024 seeking default judgment against the defendant for Kshs.48,403,911.00, plus interest and costs on the grounds that the defendant had failed to file a defence within the required timelines. The plaintiff's case is that it filed a plaint dated 25<sup>th</sup> March 2024, while the defendant only filed a Notice of Appointment of Advocates on 10<sup>th</sup> June 2024, but did not file any defence thereafter.
2. The request for judgment was supported by an affidavit sworn on 26<sup>th</sup> June 2024 by Mr. Javan Oningo, an Advocate of the High Court of Kenya and learned Counsel for the plaintiff. Mr. Oningo averred that after filing the plaint in this suit on 5<sup>th</sup> June 2024, it was served on the defendant's Advocates electronically on 7<sup>th</sup> June 2024 together with accompanying documents, summons to enter appearance, the plaintiff's application under certificate of urgency and the Court Order issued on 6<sup>th</sup> June 2024. He further averred that personal service on the defendant was also effected on the same day and duly acknowledged by the defendant. Subsequently, the defendant's Advocates filed a Notice of Appointment on 10<sup>th</sup> June 2024 and served it on the plaintiff's Advocates on 11<sup>th</sup> June 2024, but no Memorandum of Appearance or defence has been filed to date.

3. Mr. Oningo stated that on 19<sup>th</sup> June 2024, he wrote to the defendant's Advocates seeking to confirm whether the defendant wished to pursue a negotiated settlement, but no response was received and no defence was filed thereafter. He deposed that the defendant's failure to file a defence contravenes Order 7 Rule 1 of the Civil Procedure Rules, 2010 thus entitling the plaintiff to default judgment under Order 10 Rule 10 of the said Rules. He asserted that the defendant's inaction demonstrates lack of interest in defending the suit and that default Judgment should therefore be entered.
4. In opposition to the application, the defendant filed a replying affidavit sworn on 30<sup>th</sup> August 2024 by Mr. Samuel Omondi Ogutu, an Advocate of the High Court of Kenya and learned Counsel for the defendant. Mr. Ogutu averred that the plaintiff's request for Judgment is fatally defective and seeks to deny the defendant its right to be heard. He deposed that the plaintiff has an active application dated 2<sup>nd</sup> April 2024 seeking preservation orders, for which the Court issued directions on 7<sup>th</sup> June 2024 requiring parties to file responses and submissions and to highlight them on 16<sup>th</sup> October 2024. He asserted that the defendant had already complied by responding to that application.
5. Mr. Ogutu contended that the plaintiff's request for default judgment is premature and improper noting that its own application remains pending and unwithdrawn. He asserted that allowing the request for judgment would cause irreparable harm to the defendant, which is keen to defend the suit on its merits. Mr. Ogutu urged this Court to dismiss the plaintiff's request for judgment and grant the defendant leave to file its defence.
6. The plaintiff's request for judgment was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Wanam Sale & Oningo Advocates on 2<sup>nd</sup> January 2025, whereas the

defendant's submissions were filed on 11<sup>th</sup> December 2024 by the law firm of Omondi Ogutu & Associates Advocates.

7. Mr. Oningo, learned Counsel for the plaintiff submitted that service of the plaint and summons to enter appearance upon the defendant was proper and uncontested, and as such, the defendant's failure to enter appearance under Order 6 Rule 1 of the Civil Procedure Rules, 2010, or to file a defence under Order 7 Rule 1 of the said Rules renders the matter ripe for default judgment under Order 10 Rules 4 & 10 of the Civil Procedure Rules, 2010. He argued that the defendant's filing of a Notice of Appointment did not constitute entry of appearance and that the defendant's explanation that it focused on the interlocutory application is legally untenable, as the pendency of such an application does not bar compliance with procedural timelines.
8. Counsel submitted that the defendant has not demonstrated the existence of any triable issue, having neither filed a defence nor annexed a draft defence, nor sought leave to file one out of time even after withdrawal of the interlocutory application. Mr. Oningo asserted that the defendant's conduct shows disinterest in defending this suit. Further, that the Rules of procedure cannot be suspended merely because an application is pending, thus the request for default judgment is merited and should be endorsed.
9. Mr. Ogutu, learned Counsel for the defendant submitted that the instant request for judgment is fundamentally flawed, premature, and contrary to the interests of justice. He contended that the plaintiff has improperly invoked default procedures despite failing to demonstrate that summons to enter appearance were ever taken out or served, noting that the affidavit in support of the request for judgment makes no reference to service of summons or proof thereof. Mr. Ogutu argued that without service of summons, the time for entering appearance and filing a defence never begun to run, rendering the request incompetent.

10. It was stated by Counsel that the plaintiff's request deliberately disregards the procedural posture of the matter, as the plaintiff's own application filed under certificate of urgency was pending and actively engaging the parties and the Court. He submitted that good practice dictates that such an interlocutory application whose outcome could materially affect the conduct of the suit, should be resolved first. He further stated that the defendant had complied with the Court's directions regarding the interlocutory application and had filed the necessary response, demonstrating active participation in the proceedings.

**ANALYSIS AND DETERMINATION.**

11. I have considered the plaintiff's request for judgment dated 26<sup>th</sup> June 2024, the affidavit filed in support thereof, the defendant's replying affidavit and the written submissions filed by Counsel for the parties. The issue that arises for determination is whether default judgment should be entered against the defendant.
12. This suit was instituted by a plaint dated 25<sup>th</sup> March 2024, accompanied by an application under certificate of urgency dated 2<sup>nd</sup> April 2024, both filed on 5<sup>th</sup> June 2024. The plaintiff contends that upon filing the plaint, its supporting documents, and the said application, it duly effected service of all the documents together with summons to enter appearance upon the defendant's Advocates electronically on 7<sup>th</sup> June 2024, in addition to personal service upon the defendant, which was acknowledged by the defendant. The plaintiff asserted that save for the defendant's filing of a notice of appointment on 10<sup>th</sup> June 2024, the defendant has to date, and neither entered appearance nor filed a defence in response to the plaintiff's claim.
13. The defendant however maintains that it has never been served with summons to enter appearance in this suit, and therefore the period within

which it is required to enter appearance and file a defence has not commenced. The defendant further stated that the plaintiff filed an application under certificate of urgency dated 2<sup>nd</sup> April 2024 seeking preservation orders, pursuant to which the Court issued directions on 7<sup>th</sup> June 2024 requiring the parties to file their responses and submissions and to highlight the same on 16<sup>th</sup> October 2024. It averred that it has already complied by filing its response to that application. The defendant contends that the plaintiff's request for judgment is premature and improper, particularly given that the said application remains pending and has not been withdrawn.

14. Upon perusal of the annexures to the plaintiff's affidavit in support of the instant request for judgment, it is evident that the defendant was served with summons to enter appearance on 7<sup>th</sup> June 2024 and that service was acknowledged by the defendant through the affixing of its official stamp on the face of the summons. From the defendant's own pleadings, it is clear that the defendant has not disputed the authenticity or ownership of the stamp appearing on the summons annexed to the plaintiff's affidavit. Accordingly, this Court finds that the defendant was duly served with summons to enter appearance in this suit.

15. The time for entering appearance is provided for under Order 6 Rule 1 of the Civil Procedure Rules, 2010, which 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.***

16. Further, Order 7 Rule 1 of the Civil Procedure Rules, 2010, states that –

***Where a defendant has been served with a 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.***

17. The import of the above provisions is that upon being served with summons to enter appearance, the defendant was under an obligation to enter appearance within the period prescribed therein, and thereafter, to file a defence within fourteen days of entering appearance. This obligation arises irrespective of the existence of any pending application filed alongside the plaint. This Court is of the considered view that the mere pendency of an application does not in any way affect or suspend the timelines within which a party must enter appearance and file a defence in a suit in compliance with the provisions of Order 6 Rule 1 and Order 7 Rule 1 of the Civil Procedure Rules, 2010.
18. To this end, I am bound with the Supreme Court's holding in the case of **Mwigi & 14 others v Independent Electoral and Boundaries Commission & 5 others** [2016] KESC 2 (KLR), where the Supreme Court of Kenya considered the importance of adherence to laid down procedures in approaching a Court of law as hereunder -

***This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.***

***Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article***

**159(2) (d) of the constitution, which proclaims that, “...courts and tribunals shall be guided by... [the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.**

19. I find that the defendant’s compliance with the directions given in respect of the interlocutory application does not negate or substitute the mandatory requirement to enter appearance and file a defence.
20. The request for judgment herein was filed under the provisions of Order 10 Rule 10 of the Civil Procedure Rules, 2010, which states that –

***The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.***
21. On perusal of Order 10 Rules 4 to 9 of the Civil Procedure Rules, 2010, it is evident that they set out the circumstances and procedure for the entry of both interlocutory and final judgment where a defendant fails to defend a suit. These provisions vest the Court with the discretion to enter judgment against a defendant who despite having been duly served with summons, fails to enter appearance or file a defence within the stipulated timelines. The Rules draw distinctions between claims for liquidated demands, liquidated demands with costs, suits involving pecuniary damages or detention of goods and other claims that necessitate formal proof. They also prescribe the procedure for setting aside or varying default judgments where a party demonstrates sufficient cause.
22. In this case, the Court has already determined that although the defendant was duly served with summons to enter appearance, it has neither entered appearance nor filed a defence. Accordingly, this Court’s jurisdiction to

enter interlocutory judgment pursuant to Order 10 of the Civil Procedure Rules, 2010, has been properly invoked. Upon examining the plaintiff's plaint dated 25<sup>th</sup> March 2024, I am satisfied that the claim is a liquidated one, as the plaintiff seeks a sum of Kshs.47,604,574.00. Consequently, the Court is guided by the provisions of Order 10 Rule 4(1) of the Civil Procedure Rules, 2010, which provides as follows-

*Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.*

23. Having found that the defendant was duly served with summons to enter appearance and failed to comply with the mandatory procedural requirements, I am satisfied that the plaintiff has made out a case for entry of default judgment for the plaintiff as against the defendant.
24. Consequently, though the plaintiff's request for judgment seeks a default judgment in the sum of Kshs.48,403,911.00, this Court enters default judgment in favor of the plaintiff against the defendant in the sum of Kshs.47,604,574.00 as prayed in the plaint.
25. In the end, I make the following orders –
  - i) Default Judgment is hereby entered for the plaintiff as against the defendant in the sum of Kshs.47,604,574.00 with interest at Court rates from the date of filing suit until payment in full; and**
  - ii) Costs of this suit with interest from the date of entry of the default Judgment until payment in full are awarded to the plaintiff.**

It is so ordered.

**DELIVERED, DATED and SIGNED at NAIROBI on this 7<sup>th</sup> day of November 2025. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of;-**

Mr. Oningo for the plaintiff/applicant

Mr. Momanyi h/b for Mr. Ogutu for the defendant

Ms B. Wokabi – Court Assistant.