Mwiva (Suing as the Legal Representative and Administrator of the Estate of Charles Kyengo Kyungu - Deceased) v Musyoka (Civil Case E020 of 2020) [2026] KEMC 14 (KLR) (3 February 2026) (Ruling)

Neutral citation: [2026] KEMC 14 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CIVIL CASE E020 OF 2020

YA SHIKANDA, SPM

FEBRUARY 3, 2026

BETWEEN

WAEMA MWIVA (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF CHARLES KYENGO KYUNGU - DECEASED) ..... PLAINTIFF

AND

MARRIAM NGENA MUSYOKA ..... DEFENDANT

RULING

The Application

1. The application for determination is dated 20/5/2025 brought by the defendant pursuant to the provisions of Order 22 rule 22 of the *Civil Procedure Rules* and sections 1A, 1B and 3A of the *Civil Procedure Act*. Some prayers have been spent save the following:

    1. That this Honourable court be pleased to set aside the ex parte judgment entered herein in favour of the plaintiff as against the defendant and all consequential orders and proceedings thereto;

    2. That this Honourable court be pleased to grant the firm of Joe Ngigi & Company Advocates LLP leave to come on record for the defendant;

    3. That the costs of this application be provided for.

2. The application is supported by affidavit sworn by one Moses Barasa who claimed to be the Legal officer at Madison General Insurance Kenya Limited and is premised on the following grounds:

    i. The defendant was not served with summons to enter appearance and pleadings as is provided for by law;

ii. The applicant has a defence to the claim herein that raises triable issues;

iii. The application has been made without unreasonable delay;

iv. The orders sought by the applicant are in the interest of justice.

3. In the affidavit in support of the application, the applicant reiterated the grounds in support of the application and stated that the defendant herein became aware of the suit when she was notified of the summons to enter appearance in the declaratory suit against the insurance company. The deponent further deposed that there is no prejudice or injustice that cannot be compensated that will be occasioned to the plaintiff, should the orders sought be granted.

The Plaintiff's Response

4. The plaintiff opposed the application by filing a Replying affidavit sworn by his Counsel. Counsel deposed that the application was an afterthought, fatally defective and incompetent. Counsel further deposed that the defendant herein was served with summons to enter appearance and plaint but chose to ignore. That the defendant's insurer was also served with a notice of institution of suit. The plaintiff argued that the draft defence did not raise any triable issue and is a bare denial intended to defeat the lawful judgment. That the court should not exercise its discretion to aid an indolent party. The plaintiff stated that the applicant had denied service but did not seek to cross-examine the process server. The plaintiff argued that the applicant had not approached the court with clean hands and there had been inordinate delay in filing the application. That if the orders are granted, the respondent stands to suffer prejudice and delay in accessing justice. The respondent attached copies of documents to support the objection.

Main Issues Or Questions For Determination

5. It appears that there is no objection to the firm of Joe Ngigi & Company Advocates LLP coming on record for the defendant. Having perused the application as well as the response by the Plaintiff, together with the parties' submissions, I find that the main issues or questions for determination are as follows:

i. Whether there are sufficient grounds to warrant setting aside of the Judgment herein and granting the defendant leave to defend the suit;

ii. What other orders should the court make if need be?

iii. What orders should the court make with respect to costs of the application?

The Applicant's Submissions

6. The parties agreed to dispose of the application by way of written submissions which were duly filed. The applicant submitted that the process server did not indicate the exact location of the defendant's shop in Kibwezi and how he knew that the defendant was with the daughter. The applicant erroneously argued that one Robert had received summons on behalf of the defendant. There is no such indication in the affidavit of service. The applicant submitted that it would be in the interest of justice to allow the defendant to file her defence and defend the suit. That the setting aside of the judgment would not prejudice the plaintiff but would cure an injustice against the defendant. The applicant contended that the draft defence raised triable issues. The applicant relied on several authorities but no copies of the same were filed.

The Plaintiff's Submissions

7. In his submissions, the plaintiff submitted that the defendant was served with summons to enter appearance and plaint as well as mention notices. That the affidavits of service were not challenged by way of cross-examination of the process server. The plaintiff argued that since the defendant was served, the judgment entered was lawful and cannot be set aside on account of irregularity. That the defendant has not offered a plausible explanation as to why she failed to enter appearance and defend the suit. The plaintiff contended that the defendant was aware of the suit but deliberately failed to enter appearance and file her defence within the stipulated time. The plaintiff also relied on several authorities whose copies were not filed.

Analysis And Determination

8. The Legal Provisions

Order 6 rule 1 of the *Civil Procedure Rules* stipulates that:

> " Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons."

9. Order 7 rule 1 of the *Civil Procedure Rules* provides that:

> " Where a defendant has been served with summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service".

10. Order 10, rule 9 of the *Civil Procedure Rules* states:

> " Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing."

11. Order 10, rule 10 of the *Civil Procedure Rules* provides:

> " The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence."

12. Order 10, rule 11 of the *Civil Procedure Rules* provides:

> " 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."

13. Section 1A of the *Civil Procedure Act* provides as follows:

> " (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
>
> (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".

14. Section 1B provides thus:

> "(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
>
> (a) the just determination of the proceedings;
>
> (b) the efficient disposal of the business of the Court;
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> (c) the efficient use of the available judicial and administrative resources;
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> (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
>
> (e) the use of suitable technology".

15. Section 3A provides:

> "Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

16. Article 159(2) (b) of *the Constitution* provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall not be delayed.

Analysis

17. I have carefully considered the application as well as the plaintiff's response. I have further considered the submissions made on behalf of the parties. The application is supported by an affidavit sworn by one Moses Barasa who claimed to be the legal officer at Madison General Insurance Kenya Limited. That the said insurance company had insured the defendant herein. The deponent stated that he had authority from the insurance company and the applicant (defendant) to swear the affidavit. Order 19 rule 3(1) of the *Civil Procedure Rules* provides as follows:

> "Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:
>
> Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof".

18. In the case of *Gerphas Alphonse Odhiambo v Felix Adiego* [2006] eKLR, Waki JA held as follows:

> "An affidavit, by definition, is evidence given on oath and is subject to the provisions of the *Evidence Act*, Cap 80 – see section 2(2). Admissibility of hearsay evidence must therefore be shown to comply with the provisions of that Act. Ordinarily, an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to

swear and prove the facts of their own knowledge. In appropriate cases such affidavits may be struck out or given little or no weight at all. Even where exception is made to section 2(2) of the *Evidence Act*, as it is in interlocutory proceedings under the *Civil Procedure Rules*, Order 18 rule 3(1) (now Order 19), the need to ensure that facts are proved by a person or persons who have personal knowledge of such facts is closely guarded. This Court interpreted that provision in *Kenya Horticultural Exporters [1977] Ltd v Pape (trading as Osirua Estate)* [1986] KLR 705 where it stated:

"Order XVIII rule 3(1) (now Order 19) of the *Civil Procedure Rules* is not to be understood to provide that an affidavit in interlocutory proceedings may be sworn by a deponent who is unable of his own knowledge to prove facts, or that such an affidavit may be confined entirely to statements of information and belief even if the sources and grounds are shown. The words "may contain" suggest that the main body of such an affidavit has to be confined to facts which the deponent is able of his own knowledge to prove."

19. The insurance company is not a party to this suit. Therefore, the purported authority given to the deponent by the insurance company is of no consequence. There is nothing to show that the deponent has authority from the defendant to swear the affidavit. In paragraph 2 of the supporting affidavit, the deponent deposed that:

> " That the events leading to the present application are either known to me or have been brought to my attention by the Applicant's Advocates now on record and I am competent to swear this affidavit."

20. The suit was filed against the defendant herein. It is not clear how the deponent, a stranger to the suit, knew that the defendant was never served with summons to enter appearance. He did not even indicate that he was informed by the defendant that she was not served or has knowledge of the fact. The deponent has not disclosed the source of his information. The only person who can properly dispute service of summons to enter appearance is the defendant herself. It is not clear why the defendant did not swear an affidavit to dispute service. I strongly believe that the real applicant is the insurance company but is hiding under the defendant's name. It is obvious that the deponent cannot prove or disprove, of his own knowledge, the fact of service or non-service of summons and plaint upon the defendant.

21. The deponent cannot also prove that the defendant was not aware of the suit and proceedings leading to the judgment herein. He cannot therefore of his own knowledge prove the facts surrounding service of summons and other court processes against the defendant. Consequently, I hereby strike out the contents of paragraphs 4 and 5 of the supporting affidavit. From the provisions of Order 10 rule 11 of the *Civil Procedure rules*, it is clear that the power to set aside a judgment entered in default of appearance or defence is within the discretion of the court. In the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 the Court of Appeal, per Duffus President of the Court stated thus:

> " 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.....the principle obviously is that unless and until the Court has pronounced judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any of the rules of procedure."

22. In *Shah v Mbogo* [1967] E.A 116 at 123, Harris J, held as follows;

> " I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgement obtained ex parte. This discretion is intended 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."

23. In the case of *Smith v Middleton* [1972] SC 30, it was held that discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. The principles to be considered by the court in an application of this nature were well articulated in the case of *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR. In the said case, the Court of Appeal held that the principles governing the exercise of judicial discretion 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 are:

1. 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;
2. This 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice;
3. The court has no discretion where it appears there has been no proper service;
4. The power to set aside judgment does not cease to apply because a decree has been extracted;
5. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed;
6. The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered;
7. The question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered;
8. It should be remembered that to deny the subject a hearing should be the last resort of a court.

24. There is an affidavit of service indicating that the defendant was served with summons to enter appearance and the plaint. There are further affidavits of service indicating that the defendant was notified of the proceedings. There is no affidavit by the defendant disputing service upon her. I have no difficulty in finding that the defendant was duly served. No explanation at all has been given to explain why the defendant did not enter appearance and file a statement of defence. The deponent of the affidavit in support of the application indicates that the insurance company has a direct interest in the matter. I agree. There is an affidavit showing that the insurance company was served with a notice

of institution of suit. This fact has not been denied by the applicant either by way of further affidavit or otherwise.

25. No explanation has been given as to why the insurance company did not take steps to defend the suit. I agree with the plaintiff that the application is an afterthought meant to derail or delay execution of the decree herein. No plausible explanation has been given for the failure to file the defence within time or even seek extension of time promptly. The defendant and her insurer were made aware of the institution of the suit but they did not bother to defend it. It is also obvious that the applicant is in default. She seeks indulgence from the court yet her hands are tainted. He who comes to equity must come with clean hands. I do not think the applicant's soiled hands should be allowed to touch the pure fountain of justice. My view is that the applicant is not entitled to the indulgence sought. She has no reasonable or legitimate expectation of receiving one. Her only reasonable or legitimate expectation is that the discretion relevant to her application be exercised judiciously in accordance with established principles of what is fair and reasonable.

26. In those circumstances, it is incumbent on the applicant to provide the court with a full, honest and acceptable explanation of the reasons for failure to enter appearance and defend the suit. She cannot reasonably expect the discretion to be exercised in her favour, as a defaulter, unless she provides a reasonable explanation for the default and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. I am afraid that the applicant has failed in this endeavour. Her conduct has given her away. I see no plausible reason to enable me exercise my discretion in favour of the defendant/judgment debtor.

27. I would borrow the words of the Court of Appeal in the case of *John Ongeri Mariaria & 2 Others v Paul Mutundura* [2004] 2 EA 163, wherein the Court observed quite authoritatively that:

> Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work must fall on their shoulders ....whereas it is true that the court has unfettered discretion, like all judicial discretions, must be exercised upon reason not capriciously or sympathy alone..... justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent."

28. I do not think the applicant is keen on settling the decretal sum. It has been argued that the applicant has a defence that raises triable issues. I have perused the draft defence. It is actually a copy of the defence in the declaratory suit. The defence does not answer the claim herein. It cannot therefore be said to raise triable issues. The application was heedlessly prepared. I think I have said enough to show that the application is untenable. As rightly observed by the plaintiff, the application is clearly an afterthought. The applicant is out to gamble with the course of justice.

Disposition

29. Consequently, I proceed to make the following orders:

    a. The application dated 20/5/2025 is hereby Dismissed;

    b. The Judgment in default entered herein is maintained;

    c. The defendant is condemned to pay costs of the application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 3RD DAY OF FEBRUARY, 2026.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.