

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E321 OF 2025

CHARLES LUTTA KASAMANI.....
PLAINTIFF

VERSUS

PHILIP INDIKA KEYA.....
....DEFENDANT

RULING

1. The Defendant’s Notice of Motion dated 27th October 2025 seeks, principally, that the interlocutory judgment entered on 26th July 2025 be set aside, together with all consequential orders, and that the annexed Statement of Defence be deemed as duly filed upon payment of the requisite fees.
2. The application is premised on the grounds that the failure to file a defence within the prescribed timelines was occasioned by inadvertence and mistake of counsel. The Defendant further avers that the sum claimed, being Kshs. 2,000,000/=, has substantially been settled through instalments made between July 2024 and September 2025, and that the Plaintiff will suffer no prejudice if the application is allowed. It is also contended that the proposed defence raises triable issues, including a set-off and counterclaim.

3. The Plaintiff opposes the application through a Replying Affidavit sworn on 11th November 2025. He depones that the Defendant was duly served with summons to enter appearance, the Plaintiff, witness statements and list of documents on 15th May 2025, and that the Defendant entered appearance on 27th May 2025 but failed to file a defence within time. Consequently, interlocutory judgment was regularly entered. The Plaintiff disputes the alleged payments, contending that they amount to an acknowledgment of debt and do not extinguish liability. He further asserts that the proposed defence is a sham, raises no triable issues, and that the issuance of dishonoured cheques by the Defendant renders the defence untenable.
4. The singular issue for determination is whether this Court should set aside the interlocutory judgment entered on 26th July 2025.
5. The principles governing the setting aside of default judgments are well settled. The Court exercises an unfettered discretion, guided by the need to do justice between the parties. However, where the judgment is regular, the Court will not ordinarily set it aside unless the applicant demonstrates a plausible defence on the merits. In **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75**, the Court held that:

“Where there is a regular judgment, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.”

6. In the present case, it is not disputed that the Defendant was duly served and entered an appearance on 27th May 2025 but failed to file a defence within the stipulated time. The interlocutory judgment entered on 26th July 2025 was therefore regular.
7. The Court must therefore consider whether the proposed defence raises triable issues. A triable issue is not one that must succeed at trial, but one that merits consideration by the Court. Even a single *bona fide* triable issue is sufficient to entitle a defendant to unconditional leave to defend.
8. The draft defence annexed to the application raises, *inter alia*, the issue of part payment of the claimed sum, the existence of a set-off, and a counterclaim. While the Plaintiff disputes these assertions and characterizes them as admissions of debt, the question of whether the payments were made in full settlement, partial discharge, or under what terms, is a matter that calls for evidentiary interrogation at trial. The allegation of a counterclaim further underscores that the dispute between the parties is not entirely straightforward.
9. In the Court's view, these issues cannot be dismissed as frivolous or a sham at this interlocutory stage. They warrant ventilation at a full hearing.
10. As regards prejudice, the Plaintiff can be compensated by an award of costs. The Defendant's explanation that the default was due to counsel's mistake, though not in itself a sufficient ground, is a factor the Court may take into account

in exercising its discretion, particularly where denying relief would shut out a party from being heard.

11. In the circumstances, and bearing in mind that the primary concern of the Court is to do substantive justice, I am satisfied that this is a proper case for the exercise of discretion in favour of the Defendant.

12. Consequently, the Notice of Motion dated 27th October 2025 is allowed on the following terms:

- i. The interlocutory judgment entered on 26th July 2025 and all consequential orders are hereby set aside.***
- ii. The Defendant shall file and serve its Statement of Defence and Counterclaim within fourteen (14) days from the date hereof upon payment of the requisite fees.***
- iii. The Defendant shall pay thrown away costs to the Plaintiff, assessed at Kshs 40,000/=, within fourteen (14) days.***
- iv. In default of compliance with (ii) and (iii) above, the orders herein shall lapse automatically.***

RULING delivered virtually, dated and signed at **NAIROBI**

This **30th** day of **April** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Mukoya for Plaintiff/Applicant

Mr. Okinyi for Defendant

Court Assistant: *Lispa*