



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO. E142 OF 2023

HORACE MUSILI MUTINDA.....PLAINTIFF/RESPONDENT

VERSUS

JENIFFER NTHENYA WAMBUA.....DEFENDANT/APPLICANT

RULING

THE APPLICATION

The application for determination is dated 2/5/2025 brought by the 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 12 rule 7 and Order 45 rule 1 of the Civil Procedure Rules. The application seeks the following main prayers, others having been spent:

- 1) That the Interlocutory Judgment dated 29/09/2023 be set aside and the defense be heard on merit.
- 2) That the defendant/Applicant be granted leave to file a defence and witness statement in this suit.
- 3) That the costs of this application be in the cause.

The application is supported by the affidavit sworn by the defendant/applicant and is premised on the following general grounds:

- a) THAT the Defendant was served with summons to enter appearance from court she was taken ill and got admitted to hospital.
- b) THAT even during her admission in hospital and after her discharge, she has never been issued with any hearing or mention notice.
- c) THAT the Defendant was surprised to learn that the suit proceeded in her absence when she was served with a notice to show cause why she should not be committed to civil jail.
- d) THAT the Defendant did not attend court hearings and or mentions because she was hospitalized and that the relevant notices were not served upon her to make her understand the plaintiff proceeded with the matter.
- e) THAT the claim herein is exaggerated and there is the need for the court to hear and decide the matter on merit.
- f) THAT the subject of the agreement giving rise to this suit is Kshs. 150,000/= and the Plaintiff has inflated it to Kshs. 360,000 therefore misleading on the calculation of the decretal sum which stands at Kshs. 430, 900/=.
- g) THAT the plaintiff has already obtained both the interlocutory and final judgements against the defendant/applicant and is in the process of executing the decree vide a Notice to Show cause set to be heard on 05/05/2025.
- h) THAT the defendant/applicant has a good defence and thus she should not be condemned unheard.
- i) THAT no party will suffer undue prejudice if the orders sought are granted as whatever inconvenience the plaintiff may suffer can be compensated by way of costs.
- j) THAT this application has been brought forth without undue delay.
- k) THAT it's only fair, just and in the interest of justice that the orders sought be granted.

In the affidavit in support of the application, the defendant reiterated the grounds on the face of the application and attached supporting documents.

THE PLAINTIFF'S RESPONSE

The plaintiff opposed the application by filing a Replying affidavit sworn by himself on 30/6/2025. The plaintiff deposed that the defendant had come to court with unclean hands and the grounds up which the application is grounded were false. The plaintiff further deposed that the defendant was served with all relevant documents pertaining to the case and that she signed in acknowledgment of receipt. That the affidavits of service were filed. The plaintiff deposed that on 201/2025 the defendant was in court and undertook to pay the decretal sum but failed to do so. The plaintiff contended that the application was an afterthought meant to frustrate and delay payment of the decretal sum. That the defendant has failed to comply with the orders of the court. The plaintiff annexed documents to support his position.

MAIN ISSUES OR QUESTIONS FOR DETERMINATION

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. Whether the defendant should be granted leave to defend the suit;
- iii. What other orders should the court make if need be?
- iv. What orders should the court make with respect to costs of the application?

THE DEFENDANT'S SUBMISSIONS

The defendant submitted that she has been battling with a health condition for the past three years but she is nevertheless desirous of complying with the court order dated 05/05/2025 by 30.11.2025. It is worth noting that the defendant never complied with the order. The defendant further submitted that it was due to the indisposition that she was unable to offer her defence to the suit but instead entered into a consent without counsel as to the nature, incidence and impact of doing so. The applicant argued that the principal amount borrowed by her was Kshs. 150, 000/=. That the Duplum rule requires that the

interest earned on the principal amount plus other expenses involved should not exceed the principal sum.

The defendant further argued that the Plaintiff herein inflated the principal sum to Kshs. 360,000/= thereby leading to the calculation of a decretal sum of Kshs. 430,900 which is nearly thrice the principal sum borrowed by the Defendant/Applicant. The defendant relied on the authority of ***Mugure & 2 others v Higher Education Loans Board [2022] KEHC 11951 (KLR)***.

On setting aside of judgments, the defendant relied on the authority of *Patel v E.A Cargo Handling Services Ltd. (1974) EA 75*, but did not annex a copy thereof. The defendant contended that the draft defence raises triable issues and prayed that she be allowed to defend the suit as any delay can reasonably be compensated by way of costs. She further urged the court to stay execution of the decree pending hearing and determination of the main suit.

THE PLAINTIFF'S SUBMISSIONS

The plaintiff made oral submissions. He submitted that the defendant was not hospitalized. That he worked close to the defendant's place of work and had been seeing her all along. The plaintiff submitted that the defendant agreed to pay him but she declined. That the defendant has never honoured any promise she made. The plaintiff contended that the application was a waste of time and that the defendant was delaying justice. He prayed that the application be dismissed.

ANALYSIS AND DETERMINATION

The Legal Provisions

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".

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".

Order 10 rule 4(1) provides that where the plaintiff 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, 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. Order 10 rule 10 of the same rules provides that the provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.

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".

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".

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".

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".

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.

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."

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."

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.

I have perused the record. The defendant admits that she was served with summons to enter appearance and even filed a memorandum of appearance. The record confirms the position. The explanation given by the defendant is that she was taken ill and was unable to file her defence. The defendant annexed copies of medical documents to show that she was unwell. The memorandum of appearance was filed on 23/8/2023. This implies that the defendant was required to have filed her statement of defence on or about 6/9/2023. If the medical documents are anything to go by, it would appear that the first time the defendant was hospitalized was on 1/11/2023. That was long after the lapse of the period within which she was to file her defence.

The defendant was not hospitalized throughout. She has not explained why she was unable to file her statement of defence by 6/9/2023. There is nothing on record to show that she was prevented by anything to file her defence within the prescribed time. The defendant did not even bother to move the court so as to be given extension of time to file the statement of defence. The record indicates that an affidavit of service was filed on 9/11/2023 indicating that the defendant was duly served with a notice of entry of judgment on 9/10/2023 and that she even signed in acknowledgment of receipt. This fact has not been disputed by the defendant. The defendant alleges that she was never served with hearing or mention notices. There was no hearing in this matter. The suit involves a liquidated demand. When the defendant failed to file her defence, final judgment was entered.

The record indicates that the defendant was in court in person on 29/7/2024 and prayed for time to settle the decretal sum in instalments. The defendant was also in court on 16/12/2024 and prayed for more time to settle the decretal sum. She further attended court on 20/1/2025 and entered into a consent with the plaintiff on how to settle the decretal sum. It was a term of the consent that the defendant would pay a sum of Ksh. 230,000/= by 20/2/2025. The defendant did not honour the consent. Just before 5/5/2025 when the matter was to be mentioned, the defendant filed the instant application. It is worth noting that to date, the defendant is yet to honour the consent nor the orders of the court concerning depositing part of the decretal sum in court.

I agree with the plaintiff that the application is an afterthought meant to derail or delay execution of the decree herein. No plausible explanation has been given for the failure to file the defence within time or even seek extension of time promptly. The defendant was made aware of the judgment way back in 2023 but she did not bother to apply to set it aside. She even attended court on subsequent occasions and entered into a consent on the settlement of the decretal sum.

There was inordinate delay in filing the application. No reasons have been given to explain the delay in bringing the application. Given the circumstances of the case, I find the delay to be unreasonable. When delay is unexplained, it becomes inexcusable. It is also obvious that the applicant is in default. She seeks indulgence from the court yet her hands are tainted. He who comes to equity must come with clean hands. I do not think the applicant's soiled hands should be allowed to touch the pure fountain of justice. My view is that the applicant is not entitled to the indulgence sought. She has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to her application be exercised judiciously in accordance with established principles of what is fair and reasonable.

In those circumstances, it is incumbent on the applicant to provide the court with a full, honest and acceptable explanation of the reasons for failure to honour her commitment and orders of the court. She cannot reasonably expect the discretion to be exercised in her favour, as a defaulter, unless she provides a reasonable explanation for the default and whether there are any extenuating circumstances that can enable the Court to exercise its

discretion in favour of the applicant. I am afraid that the applicant has failed in this endeavour. Her conduct has given her away. I see no plausible reason to enable me exercise my discretion in favour of the judgment debtor.

I would borrow the words of the Court of Appeal in the case of **John Onger Mariaria & 2 Others v Paul Mutundura [2004] 2 EA 163**, wherein the Court observed quite authoritatively that:

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work must fall on their shoulderswhereas it is true that the court has unfettered discretion, like all judicial discretions, must be exercised upon reason not capriciously or sympathy alone.....justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.”

I do not think the applicant is keen on settling the decretal sum. Furthermore, allowing her application would be tantamount to setting aside the consent order on payment. The consent order on payment of the decretal sum by the applicant is still in force. Are there sufficient grounds to set aside or vary the consent order? In the case of **Brooke Bond Liebig (T) Limited v Mallya [1975] E.A. 266**, Law JA, stated the law at p. 269 in these terms: -

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani vs Kassam (1952), 19EACA 131, where the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 was approved:

'prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement. (Emphasis supplied)

A court cannot interfere with a consent judgement or order except in such circumstances as would afford good ground for varying or rescinding a contract between the

parties. This was the holding in the case of *Flora Wasike v Destimo Wamboko (1988)1 KAR 625*, wherein Hancox JA (as he then was) said in his judgment at page 626:

"It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out."

No such circumstances have been shown to exist in this case. There is no suggestion of fraud or collusion. I have had occasion to peruse the draft statement of defence. It is further proof that the defendant is not keen on settling the decretal sum. The draft defence does not raise any triable issue. It is a sham comprising of mere and bare denials. Even the issues raised in the defendant's submissions concerning the *in duplum* rule have not been mentioned in the draft defence. I think I have said enough to show that the application is untenable. As rightly observed by the plaintiff, the application is a waste of precious judicial time.

DISPOSITION

Consequently, I proceed to make the following orders:

- a) The application dated 2/5/2025 is hereby DISMISSED;
- b) The Judgment in default entered herein is maintained;
- c) Given the circumstances, the sum of Ksh. 150,000/= deposited herein by the defendant shall be paid to the plaintiff/decreed holder, forthwith;
- d) The defendant is condemned to pay costs of the application.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 16TH DAY OF
DECEMBER, 2025.**

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

