

**IN THE COURT OF
APPEAL AT NAIROBI
(CORAM: MUSINGA (P), JOEL NGUGI & ODUNGA, JJ.A.)
CIVIL APPEAL NO. 593 OF 2019**

BETWEEN

**BERLIN EQUIPMENT LTD.....1ST
APPELLANT KWALE INTERNATIONAL SUGAR COMPANY LTD...
2ND APPELLANT**

AND

TATA AFRICA HOLDINGS (K) LIMITED.....RESPONDENT

*(Being an application from part of the ruling of the High
Court of Kenya at Nairobi (Okwany, J.) dated 21st November,
2019*

in

HCCC No. E104 of 2019)

JUDGMENT OF THE COURT

1. This appeal arises from part of the ruling of the High Court (Okwany, J.) delivered on 21st November, 2019 in **HCCC No. E104 of 2019**. By that ruling, the learned Judge set aside a default judgment entered against the appellants, but imposed a condition that the appellants deposit the entire decretal sum of Kshs. 22,396,115.22 in a joint interest earning account in the names of counsel for the parties within thirty (30) days, failing which the default judgment would stand reinstated.
2. The appellants were aggrieved by that conditional aspect of the ruling and lodged the present appeal through a Memorandum of

Appeal dated 29th November, 2019, raising eight grounds of appeal. In

substance, they contend that the learned Judge, having correctly found that their defence and counterclaim raised triable issues, nonetheless abused her discretion by imposing an onerous and oppressive condition that effectively denied them the opportunity to defend the suit on the merits.

3. The respondent opposes the appeal. It raises a threshold jurisdictional objection that the appeal was incompetent for want of leave under section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, and further maintains that the learned Judge exercised her discretion judiciously and in accordance with settled principles and that, thus, her ruling should be left undisturbed.
4. We heard the appeal on 10th November, 2025. Mr. Njuru, learned counsel, appeared for the appellants while Mr. Nyagaka, learned counsel, appeared for the respondent. Both counsel confirmed that they had filed written submissions together with lists and digests of authorities and proceeded to make brief oral highlights.
5. For the appellants, counsel emphasized that the High Court correctly appreciated the governing principles on setting aside default judgments and expressly found that the defence and counterclaim raised triable issues. The gravamen of the appeal, he submitted, lay in the condition imposed, which required deposit of the entire decretal sum as a precondition to defending the suit. Counsel argued that such a condition was unjust, disproportionate, inconsistent with the overriding objective, and contrary to the jurisprudence of this Court deprecating conditions that compel payment or security of a disputed claim once triable issues are found.

6. For the respondent, counsel maintained that leave to appeal was required because the default judgment had been entered after appearance but in default of defence. On the merits, he submitted that the learned Judge was entitled to impose conditions under Order 10 rule 11 of the Civil Procedure Rules; that the appellants had delayed without explanation; and that the decretal sum was to be held in escrow rather than released to the respondent.
7. The procedural background is largely common ground and is adequately captured in the impugned ruling. The suit was filed on 26th April, 2019 and service of summons was effected on 30th April, 2019. The appellants entered appearance on 14th May, 2019 but did not file a defence within the prescribed time. Upon request by the respondent, judgment in default of defence was entered on 17th June, 2019.
8. According to the appellants, upon being served with a notice of entry of judgment on 20th June, 2019, they filed their defence and counterclaim the following day. Execution steps by the respondent thereafter ensued, prompting them to file an application dated 8th July, 2019 seeking stay of execution, setting aside of the default judgment, and deeming of the defence and counterclaim as duly filed.
9. In her ruling of 21st November, 2019, the learned Judge reviewed the applicable principles under Order 10 rule 11 of the Civil Procedure Rules. She expressly found that the defence and counterclaim raised triable issues and that the dispute required interrogation at a full hearing. She, therefore, set aside the default judgment but conditioned that relief on the appellants

depositing the decretal sum

of Kshs. 22,396,115.22 within thirty days, failing which the default judgment would be reinstated.

10. From the memorandum of appeal, the submissions, and the oral highlights, two issues arise for our determination. The first is whether leave to appeal was required and, if so, whether its absence deprives this Court of jurisdiction. The second is whether the learned Judge abused her discretion in imposing the condition requiring deposit of the entire decretal sum as a term for setting aside the default judgment.
11. Turning to the jurisdictional objection, the respondent's contention is that the appeal is incompetent for want of leave because the default judgment was entered after appearance but in default of defence. The argument is that in such circumstances, an appeal lies only with leave of the Court under section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules.
12. The starting point is section 75 of the Civil Procedure Act, which provides for appeals as of right from specified orders and from orders made under rules, while requiring leave for other orders. Order 43 rule 1 enumerates the orders from which an appeal lies as of right. Of relevance is Order 43 rule 1(1)(g), which includes an order made under Order 10 concerning the setting aside of default judgment.
13. The impugned ruling was made on an application anchored squarely under Order 10 rule 11. The order appealed from is, therefore, an order under that rule. We are unable to accept the respondent's attempt to draw a distinction between default

judgments entered in default of appearance and those entered in default of defence so as to restrict the right of appeal. The operative provision is the rule

itself, and where it grants a right of appeal as of right from an order under Order 10 rule 11, that right cannot be curtailed by implication.

14. We, therefore, hold that the appeal lay as of right and that this Court's jurisdiction was properly invoked. The preliminary objection on want of leave accordingly fails.

15. We now turn to the merits of the appeal. It is common ground that the jurisdiction under Order 10 rule 11 is discretionary. The rule empowers the court to set aside or vary a default judgment "upon such terms as are just." The principles guiding the exercise of that discretion are well settled. The discretion exists to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, and is not intended to assist a party who has deliberately sought to obstruct or delay the course of justice, as articulated in the celebrated case, ***Shah v Mbogo (1967) EA 166***.

16. Where a default judgment is regular, the court ordinarily considers whether the defendant has shown a defence on the merits. A defence on the merits does not mean one that must succeed; it suffices that it raises a triable issue deserving of adjudication at a trial, as stated by this Court in ***Patel v E.A. Cargo Handling Services Ltd (1974) EA 75*** and reiterated in ***Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) 1 EA 324***.

17. As an appellate court, we are slow to interfere with the exercise of discretion by a trial judge. We may do so only where the trial court misdirected itself in law, misapprehended the facts, took

into account irrelevant considerations, failed to take into account relevant considerations, or where the decision is plainly wrong. (see ***Mbogo v Shah* [1968] EA 93; *United India Insurance Co. Ltd v***

East African Underwriters (Kenya) Ltd [1985] EA 898). Our review in this appeal is, therefore, anchored on the abuse-of-discretion standard.

18. The learned Judge in this case made two critical findings. First, she found that the defence and counterclaim raised triable issues and that the dispute required interrogation by hearing the main suit. Second, she nonetheless imposed a condition requiring deposit of the entire decretal sum within thirty days, in default of which the default judgment would be reinstated. The sole reason advanced for this condition was that it would ensure that the parties exhibited commitment to the speedy conclusion of the dispute.
19. With respect, once a court has found that a defence raises triable issues warranting the setting aside of a default judgment, the inquiry must shift to whether the terms imposed are truly “just” in the circumstances. The discretion must be exercised to facilitate a fair hearing on the merits, while guarding against prejudice arising from delay or abuse of process. The terms imposed must, therefore, be proportionate and rationally connected to that objective.
20. We are persuaded that the condition imposed in this case was not just. Having set aside the default judgment, the learned Judge effectively restored the matter to a contested posture requiring proof at trial. In that context, requiring the appellants to deposit the entire decretal sum as a precondition to defending the suit had the practical effect of compelling them to secure the full claim before liability was determined. That approach sits uneasily with the finding that there were triable issues requiring

adjudication.

21. We agree with the reasoning in decisions of this Court and the High Court that have cautioned against imposing conditions that compel payment or security of a substantial and disputed claim once a court has found that triable issues exist. See, for example, ***Kenya Power & Lighting Company Limited -vs- Abdulhakim Abdulla Mohamed & Another (2017) eKLR***. Such conditions do not ordinarily facilitate the just, proportionate and affordable resolution of disputes contemplated by sections 1A and 1B of the Civil Procedure Act.
22. The justification advanced for the condition was expedition. However, expedition may be achieved through case-management tools such as fixing timelines, limiting adjournments, and issuing firm directions for hearing. It is not apparent how requiring deposit of the entire decretal sum — particularly in a contested commercial dispute — was necessary or proportionate to achieve that objective.
23. The existence of a substantial counterclaim, as pleaded by the appellants, further underscores that the dispute was not a straightforward debt recovery. While the merits of that counterclaim are for trial, its presence reinforces the conclusion that compelling deposit of the entire claim sum tilted the playing field at the outset and undermined equality of arms.
24. Moreover, a condition that is so onerous as to be difficult or impossible to meet within the stipulated time effectively amounts to a denial of the opportunity to be heard. Terms imposed under Order 10 rule 11 must regulate the process, not foreclose it. In the circumstances of this case, the condition imposed crossed that

line.

25. We have considered the authorities cited by the respondent where courts imposed conditions when setting aside default judgments. We do not doubt that courts have jurisdiction to impose conditions, including, in appropriate cases, the requirement of a deposit. However, the question before us is whether this particular condition, in the context of this case and after a finding of triable issues, was just. We are satisfied that it was not.
26. The respondent also urged that the appellants failed to comply with an interlocutory order of this Court requiring deposit of Kshs. 10 million as a condition for stay pending appeal. That history may be relevant to interlocutory compliance, but it cannot validate an oppressive condition in the impugned ruling if, on principled analysis, that condition constituted an abuse of discretion.
27. In the end, we are satisfied that the learned Judge, though correct in identifying triable issues, misdirected herself in imposing a condition that was disproportionate, insufficiently connected to the stated aim of expedition, and had the effect of denying the appellants a hearing unless they first secured the entire claimed sum. That amounted to an abuse of discretion warranting appellate interference.
28. Accordingly, the appeal succeeds. We allow the appeal and set aside that part of the ruling of the High Court delivered on 21st November, 2019 requiring the appellants to deposit Kshs. 22,396,115.22 as a condition for setting aside the default judgment.

29. In substitution therefor, we order that the appellants' application dated 8th July, 2019 be and is hereby allowed unconditionally to the extent that the default judgment entered on 17th June, 2019 is set aside, the defence and counterclaim filed on 21st June, 2019 shall

stand as duly filed, and the suit shall proceed to hearing on the merits before the High Court on a priority basis before a judge other than Okwany, J.

30. The costs of this appeal as well as the costs of the application in the High Court shall abide the outcome of the suit.

31. Orders accordingly.

Dated and delivered at Nairobi this 30th day of January, 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

JOEL NGUGI

.....
JUDGE OF APPEAL

G. V. ODUNGA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed
DEPUTY REGISTRAR