



**Atta (K) Limited v Mathew Six Eleven Bakers Limited (Civil Case E098 of 2022)
[2026] KEHC 4903 (KLR) (Commercial and Tax) (19 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 4903 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E098 OF 2022
F GIKONYO, J
MARCH 19, 2026**

BETWEEN

ATTA (K) LIMITED PLAINTIFF

AND

MATHEW SIX ELEVEN BAKERS LIMITED DEFENDANT

RULING

1. Before the court is the defendant's notice of motion dated 11.12.2024 brought under Orders 10 Rule 11, 22 Rule 6 and 40 Rules 1 and 2 of the Civil Procedure Rules.
2. The defendant seeks three main orders: -
 1. Leave for Chege Kibathi & Co. Advocates LLP to come on record.
 2. Setting aside of the interlocutory default judgment entered against it together with any consequential orders/ decree.
 3. Unconditional leave to defend the suit and file its statement of defence.
3. The application is supported by an affidavit sworn by its shareholder, Geoffrey Kariuki Mboo on 11.12.2024 and written submissions dated 17.6.2025.
4. The grounds are: -
 1. The defendant's shareholder was arrested at his house pursuant to the warrant of arrest in execution of the decree dated 7.3.2023.
 2. The defendant was not served with the pleadings in this matter. Service was effected through registered post through P. O. Box 524-00200 Nairobi which is not operational.



3. The default judgment is irregular and should be set aside unconditionally and it be allowed to file its defence for the matter to be heard on merits as this is a constitutional right.
4. The plaintiff failed to issue the mandatory 10-day notice of entry of judgment upon the defendant under order 22 rule 6.
5. The plaintiff failed to file a formal application under order 22 rule 35 seeking an order for piercing the corporate veil for the issuance of warrants of arrest against the shareholder directly.
5. The defendant urged the court to allow the application, set aside the default judgment and grant it leave to file its defense. He relied on: -
 1. Mohamed & Anor v Shoka [1990] KLR 463
 2. Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubede (1982-1988) KAR
 3. International Air Transport Association & another v Roskar Travel Limited & 3 others (Civil Case E457 of 2020) [2022] KEHC 200 (KLR)
 4. Ouma v Ondieki (Civil Appeal 076 of 2023) [2024] KEHC 7093 (KLR)
 5. Langer v Mutambu & Anor (Civil Case 303 of 2011) [2023] KEHC 25372 (KLR)
 6. Michael Kyambati v Principal Magistrate, Milimani Commercial Courts, Nairobi & Anor [2016] eKLR
 7. Patel v East Africa Cargo Handling Services Ltd [1974] EA 75

Response

6. In opposition to the application, the plaintiff filed grounds of opposition dated 14.2.2025, to wit: -
 1. The application does not meet the threshold for the grant of orders sought.
 2. The defendant deliberately failed to enter appearance and defend the matter despite being served with summons and court documents.
 3. The application and prayers sought are misconceived and intended to mislead the court and unnecessarily delay the execution of judgment.
 4. The application and prayers are misconceived, incompetent and an abuse of the court process and ought to be struck out with costs.
7. The plaintiff urged the court to dismiss the defendant's application with costs and uphold the judgment. It relied on: -
 1. Fidelity Commercial Bank Limited v Owen Amos Ndung'u & Another (HCCC No.241 of 1998) (UR)
 2. Kenny Muthoka Maluki t/a Nzambani Hardware & another v Mabati Rolling Mills Limited [2022] KEHC 13114 (KLR)
 3. Patel v East Africa Cargo Handling Services Ltd [supra]
 4. Kenya Game Hunting Union v Glory Car Hire KEELRC 658 (KLR)
 5. Josephat Muthui Muli v Ezeetec Ltd [2014] eKLR



6. Abigael Barma v Mwangi Theuri (ELC No. 393 of 2013)
7. Ruth Wambui Nganga v Ngong Butchers Co-operative Limited [2021] eKLR

Analysis and Determination

8. Order 10 Rule 11 of the Civil Procedure Rules provides that: -

“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.”
9. The courts power to set aside an interlocutory judgment is discretionary and ought to be exercised reasonably based on the circumstances of the case.
10. A distinction is made between a regular and irregular default judgment. A regular default judgment is entered where the defendant was duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file a defence, resulting in the default judgment. An irregular default judgment is entered against a defendant who has not been served or properly served with summons to enter appearance would be set aside *ex debito justitiae*, as a matter of right, to uphold the dignity of the legal process. *Frigoken Limited v Value Pak Food Limited* [2011] KEHC 749 (KLR)
11. In this case, the defendant disputes service. It contended that it was not served with the summons to enter appearance and that the judgment in default is irregular.
12. On the other hand, the plaintiff asserted that the defendant deliberately failed to enter appearance and defend the matter despite being served with summons and court documents. Therefore, it claimed that the default judgment was regular.
13. The plaintiff relied on affidavits of service sworn on 17.5.2022 and 25.11.2022.
14. The record contains both affidavits. In the affidavit of service sworn on 17.5.2022, Willis Agayi, authorized process server deposed that he received the summons to enter appearance dated 30.12.2022, copies of the plaint, verifying affidavit, list of witnesses, witness statements and list of documents. After exhausting all avenues of due diligence, he could not effect service through physical service. He was then instructed to serve the defendant through registered post following which he sent the documents to the defendant through its last known postal address, P. O. Box 524-00200 Nairobi.
15. The deponent exhibited the postal receipt confirming the position. He also deposed that the parcel was not returned as an unclaimed parcel indicating that it was received.
16. The affidavit of service sworn by the said Willis Agayi on 28th November 2022, confirms that a hearing notice dated 27.7.2022 for hearing scheduled for 29.11.2022 was served upon the defendant through its postal address, P. O. Box 524-00200 Nairobi on 18.11.2022.
17. The deponent exhibited the postal receipt confirming the position. He also deposed that the notice and letter were not returned as an unclaimed parcel indicating that it was received.
18. Order 5 Rule 22A 4 states that “4. An affidavit of service shall be proof enough that service was effected, even if the person being served declines to acknowledge receipt.”
19. The defendant contended that it was not served. However, it did not produce any evidence that the postal address was inactive during the periods in question.



20. The defendant faulted the plaintiff for not using his email address or his phone number registered on Whatsapp for effecting service. I do note that the applicant challenges the validity of the invoices he claims these phone numbers and email addresses were indicated for purposes of showing that it has a good defence. But, on the other hand, relies on part of the information in the said invoices to show that it ought to have been served through those email addresses or phone numbers.
21. Nothing shows these are official email addresses or phone numbers for the defendant company. Some are personal. There is no obligation to serve through email or whatsapp over a registered mail or address. The law recognizes service through registered service. Order 5 Rule 3 (b) (iv) of the Civil Procedure (Amendment) Rules 2020.
22. Therefore, service through registered mail is permitted in law. See the affidavits of service. Thus, the default judgment was a regular default judgment.
23. That notwithstanding, the law has engaged a transformative discursive approach based on the right to be heard by bequeathing the court unfettered discretion under Order 10 rule 11 of the Civil Procedure Rules to set aside a regular interlocutory judgment on sufficient reason being shown and allow the defendant to defend the suit. Relevant factors here include: the reason for the failure to file his memorandum of appearance or defence; the length of time elapsed since the default judgment 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. *James Kanyिता Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR)
24. The plaintiff submitted that the defendant ignored the summons until the shareholder was arrested. It contended that the defendant has not given reasonable justification for ignoring the summons. It further contended that the defendant intended to delay and frustrate the expeditious prosecution of the matter, that its actions contravene the doctrine of overriding objective and amounts to blatant disrespect and abuse of the court process and that the defendant intends to frustrate it from enjoying the fruits of its judgment.
25. The plaintiff asserted that continued delay in settling the judgment sum negatively impacts its business operations and financial interests.
26. The defendant retorted that the plaintiff breached various provisions of law and cannot therefore rely on maxims of equity. It asserted that it stands to suffer prejudice if the judgment is not set aside to allow hearing on merits. It faulted the plaintiff for seeking to steal a match and unlawfully gaining at its expense.
27. The defendant highlighted that the suit relates to a dispute over Kshs. 63,509,824/- which is denied in the defence.
28. The court finds that the defendant has not given a justifiable reason for not filing a memorandum of appearance and a defence in time despite being served.
29. The subject interlocutory judgment was entered on 13.6.2022. The application to set aside the judgment is dated 11.12.2024, over two years after judgment was entered.
30. The delay is inordinate and deliberate; a negation of the principle of justice that justice shall be administered without delay.
31. The court finds that the plaintiff stands to suffer prejudice from the delay in enjoying the fruits of its judgment.



32. In the draft statement of defence, the defendant denied that it bought wheat products on credit and disputed the alleged cheque payments. It contended that the transactions were paid for in cash. It claimed that the invoices do not bear its official receiving stamp nor a signature by an authorized official. It also claimed that the invoices produced amount to Kshs. 30,000,000, far below the claimed sum of Kshs. 63,509,824/-.
33. From the evidence on record and the exhibits, the court is not persuaded that the defendant has shown a reasonable defence on merits as required by the court in *Tree Shade Motors Limited v D.T. Dobie And Company (K) Limited & Another* [1998] KECA 40 (KLR).

Change of advocates

34. The defendant sought leave for Chege Kibathi & Company Advocates, LLP to come on record. It subsequently filed a notice of change of advocates dated 26.3.2025 to the effect that it had appointed Gakuhi Chege & Associates Advocates in place of the former.
35. The prayer for leave has now been overtaken by events or inappropriately pleaded.
36. Again, the court finds that the defendant has not complied with Order 9 Rule 9 for leave for Gakuhi Chege & Associates Advocates to come on record.

Lifting of the corporate veil

37. The issues relating to lifting of the corporate veil fit within the procedure for Notice to show cause before the DR. After all, there was no specific prayer for the setting aside of the NTSC or warrants of arrest herein. I am aware they only prayed for stay of the warrants of arrest pending the hearing and determination of the application.

Disposal

38. In the upshot, the defendant's application dated 11.12.2024 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 19TH DAY OF MARCH, 2026

F. GIKONYO M

JUDGE

In the presence of: -

Ms. Kimotho for Chege for Applicant

Ms. Wangui for Respondent

CA – Ivan/Aggrey

