



Munga v Munyi (Civil Case E003 of 2024) [2026] KEMC 29 (KLR) (19 February 2026) (Ruling)

Neutral citation: [2026] KEMC 29 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE E003 OF 2024
PA NDEGE, SPM
FEBRUARY 19, 2026**

BETWEEN

PETER KINYANJUI MUNGA PLAINTIFF

AND

SAMUEL WARUHIU MUNYI DEFENDANT

RULING

1. The Defendant to the suit herein, Samuel Warihui Munyi, brought the application herein seeking to review and/or set aside the interlocutory judgment given on 25/03/2025 and all consequential orders and proceedings arising therefrom, and that the defendant be granted leave to file his Statement of Defence as annexed and that this suit be set down for hearing inter-partes and be determined on merit. He is further praying that the costs of this application be in the cause.
2. The said application is supported by the grounds on the face of the application as well as the affidavit sworn by the Defendant/ Applicant. The plaintiff, Peter Kinyanjui Munga, Filed A Replying Affidavit Of His Counsel On Record, John Ndugu Njuguna, sworn at Nakuru on 03/10/2025 opposing the application. Parties herein filed, and I do believe, exchanged their written submissions and arguments.

Setting Aside and The Guiding Principles

3. It is a deeply entrenched principle that a court of competent jurisdiction can vary, vacate or set aside ex-parte proceedings and judgment it entered in default pursuant to a number of factors. Also, the power of the court and its discretion to set aside a judgment entered ex parte to allow the hearing of a matter inter partes is unfettered. The court has a wide discretion to set aside such judgments where the defendant failed to enter appearance and/or file a defense. This jurisdiction is exercised to avoid injustice and hardship resulting mainly from accident, inadvertence or excusable mistake or error. In normal circumstances, courts do lean towards a policy of deciding cases on merits rather



than encourage ex parte judgments based on procedural technicalities. There is also a constitutional requirement to that effect¹.

4. The Court of Appeal in *James Kanyiita Nderitu & Another -vrs- Marios Philotas Ghikas & Another* [2016] e KLR, expressed itself thus,

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 defense, 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 defense, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defense 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 other... (Emphasis added)

Determination

5. The applicant herein has confirmed service. He avers that upon service of the pleadings herein, he forwarded the same to his insurer, Trident Insurance Company Limited for further action. That he was later made aware that an advocate had been assigned the matter.
6. As correctly submitted by the learned counsel for the Plaintiff/ Respondent, the Applicant did not however demonstrate any efforts he made in following up the case and appraise himself with its progress if at all he was a serious litigant who was desirous of defending this matter at all material times as he now wants the court to believe. This is in line with the case of *J. G. Builder Vrs Plan International* [2015] e KLR, where the court held that a case belongs to a litigant and hence he/she has a duty to pursue the same and to constantly check its progress and that failure to do so is a demonstration of indolence on the litigant's part.
7. Further, in the case of *Multiple Hauliers Vrs Enock Bilindi Musundi & 2 Others* [2021] e KLR, the Court held as follows: -

Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. the Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was

¹ Article 159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution. (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles – (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted



dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant...it is not enough for a party to simply blame the Advocate but must show tangible steps taken by hi in following up his matter.

8. That notwithstanding, I am supposed to look at whether there is any defence raising a triable issue. This was specifically held in *CMC Holdings Vrs James Mumo Nzioka* [2004] e KLR, as follows:

The law is now well settled that in an application for setting ex parte judgment, the court must consider not only reasons why the defence was not filed, or for that matter why the applicant failed to turn up for hearing on the hearing date, but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft is annexed to the application, raises triable issues.

9. In *Tree Shade Motorslimited Vrs D T Dobie & Company (k) Limited & Another*, Civil Appeal No. 38 OF 1998), the Court stated as follows:

The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff's claim. Where a draft defence is tendered with the application to set aside the default judgment, the Court is obliged to consider it to see if it raises a reasonable defence to the Plaintiff's claim. If it does, the defendant should be given leave to enter and defend,

10. I have gone through the draft defence annexed herein. As correctly submitted by the learned counsel for the Applicant, there is a core defence that if the accident herein occurred on the material date as alleged, the same was wholly and or substantially contributed to by the Plaintiff. The Defendant/ Applicant went ahead and enlisted at least 8 particulars of negligence at paragraph 6 thereof. This defence is not a mere or general denial as submitted by the learned counsel for the Plaintiff. On this ground alone, I find that the applicant should be allowed to defend this suit. However due to his negligence he shall have to refund the Plaintiff, the costs he has so far incurred in prosecuting this suit.

11. The upshot is that this court issue the following orders:

- a. This court be and is hereby pleased to set aside the interlocutory judgment given on 25/06/2024 and all consequential orders and proceedings thereto.
- b. The Defendant/ Applicant be and is hereby granted leave to file his Statement of Defence as annexed herewith, upon payment of costs so far incurred by the plaintiff in prosecuting this suit, as already assessed, and the costs of defending this application, in full, and not later than 60 days from the date hereof.
- c. Failure to comply with (b) above, the interlocutory judgment and ex parte proceeding thereto shall be reinstated and the Plaintiff shall be at liberty to proceed with the execution.

RULING DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF FEBRUARY , 2026

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: Kurere h/b Njuguna

Defendants' Counsel: n/a



Defendant/ Applicant: n/a

Kurere: We can have a date to confirm compliance. 04/8/26. MNTI.

