



Rocklink Limited v Gitau & another (Both Sued in their Capacity as Personal Representatives of the Estate of Paul Gachui Thothi and Mbugua Paul Gitau Deceased) (Environment and Land Case 276 of 2018) [2025] KEELC 5556 (KLR) (23 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5556 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE 276 OF 2018**

**JA MOGENI, J
JULY 23, 2025**

BETWEEN

ROCKLINK LIMITED PLAINTIFF

AND

PAUL MBUGUA GITAU 1ST DEFENDANT

JOSEPH KAHIGA GACHUI 2ND DEFENDANT

**BOTH SUED IN THEIR CAPACITY AS PERSONAL REPRESENTATIVES
OF THE ESTATE OF PAUL GACHUI THOTHI AND MBUGUA PAUL GITAU
DECEASED**

RULING

1. The matter is for Application to set aside the proceedings of 21/11/2024 and to have the matter commence de novo and stay of any further proceedings of this Court.
2. The Notice of Motion anchored on the provisions of Section 1A, 1B, 3A and 63 (e) of the [Civil Procedure Act](#), Order 9 Rule 9 (a), Order 42 Rule 6, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following:
 - a. Spent.
 - b. The Court be pleased to set aside the proceedings of 24th June 2024 and to direct that the hearing of this matter commences de novo.
 - c. Pending hearing and determination of this application inter partes this Honorable Court be pleased to issue stay of any further proceedings of this Court.
 - d. The costs of this application be in the cause.



3. The application is based on the grounds on the foot of the Motion and reiterated in the Affidavit of Andrew Kabugu an Advocate in the firm of Kabugu and Company Advocates sworn on 21/11/2024 representing the Plaintiff.
4. The Application is opposed and a Replying Affidavit was filed sworn by Betty Wanjiru Kamiro 13/01/2025 where she averred that the Plaintiff's allegations are baseless and misleading since despite being granted an opportunity to participate in the hearing through the Ruling of 7/10/2021 by filing their Defence to the Counter-claim out of time they failed.
5. Following this the hearing of the counterclaim proceeded on 24th June 2024 as scheduled and the Plaintiff failed to attend meaning the counter-claim stands undefended and so in line with Order 1 Rule 4 of the Civil Procedure the matter is subject to default Judgment since the amount claimed in the counter-claim of Kesh 1,359,602 is a liquidated sum.
6. The Defendant avers that it is trite law as provided under Order 10 Rule 4 that where there is a liquidated claim and the Defendant does not file a defence the Plaintiff is entitled to Judgment as a matter of right. Thus, the application is simply a delay tactic and the Court should proceed and to render Judgment in favour of the Defendants.
7. The parties were invited to canvas their application through written submissions which I have considered.

Analysis and Determination

8. The remedy of setting aside ex parte proceedings, decisions or orders, is available to a party who has been condemned ex parte by an irregular proceeding, decision or order (without notice to the aggrieved party) or if regular (done with notice to the aggrieved party), the aggrieved party was hampered to attend by some sufficient cause (an accident or inadvertence or an excusable mistake or an excusable error) or that notwithstanding the fact that the aggrieved party had notice and actually failed to attend Court, the nature of the subject matter is so solemn (like land, fraud, et alia) that it will occasion grave injustice and hardship to the aggrieved party, if the order is not granted. The legal principles which govern setting aside interlocutory or ex parte Judgments and ex parte proceedings or orders are the same (see Esther Wamaitha Njihia & 2 Others vs. Safaricom Limited [2014] eKLR, per Havelock, J.)
9. In this regard, the aggrieved party is entitled to move the Court with a view of having such a decision vacated and the suit or Application heard on merit. Whenever it is found that the aggrieved party had no notice, the aggrieved party is entitled to an order of setting aside ex debito justitiae. On the other hand, if the aggrieved party had notice but failed, the order of setting aside will depend on the discretionary power of the Court which ordinarily gravitates on the fulcrum of sufficient cause or the nature of the subject.
10. The parties agreed to canvass application via submissions which by the time of writing this Ruling only the Defendant/Applicant had filed their submissions dated 13/06/2025.

The Defendant/Applicant's case

11. The Applicant states that on 24/06/2024 while sitting virtually and this matter was on the day's causelist, and coming up for hearing before Justice Kemei, the Court experienced an internet disconnection and the Advocates waiting in the lobby were requested to join later at 10:20 a.m to allow the internet challenge to be fixed and the Court state that the Applicant's matter shall now be heard at 12:15 p.m. The Court however failed to direct on whether the hearing shall be virtual or in open Court. That the assumption of the Applicant was that the matter would proceed virtually.



12. That the matter however proceeded in open Court denying the Applicant a chance to address Court since he was still logged in through the virtual platform and despite the Court knowing that the Applicant was engaged in virtually it did not seek to have the Applicant engaged and or give clear directions as how the matter would proceed.
13. It is the Applicant's averment that they have an arguable case and they are intending on prosecuting in the interest of justice.

Plaintiff's/Respondent's Case

14. It is the Plaintiff's case that the allegations by the Applicant are baseless and misleading, as the Plaintiff was duly granted an opportunity to participate in the hearing of the counterclaim but failed to do so.
15. According to the Respondent, the Plaintiff was permitted by the Ruling dated 7th October 2021 to file their defence to the counter-claim out of time, despite this indulgence by the Court, the Plaintiff failed and/or neglected to file any defence to the counterclaim. Therefore, the hearing of the counter-claim proceeded on 24th June 2024 as scheduled, during which the 2nd Defendant testified, and the Plaintiff did not appear or cross-examine the witness, effectively abandoning their right to participate in the proceedings.
16. The Respondent contends that the Plaintiff's failure to file a defence and/or participate in the hearing means the counter-claim stands undefended, and as such the matter is subject to a default Judgment under the provisions of Order 1 Rule 4 of the Civil Procedure Rules, 2010 which provides for entry of Judgment in default of defence in cases involving liquidated claims.
17. That it is trite law as provided under Order 10 Rule 4 of the Civil Procedure that where a claim is for a liquidated claim and the Defendant does not file a defence then the Plaintiff is entitled to Judgment as a matter of right. That the amount claimed in the counter-claim Ksh 1,359,602 is a liquidated sum, as demonstrated by the evidence submitted during the hearing, including the comparison of the raw data collected by the Defendants' agents on-site and the payments made by the Plaintiff.
18. Thus, it is the Respondent's view that given foregoing, the Plaintiff's application is a deliberate attempt to delay the conclusion of this matter, which has already been determined as undefended. That in the interest of justice the Honourable Court should proceed to render Judgment in favour of the Defendants as prayed in the counterclaim, together with costs and interest.

Analysis and Determination

19. It is not in dispute that the matter came up for hearing on 24/06/2024 and it is also not in dispute that Counsel for the Defendants herein attended virtual Court when there was an internet interruption leading to the drop of the Defendants' Counsel call. The main issue for determination in this case is whether the Plaintiff/Respondent and Defendant in the counter-claim should be granted the orders sought in the Application.
20. The Defendants presented their counter-claim and a date for Judgment was reserved in the absence of the Plaintiff.
21. In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:

“Sufficient cause is thus the cause for which the Defendant could not be blamed for his absence. Sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-



jacket formula of universal application. Thus, the Defendant must demonstrate that he was prevented from attending Court by a sufficient cause ...”

22. Order 10 Rule 11 of the Civil Procedure Rules provides as follows;

“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.”

23. Vide the Ruling dated 7/10/2021 the Plaintiff was directed to file their defence to the counter-claim and it would be prejudicial if the suit was not heard on merit denying the Plaintiff the right to defend the cause arising out of the counter-claim. The Plaintiff denied causing a delay in conclusion of the suit stating that the technological hitch affected the Court and also the litigants on 24/06/2024.

24. In *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 Duffus P. held that:

“The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the Court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence 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.”

25. Section 1A of the *Civil Procedure Act* enacts the overriding objective of the *Civil Procedure Act* and the Rules thereunder which is to facilitate the just, expeditious, proportionate, and affordable resolution of the civil disputes governed by the *Civil Procedure Act*. The text states thus:

- “(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.”

26. Section 1B of the *Civil Procedure Act* enacts the duty of the Court in respect to the overriding objective which is to handle all matters presented before the Court with a view of attaining a just determination; efficient disposal of the business of the Court; efficient use of the available judicial and administrative resources; timely disposal of the proceedings at a cost affordable by the respective parties; and use of suitable technology. The text reads 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;
- c. the efficient use of the available judicial and administrative resources;
- 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.”

27. Therefore as the Court trains its eye on the foregoing procedural edict, it should be construed in the context of the command of the supreme law and in particular Article 50 (1) of *the Constitution* of Kenya, which guarantees every person’s right to have any dispute determined fairly and that every person be afforded an opportunity to be heard. The text thereof reads:

“ 50.

- (1) Every person has the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”

28. Irregular proceedings or orders or decisions must be set aside as a matter of right or of course. In such circumstances, a Court is stripped of discretionary power to determine whether or not an order of setting aside can be granted. See *Mbogo & Another vs. Shah* [196 7] E. A. 116; *Mbogo and Another vs. Shah* [1968] 1 EA 93; *Mwalia vs. Kenya Bureau of Standards* [2001] 1 EA 151; *Francis Kipkemoi Ruto vs. Jeremiah Langat, Simon Kipngetich Kitur, Kipkemoi Tele & Charles Tele* [2004] eKLR; *Pithon Waweru Maina vs. Thuku Mugiria* [1983] KLR 78; *Kenya Ports Authority vs. Kustron (K) Ltd C. A. Civil Appeal Number 142 of 1995* (unreported); *Jesse Kimani vs. McConnel* [1966] E.A. 547; *Sebei District Administration vs. Gasyali* [1968] EA 300; and *Jamnadan Sodha vs. Gordhandas Hemraj* [1952] 7 ULR.

29. In light of the right to a fair hearing as espoused under *the Constitution*, I am inclined to grant the application. Of course, the Defendant/Respondent shall suffer prejudice in terms of delay in concluding the hearing in view of the hearing that had concluded and date for Judgement reserved. Weighing the prejudice against the right to be heard, this Court finds favour with the latter so that the dispute may be heard on merit.

30. Therefore, the Court finds that the Plaintiff has given sufficient reasons for the failure to attend Court proceedings due to the technological challenges faced by both the Court and the Counsel for the Plaintiff. Further, the Plaintiff has also demonstrated that they are willing to defend their case in the counter-claim as it raises triable issues. This Court therefore orders as follows:-

- a. That the proceedings of this Court of 24/06/2024 are hereby set aside and the matter do start de novo.
- b. The Plaintiff is granted leave to cross examine the Defendants on their Counter-claim from the evidence of 24/06/2024, leave is also granted to the Plaintiff to canvass their evidence.
- c. Costs shall be in the cause.
- d. Matter shall now be heard on 3/12/2025.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS
23RD DAY OF JULY 2025.**

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MOGENI J

JUDGE

In the presence of:-

Mrs. Buluma holding brief for Mr. Kabugu for the Plaintiff

1st and 2nd Defendants – Absent

Melita – Court Assistant

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MOGENI J

JUDGE

