



REPUBLIC OF KENYA



**KENYA LAW**  
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**Thuku (Suing on Behalf and t/a as Hillset Enterprises) v Tgram Global Consultancy Limited  
& another (Civil Case E031 of 2025) [2026] KEMC 53 (KLR) (26 February 2026) (Ruling)**

Neutral citation: [2026] KEMC 53 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
CIVIL CASE E031 OF 2025  
PA NDEGE, SPM  
FEBRUARY 26, 2026**

**BETWEEN**

**HILDA NYARUAI THUKU (SUING ON BEHALF AND T/A AS HILLSET  
ENTERPRISES) ..... PLAINTIFF**

**AND**

**TGRAM GLOBAL CONSULTANCY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TIRUS KARANJA NDEGWA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. On 04/03/2025, after considering the Request for Judgment dated 19/02/2025, and in the presence of Mr. Muiruri for the defendant, there having been no defence lodged for this Suit, I granted the request and entered a final judgment for the liquidated claim herein.
2. This ruling is the subject of a Motion on Notice dated 02/04/2025, by the defendants/ applicants herein, Tirus Karanja Ndegwa and TGRAM Global Consultancy LTD, in which they seek the following orders:
  - i. That application herein be certified as urgent and be heard on priority basis.
  - ii. That the Court be pleased to set aside the judgment in default of Defence entered against the Defendants herein.
  - iii. That this Honorable Court be pleased to grant leave to the Respondents to file a Statement of Defence as per the annexed draft within 14 days.
  - iv. That the Defendants be given an opportunity to unconditionally defend the case against them on merit.



- v. That it is in the interest of justice that this present Application be heard and for further reasons of urgency set out in the Affidavit in support of the Application.
3. The said application is supported by an affidavit sworn by Tirus Karanja, the 1<sup>st</sup> Defendant/ Applicant sworn 02/04/2025 where he deposed that the defendants herein are aggrieved by the default judgment obtained by the Plaintiff against them herein. That they were served with summons to enter appearance indicating that the matter was scheduled for mention on 04/03/2025 and promptly instructed the firm of Esther Thiong'o and Co. Advocates to act on their behalf. That pursuant to the instructions, their counsel on record without delay entered appearance vide a memorandum of appearance dated 04/02/2025. That they therefore reasonably believed that the matter would come up solely for directions, including timeliness for filing pleadings and not for any final or substantive action such as entry of judgment. That as such, the entry of judgment on the aforesaid date was both premature and procedurally prejudicial. That they have a viable defence. That were execution to proceed unstayed, the Applicant's' business will be paralyzed and the Applicants stand to suffer extreme prejudice and substantial loss as judgment was entered without their participation thereby infringing on their fundamental right to a fair hearing. That moreover, this application has been made without unreasonable delay, and is made in good faith with the intention of having the dispute determined on its merit. That the Plaintiff will not suffer prejudice that cannot be compensated by an award of costs, whereas they risk severe injustice if the orders sought are not granted. The Applicants also filed and relied on the 1<sup>st</sup> Defendant's further affidavit sworn at Nakuru on 11/11/2025.

#### **Plaintiff's/ Respondent's Response**

4. The application was opposed by the Plaintiff/Respondent vide the Plaintiff's Replying Affidavit sworn at Nakuru on 08/08/2025. The plaintiff deposed that the application is fatally defective and grossly incompetent and should not be entertained by this Honorable Court. That the application is founded on falsehood and material non-disclosure and the affidavit in support comprises of lies and misrepresentations. That if the applicants had told half truth in the affidavit, the application would have been deemed a non-starter and dismissed in limine. That the application is a mere afterthought by the Defendants/ Applicants herein and desperate attempts through the backdoor by the applicants to have a second bite on the cherry and which action the law abhors. That this court is already functus officio and ought to be very reluctant to interfere with the regular and valid judgment on record. That there is no plausible reason/s or explanation given by the Defendants/ Applicants on why the said judgment ought to be set aside and as such this Honorable Court's hands are tied as there is no reason whatsoever for it to interfere with the said judgment or exercise its unfettered discretion. That the defendants/ Applicants admit that they were indeed served with the summons to enter appearance and the plaint on 22/01/2025 and where they signed the summons confirming service. That the said summons expressly stated that the Defendants were to enter appearance within 15 days. That on 04/02/2025 and which was approximately 14 days from being served, the Defendants herein entered appearance and filed and served a memorandum of appearance. That having enter appearance on 04/02/2025, the Defendant had 14 days to file their Statement of Defence in line with the provisions of Order 10, Rule 4(1) of the Civil Procedure Rules and as such the time for filing a statement of defence lapsed on 18/02/2025. That no defence was filed on or before 18/02/2025 and arising from the default and in line with the provisions of Order 10, Rule 4(1) of the Civil Procedure Rules, the Plaintiff made a request for judgment in default. That, the Plaintiff, further sought for the matter to be fixed for mention, and a mention date was given on 04/03/2025, which he duly served on the defendants on 18/02/2025 and filed an affidavit of service. That as at 04/03/2025, 30 days after entering appearance, no defence had been filed by both defendants/ applicants. That as provided by Order 10, Rule 4(1) of the Civil Procedure Rules and noting that the claim is liquidated, the Plaintiff sought for judgment to



be endorsed, which request was granted. That the judgment was entered on 04/03/2025 is therefore regular and for the same to be set aside, the plausible reasons must be given. That the Defendants/ Applicants have however not given any plausible reason/s as to why they failed to file their defence within the statutory time lines. That rules of procedure and timelines are maiden of justice and litigants are bound to obey them. That these rules are not mere technicalities and as such, they must be adhered to and a delay of even a day must be sufficiently explained before such delay can be excused. That it is clear as day that the Defendants/ applicants herein deliberately and callously failed, refused, ignored and/or neglected to file the Statement of Defence and this was solely for purpose of delaying the matter. That the Defendants/ Applicants have not in any way poked holes on the said entry of judgment on 04/03/2025 nor have they demonstrated that they indeed have any formidable defence. That to the contrary, the Defendants/ Applicants herein admit the Plaintiff's averments in the Plaint and further admit that they failed to provide the said services as contracted. That this Honorable Court has a cardinal duty to preserve the precious judicial time and allowing this application shall not only be prejudicial to the Plaintiff and his rights, but rather shall be an exercise in futility since on the basis of the evidence on record, this Honorable Court shall again arrive at the same finding already arrived in the judgment entered on 04/03/2025. That it is clear that the defendants were never interested at prosecuting this matter and went into indolence with the aim of paralyzing the hearing of this matter. That this is a fairly old dispute which has remained unsettled for long enough and this dispute now ought to come to an end and the regular judgment delivered on 04/03/2025 left undisturbed.

5. It was submitted on behalf of the Plaintiff/Respondent that the claim herein is a liquidated claim and therefore the request for judgment was in accordance with the law and is further supported by Section 1A of the Civil Procedure Rules, 2010, which provides for the overriding objective. The learned counsel for the Plaintiff/ Respondent generally submitted that the Defendants/ Applicants have not met the threshold for the grant of the orders sought and it was therefore urged that the application dated 02/04/2025 be dismissed for lack of merit and this court's judgment entered on 04/03/2025 be maintained and the matter herein be marked as finalized.

### **Determination**

6. The application before me is expressed to be brought pursuant to Section 1A, 1B and 3A of the *Civil Procedure Act*, basically the overriding objective of the civil procedure and inherent jurisdiction of this court. The power to set aside judgement is however discretionary and the principles guiding the exercise of discretion apply with equal force. Like any other judicial discretion, it must be exercised on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the applicant for such orders.
7. In this case, the Applicants contend that they were never afforded an opportunity of being heard since they were not aware that the judgment in default was to be entered on a day which they believed was scheduled for a mention for pretrial and directions as to the closure of pleadings etc. It was however deposed in their supporting affidavit and further affidavit that they were duly served with summons to enter appearance and that they duly instructed their advocates who entered appearance for them.
8. This Court is bound by the depositions in the affidavits which were made on oath. On the basis of the same, it is clear that the Applicants were served with the summons to enter appearance, the plaint and the suit papers herein. Pursuant to Order 7, Rule 1, the defendants/ applicants were supposed to file their defence within 14 days of entry of appearance. In this case, the Applicants aver that they were in Court when the judgment was irregularly entered. It appears that the applicant cared less whether they



had filed their defence or not. They appear to contend that a Memorandum of Entry was sufficient. Rule 10, as read with rule 5, of Order 10, however provides for entry of final judgments where a defendant fails to file a defence within the 14 days stipulated in Order 7, rule 1.

9. What comes out from the foregoing is that the Applicants were duly served, entered appearance and were represented during a mention, but they failed to defend the suit herein, hence the final judgment in default herein. This is therefore not a case where service was not effected. It cannot therefore lie in the mouths of the Applicants to contend that they were denied an opportunity of being heard. As was held by the Court of Appeal in *Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji* Civil Application No. Nai. 179 of 1998:

Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.

10. The same principle was restated by the same Court in *Issa Leshan Keres and 4 Others vs. Kipoki Oreu Tasur and 10 Others* Civil Appeal No. 5 of 2004. The question that this Court is therefore called upon to determine is the reason for the failure to file the Statement of Defence. Ringera, J (as he then was) in *Omwoyo vs. African Highlands & Produce Co Ltd* [2002] 1 KLR 698 expressed himself as hereunder:

A factor, which a judge must weigh in the balance, is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interest of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequence of the negligence of the lawyers to fall on their own heads rather than by allowing amendment at a very late stage of the proceedings...The time has come for the legal practitioners to shoulder the consequences of their acts or omissions like other professionals do in their fields of endeavor.

11. A proper consideration of the material placed before me leads me to the conclusion that the failure by the applicants to defend the suit was simply based on inaction on their part. In any case, their counsel who was present on 04/03/2025 had in his powers what it could take to seek indulgence from this court while seeking for time to file their Defence but he simply did nothing. In *Mwangi vs. Mwangi* [1999] 2 EA 234, it was held that:

The burden lies on a party who seeks the exercise of a Court's discretion in his favour to place some material before the Court upon which material the discretion is to be exercised. To simply say "it is the mistake of my counsel", is really no answer...Pure and simple inaction by counsel or a refusal by him to act, cannot amount to a mistake which ought not to be visited on a client. Simple inaction by a lawyer coupled with client's careless attitude may be enough to say: "I am not going to exercise my discretion



12. That was the position adopted in *Maneno Mengi Ltd and Others vs. Nyamachumber and Another* [2004] 1 EA 116 where it was held that it is now settled that a party's lack of diligence and inaction is no ground for circumventing the clear provisions of the Rules.
13. Instead of offering plausible explanation for the default, the Applicants have instead attacked the court's exercise of its powers to enter the judgment herein, which they contend was premature and or irregular, grounds which can best be handled by an appellate court, given that I am sure that the judgment herein is neither premature nor irregular. As was held in *Shah vs. Mbogo* (1967) EA 166:

...this discretion to set aside an ex-parte judgment 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.
14. The impression I get from the position taken by the Applicants is that the Court ought to have gone out of its way, on its own motion, to extend the time for filing of a Defence herein and notify or advise their counsel of the same notwithstanding lack of indication that the Applicants were objecting to, or defending, the suit. With due respect, it is not the duty of this court to hold brief for the applicants and inquire why they are not objecting to, or defending, a suit. To do so would amount to this court extending to the applicants/ defendants undue advantage and treating them differently from other litigants yet this Court is sworn to do justice to all parties before it without fear or favour. Having considered this application dated 02/04/2025 I find it unmerited and dismiss it with no order as to costs.
15. It is so ordered.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF FEBRUARY , 2026.**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of:

...Karungu..... for the Plaintiff

...N/A..... for the Defendants

