Miguna v Kipchumba (Civil Suit E174 of 2024)
[2026] KEHC 1035 (KLR) (Civ) (29 January 2026) (Ruling)

Neutral citation: [2026] KEHC 1035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E174 OF 2024

SN MUTUKU, J

JANUARY 29, 2026

BETWEEN

MIGUNA MIGUNA ..... PLAINTIFF

AND

SUDI OSCAR KIPCHUMBA ..... DEFENDANT

RULING

The Notice of Motion

1. This Ruling relates to the Notice of Motion dated 26.09.2025 (the Motion) filed by Sudi Oscar Kipchumba (hereafter the Applicant) brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); Order 10 Rule 11 and Order 51 of the Civil Procedure Rules (CPR) and Articles 50 and 159(2)(d) of *the Constitution*.

2. The Applicant is seeking to set aside the interlocutory judgment entered in the suit on 20.03.2025 and all consequential orders; an order to have the draft statement of defence annexed to the Motion deemed as having been filed within time and leave to have the firm of C & O Advocates LLP come on record for the Applicant. This court granted the latter order.

3. The grounds in support of the Motion are laid out on its face and in the Supporting Affidavit sworn by the Applicant to the effect that he was never served with summons to enter appearance or the pleadings in the suit; that he only came to learn of the existence of the suit on 23.06.2025 upon his advocates' court attendance in respect of a separate matter, on which date the present suit was mentioned.

4. The Applicant has averred that upon being informed of the existence of the present suit, he instructed his advocates; the firm of C & O Advocates LLP; to come on record and that, consequently, a memorandum of appearance dated 25.06.2025 was filed on his behalf.

5. It is the Applicant's assertion that upon his advocates' perusal of the court file, it was discovered that interlocutory judgment had been entered against him on 20.03.2025 for failure to enter appearance and to file a statement of defence, hence the instant Motion.

6. It is therefore the Applicant's assertion that the delay on his part is not intentional and is excusable. It is equally his assertion that he has a triable defence and that it would be in the interest of justice to grant the orders sought in the Motion and that the Respondent does not stand to suffer any prejudice which cannot be compensated by way of costs in the circumstances.

The Replying Affidavit

7. The Application is opposed by Miguna Miguna (the Respondent) through his Replying Affidavit sworn on 15.10.2025 wherein he deposed that contrary to the averments being made in the Motion, the Applicant was at all material times made aware of the suit against him, upon being served with the summons and pleadings on 30.09.2024 through his registered WhatsApp mobile number. That the Applicant was subsequently served with a mention notice on 18.10.2024 via the same number, indicating that the matter was slated to come up for mention on 22.10.2024. That by the said mention date, the Applicant had not entered appearance, thereby prompting the Respondent's advocates to lodge a request for entry of judgment against him on that basis.

8. The Respondent has proceeded to state that an interlocutory judgment was entered on 20.03.2025 and the matter was scheduled for formal proof. That even so, the Applicant was served with a copy of the interlocutory judgment coupled with a notice of formal proof hearing via his WhatsApp mobile number. That consequently, the instant Motion is a mere afterthought, adding that the Applicant has failed to provide basis for setting aside the interlocutory judgment.

Written Submissions

9. The Motion was canvassed through written submissions. In support of the Motion, the Applicant anchored his submissions, inter alia, on the decision in Jimmy Mutuku Kiamba v Nation Media Group & 2 others [2017] KEHC 1439 (KLR) on the discretionary power of the courts in setting aside an ex parte judgment and the principles for consideration thereunder.

10. On the question of service, it is the Applicant's submission that while service was purportedly attempted via WhatsApp, the process server in question mislabelled the service as being undertaken pursuant to Order 5, Rule 22B of the CPR (which provides for service by way of email) rather than relying on Order 5, Rule 22C (which governs service via mobile-enabled messaging applications). That consequently, the purported service is defective.

11. Further, it is the Applicant's submission that the burden lies with the Respondent to demonstrate that service was properly effected, which burden has not been discharged, in the absence of any proof that the Applicant was actively using the WhatsApp mobile number through which service of summons and the pleadings was effected.

12. Regarding the question of a triable defence, the Applicant has contended that his draft statement of defence raises various triable issues within the meaning set out in the case of Kaloki v Mohammed [2024] KEHC 197 (KLR) and echoed in the case of John Mugambi t/a Mugambi and Company Advocates & another v Showcase Properties Limited [2021] KEHC 12822 (KLR). That in the circumstances, the interest of justice demands a grant of the prayers sought in the Motion.

13. The Applicant has also contended that the instant Motion has been brought without undue delay and that a reasonable explanation has been given for the slight delay in entering appearance in the matter.

That in addition, it has not been shown that the Respondent is likely to suffer any grave prejudice which cannot be remedied by an award of costs, if the Motion succeeds. On those grounds, the Applicant has urged the court to allow the Motion as prayed.

14. In urging the court to dismiss the Motion, the Respondent has submitted that the Applicant would be required to demonstrate that this court has jurisdiction to entertain the Motion to begin with, since the Respondent's case was earlier closed and the matter was pending judgment. That a consideration of the Motion would infer that all proceedings that took place after entry of interlocutory judgment would be set aside and the witnesses who had earlier testified would be recalled to give their testimonies and the proceedings. That such discretion by the court in recalling witnesses, under Section 146(4) of the *Evidence Act* and Order 18, Rule 10 of the CPR, would be required to be exercised judiciously.

15. On the merits of the Motion, the Respondent has maintained that the interlocutory judgment entered in the suit is regular, since the same resulted from the effect of proper service of the summons and pleadings upon the Applicant, as seen in the affidavit of service sworn on 22.10.2024 and 31.10.2024 and availed in the court record.

16. The Respondent has relied on the decision in James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR where the court clarified that the distinction between a regular and irregular default judgment lies in whether service of summons and the pleadings was duly effected upon a defendant.

17. Further to the foregoing, it is the Respondent's contention that the Applicant has not denied that the WhatsApp mobile number through which service was effected, belongs to him. That consequently, the Applicant cannot purport to have been unaware of the existence of the suit, thereby causing the instant Motion to constitute a mere afterthought and that no reasonable explanation has been given for the delay in defending the suit and in bringing the Motion.

18. On the question whether a triable defence exists here, it is the Respondent's submission that the Applicant's draft defence constitutes denials in certain instances, and amounts to an admission of liability in other instances. That overall, no valid defence exists.

19. On the question of prejudice, it is the Respondent's submission that he stands to be prejudiced if the Motion is allowed since hearing had taken place in the suit and the same was in its final stages.

20. Whilst citing the decision in Philip Keiptoo Chemwolo & Another v Augustine Kubende, Civil Appeal No. 103 of 1984 the Respondent has argued that no reasons have been given to warrant an exercise of this court's discretion in favour of the Applicant and the court is therefore urged to dismiss the Motion with costs

Analysis and Determination

21. I have considered the application and the grounds advanced in support of it as well as the Replying Affidavit ins opposition. I have also considered rival submissions in respect of the Motion and the authorities relied on.

22. Before addressing the merits of the application, I have noted that the Respondent has challenged the jurisdiction of this court to entertain the Motion on the ground that formal proof hearing in the suit has concluded. However, it is apparent from the record that this issue was not raised in the Respondent's Replying Affidavit but was only raised at the submissions' stage.

23. It is trite that each party is bound by his pleadings and that submissions do not constitute evidence. Hence a party cannot be heard to raise new issues or arguments by way of his or her submissions.

This position was succinctly stated by the Court of Appeal in the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR when it held that:

> "Submissions cannot take the place of evidence...Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."

24. In view of the foregoing position, the court is of the view that the Respondent cannot be heard to raise issue with the competency of the Motion by way of his written submissions. In any event, courts have discretionary power to set aside or vary default or interlocutory judgments, upon consideration of the various principles which will be addressed hereunder.

25. The applicable provisions for setting aside interlocutory judgments is Order 10 Rule 11 of the CPR which gments, expresses thus:

> "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."

26. The discretion of the court to grant or decline an application seeking to set aside or vary a judgment or any consequential decree or order, is wide and unfettered, but must be exercised judicially. In respect of the discretion conferred upon the court, the Court stated in the case of Shah v Mbogo & Another [1967] EA 116 as hereunder:

> "The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

27. The principles in the above case of Shah v Mbogo were amplified in Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193, cited with approval by the same Court in Miarage Co Ltd v Mwichuiri Co Ltd [2016] eKLR as follows:

> "The basis of approach in Kenya to the exercise of the discretion to be employed or rejected...is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justiciae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice...A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent

it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure...The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex partes... Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction."

28. Flowing from the above, the first question arising for determination is whether the Applicant was duly served with summons to enter appearance, which would resultantly ascertain whether the interlocutory judgment entered is regular. As earlier mentioned, the Applicant has on the one hand denied receipt of the summons and pleadings. The Applicant has further submitted that the affidavit of service is defective for having been sworn under Order 5, Rule 22B of the CPR rather than under Order 5, Rule 22, as a consequence of which the interlocutory judgment is irregular.

29. On the other hand, the Respondent takes the stand that service was duly effected upon the Applicant through his registered WhatsApp number, but that he neglected to enter appearance and/or file his statement of defence, thereby resulting in entry of a regular interlocutory judgment.

30. The purpose of the requirement for effective service of summons cannot be disputed. As stated by the Court of Appeal in Giro Commercial Bank Ltd v Ali Swaleh Mwangula [2016] eKLR:

> " Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend. Under order 10 Rules 4, 5, 6 & 7, where a party fails to enter appearance after being served with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods. In all other instances, where there is default of appearance, the plaintiff, is under Order 10 Rule 9 required to set the suit down for hearing by formal proof of the plaintiff's claim."

31. Upon my perusal of the record, I have noted that the Respondent's request for judgment dated 15.10.2024 has backing in the affidavit of service sworn by process server Augustine M. Nzive on 15.10.2024 stating that upon receiving the summons and pleadings on the aforementioned date, the said process server proceeded to effect service upon the Applicant through his WhatsApp mobile number.

32. Order 5, Rule 8 of the CPR expresses that as far as is practicable, service shall be effected upon a defendant in person. That notwithstanding, pursuant to the fairly recent amendments to the CPR, provision is made for additional modes of service, including electronic email (under Order 5, Rule 22B) and mobile enabled messaging applications (under Order 5, Rule 22C).

33. Upon my further perusal and consideration of the record, I have noted that the Applicant did not deny that the WhatsApp number detailed in the affidavit of service referenced hereinabove as well as in the Respondent's replying affidavit to the Motion, belongs to him. Going by the averments made by the Applicant both in the Motion and in his written submissions and backed by the documentation on record, it is apparent that the summons and pleadings were forwarded to and received on the referenced mobile number.

34. In the absence of any contrary evidence therefore, I am satisfied that the Respondent has reasonably demonstrated that service was duly effected upon the Applicant. To add on, in the absence of any evidentiary material to the contrary, the presumption is that the contents of an affidavit of service are factual and truthful as to the circumstances of service. In finding so, I draw reference from the following reasoning by the Court of Appeal in Shadrack Arap Baiywo v Bodi Bach [1987] eKLR:

> " There is a qualified presumption in favour of the process server recognized in M B Automobile v Kampala Bus Service, [1966] EA 480 at page 484 as having been the view taken by the Indian Courts in construing similar legislation. On Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670, the learned commentators say:
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> "3. Presumption as to service – There is a presumption of services as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service.'"

35. In view of all the foregoing circumstances therefore, I am satisfied that service of Summons to enter appearance was properly effected, making the interlocutory judgment entered on 20.03.2025 a regular judgment.

36. That notwithstanding, in determining whether or not to set aside an interlocutory/default judgment, the courts are likewise required to consider whether a party has a defence which raises triable issues, even where service of summons is deemed to have been proper. The court in the case of Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) IEA 324 reasoned thus:

> " Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."

37. Furthermore, the phrase 'triable issue' was defined by the Court of Appeal in the case of Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR thus:

> " ...a triable issue" is an issue which raises a prima facie defence and which should go to trial for adjudication."

38. The Court went on to appreciate that:

> " The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend."

39. From my perusal of the Respondent's pleadings, it is apparent that his claim is founded on defamation. From my study of the Applicant's draft statement of defence annexed to the Motion, it is clear that in addition to denying the averments made in the plaint, the Applicant further pleaded the defence of fair comment on a matter of public interest. The Applicant further pleaded that his actions fall within the scope of freedom of expression under Article 33 of *the Constitution*. Upon consideration thereof,

I am satisfied that the Applicant's draft statement of defence raises triable issues which can only be adequately ventilated at the hearing of the suit.

40. In considering whether to set aside a default/interlocutory judgment, a court of law is also required to ascertain whether the Respondent stands to be prejudiced. From my overall study of the pleadings and material in the record, while it is not disputed that the Respondent had testified and called an addition witness before closing his case, I have not come across anything to indicate that he would be prejudiced in a manner that cannot be adequately compensated by way of costs, if the interlocutory judgment is set aside.

41. Upon taking into account all the foregoing factors hereinabove, I am convinced that it would be a proper exercise of my discretion to find in favour of the Applicant.

42. The upshot therefore is that the Notice of Motion dated 26.09.2025 is hereby allowed on merit, giving rise to the orders hereunder:

    a. The interlocutory judgment entered on 20.03.2025 and all consequential orders/proceedings are hereby set aside.

    b. The Defendant/Applicant is hereby granted leave to file and serve his statement of defence within 14 days from today.

    c. The Applicant shall pay the costs of the proceedings so far undertaken including the costs of this application.

43. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF JANUARY 2026.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Rono holding brief for Mr. Anjichi for the Applicant

Mr. Muriasi holding brief for Mr, Ndiro for the Respondent