

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**MILIMANI LAW COURTS**  
**HCCC E607 OF 2024**

**ASSARO MILKESSO**

**MUDA.....PLAINTIFF**

**VERSUS**

**EVANS GOR**

**SEMELANG'O.....1<sup>ST</sup>**

**DEFENDANT BLUE ZONE FLAMES LOUNGE**

**LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the court is the plaintiff's notice of motion dated 26.3.2025 seeking the setting aside of the interlocutory judgment entered on 20.3.2025 and for leave to file his defence to the counterclaim dated 6.12.2024.
2. The application is supported by the affidavit sworn by the plaintiff on 26.3.2025 and written submissions dated 26.5.2025.
3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants opposed the application through grounds of opposition dated 9.4.2025 and written submissions dated 5.8.2025.

**Applicant's case**

4.The grounds for applying are as follows: -

(1) THAT failure to file the defence to the counterclaim was not intentional but was occasioned by an oversight on the part of the advocate handling the matter.

(2) THAT the plaintiff has a very good defence to the counterclaim as demonstrated in the draft defence annexed to the supporting affidavit.

(3) THAT the issues raised in the defence to the counterclaim are intrinsically intertwined with the issue in the main claim.

(4) THAT the amount involved is quite substantial and it would be unfair to condemn the plaintiff without giving him a chance to be heard.

(5) THAT it is only fair and just that the *ex parte* interlocutory judgement be set aside to afford the plaintiff a chance to be heard in his defence to the counterclaim.

(6) THAT the plaintiff would suffer injustice if the orders sought are not granted.

(7) THAT no prejudice will be occasioned by setting aside the ex parte judgment as each party will be provided a chance to present their case during the main hearing.

(8) THAT it is in the interest of justice that the ex parte judgement be set aside to pave way for hearing of the suit and counterclaim inter parties.

### **Respondent opposed application**

5. The respondent opposed the application on the following grounds of opposition: -

(1) THAT the court's record of 20.3.25 is self-evident that counsel confirmed that the defendants had indeed served him with the statement of defence and counterclaim dated 6.12.24 and that the applicant had failed to file a response. His counsel proceeded to request for a mention date before the Judge to take a hearing date.

(2) THAT the applicant has failed to raise any satisfactory and sufficient cause why he

failed to file a response to the counter claim 94 days after service.

(3) THAT to allow the application will not only be prejudicial to the respondents but will also be a miscarriage of justice against them.

(4) THAT the applicant has failed to approach this court with clean hands by lying yet his application is for a discretionary order.

(5) THAT, the applicant is the author of his own predicament and as a result, the application dated 26.03.25 is for dismissal.

### **Submissions**

6. The plaintiff and the defendants filed written submissions dated 26.5.2025 and 5.8.2025 respectively.

7. The plaintiff relied on **Pithon Waweru Maina v Thuka Mugiria [1983] KECA 117 (KLR)** on the principles for the exercise of judicial discretion; **David Kiptanui Yego & 134 others v Benjamin Rono & 3 Others**

**[2021] eKLR** to the effect that one of the key factors to consider when setting aside an *ex parte* judgment is whether the defendant has a defence on merit; that an applicant should not suffer due to a mistake of its Counsel.

8.The plaintiff stated that he brought this application promptly after learning of the interlocutory judgment against him.

9.The defendants relied on **Mohamed & Another v Shoka [1990] KLR 463, Kimani Kigano & Co. Advocates v Jimba Credit Corporation Limited [1991] KLR 503, Harrison Wanjohi Wambugu v Felista Wairimu Chege & another [2013] eKLR Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR, Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) 1 EA 324 and Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd [2018] eKLR** on the tests for consideration.

10.They cited **Board of Management St Augustine Secondary School v Chambalili**

**Trading Co. Ltd [2021] eKLR** to support the proposition that the right to be heard is a fundamental right but a party cannot use it to abuse well laid down court process.

### **Analysis and Determination**

11. '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.' **Order 10 Rule 11 of the Civil Procedure Rules.**
12. Thus, the court has unfettered discretion to set aside or not to set aside an interlocutory judgment. Except, the discretion ought to be exercised reasonably based on the circumstances of the case.
13. There is no contest that the plaintiff's advocate was served with the defendants' counterclaim. Making, the interlocutory judgment regular judgment.

14. Nevertheless, it bears repeating that, the court has unfettered discretion to set aside or not to set aside such interlocutory judgment depending on the circumstances of the case.

15. In a situation such as this, the court will consider, amongst other things: -a) the reason for the failure to file the required pleading, in this case, defence to counter-claim; b) the length of time that has elapsed since the default judgment was entered; c) whether the intended defence raises triable issues; d) the prejudice each party is likely to suffer; e) whether on the whole it is in the interest of justice to set aside the default judgment.

**James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)**

16. See also **Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).**

17. The defendant stated that there was a period of 94 days from the date of service of the counterclaim to when the application was filed.
18. Interlocutory judgement was entered on 20.3.2025. The application to set aside is dated 26.3.2025. This is a period of 6 days. Therefore, the application has been filed timeously.
19. The plaintiff stated the reason why it did not file its defence to the counterclaim was due to his advocate's mistake.
20. The advocate explained the circumstance leading to inadvertent failure to file the defence; that the counterclaim was served upon him on 16.12.2024 via email when his office was closed for the Christmas break. Thereafter, when the offices opened on 10.1.2025, the advocates secretary neglected to place the file with the email and the pleadings on his desk. He came to learn of the ruling when it was posted on the Judiciary's case tracking system.

21.I do note that the judgment sum comprises a large amount, being USD 300,000.

**Does the plaintiff raise triable issues in its draft defence to the counterclaim?**

22.The plaintiff argued that the case between the plaintiff and defendants revolves around the agreement for sale and transfer dated 21.3.2023 and as such the issues in the main suit and in the counterclaim are substantially intertwined and have to be determined together.

23.The plaintiff contended that the whole counterclaim is a total fabrication and creation of the defendant as none of the facts pleaded thereof is reflected on the sale agreement dated 21.3.2023 which is the basis of this case.

24.The plaintiff also contended that the parties to the suit were bound by the terms of the agreement for sale of shares. It was agreed that the 1<sup>st</sup> defendant would transfer 51% of the shares of the 2<sup>nd</sup> defendant for the price of 8,000,000/- to which the plaintiff paid.

25. In my view, the draft defence to counterclaim raises triable issues. Triable issue is not one which must succeed but one that is worth of consideration by the court in the trial.

26. Thus, notwithstanding the regularity of the judgment ‘...a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits.’ **Kingsway Tyres and Automart Ltd v Rafiki Enterprises Ltd (Civil Appeal No. 220 of 1995) (Unreported) and Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & Another [1998] KECA 40 (KLR)**

27. The defendants submitted that they stand to be prejudiced if the orders sought are granted. However, in my considered view, such prejudice is avoided as the trial provides ample opportunity for both parties to adduce evidence in support of their respective cases. Costs, may also be awarded to the defendant in appropriate cases to mitigate any prejudice that may occur. But, denying the request will

deny the plaintiff the benefit of defending the counter-claim leaving it to the cloud of judgment in the same proceeding that is yet to be determined. The prejudice would be great and an injustice.

28.The upshot is that the plaintiff's application dated 26.3.2025 is allowed. Costs to the defendants.

**Dated, signed and delivered at Nairobi through Microsoft Teams online application this 19<sup>th</sup> day of February, 2026**

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**F. Gikonyo M**

**Judge**

**In the presence of: -**

**Ms. Wangoi for Plaintiff**

**Simiyu for Kipkorir for defendant**

**CA - Ivan/Aggrey**