

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
CAUSE NO. E821 OF 2022

GILBERT LANGAT.....CLAIMANT/RESPONDENT

VERSUS

AIC KIJABE HOSPITAL.....RESPONDENT/APPLICANT

RULING

1. Perhaps I should begin by outlining the background of this matter. The Claimant filed a Statement of Claim dated 25th October 2021, seeking declaratory reliefs and compensatory damages amounting to Kshs 3,960,000/= for alleged unfair termination. He also sought damages for discrimination, unfair labour practices, together with costs of the suit and interest.

2. The matter remained inactive for some time, prompting the Court on 21st November 2024 to direct that a Notice to Show Cause be issued to the Claimant to explain why the suit should not be dismissed for want of prosecution. When the notice came up for hearing on 4th December 2024, the Court was informed that the Claimant's previous advocate had passed away and that he had since

instructed a new advocate. Consequently, the Notice to Show Cause was vacated.

3. Noting that there was no Affidavit of Service on record, the Court fixed the matter for mention on 16th December 2024 to confirm whether service of summons and the Memorandum of Claim had been effected.
4. On 16th December 2024, Counsel for the Claimant requested additional time to confirm service upon the Respondent. The matter was then rescheduled for mention on 4th February 2025.
5. When the matter came up on 4th February 2025, the Claimant's advocate informed the Court that service had been difficult to effect as the Respondent had allegedly declined to accept service and asked Counsel to return on 3rd February 2025. The Court therefore fixed a further mention for 12th February 2025.
6. On 12th February 2025, Counsel for the Claimant indicated that the summons contained an error and sought reissuance of fresh summons. The Court allowed the application and reissued the summons, scheduling the matter for mention on

26th February 2025, and subsequently on 13th March 2025, to confirm proper service upon the Respondent.

7. On 13th March 2025, the Claimant's advocate reported that service of the summons and mention notice had been effected both physically and electronically. To this end, reliance was placed on an Affidavit of Service sworn on 12th March 2025 by Henry Omwega, to which a copy of the Memorandum of Claim bearing the Respondent's receiving stamp indicating service on 3rd February 2025, was attached.
8. Satisfied that proper service had been effected, the Court scheduled the matter for pretrial directions on 20th March 2025. Although the Respondent did not attend Court that day, the Court nonetheless granted them seven (7) days to file their pleadings.
9. The Respondent subsequently entered appearance through **Peris Wanjiku, Advocate** vide a Memorandum of Appearance dated 19th March 2025.

10. On 3rd April 2025, the Court noted that the Respondent had not filed any pleadings despite entering appearance. Consequently, the matter was certified as undefended and fixed for formal proof hearing on 23rd June 2025.

11. Following the formal proof hearing, the Court delivered its judgment on 19th September 2025. Notably, a few days before the scheduled delivery of judgment, the Respondent filed a Notice of Motion dated 11th September 2025 seeking leave to enter appearance, stay the delivery of judgment, reopen the proceedings, and file a statement of defence and/or counterclaim.

12. The court, having considered the history of the matter and noting that the judgment was ready for delivery, declined to suspend its delivery and instead directed the Respondent to serve the Motion upon the Claimant.

13. The Respondent thereafter withdrew the Motion dated 11th September 2025 and filed a fresh Motion dated 4th November 2025 seeking the following orders:

1) Spent.

2) Spent.

3) THAT, this Honourable Court be pleased to set aside in its entirety the default Judgment delivered on 17th September 2025 and all consequential orders arising therefrom.

4) THAT, the Respondent/Applicant be granted leave to defend the suit based on the Statement of Response and other supporting documents filed on 4th July 2025.

5) THAT costs of this application be in the cause.

14. It is that Motion that now comes up for determination. The Motion is premised on the grounds set out on its face and the averments contained in the Supporting Affidavit sworn on 4th November 2025 by **Peris Wanjiku**, who describes herself as the Applicant's Legal Officer.

15. Ms. Wanjiku deposes that upon service of the Claim and Summons to Enter Appearance on or about 3rd February 2025, the Applicant promptly notified its insurers, Minet, under its Employer's Liability Insurance Cover. She states that the insurers, through their agent, assured the Hospital that external counsel would be appointed to enter appearance and defend the suit on its behalf.

16. She avers that the Applicant, acting in good faith, relied on this assurance and continued to follow up the matter with its insurers, consistent with its standard

practice. However, despite repeated enquiries, the insurers neither appointed counsel nor took over the matter within the statutory timelines for filing appearance and defence. By the time they communicated their declination of cover in July 2025, the prescribed period for filing a defence had already lapsed.

17. Ms. Wanjiku further states that upon receiving the insurers' decision, the Hospital acted without delay to safeguard its interests by filing its Statement of Defence on 4th July 2025, and thereafter lodged an Application dated 10th September 2025 seeking to stay or arrest the delivery of judgment, demonstrating diligence and intent to defend the suit. She contends that despite these efforts, the Court proceeded to deliver judgment on 17th September 2025 without considering the Defence on record or the pending Application.

18. She further avers that the redundancy process was systematic and well-documented, having been preceded by internal memoranda, consultations, retraining efforts, notification to the Labour Officer, and payment of all terminal dues.

19. Ms. Wanjiku maintains that the issues raised are genuine, arguable, and deserving of a full hearing, and cannot be adequately resolved without oral testimony and documentary evidence.

20. The Claimant opposed the Motion through his Replying Affidavit, sworn on 25th November 2025.

21. In his Affidavit, the Claimant deposes that the Applicant's internal challenges do not constitute a basis for setting aside the judgment and asserts that no sufficient reason has been provided for the Applicant's failure to attend court.

22. He avers that the Applicant cannot shift responsibility to a party who is not before the Court for its failure to enter appearance or attend proceedings, particularly when its own counsel was capable of representing it.

23. The Claimant further contends that the Application is an afterthought, noting that the Court properly exercised its discretion on 17th September 2025. He maintains that the Applicant was duly and repeatedly served but failed to attend court.

24. He adds that the Court could not be expected to wait indefinitely for the Respondent while it awaited its insurer's decision.

25. The Claimant deposes that he is presently without a source of income and unable to engage in any income-generating activity, and that unless the Application is dismissed, he stands to suffer irreparable harm arising from the alleged negligence of the Applicant's counsel.

Submissions

26. On 26th November 2025, the Court directed that the Motion be disposed of by way of written submissions. Only the Claimant complied and filed submissions, which the Court has duly considered.

Analysis and Determination

27. I have considered the Applicant's Notice of Motion, the Claimant's Replying Affidavit, and his submissions, and it is evident that the Court is being called to determine whether it should set aside the Judgment delivered on 19th November 2025, grant the Applicant leave to file a Statement of Defence, and reopen the matter. I will address these issues concurrently.

28. In the Court of Appeal decision of *Pithon Waweru Maina v Thuku Mugiria (1982–88) 1 KAR 171*, the Court set out the principles governing the exercise of

discretion to set aside a judgment entered in default of appearance or defence, or where a party fails to attend the hearing, as follows:

“This is another case concerning the exercise of the judicial discretion under Order 9A, rr10 and 11 and Order 9B r8(which are in the same terms) of the Civil Procedure (Revised) Rules 1948, 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. As regards the exercise of that discretion, certain principles are now well established in our law.

Firstly, as was stated by Duffus P in Patel vs. EA Cargo Handling Services Ltd. [1974] EA 75 at 76C and E: “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.”

Secondly, as Harris J. said in Shah vs. Mbogo [1967] EA 116 at 123B, “This discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, 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”. That

judgment was approved by the court of appeal in Mbogo vs. Shah [1968]EA 93 and in Shabbir Din vs. Ram Parkash Anand [1955]22EACA 48 Biggs JA said at 51 “I consider that under Order 9 r20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant’s legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised”.

29. Fundamentally, the Court retains discretion to reopen a case, and such discretion must be exercised judiciously. In exercising this discretion, the Court must ensure that reopening does not prejudice or embarrass the opposing party.

30. I will now consider the instant Motion in light of the established principles.

31. As stated earlier, and at the risk of sounding repetitive, the matter was set down for formal proof hearing on 23rd June 2025, the Court being satisfied that the

Applicant had been duly served with the Notice of Summons and Statement of Claim but had failed to file a Defence.

32.Indeed, the Applicant's Counsel admits, at paragraph 3 of her Supporting Affidavit dated 4th November 2025, that the Applicant was served with the Notice of Summons on or about 3rd February 2025.

33.The primary reason cited for the Applicant's failure to file a Defence is that its insurer declined to handle the matter despite prior assurances. According to the Applicant, the declination was communicated after the statutory period for filing a Defence had already lapsed.

34.In support of its position, the Applicant annexed email correspondence exchanged with the insurers. It is notable that in an email dated 5th February 2025, the Applicant's Advocate (Ms. Wanjiku) requested feedback from the insurer, noting that the instant matter had been listed for mention on 12th February 2025.

35.The insurer responded by email on 5th February 2025, indicating that the applicable policy was a directors and officers liability policy, rather than an employee liability cover.

36.It is therefore evident that as of 5th February 2025, the Applicant was aware of its insurer's position with respect to handling the matter and, as such, had ample time to file a Defence. Indeed, Ms. Wanjiku filed a Memorandum of Appearance on 19th March 2025. It is unclear why a Defence was not filed concurrently with the Memorandum of Appearance.

37.What's more, the insurer's communication was relayed to the Applicant's counsel well before the pretrial directions and formal proof hearing. As a matter of fact, the Memorandum of Appearance was filed nearly three months prior to the scheduled formal proof hearing on 23rd June 2025. It is therefore unclear why the Applicant did not file a Defence before the formal proof hearing and seek the Court's leave to have it deemed as duly filed.

38.Accordingly, the Applicant's argument that it failed to file a Defence within the prescribed period due to delayed communication from its insurer is not plausible.

39. From the circumstances of this case, it is apparent that despite being aware of its insurer's position, the Applicant remained passive and only sought to move the Court when judgment was imminent.

40. The Applicant further contends that judgment was delivered despite a Defence having been filed on 4th July 2025. It is therefore unclear why the Applicant did not promptly move the Court to set aside the proceedings of the formal proof hearing and defend the matter, instead waiting until the last moment, just before judgment was to be delivered, to seek to arrest the judgment and defend the suit.

41. It is a well-established principle that equity aids the vigilant, not the indolent. In my respectful view, the Applicant's conduct in this matter depicts an indolent litigant, and it would be a travesty of justice for the Court to exercise its discretion in favour of such conduct.

42. While the Applicant may have a Defence raising triable issues, no plausible explanation has been provided for its failure to file a Defence in a timely manner or to attend Court as required and participate in the proceedings. By its own conduct, the Applicant has disentitled itself from the Court's discretion.

43. In reaching this conclusion, I am mindful that the Constitution guarantees the right to be heard before an adverse decision is made. However, in this case, the Applicant was afforded the opportunity to be heard but failed to exercise it by neglecting to file a Defence in a timely manner and attend Court when required.

44. Overall, it is my respectful view that the Applicant is undeserving of the Court's discretion.

45. For these reasons, the Court finds that the Application dated 4th November 2025 lacks merit and is therefore dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of February 2026.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Omwega for the Claimant/Respondent

No appearance for the Respondent/Applicant

Mohammed Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE