Glenrock Company Limited v County Government of Kitui (Civil Suit E008 of 2020) [2026] KEHC 4308 (KLR) (17 March 2026) (Ruling)

Neutral citation: [2026] KEHC 4308 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL SUIT E008 OF 2020

LW GITARI, J

MARCH 17, 2026

BETWEEN

GLENROCK COMPANY LIMITED ..... PLAINTIFF

AND

COUNTY GOVERNMENT OF KITUI ..... DEFENDANT

RULING

1. The matter pending before me is the Notice of Motion dated 19/2/2025 brought under Order 10 Rule 8 and Order 22 Rule 22 of the Civil Procedure Rules and seeks orders that:

    1. The matter be certified as urgent.

    2. That pending the inter parties hearing of this application, there be stay of execution of the Judgment and decree herein issued against the defendants.

    3. That the court be pleased to set aside the ex-parte Judgment and the resultant decree and any other consequential orders and the defendants be granted unconditional leave to defend the suit herein.

    4. That the cost of this application be provided for.

2. The application is based on the following grounds:

    i. The Interlocutory Judgment against the defendant herein is irregular and premature as it entered without formal leave of the Honourable court.

    ii. The interest computed as comprising of the decretal amount contravenes the mandatory provisions of Section 26 of the *Civil Procedure Act* and Section 20 of the *Government Proceedings Act* since it was not calculated from the date of the suit herein and particularly that there was no interest adjudged on the principal amount before the filing of the suit herein.

iii. The interest as computed is unreasonable and unconscionable and thus unenforceable against the defendant.

iv. The decretal amount comprises of a claim for special damages which were not specifically pleaded and proved with a degree of certainty and consequently, the decree is erroneous thus rendering the execution process unlawful.

v. The defendant was never properly served with the summons and the plaintiff's pleadings.

vi. The defendant was condemned unheard and have a right to be heard on their case.

vii. The defendant has a good defence to the claim herein and it is in the interest of justice and fairness that the defendant be accorded an opportunity to defend the plaintiff's claim.

viii. The plaintiff has commenced the process of executing the decree issued herein by taking out judicial review proceedings compelling payment of the decretal amount.

ix. The Judgment entered against the defendants herein is an irregular and unlawful judgment and the defendant stands at the imminent danger of being compelled to settle an unlawful decree to the tax paper's detriment.

3. The application is supported by the affidavit of Aggrey Kamba who is the Chief Officer of the applicant. He deposes that the respondent filed a suit claiming a sum of Kshs. 14,500,000/=, special damages of Kshs. 6,500,000/= and interest of 3% above the CBK lending rate prevailing as at 17/12/2019 as well as general damages for breach of contract and costs of the suit.

4. That the court entered interlocutory Judgment although there was no proper service. The respondent went ahead and taxed his bill of costs at the sum of Kshs. 372,640/= then extracted a certificate of order against the government for the sum of Kshs. 29,330,000/=. The applicant contends that the respondent has commenced execution process by instituting Judicial Review proceedings for the writ of mandamus to compel the applicant to pay the said amount.

5. The applicant contends that the interlocutory Judgment entered against it was premature, irregular, unlawful and incapable of execution for the reasons that:

    1. That I am an advocate of this Honourable Court, practicing as such with the law firm of Prof. Albert Mumma & Company Advocates, which firm has the conduct of this matter on behalf of the plaintiff/respondent. I am well versed with the facts of this matter and fully authorized by the plaintiff to swear this affidavit hence competent to so swear.

    2. That I have read and understood the tenor and purport of the defendant's notice of motion application dated 19th February 2025 and the supporting affidavit sworn by Aggrey Kamba and wish to respond to the same as below.

    3. That the application as filed herein is in furtherance of the defendant/respondent's irregular and unlawful resolve to frustrate the due process of the law and the final determination and disposition of the matter now before court.

    4. That it is sad and disappointing that in its effort to frustrate the due process and proper administration of justice, the defendant has opted to file an application premised on absolute lies and deliberate misrepresentation of material facts with the sole intention of misleading this Honorable Court.

5. That the application is filed by an advocate who is not properly on record and the same contravenes express provisions of Order 9 Rule 9 of the Civil Procedure Rules and other relevant provisions of the law. The application is therefore incompetent and ought to be dismissed with costs to the plaintiff.

6. That the respondent was not aware of the Judgment as he was not served with the respondent's pleadings and the summons inorder for them to instruct an advocate and file a defence. Further the applicant deposes that he has a good defence to claim and should be given a chance to be heard. That the applicant will seek leave to challenge the legality of the contract between the respondent and the applicant, whether it was enforceable on account of effluxion of time and whether there can accrue any cause of action as a result of none performance. That it is the interest of justice that the interlocutory judgment be set aside.

7. The respondent opposed the application and filed a replying affidavit sworn by Nicholas Kamande and a notice of Preliminary Objection. In the affidavit the respondent asserts that the application is filed in furtherance of the applicant's resolve to frustrate the due process of the law and the final determination and disposal of the matter. That the application is filed by an advocate who is not properly on record in contravention of the express provisions of Order 9 Rule 9 of the Civil Procedure Rules in that the Law Firm of C.K Musyoki & Company Advocates has not obtained the requisile leave of court to come on record after Judgment to enable it appear and/or file any document in this matter.

8. That the application lacks merits as the applicant has not demonstrated any sufficient cause for its delay to file the application and yet the Judgment was regularly entered on 25/10/2022.

9. The respondent contends that what transpired between it and the applicants as follows:

    i. On 11th May 2017, the defendant, County Government of Kitui, contracted the plaintiff to execute the supply, installation and commissioning of Oxygen Plant Machine for Kitui Referral Hospital at the contract cost of Kshs. 14,500,000.00. the contract was lawfully and regularly executed between the parties. Particulars are within your knowledge.

    ii. Pursuant to the above contract and the Local Service Order No. 1290307, the plaintiff mobilized resources (even took a financial facility) and commenced the implementation of the contract by initiating the process of importation of the requisite Oxygen Plant Machine from India and other operational parts from the USA and France.

    iii. The Oxygen Plant machine manufacture's required the defendant to build a tailor made structure to house the machine and guarantee optimum oxygen production. The fact was communicated to the defendant and after substantial delay, the same was constructed and the plaintiff thereafter proceeded to import and supply the contracted Oxygen Plant Machine which was delivered and received by the defendant on 17th December 2019.

    iv. Upon receipt of the contracted Oxygen Plant Machine, the defendant started playing games and for some reasons not been keen to have the same installed and commissioned and completely refusing to pay the plaintiff for the equipment supplied or the contracted sums thereof, with the result that the said machine is currently laying unused at the Kitui Referral Hospital.

v. The above circumstances forced the plaintiff to file the subject suit before this Honourable court on 2nd July 2021, some four years ago.

10. The respondent contends that the applicant was duly served with the summons to enter appearance and the plaint and all the accompanying documents on 6/07/2021 and accepted service by stamping copies of the plaintiff's documents but failed to enter appearance and to file a defence. That thereafter, he abandoned the claim for general damages leaving the claim for contract sum and special damages and the court proceeded and entered Judgment against the applicant.

11. The applicant was served with notice of entry of Judgment and the decree thereof. Thereafter the applicant entered appearance by filing a notice of Appointment of Adovates and the application seeking to set aside the Judgment herein. The application came up for hearing on 1/12/2022 but the applicant opted to withdraw it in the light of the evidence that they were properly served with all the pleadings, the application and all the notices in the matter. That the applicant engaged the plaintiff on discussions towards settlement but it did not materialize. The respondent avers that he moved the court to tax the bill of costs and served a certificate of order against the government on 19/06/2024 upon the defendant but it did not do anything. The applicant decided to file Judicial Review proceedings.

12. The respondent avers that the application is an afterthought and an abuse of court process. The respondent further asserts that the Judgment entered against the applicant was regularly entered and that applicant has not demonstrated any of the grounds to persuade the court to exercise its discretion to set aside the Judgment. The respondent submits that litigation must come to an end, the applicant has not demonstrated any justifiable reasons for its unreasonable and inordinate delay in instituting the application herein and prays that the application be dismissed.

13. The respondent filed a Notice of Preliminary Objection on the basis that this court lacks the requisite jurisdiction to hear and determine the application as filed. That the application is incompetent and fatally defective as it has been filed contrary to the express mandatory requirement of Order 9 Rule 9 of the Civil Procedure Rules by a firm of Advocates who are not regularly on record for the defendant and/or any party in the matter. That the application is frivolous, vexatious and an utter abuse of the court process and a waste of the precious judicial time. The application was argued alongside the Preliminary Objection and parties agreed to file written submissions.

The Applicant's Submissions

14. He submits that the objection raised with respect to the provisions of Order 9 Rule 9 of the Civil Procedure Rules applies where a party seeks t change representation from an advocate or firm of advocates or seek to act in person which is not the case in the present application.

15. That the defendant's Advocates on record only filed a Notice of Appointment of Advocates dated 31/10/2024 proceeding the present application. He relies on the case of Speedwall BUlding Technologies limited -vs- County Government of Migori (2018) eKLR (High Court stated:

> " ...I do not see any bar to a party being represented by more than one Firm of Advocates of such a party so chooses...

> As I come to the end of this ruling, I must state that had the firm of Messrs Odhiambo Oronga and Company Advocates filed a notice of change of advocates instead of a notice of appointment I would decline to treat that as a technicality but rather a substantive issue resulting to striking all the documents filed by the firm which would be irregularly on record."

16. That the participation of the Office of the County Attorney was a matter of right within the provisions of Section 8(1)(a) of the Office of the County Attorney Act. That the County Attorney was empowered to appear in these proceedings as the is House Counsel and the defendant was therefor acting in person. That consequently, the requirement of leave or a consent within the meaning of Order 9 Rule 9 of the Civil Procedure Rules was not necessary.

17. He relies on National Transport and Safety Authority -vs- Aloice Ochieng Olal (2018) eKLR where the court held that since the applicant had acted in person in the Lower Court, it was not necessary for the Firm of Advocates who filed notice of appointment to represent a party on appeals to seek leave of the court under Order 9 Rule 9 of the Civil Procedure Rules. The counsel submits hat the preliminary objection lacks merits.

18. On the Notice of Motion, the counsel for the applicant has raised three issues as follows:

    i. Whether the interlocutory Judgment entered is regular and valid.

    ii. Whether the draft defence raises triable issues.

    iii. Whether there would be any prejudice.

19. On the issue as to whether the interlocutory judgment was regular, he relies on Order 10 Rule 8 of the Civil Procedure Rules and submits that Article 6 & 176 of *the Constitution* of Kenya Establishes and recognizes the defendant as part of government. The plaintiff was therefore strictly obligated to seek formal leave of the court and serve such application upon the defendant. That the plaintiff never sought formal leave before the interlocutory judgment was entered against the defendant and the Judgment was therefore irregular and a nullity.

20. Hat the ex-parte judgment and the resultant decree as well as all other consequential orders ought to set aside "ex-debito justice" since they are in violation of the express mandatory provisions of Order 10 Rule 8 Civil Procedure Rules. He relies on Gulf Fabricators -vs- County Government of Siaya (2020) eKLR where the High Court ordered the setting aside of the ex-parte judgment for being irregular as the plaintiff did not serve the defendant with the application seeking leave to apply for leave for judgment against the county in default of appearance or defence. He further relies on Yooshin Engineering Corporation -vs- Aia Architects Limited (Civil Appeal E074/2022) (2023) KECA 872 (KLR) (7th July 2023 (Judgment) where the Court of Appeal held that a Judgment is irregular for want of service or was improperly and prematurely entered... such judgment must be set aside without considering whether or not he has a good defence.

(2) Whether the Draft defence raises triable issues.

21. The applicant submits that the defence raises triable issues of law and fact on the legality of the contract between the plaintiff and the defendant, whether the contract is enforceable on account of effluxion of time whether there can accrue any cause of action as a result of plaintiff's none performance and whether the reliefs sought are available to the plaintiff. That the issues raised on the draft defence can

only be determined on merits. The applicant relies on Forty Aviation Limited -vs- Tradewinds Aviation Services Limited (2015) KECA 125 (KLR) where the Court of Appeal held that:

> " A triable issue does not mean one that will succeed, it means an issue which raises a prima facie defence and which should go to trial for adjudication."

Whether there would be any prejudice

22. It is submitted hat the respondent will not suffer any prejudice as opposed to the defendant who may be compelled to settle an unlawful decree to the tax payers detriment leading to volition of numerous provisions of the Public Finance Act. That the applicant would be able to settle the decretal sum in the event that the respondent succeeds. The applicant submits that it is in the interests of justice that the default judgment be set aside. That the application be allowed.

Respondents Submissions

23. The respondents has urged the court to consider four issues for determination as follows:

    i. Whether the Firm of C.K Musyoki & Co. Advocates is properly on record.

    ii. Whether he applicant has demonstrated sufficient cause to warrant setting aside of the default judgment entered herein on 25/10/2022.

    iii. Whether the interlocutory judgement is regular and valid.

    iv. Whether the defendant is entitled to the orders sought in this application.

24. On whether the firm of C.K Musyoki & Company Advocates are properly on record, it is submitted that the defendant had appointed the County Attorney of County government of Kitui to represent it in the suit and without complying with Order 9 Rule 9 Civil Procedure Rules C.K Musyoki and Company Advocates filed a Notice of Appointment of Advocates dated 31/10/2024. That the advocate was supposed to comply with Order 9 Rule 9 of the Civil Procedure Rules as the matter was still in the trial court and not filed in the Court of Appeal. He relies on the Court of Appeal decision in Tobias M. Wafubwa -vs- Ben Butali (2017) eKLR where the Court of Appeal held that:

> " An appeal is not a continuation of proceedings but a commencement of new proceedings in another court where different rules may be applicable. That since the applicant did not file an appeal, the counsel should have applied for leave to come on record."

25. On the authorities cited by the counsel for the applicant, it is submitted that they are not binding nor are they relevant. He relies on the holding by Mativo J as he then was in Bwire -vs Wayo & Sallake Civil 032 (2021) 2022 KEHC 7 KLR (24th January 2022) where he held that:

> " A decision is only an authority for what it actually decides and must be applicable to the particular facts proved or assumed to be proved..."

26. He further relies on Jackline Wakesho -vs- Aroma Case (2014) eKLR where the court stated that:

> " the issue of a counsel filing documents when he is not properly on record is not a technicality on jurisdiction as the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lacks Locus Standi."

27. He submits that the counsel has no legal standing to move the court on behalf of the applicant. On whether the applicant has demonstrated; sufficient cause to warrant setting aside of an interlocutory Judgment it is submitted that it is an exercise of Judicial discretion which must be exercised in accordance with the law. Refers to Court of Appeal decision in CMC Holdings Ltd -vs- Nzioki (2004) KLR 173, Mbogo -vs- Shah (1968) EA 93. The respondent submits that the applicant has not demonstrated sufficient cause to warrant the setting aside of the ex-parte interlocutory Judgment. That the applicant was served with notice of entry of Judgment and he rushed to court to file an application to set aside, which he later withdrew. That the respondent did not dispute service nor did he challenge the taxation of the bill of costs. That there was in-ordinate delay in filing the application relies on Lord Denning famous quote –

> "It is common fate of the indolent to see their rights become a prey to the active. The condition upon which God hath given liberty to man is eternal vigilance."

28. That the applicant has not shown sufficient cause and delay of four years should not be condoned. On whether the interlocutory judgment was regular the respondent relies on the court of Appeal decision in James Kanyita Nderitu & Another -vs- Marios Pritotas Ghikas & another (2016) KELA 470 KLR where the court stated 'inter alia' that:

> "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 but for one reason or another we 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 the 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 factors such reasons for failure to defend the suit..."

29. The respondent submits that the defendant was served and did not challenge such service. That the defendant is underserving of the exercise of the court's discretion. Relies on the case of Shah -vs- Mbogo where it was stated that, the exercise of court's discretion is not meant to assist a party who has deliberately sought, whether by evasation or otherwise, to obstruct or delay the course of justice.

30. The respondent submits hat the applicant deliberately failed to adhere to the rules laid down for the orderly conduct of his proceedings and cannot fall back and rely on the rules so as to defeat the plaintiff's noble and protracted quest for justice. In conclusion the respondent submits that the application is materially defective as it is field by an advocate who is not properly on record given the mandatory provisions of Order 9 rule 9 of the Civil Procedure Rules 2010. That the applicant has not demonstrated any sufficient cause why the default Judgment entered herein on 25/11/2022 should into be set aside.

Analysis and Determination

31. I have considered the application and the Notice of Preliminary Objection. It is now well settled law that a judicial officer or Judge downs his tool where he decides that he lacks the requisite jurisdiction to entertain the matter before him. This was held in the case of Owners of Motor Vessel Lillians 'S' -vs- Caltex Oil (Kenya) Ltd (1989) KECA 48 Nyarangi JA stated –

> "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending

other evidence. A court of Law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

32. It is therefore important for this court to determine whether it has jurisdiction to entertain the application. The issues which I will set out to determine are:

    1. Whether this court has jurisdiction to entertain the application.

       This issue was raised in the preliminary objection filed by the respondent on 4/4/2025. The objection is based on the ground that the firm of C.K Musyoki & Company Advocates is not properly on record for its failure to seek leave to come record after Judgment was entered. The objection is hinged on the provisions of Order 9 rule 9 of the Civil Procedure Rules. The rule provides as follows:

       > " When there is change of advocate, or when a party decides to act in person having previously engaged an advocate after Judgment has been passed such change or intention to act in person shall not be effected without an order of the court –
       >
       > a. Upon an application with notice to all the parties.
       >
       > b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case maybe."

33. This provision is couched in mandatory terms and a party seeking to change its advocate after judgment has been entered is enjoined to seek leave of the court or enter a consent with his former advocate.

34. It is therefore important to consider how the firm of C.K Musyoki Advocates came on record. A perusal of the record shows that the firm of advocates filed a notice of appointment dated 31/10/2024. The notice states as follows:

    > " Take notice that the defendant, County Government of Kitui herein, County Government of Kitui has appointed M/s C.K Musyoki & Co. Advocates, Uniafric house 2nd Floor Room 265, P.O Box 46363 – 00100 Nairobi"

35. The firm of Advocate C.K Musyoki filed a notice of appointment and not a notice of change of advocates. Previously, the County Attorney had filed a notice of appointment dated 25/10/2022. The functions of a County Attorney are set out at Section 8 of the County Attorney Act (Cap 265 E Laws of Kenya). Section 8 sets out the powers of the County Attorney and at Section 8(1)(a) provides as follows:

    > " The County Attorney shall, in the discharge of the functions under this Act have the power to –
    >
    > a. Appear at any stage of any proceedings, appeal execution or any incidental proceedings before any court or tribunal in which by the law the County Attorney's right of audience is not excluded."

36. The County Attorney is therefore given powers under the Act to represent the County in matters where the County is a party before a Court of Law. The firm of Advocate and the County Attorney filed notice of appointment. The firm of Advocate did not file a notice of change of advocates. There is no law that prevents a party from being represented by two or more advocates in proceedings before

a court of law. There is also no law preventing a party from appointing a party from appointing an advocate in the course of the proceedings.

37. Order 9 rule 9 (supra) deals with a situation where a party seeks to change representation from an advocate or firm f advocates or seek to act in person. The defendant did not, by appointing the firm of advocates vide the notice of appointment filed by C.K Musyoki Advocate. The intention of that notice was to add the firm of C.K Musyoki advocate in its defence team. It was not intended to change the representation of the defendant.

38. I am therefore persuaded by the case of Speedwall Building Technologies Limited -vs- County Government of Migori (2018) eKLR High Court where it was held that:

> " In this matte however, the defendant through the firm of Messers, Odhiambo Oronga & Advocates did not change its advocates. The defendant instead appointed a further advocate to appear on its behalf. The question which readily comes to the fore is whether a party in a civil litigation can be represented by more than one firm of advocates.....
>
> The defendant being a body corporate under Section 6 of the County Government Act No. 17/2012 is therefore a person in law and has rights and fundamental freedoms as provided for in *the Constitution*."

39. The Judge went further to hold that he did not see any bar to a party being represented by more than one firm of advocates if such a party so choses. The office of the County Attorney is empowered to represent the County before court. He represented the County which as the proceedings progressed, decided to appoint an additional counsel. The County did not breach the rules for it exercised its right to have an additional counsel at that stage of the proceedings. The situation would have been different if the defendant applied for change of advocate, which was not the case. The firm C.K Musyoki filed a notice of appointment and the advocate is therefore properly on record. The objection is not well founded and lacks merits.

2 . whether the Ex-parte Judgment was regular

40. I will approach this issue on two heads as follows:

    I. Whether there was compliance with the Civil Procedure Rules.

    II. Whether the defence raises triable issues.

41. On whether the Judgment obtained by the plaintiff was regular with (1) Order 10 rule 8 of the Civil Procedure Rules

    The Rule provides as follows:

> " No Judgment in default of appearance or pleading may be entered against the government without the leave of the court and any application for leave shall be served not less than seven days before the return day (emphasis mine.)"

    The issue to be determined under this ground is whether the respondent obtained leave of the court to apply for Judgment in default of filing a defence by the defendant. The County Government of Kitui

is part of Government by dint of the provisions of *the Constitution* which establishes the national and County Government. Article 6(2) of *the Constitution* Provides as follows:

> " The Governments at the national and County levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of Consultation and co-operation."

42. This is further expounded under Article 176 which provides:

> " (1) There shall be a County Government for each County, consisting of a county assembly and county executive.
>
> 2. Every county government shall decentralize its function and the provisions of its services to the extent that is efficient and practicable to do so."

43. The County Government of Kitui was sued in these proceedings and therefore the plaintiff had a duty to comply with the law when applying for default Judgment. This is what the Judge was saying in the persuasive case of Gulf Fabricators -vs- County Government of Siaya (2020) eKLR when she states that the defendant respondent being a County Government, the process of obtaining leave of court to apply for interlocutory Judgment must be complied with. The plaintiff was therefore supposed to comply with Order 10 Rule 8 of the Civil Procedure Rules for the default Judgment to be regular.

44. The Court of Appeal in Yooshin Engineering corporation -vs- Aia Architects Limited (Civil) Appeal E074 of 2022 Judgment, the Court of Appeal held that:

> " What comes out clearly is that where the Judgment is irregular in the sense that service was not affected or that the Judgment was improperly or prematurely entered, then such a Judgment is irregular and must be set aside as a matter of right. It does not matter whether the dependant has a defence or not the defendant only needs to satisfy the court that the Judgment was irregular and that is the end of the matter. The issue of imposing conditions does not arise."

45. The Court of Appeal in James Kanyita Nderitu & Another -vs- Marios Philotas Gikas & Another (2016) KECA 470 (KLR) held that:

> " 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."

46. The Court of Appeal was emphasizing the need of proof service for a Judgment to be considered as regular. That is in accordance with the rules where service is required before an adverse orders are made against the defendant. It follows that under the Civil Procedure Rules prove of service is paramount for the orders obtained by a party to be considered regular. In the suit, the plaintiff was mandatory required to go a step further after service of summons to enter appearance and the plaint and seek leave of the court to apply for default Judgment. A party has a duty to comply with all the rules and not chose to comply with some and ignore others.

47. It has been held that Rules of Procedure are handmaids of justice and not mistresses. Failure by the plaintiff to seek leave to apply for Judgment against the defendant is not a procedural technicality but a substantive issue as it raises the issue of the validity of the default Judgment.

48. To echo the words of the Court of Appeal in James Kanyita Nderitu & another -vs- Morios Philota Gikas & Another (Supra). In a regular default Judgment against the government, the defendant will

have been served with summons to enter appearance and leave obtained from the court to enter Judgment against the government and such application for leave being served on the defendant as provided under Order 8 Rule 10 Civil Procedure Rules. A party that ignores rules of procedure does so at his/her own peril. The plaintiff failed to seek leave to obtain a default Judgment against the defendant and to serve the defendant as provided under the law. The resultant Judgment is therefore irregular and is only good for setting aside. The plaintiff cannot be heard to urge this court to find that the defendant eschewed the Rules when he is the one who is taking us back to where it all started by failure to comply with the Rules. The Plaintiff has not stated why he failed to seek leave. The plaintiff has cited Lalji Bhinji Shangani Builders & Contractors -vs- City Council of Nairobi (2012) eKLR where Judge Odunga stated for all and sundry –

> " A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply was deliberate."

49. The requirement for leave to enter Judgment against the government is aimed at protecting public funds and for it to decide whether or not to settle to avoid litigation amongst other. It is therefore an issue of public interest and cannot be wished away. I find that it was a fatal omission by the plaintiff to failed to seek leave and to serve the defendant with the application for leave. The Judgment obtained against the defendant without seeking leave of the court and without service of the application on the defendant was irregular.

(3) Whether the defence raises triable issues

50. What constitutes a triable issue was stated in a binding decision by the Court of Appeal in the case of Five Forty Aviation Limited -vs- Tradewinds Aviation Services Limited (2015) KECA 125 (KLR) (cited by the defendant) where the Court of Appeal held as follows:

> " The court considered H.D Hasmani -vs- Banque Du Congo Deige (1938) 5 EACA it had held that only one trial issue was sufficient for a defendant to be granted leave to defend. The court added:
>
> "We must however, loosen to add that a triable issue dies not mean one that will succeed. Indeed, in Patel -vs- EA Cargo Handling Services Ltd (1974) EA 75 at page 76 Dufus P said:
>
> "In this respect, defence on merits does not mean in my view a defene that must succeed, it means as Sheridan J put it, "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

51. Continental Butchery Limited -vs- Samson Msila Ndura, Civil Appeal No. 35/1997 it was stated:

> " With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter Judgment for the claim from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle the defendant leave to defend. If a bona fide triable issue is raised the defendant must be given leave to defend."

52. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham. That decision was made in 1977 this court again confirmed the same principle in the case of Dhanyal

Investments Limited -vs- Shabana Investments Limited Civil Appeal No. 1232 of 1997 (unreported) where it stated:

> " The law on summary judgment procedure has been settled for may years now. It was held as early as 1952 in the case of Kundanlal Restaurant -vs- Deushi & Company Limited (1952) 19 EA 77 and failure in the Court o Appeal for Eastern Africa in the case of Souza Fiquerodo & Company -vs- Moonings Hotel (1959) EA 452 that if the defendant shows a bona fide triable issue he must be allowed to defend without conditions.
>
> .....As we have shown only one triable issue was enough to allow the appellant to be heard on its defence and not to be shut out of the Judgment seat. We are of the considered opinion that the learned Judge was wrong to avail the respondent of summary process when there were clear summary issues raised in the defence and counter claim."

53. The court of Appeal has further held that he overriding objective where the intended defence raises triable issues is to do justice. See Kenya Power & Lighting Company Limited -vs- Abdu hakim Abdulla Mohamed & Another (2017) KECA 527 KCR. The applicant has urged the court to find that the draft defence raises serious triable issues. This he states touches on the legality of the contract between the plaintiff and the defendant and whether the contract enforceable on account of effluxion of time, whether there can accrue any cause of action as a result of plaintiffs none performance and whether the relief sought are available to the plaintiff.

54. The plaintiff has urged the court to find that the defendant has not demonstrated sufficient cause to warrant the setting aside of the default Judgement. He has right submitted that the setting aside of a Judgment is an exercise of judicial discretion. It well settled by the courts that courts discretion must be exercised upon reason and must be exercised judiciously. In CMC Holdings Ltd -vs- Nzioki (2004) KLR 173 the Court of Appeal stated that:

> " In law the discretion that a court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper to use such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake or error...
>
> The law is now well settled that in an application for setting aside ex-parte Judgment, the court must consider not only the 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 a reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to application, raises triable issues. The court has wide discretion in such cases to set aside ex-parte Judgement."

55. See Mbogo & Another -vs- Shah (1968) EA 93 where the Court of Appeal stated that:

> " The exercise of discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error..."

56. The main business of the court is to do justice and in he exercise of judicial discretion the court should concern itself with doing justice to the parties. Based on the authorities cited by the parties this court should consider whether the defendant has shown sufficient cause which in my view depends on the circumstances of each case. The defendant had alleged that they were not served with summons. The defendant abandoned that ground. The record shows that they were indeed served as there is no record

an affidavit of service showing that they were served with summons and the plaint. They will not have the benefit none service of summons.

57. I however, note that there was none service of the request for Judgment against the County Government which I have discussed. None compliance with mandatory requirement render the ex-parte Judgment as irregular ab-initio. Secondly the defence filed has raised triable issues which if the defendant is not given an opportunity to ventilate them they are likely to suffer injustice and be compelled to settle unlawful decree to the taxpayer's detriment. Having considered the application and the vehement opposition by the respondent the interests of justice dictates that this application be allowed. Even looking at the ex-parte Judgment and decree Judgment was entered in the sum of Kshs. 6,500,000.00 as special damages an amount that was not specifically pleaded in the entire plaint.

58. I would be doing an injustice to shut my eyes to such grave illegality. For these reasons I come to the following conclusion:

    1. The application dated 19/2/2025 has merits and is allowed.

    2. The Firm of Advocates Musyoki & Co. Advocates is properly on record and therefor the preliminary objection lacks merits.

    3. The ex-parte Judgement, the resultant decree and any other consequential orders are hereby set aside.

    4. The defendant is granted unconditional leave to defend the suit.

    5. Costs to the applicant.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF MARCH 2026

HON. LADY JUSTICE L. GITARI

JUDGE