PKI v EWM (Matrimonial Cause E004 of 2022)
[2026] KEHC 21 (KLR) (13 January 2026) (Ruling)

Neutral citation: [2026] KEHC 21 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MATRIMONIAL CAUSE E004 OF 2022

SM MOHOCHI, J

JANUARY 13, 2026

BETWEEN

PKI .... APPLICANT

AND

EWM .... RESPONDENT

RULING

1. Before me is a Notice of Motion Application dated 13th August, 2025 filed pursuant to Article 50(1) and 159(2) of *the Constitution* of Kenya 2010, Sections 1A, 1B, 3A and 79G of the *Civil Procedure Act* Cap 21,, Order 42 Rule (6), Order 12 rule 7, Order 45 and Order 51 rules (1), (3), (4) and (6) of the Civil Procedure Rules, 2010 where the Applicant P.K.I seeks the following reliefs;

   a. Spent

   b. Spent

   c. That, this Honourable Court be pleased to vary, review, discharge or set aside judgment/decree orders issued on the 24th July, 2025 and all the consequential orders arising therefrom.

   d. That, the suit herein is reinstated for hearing and determination on merit.

   e. That, costs of this Application be in the cause.

2. The Applicant has anchored his Application on the following thirteen (13) grounds;

   a. That, judgment was entered on the 24th July, 2025 in favour of the Plaintiff Respondent who was granted all the matrimonial properties as listed in the Amended Originating Summons dated the 15th of May, 2023.

b. That, the Defendant/Applicant appeared in Court on the 9th of July, 2024 for hearing whereby gave his testimony and was informed that there would be another date for a further hearing which will be communicated to him by his advocates on record Sinana & Company Advocates

c. That, the Defendant/Applicant followed up on the further hearing date with his advocates of record at the time to which he was informed that further hearing would be on the 7th October, 2024.

d. That, the Defendant/ Applicant logged into Court and when his matter was not called he sought for clarification on the next day from his advocate on record who informed that there was an error the matter came up on the 8th of October, 2024 and they were not able to proceed as he was not in attendance.

e. That, the Applicant proceeded to visit the offices of his advocates on record and he was informed that the advocate handling his matter was not available as she had proceeded for maternity leave and he would be duly informed of the next date for bearing by another advocate who will be taking over his matter.

f. That, the Applicant proceeded to make follow ups to no avail as his calls went unanswered

g. That, the Applicant upon seeing as the communication was not forthcoming, he proceeded to the Nakuru Law Courts to confirm the status of his file to which he was informed that the matter would be coming up on the 10th December, 2024 for filing of submissions.

h. That, uncertain of what that meant for his case the Applicant went to his Advocates office to confirm the same and he has informed that submissions are filled by the advocates and there was no need for a hearing as the submissions would be filled.

i. That, afterwards there was no communication from the advocates on record who later informed him that they had ceased acting in the matter on the 16 of December to which he pleaded that they remain on record as he sought for representation.

j. That, all calls went unanswered until the Applicant decided to go to Nakuru Law Courts to confirm the status of his matter when he was informed that judgment would be delivered on the 24th of July, 2025

k. That, the Applicant was advised to log into Court on the said date and raise his issues however, this was not possible as judgment had been delivered and all he had was that he was not cross examined therefore all the matrimonial properties and orders sought were granted to the Plaintiff Respondent.

l. That, the Plaintiff/Respondent is in the process of executing judgment and has attached transfer documents in respect to the parcels of land: Miti Mingi/ Mbaruk Block 5/1729 (Kiungururia) and Miti Mingi Mbaruk Block 5/1931 (Kiungururia) for execution by the Applicant which will result in prejudice and substantial loss to the Applicant/Respondent who shall be rendered homeless and destitute from their home that he attaches great sentimental value.

m. That, without any delays, the Applicant instructed the firm of Miima & Company Advocates to take over conduct of his matter and file this present application.

n. That, this Honourable Court has the power and discretion to grant the reliefs sought in the interests of justice.

3. The Applicant further regurgitates his grounds in the evenly dated sworn affidavit attributing his tribulations of failing to defend his case to his former advocates whom he accuses of professional misconduct and indolence on their part.

4. The Respondent on her part opposed the application by filing a Replying Affidavit dated 28th August 2025 averring that;

   i. The said application is an afterthought, made in outmost bad faith as it is full of falsehoods, a total abuse of the Court process and is deserving of dismissal.

   ii. Indeed, this matter was heard and determined in her favour as against the Respondent vide a judgment delivered on 24th July 2025.

   iii. That she filed this cause against the Respondent who duly appointed his erstwhile advocates, M/s Sinana & Company Advocates, who filed a replying affidavit to her Originating Summons.

   iv. That this cause was first set for hearing on 9th July 2024 where both the Applicant's advocate and her advocate were present and ready to proceed. She proceeded with her exam-in-chief and was partly cross-examined for want of Court's time. Subsequently the cause was set for further hearing on 8th October 2024

   v. That on 8th October 2024 she attended Court for further cross-examination and hearing of the Applicant's case. The Applicant's advocate however attended Court and stated that she was unable to get hold of the Applicant as his phone was not going through, Nevertheless, the Court placed the file aside and gave a time allocation to allow the Applicant's advocate locate the Applicant, However, upon the case been called out later, the Applicant's advocate stated that she was unable to get hold of the Applicant

   vi. That taking note of the fact that; the hearing date had been taken in the presence of both advocates and possibly the Applicant and despite being aware of the date and/or being informed by his advocates, the Applicant did not attend Court, this Honourable Court proceeded to close the Applicant's case and gave directions on submissions.

   vii. That on 18th December 2024 they attended Court to confirm filing of submissions. Her advocates on record had already filed submissions on her behalf. However, the Applicant's advocate had not filed submissions, rather, she sought for time to file an application to have the Applicant's case heard,

   viii. That the Court proceeded to give a judgment date for 6th March 2025. However, the Court was categorical that the Applicant was free to file any application before the judgment date.

   ix. That this matter came up for judgment on several dates being; 6th March 2025,4th April 2025, 7th may 2025, 21st April 2025, 30th May 2025, 19th June 2025, 17th July 2025, 24th July 2025 but the same was never delivered as it was not ready.

   x. That from 18th December 2024 to 24th July 2025 seven (7) months since the Applicant was allowed to file any application and despite the Applicant or his advocates being present on all those dates, the said application was never filed. And on 24th July 2025 when judgement was delivered, the Applicant was present in person but still, no application had been filed,

   xi. That in fact the same was not filed until on 13th August 2025 when her advocates on record sought to have the Applicant sign the transfer forms in respect of the subject properties.

xii. That it is therefore not true for the Applicant to allege that he was never properly informed of the progress of this case whereas himself and/or his advocate were always present during all the proceedings.

xiii. That the Applicant has not presented any official communication from his then advocates showing that there was indeed some miscommunication on the hearing date for 7th October 2024 as opposed to the actual date of 8th October 2024 as such, no mistake of the advocate has been demonstrated

xiv. That be that as it may, on 9th July 2024 when this cause was first heard, the Applicant's advocate did confirm to Court that she was ready to proceed. At no point did the advocate inform the Court that she would only be proceeding with her case, as such it was taken that the Applicant was also present and ready to proceed. As such, any further date given, in this case the 8th October 2024 was given in the presence of both the Applicant and his advocate.

xv. That the Court record will bear her witness that upon this cause proceeding and in the process of awaiting judgment, the Applicant either on his own or through his advocate was always present and as such, the Applicant has always been on the know of any date given hence is constant presence

xvi. That again and be that as it may, the Applicant has not presented any official communication between him and his advocates on record on his inquiry on the progress of his case, be it; record of calls, letters, WhatsApp conversation or emails.

xvii. That in paragraph 11 of the Applicant's supporting affidavit, the Applicant states that his advocates informed him that they had ceased acting for him on no such application has ever been filed in Court and/or served upon her advocates.

xviii. That the Applicant in the said paragraph further states that he pleaded that the said advocates remain on record as he sought for representation, as such;

a. The Applicant admits that the said advocate remained actively on record for him and as such, he ought to have been following up on the progress of his case,

b. The Respondent opted to look for alternative representation from

c. which he never did until judgment was delivered.

xix. That the Applicant's character is that of a conniving person, who sat on his rights with the hope that the judgment will go his way and when it didn't, he hopes to benefit from his indolence through this application.

xx. That it is not true that the Applicant will be rendered destitute and homeless as he has not lived in the matrimonial home since the year 2019 since their divorce as he has since remarried.

xxi. That an application to re-open a case ought to be made without unreasonable delay. A delay of seven (7) months as witnessed herein is by all means unreasonable.

xxii. That Equity favours the vigilant and the Applicant being an indolent litigant cannot be favoured by equity,

xxiii. That mistake of an advocate is not always a ground to automatically set aside a judgment. A huge responsibility is also placed on a litigant and in this case the Applicant, who is also

expected to constantly follow-up on his case from his appointed advocate, after-all, it is his case not his advocates'. mistake of an advocate should not be used as a blanket even

xxiv. where the indolence on the party seeking the exercise of discretion of the Court in its favour is glaring as in this case.

xxv. That in any event, it became clear that it is the Applicant's advocate who was always trying to get hold of the Applicant, as the advocate always stated that the Applicant could not be reached through his phone and that he had failed to give them instructions, As such, the Applicant cannot be seen to pull the "mistake of an advocate" card, when it clearly doesn't apply in his case, The Applicant is clearly a litigant who became disinterested in his case, Left his file with his advocate and never followed up until he lost.

xxvi. That further relying on my advocate's counsel the defence of mistake of counsel unless proven by cogent and credible evidence should not be used as a tool to influence the judicial discretion of the Court. lt would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant as the Applicant

xxvii. That the Applicant was given chances upon chances by this Honourable Court to present his case or even file an application to re-open his case before judgement but he instead went to slumber land, only to be awaken by the threat of execution.

xxviii. That the fundamental principle of natural justice to have all parties heard was accorded to the Applicant time and again, but he chose not to exercise it.

xxix. That she stands to suffer in the event the application is allowed as she has been in Court since the year 2022, followed up on her case, participated in the proceedings and got my hard-earned judgment, procedurally and fairly.

xxx. That the Court's discretion to set-aside judgment should not be to assist a person who deliberately seeks to obstruct or delay the Court's justice and the Applicant being such a person, is not deserving of the Court's discretion.

xxxi. That her judgment is regular as it was obtained following the lawful Court process and there is nothing, even remotely, to warrant its setting-side.

xxxii. That she be allowed to enjoy the fruits of her hard-earned judgment hence her vehement opposition to the Application and pray that it be dismissed with costs.

Applicants Submission

5. The Applicant filed its written submissions dated 25th September 2025 refining three issues for consideration.

6. The Applicant submits on the following three refined issues; ,

   i. Whether the Applicant has demonstrated sufficient cause non-attendance at the hearing.

   ii. Whether the judgment entered in default should be set aside in the interest of justice.

   iii. Whether the Respondent will suffer prejudice if the matter is reinstated for hearing on the merits.

   As to the 1st issue as to whether the Applicant has demonstrated sufficient cause for non-attendance at the hearing.

7. The Applicant respectfully submits that his non-attendance at the hearing on 8th October, 2024 was not deliberate, negligent, or in disregard of Court process. Rather, it was occasioned by the mistake of his former advocate Sinana & Company Advocates, who miscommunicated the hearing date, and thereafter failed to respond to the Applicant's repeated efforts to clarify the status of the matter.

8. The Respondent was partly heard and the matter was rescheduled to a later date which the Applicant was informed to be 7th October, 2024 and he logged into Court on that day but the matter was not called, he later on followed up with his advocates who informed him that the matter was coming up on 8th October, 2024 and was rescheduled due to his non-attendance.

9. The Applicant was not indolent as he diligently kept seeking for updates and even visiting his Advocates office for updates where he was informed that the Advocate handling his matter had proceeded for maternity leave. Without sleeping on his rights, the Applicant made several calls to his advocates who failed return the said calls prompting him to follow up with the Court's registry where he learnt that the matter was coming up for filing of submissions on 10th December, 2024.

10. That on further follow up with the Advocates, he was informed that submissions were to be drafted by the Advocates hence there was no need for hearing as the submissions would be filed. Thereafter, the Advocates would not receive his calls necessitating him to go back to Nakuru Law Courts registry where he was informed that the matter is scheduled for judgment on the 24th July, 2025 and he was advised to log into Court on 24th July, 2025 to raise his grievances before judgment was delivered. The Applicant then instructed the current advocates on record who subsequently filed an application for stay without unreasonable hence denying stay to the applicant will cause him substantial loss.

11. The principle of mistake was expressed in the case of Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nair 236 of 2009 where it was held that:

> " it is widely accepted principle of law that a litigant should not because of his Advocate's oversight."

12. The law is well-settled that a party should not be penalized for the errors or inadvertence of their legal representative. In Philip Chemwolo & Another v Augustine Kubende [1982-881 KAR 103, the Court of Appeal stated:

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case heard on merits."

13. That he has acted in good faith throughout and that his non-attendance was due to excusable mistake, and not willful default.

14. That Justice Maureen A. Odero in setting aside judgment in the matter of Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others [2018] eKLR stated that;

> " I find that this is not a case where there has indolence on the part of the respondent or his advocate. The present application has not been brought merely to delay and/or to obstruct

justice. She went further to quote the case of Martha Wangari Karua -VS-IEBC Nyeri Civil Appeal No.1 of 2017 where the Court of Appeal held as follows:

> "The Rules of Natural Justice require that the Court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.."

On the 2nd Issue as to whether the judgment entered in default should be set aside in the interest of justice?.

15. The *Civil Procedure Act* under Section 80 and Order 45 of the Civil Procedure Rules, 2010 bas illuminated the grounds for setting aside an ex-parte decree and what constitutes sufficient cause for setting aside an ex-parte judgement/decree,

16. Further, Order 10 Rule 11 of the Civil Procedure Rules vests this Honourable Court with the jurisdiction to set aside or vary any judgment entered and consequential decree arrived at, stating 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."

17. The discretion is unfettered but must be exercised judicially, In Shah v Mbogo & Another [1967] EA 116, the Court held:

> " The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the course of justice."

18. That the right to a hearing is the cornerstone of the Rule of Law envisaged under Article 50 (1) of *the Constitution* of Kenya. It is imperative that the Court considers the Applicant's testimony before proceeding to give its judgment.

19. Reliance is placed upon the case of Richard Ncharpi lelyagu vs IEBC & 2 Others CA 18/2013, the Court of Appeal held;

> " The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the Courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the Court process from abuse that would amount to injustice and at the end of the day there should be proportionality..." (emphasis added)

20. Be it as it may, the Court has discretion to set aside and vary judgment thus we pray that this Court exercises its discretion to avoid injustice against the Applicant basing our reliance in the case of Patel-E.A. Handling Services Ltd (1974) EZ 75 and Tree Shade Metor Ltd D.T. Dobie Co. Ltd CA 38 of 1998 and Mania-Muriuki (1984) KLR 407 where the Court stated that:

> " The discretion of the Court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error.".

21. It is therefore important that the Court do set-aside the judgment to enable the Applicant's case so be heard on merit. It is crystal clear that the Applicant was determined to have the matter heard on merit hence the subsequent follow up with his then advocates on record to allow the Court make a proper determination. However, the same did not materialize due to the inconsistencies in communication

from his then Advocates on record. We humbly submit that the Honourable Court be pleased to set aside the judgement and all consequential enters therein to enable the Applicant be cross-examined.

22. The Applicant's conduct does not reflect any intention to delay or obstruct proceedings. On the contrary, his swift efforts to follow up on his case and file the present application show a genuine desire to be heard on the merits.

23. The Applicant submits that substantive justice favours a hearing on the merits, and that denial of the opportunity to be heard due to his advocate's failure would amount to unjust punishment.

24. That, Article 50(1) of *the Constitution* of Kenya further guarantees the right to a fair hearing, which includes the opportunity to be heard before adverse orders are made.

25. That the execution of the judgment herein shall cause substantial loss to the Applicant who will suffer irreparable harm which cannot be compensated by way of damages.

26. The Applicant posits that the Respondent is in the process of executing judgment and has attached transfer documents in respect to the parcels of land: Miti Mingi/Mbaruk Block 5/1729 (Kiungururia) and Miti Mingi/Mbaruk Block 5/1931 (Kiungururia) to which the Applicant is claiming beneficial interest. Further, the Applicant will be rendered homeless and destitute from their home that he attaches a great sentimental value should the execution proceed.

On the third issue as to Whether the Respondent will suffer prejudice if the matter is reinstated for hearing on the merits?.

27. The Respondent stands to suffer no irreparable prejudice if the judgment is set aside. The matter will simply proceed to be heard on the merits, where both parties will have an equal opportunity to present their respective cases.

28. The Applicant stands to suffer irreparable injustice if locked out of the judicial process due to a procedural lapse that was not of his own making.

29. Any inconvenience or delay occasioned to the Respondent can be adequately compensated by an award of costs, whereas the prejudice to the Applicant is far greater being denied his day in Court.

30. That justice demands the Court to look into the circumstances of all parties to the suit before arriving at a determination on an issue such as this one and reinstating this suit will not cause prejudice to the parties herein.

31. That the case of Chebil Kipkoech vs. Barnabas Tuitoek Bargoria & Another [2019] eKLR, the Court explained the balance of convenience as:

> " the meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed.".

32. That the failure to file attend the hearing on the material date was not intentional but it was attributed to mistake and negligence on the part of the Applicant's advocates. It is therefore other Applicant's submission that the application is based on merit and he should be given a chance to be heard and defend the suit in its entirety. That further, the advocate's mistake being meted upon the innocent applicant will amount to condemning the Applicant unheard thus occasioning him to injustice.

Analysis and Determination

33. Upon considering the Pleadings for and against the sole issue in consideration is whether the Application to set aside judgment is of merit?

34. This Court is only concerned as to whether the Applicant has satisfied the principles for review and setting aside judgment.

35. This Court is empowered under Order 12 Rule 7 to annul a judgment entered in default of defense or in this instance where the Defence failed to prosecute its case to a logical conclusion. The Court is equally with the jurisdiction to exercise its discretion in reinstating a closed case only with solid justifications of the circumstances giving rise to the Application.

36. The circumstances leading to close of the defense case and the absence of the Applicant during a scheduled hearing are without persuasive justification for annulling a valid judgment.

37. The professional misconduct and indolence attributable to the lack of prosecution of the defense case is a serious accusation by the Applicant that would require fortification by proof the Applicant has not offered any evidence of adverse action against his former advocates.

38. I agree with the holding in Rajesh Rughani v Fifty Investments Limited & another [2016] eKLR that mere allegation of indolence by counsel is not enough and that a litigant guilty of delay should offer an explanation as to the action taken in order to show that he did not condone or collude in the delay. An applicant must not have been careless on their own part. Surely, the applicants cannot say that for the entire period that their previous advocate kept assuring them that they had won the case, they never bothered to ask for the judgment.

39. The delay in bringing forth the Application from the 18th December 2024 when Counsel Ms Gitau intimated the Court of the Application to be filed to the 13th August 2025 is inordinate and without any justification as the Applicant was all along aware while judgment had been reserved.

40. I am afraid that the Court is unpersuaded by the Applicant's case and accordingly find the Notice of Motion Application dated 13thAugust, 2025 to be without merit and accordingly dismiss the same with costs to the Respondent

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 13TH DAY OF JANUARY, 2026

S. M. MOHOCHI

JUDGE