Muturi v Wayua (Civil Case E011 of 2025) [2026] KEHC 3359 (KLR) (13 March 2026) (Ruling)

Neutral citation: [2026] KEHC 3359 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL CASE E011 OF 2025

MA ODERO, J

MARCH 13, 2026

BETWEEN

PHYLIS MUTHONI MUTURI ..... PLAINTIFF

AND

ANGELAH WAYUA ..... DEFENDANT

RULING

1. Before this Court is the Notice of Motion application dated 31st October 2025 by which the Applicant Angelah Wayua Stephen seeks the following orders:-

> " 1. Spent
>
> 2. Spent
>
> 3. That the Honourable Court be pleased to set aside the Interlocutory judgment entered on 11th September 2025.
>
> 4. That the Honourable Court be consequently pleased to extend time and grant leave to the defendant/applicant to file her statement of defence, witness statement and bundle of documents out of time.
>
> 5. That costs of this application be in the cause."

2. The application which was premised upon Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 10 Rule 11 of the Civil Procedure rules and all other enabling provisions of the law, was supported by the affidavit of even date sworn by the Applicant

3. The Respondent Phyllis Muthoni Muturi opposed the application through her Replying Affidavit dated 5th November 2025.

The application was canvassed by way of written submissions. The Applicant filed the written submissions dated 9th December 2025 whilst the Respondent filed submissions dated 13th January 2026.

Background

4. The Respondent herein (as plaintiff) filed a Suit by way of a Plaint dated seeking Judgment against the Applicant (the Defendant in the suit) for a principal sum of Kshs. 6,783,300.

5. In response to that suit the Applicant engaged Counsel and entered appearance in the matter.

6. Simultaneously the Applicant had been arrested and charged in Karatina PMCC No. E043 of 2025. That criminal case which case the Respondent was the complainant was based on same debt where the charge related to a series of postdated cheque totaling Kshs. 3,200,000 which the Applicant had issued to the Respondent.

7. The parties later engaged and as a result the applicant on 17th September 2025 paid to the Respondent the sum of Kshs. 3,200,000. According to the Applicant this payment settled the dispute between the two and the Respondent undertook to withdraw both cases. That in fact on 8th October 2025 the Respondent did withdraw the criminal at the Karatina Law Courts and the Applicant fully expected that the Respondent would also proceed to withdraw this Civil Case.

8. However to the Applicants great surprise on 3rd September 2025 a Request for judgment was made on behalf of the Respondent in the Civil Case and Interlocutory judgment was entered against the Applicant on 11th September 2025.

9. The Applicant was on 27th October 2025 served with Notice of entry of judgment. The Applicant then learnt that the Respondent had no intention of withdrawing the civil suit.

10. The Applicant avers that she failed to file a defence in the civil suit based on the Respondents indication that the matter had been settled and that both cases would be withdrawn. The Applicant asserts that she has a good defence to the Civil Claim.

11. The Applicant pleads that she will suffer substantial loss if the interlocutory judgment is allowed to stand yet in her view she has paid to the Respondent the full amount due. In this basis the Applicant prays that the interlocutory judgment be set aside and that she be granted leave to file her defence out of time.

12. In her reply the Respondent denies that she ever reached any agreement with the Applicant to withdraw both cases and denies that the monies paid to her in the criminal case also settled the civil suit. The Respondents states that the full claim was for Kshs. 6,783,300 yet she was only paid Kshs. 3,200,000 leaving a balance of Kshs. 3,583,000 outstanding.

13. The Respondent states that the Draft defence is benefit of substance and that this application which is full of falsehoods amounts to an abuse of court process. She prays that the entire application be dismissed. The Respondent insists that the interlocutory judgment is valid and ought to be allowed to stand. She prays that the entire application be dismissed.

Analysis and Determination

14. I have carefully considered the application before this Court, the reply filed thereto as well as the written submissions filed by both parties. The only issue for determination is whether the interlocutory judgment entered on 11th September 2025 should be set aside.

15. Order 10 Rule 11 of the Civil Procedure Rules provide for setting aside of ex-parte interlocutory judgments in default of appearance or defence as follows:-

> " Where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree or upon such terms as are just."

16. The principles governing setting aside interlocutory judgment were set out in the case of Patel -vs- East African Cargo Handling Services LTD [1974] E.A 75 in which it was held that

> " There are no limits or restrictions on the Judges discretion to set aside or vary an ex-parte judgment 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 to feter the wide discretion given to it by the Rules."

17. In an application for setting aside Ex parte judgment, the court exercises its discretion which discretion must be exercised judiciously. In the case of CML Holdings Ltd -vs- James Mumo Nzioki [2004] eKLR, the Court of Appeal stated that the court should exercise its discretion to ensure that a litigant did not suffer hardship or injustice as the result of an excusable mistake or error. In Shah -vs- Mbogo & Another [1967] EA the same court stated that it would not be proper use of such discretion if the court were to turn its back on a litigant who had clearly demonstrated an excusable mistake inadvertence, accident or error.

18. There is a distinction to be drawn between a regular and an irregular Ex Parte judgment. In the case of James Kanyiita Nderitu & Another -vs- Marios Philotas Ghika & Another [2016] eKLR, the Court of Appeal set out the criteria to be adopted when exercising the Courts jurisdiction to set aside a regular and an irregular ex-parte judgment as follows:-

> " In a regular default judgment, the defendant will have been duly served with Summons to Enter Appearance, but for one reason or another, he had failed to enter appearance or to file defence resulting in default judgment. Such a defendant is entitled under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reason for the failure of the defendant to file his Memorandum of Appearance or defence, as the case may be, the length of time that has elapsed since the default Judgement was entered, whether the intended defence raises triable issues, the respective prejudice each party is likely to suffer, whether on the whole it is in the interest of justice to set aside the default judgment, among others.
>
> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with Summons to Enter Appearance. In such a situation, the default judgment is set aside ex-debito justitiae as a matter of right. The court does not even have to be moved by the party once it comes to its notice. In addition, the court will not venture into considerations or whether the intended defence raised triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reasons why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations."

19. In this case the Ex parte judgment was regular in that Summons to enter appearance had been served upon the Applicant and indeed the Applicant through her Advocate did file a Memorandum of Appearance dated 14th August 2025 a copy of which is annexed to the Supporting Affidavit dated 31st October 2025 (Annexture AWS '1').

20. The Applicant did not however file any defence to the suit which result in the entry of the default judgment against her for the sum of Kshs. 31, 203, 180. A copy of the Notice of entry of judgment dated 27th October 2025 appears as Annexture AWS '4' to the Supporting affidavit.

21. The Applicant has explained her failure to file a defence stating that the parties had begun engaging with a view to settling the matter and stated that she believed that in paying the Respondent the sum of Kshs. 3,200,000 which led to the withdrawal by the Respondent of the Criminal case filed at the Karatina Law Courts, that the civil case had also been compromised.

22. The Court is enjoined to consider whether the reasons advanced to the Applicant amount to sufficient cause to warrant setting aside the interlocutory judgment. In Parimal -vs- Veena Bharti Civil Appeal No. 1467 of 2011, the Supreme Court of India observed as follows:-

> " Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case of the party cannot be alleged to have been "not acting diligently"

23. I note that the judgment was issued on 11th September 2025 and this application seeking leave for extension of time to file defence was made on 31st October 2025 barely one (1) month later. The delay is not inordinate. I have considered the reasons advanced by the Applicant to explain the failure to file defence. In my view those reasons are plausible. It is a fact that the parties did enter into discussions. It is also a fact conceded by the Respondent that she did receive a sum of Kshs. 3,200,000 from the applicant as a result of which the Respondent did withdraw the Criminal case. This is evidenced by the annexed copy of the proceedings from Karatina Law Courts. (Annexture "AWS 2')

24. I have perused the Draft Defence annexed to the Supporting affidavit (annexture AWS '5'). In my view the same raises triable issues.

25. The Applicant pleads that she is likely to suffer substantial loss if the judgment of Kshs. 31,203,180/- proceeds to execution. I do agree that this is a colossal sum by any accounts and the Applicant deserves a chance to be heard.

26. Based on the foregoing I do find merit in this application and the same is allowed. The court makes the following orders;-

    (i) The interlocutory judgment entered on 11thSeptember 2025 be and is hereby set aside.

    (ii) The Applicant is granted an extension of time within which to file defence to the suit.

    (iii) The Applicant is granted leave to file the statement of defence, witness statement and bundle of documents out of time. The same to be filed within twenty one (21) of date of this Ruling.

    (iv) Since this application was necessitated by the failure of the Applicant to file defence within time, the Applicant is condemned to meet the costs of this application.

DATED IN NYERI THIS 13TH DAY OF MARCH 2026.

.....

MAUREEN A. ODERO

JUDGE