



**Gulf Africa Bank Ltd v Book Saves Online Ltd & another (Commercial Civil Suit E225 of 2019)
[2025] KEHC 12269 (KLR) (Commercial & Admiralty) (29 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CIVIL SUIT E225 OF 2019**

H NAMISI, J

AUGUST 29, 2025

BETWEEN

GULF AFRICA BANK LTD PLAINTIFF

AND

BOOK SAVES ONLINE LTD 1ST DEFENDANT

VINCENT ADEDE LUVITA 2ND DEFENDANT

RULING

1. Before the Court is Notice of Motion dated 28 November 2022 seeking the following orders:
 - i. Spent;
 - ii. Spent;
 - iii. That this Honourable Court be pleased to review, set aside the order of committal of the Applicant to civil jail and order the release of the Judgement Debtor unconditionally or upon reasonable bond terms, pending the hearing of this Application inter partes;
 - iv. That this Honourable Court be pleased to review, set aside the order of committal of the Applicant to civil jail and order the release of the Judgement Debtor unconditionally or upon reasonable bond terms;
 - v. That this Honourable Court be pleased to issue summons against Abdirizak Mohammed Advocate to be cross examined on the commissioning of the Supporting Affidavit herein purportedly sworn on 10 June 2022 and Replying Affidavit purportedly sworn on 22 June 2022;



- vi. The interlocutory judgement entered against the 1st and 2nd Defendants on 6 September 2019 together with all the consequential orders be set aside;
 - vii. Upon the grant of prayer 4 above, leave be granted to the 1st and 2nd Defendants to file their defence together with list of documents, list of witnesses and witness statements;
 - viii. That the costs of this suit be provided for.
2. The Application, which is supported by an Affidavit sworn by the Applicant, is premised on the following grounds:
- i. The 2nd Defendant/Applicant was sentenced to one-month civil jail on 23 November 2022 by this Honourable Court over a debt of Kshs 63 million which is in serious contest, and he continues to be incarcerated in breach of his personal liberty;
 - ii. The said incarceration is most prejudicial to him and is in affront to his right to freedom which this Honourable Court should not countenance unless in the clearest circumstances, and he is unable to effectively mount his Defence from jail;
 - iii. The ex parte judgement that led to his incarceration was irregular ex debito justitiae as it was entered on 6 September 2019 the same he filed his Memorandum of Appearance herein, unfairly denying him his constitutional right to be heard;
 - iv. The Applicant herein was misled by persons close to him and servants of the Plaintiff to take a loan and transfer to them and their agents, on promise that they would repay the same;
 - v. Further, he was misadvised and misled by his former Advocates on record and pleadings filed in Court without his authority, and it is trite law that a litigant should not be punished for the mistakes of his counsel;
 - vi. The Applicant has a reasonable Defence that raises triable issue in that:
 - a. He took the loan on his own behalf and on behalf of another 2 persons, whom he seeks to introduce as necessary parties in this suit;
 - b. The decretal sum is seriously contested as being illegal and unlawful for being offensive to the provisions of Section 44A of the Banking Act;
 - vii. One Abdirizak Mohammed purported to commission Affidavits not sworn by the Applicant;
 - viii. The firm of Bare & Associates has consented to the firm of D.K. Githinji & Company taking over the conduct of these proceedings.
3. The Application is vehemently opposed by the Plaintiff/Respondent through a Replying Affidavit sworn on 21 February 2023.
4. Parties filed skeletal arguments in support of their respective positions.

Brief Background

5. To place the current Application in context, a brief recitation of the history of the matter is necessary. The Plaintiff/Respondent instituted this suit against the Defendants seeking recovery of certain monies advanced under a Murahaba Local Purchase Order Finance Facility. The record indicates that Summons to Enter Appearance and the Plaint were served upon the Defendants on 9 August 2019, as evidenced by an Affidavit of Service sworn on 2 September 2019.



6. Under the Civil Procedure Rules, the time limited for entering appearance lapsed on 23 August 2019. The Defendants having failed to enter appearance within the prescribed time, the Respondent's Advocates filed a Request for Judgement in default of appearance, which was lodged in Court on 3 September 2019. On 6 September 2019, the Court proceeded to enter interlocutory judgement against them jointly and severally as prayed by the Respondent.
7. It is a matter of record and a point of significant contention that on the very same day, a Memorandum of Appearance dated 5 September 2019 was filed by the firm of Erick Ntambo & Company Advocates on behalf of the Defendants.
8. Following the entry of judgement, the Plaintiff/Respondent commenced execution proceedings. These proceedings culminated in an order issued by this Court on 23 November 2022, committing the 2nd Defendant/Applicant to civil jail for a period of one month for failure to satisfy the decree. It was this committal that precipitated the present application.

The Applicant's Case

9. The Applicant's case is built on the argument that the interlocutory judgement is a nullity, which must be set aside as a matter of right, and is further buttressed by serious allegations of fraud, misrepresentation by former counsel, and the existence of a plausible defence on the merits. The Applicant contends that the judgement entered on 6 September 2019 was irregular ab initio. The Applicant submits that the presence of the Memorandum of Appearance on the court file on the same day the judgement was entered meant that there was, in fact, an appearance on record. Consequently, the condition precedent for entry of a default judgement under Order 10 of the Civil Procedure Rules was not met.
10. Further, the Applicant has made grave allegations of fraud and collusion. He depones that he was induced to take the loan facility at the instance of two third parties, one Mohamed Amin and Mr. Abdinassir, in concert with Mr. Mohammed Ahmed, who, at the material time, was a Senior Manager at the Respondent's Bank's Upper Hill Branch and a signatory to the Letter of Offer. The Applicant has provided evidence in the form of a bank statement showing that on the very day the loan was disbursed, he transferred a vast majority of the proceeds, amounting to Kshs 16,350,000/- out of the Kshs 19,900,000/= loan facility, to entities controlled by these individuals. He avers that he was given assurances by these individuals that they would manage the loan, including its repayment and any legal issues arising therefrom. He claims this fraudulent scheme lulled him into a false sense of security and explains his failure to personally engage with the court process until his committal to civil jail.
11. Thirdly, the Applicant disavows the actions of his former Advocates, including the firm of Erick Ntambo & Company and Bare & Associates. He contends that these Advocates were appointed not by him, but by third parties who orchestrated the scheme, with the intention of concealing their own liability and misleading him. He states that he was extremely shocked to discover upon perusing the court file that Affidavits had been filed in his name, specifically those sworn on 10 June 2022 and 22 June 2022, in which he purportedly admits the debt and proposes a payment plan. The Applicant categorically denies swearing these Affidavits and has annexed a forensic document Examiner's Report which concludes that the signature on the Affidavit of 10 June 2022 is a forgery. He, therefore, argues that any admissions contained in the Affidavits are void and cannot be relied upon by the Plaintiff/Respondent or the Court. He seeks an order to cross examine the Advocate who commissioned the impugned Affidavits.
12. Finally, the Applicant asserts that he has a meritorious and bona fide defence which raises triable issues that ought to proceed to full trial. One triable issue is how the original debt of Kshs



19,900,000/- escalated to Kshs 63 million. The Applicant argues that this is unconscionable and in direct contravention of the statutory in duplum rule enshrined in section 44A of the *Banking Act*, which limits the recoverable interest on a non-performing loan. Further, the question of liability necessitates the joinder of Mr. Mohammed Amin and Mr. Abdinassir as parties to the suit to enable the Court to justly and finally determine who the ultimate beneficiaries of the loan were and who should bear the responsibility for its repayment.

The Respondent's Case

13. The Respondent mounts a robust opposition to the Application, arguing that the same is unmerited, bad faith attempt to derail the course of justice and evade a legitimate debt. The Respondent maintains that the interlocutory judgement was regularly and properly obtained. It contends that the Memorandum of Appearance relied upon by the Applicant is a nullity and was not properly on record, based on the fact that the same was filed after the statutory timeline for entering appearance had lapsed and that the same was filed by the firm of Erick Ntambo & Company, whom the Applicant admits never to have instructed. Further, the said Memorandum of Appearance was never served upon the Respondent as mandatorily required by order 6 Rule 2 of the Civil Procedure Rules. The Respondent cites the Supreme Court decision in *Nicholas Kiptoo arap Korir Salat -vs- IEBC & 7 Others* [2014] eKLR.
14. The Respondent relies on the 2nd Defendant/Applicant's previous admissions of debt. It maintains that the Affidavits were validly sworn. The Respondent argues that these admissions are clear, unequivocal and binding. In light of these admissions, any proposed defence is a sham, an afterthought, and raises no bona fide triable issues. The Respondent relies on the case of *Peeraj General Trading & Contracting Company Ltd & Another -vs- Mumias Sugar Company Ltd* [2016] eKLR.
15. The Respondent further submits that the application is defeated by inordinate and inexcusable delay. The Application was brought 3 years after the judgement was entered. The Respondent argues that the Applicant has failed to provide any plausible or satisfactory explanation for this prolonged inaction, particularly given that the Applicant was represented during this time. Such an inordinate delay, it is submitted, disentitles the Applicant to the discretionary reliefs sought.

Analysis & Determination

16. Having carefully considered the Application, the Affidavits and the rival submissions of counsel, the following are the issues for determination herein:
 - i. Whether the interlocutory judgement entered on 6 September 2019 was irregular;
 - ii. Whether the Court should exercise its discretion and set aside the interlocutory judgment of 6 September 2019;
 - iii. Whether the Applicant is entitled to the other prayers sought in the Application.
17. On the first issue, an irregular judgment is one which has been entered in contravention of the rules of procedure. Where a judgement is shown to be irregular, the defendant is entitled to have the same set aside *ex debito justitiae*. The Court has a duty to set it aside to uphold the integrity of its own process. On the other hand, a defendant seeking to set aside a regular judgement would be appealing to the Court's discretion, which is unfettered but must be exercised judicially.



18. In the case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR), the Court of Appeal provided an exposition of this distinction, stating:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. 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. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default 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 such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has 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, among other. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173).

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

19. The Applicant’s argument is simple and direct: there was a Memorandum of Appearance on file, therefore, the judgement entered in default of appearance was irregular. On the other hand, the Respondent challenges the validity of the said Memorandum of Appearance, noting that the same was filed out of time and without leave of Court.

20. Procedural timelines set by the Civil Procedure Rules are not mere suggestions; they are integral to the orderly and expeditious administration of justice. A party who fails to comply with a statutory timeline must seek Court’s leave to extend time. A document filed out of time without such leave is not merely late, it is a nullity in the eyes of the law. The Supreme Court is unequivocal on this point. In the *Nicholas Kiptoo arap Korir Salat* case (supra), the Court pronounced itself as follows:

“To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the document so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.”

21. Although the above case concerned an appeal, the principle enunciated is one of general application to all pleadings and documents for which a statutory timeline for filing is prescribed. The Memorandum



- of Appearance, having been filed out of time, without leave of Court, was, therefore, a nullity. It was not properly on record and could not be considered by the Deputy Registrar. On this ground alone, the Applicant's argument of an irregular judgement fails.
22. Having determined that the judgement was regular, the question now turns to whether the Court should exercise its discretionary power under Order 10 Rule 11 of the Civil Procedure Rules to set it aside. This discretion, though wide and unfettered, must be exercised with judicially and upon established principles. The main concern of the Court is to do justice to the parties and to avoid injustice or hardship arising from accident, inadvertence, or excusable mistake or error.
 23. The Court will consider the reason for the failure to enter appearance, the length of the delay in making the application, the prejudice to the parties, and, most importantly, whether the Applicant has demonstrated a defence that raises triable issues.
 24. The cornerstone of an application to set aside a regular default judgement is the demonstration of a defence that is not a sham but raises genuine issues for trial. A triable issue is not necessarily one that must succeed, but one that raises a prima facie defence and ought to go to trial for adjudication. It is an issue that raises a reasonable doubt that the plaintiff is entitled to judgement.
 25. In this instance, the Applicant has presented two significant issues which he contends are triable. The Applicant argues that the in duplum rule limits the amount an institution can recover from a debtor on a non-performing loan. On a prima facie basis, the decretal sum appears to be in potential violation of a clear statutory provision, section 44A of the *Banking Act*. This is a substantial weighty point that raises a bona fide triable issue as to the quantum, and indeed, the legality of the sum claimed.
 26. With respect to the Applicant's allegations of a fraudulent scheme, it is trite law that fraud must be pleaded and strictly proved to a standard higher than a mere balance of probabilities. However, at this interlocutory stage, the Court is not conducting a trial to determine the veracity of the claims. The question is whether the allegations, as stated, are so incredible as to be dismissed outright. The Applicant supports his claims with a bank statement and a forensic report, challenging the authenticity of a key Affidavit containing an admission of debt.
 27. In light of the above, this Court is satisfied that the Applicant has demonstrated a defence that raises at least two triable issues.
 28. With regards to the delay in filing the Application, the Respondent has correctly pointed out there has been inordinate delay of over 3 years. Such a delay would ordinarily be fatal to an application of this nature. The explanation proffered by the Applicant is that he was misled and lulled into inaction by the very persons he accuses of fraud, who assured him that all was well.
 29. While a litigant is expected to be diligent in pursuing their case, and the mistakes of counsel are not always a sufficient excuse, the Court must consider the explanation in the unique context of the case. In this instance, the excuse is inextricably linked to the allegations of fraud and misrepresentation which form the core of the proposed defence. The Court must balance the delay against other factors, particularly in light of the proposed defence, the primary objective being to do substantive justice between the parties.
 30. In *Prime Bank Limited v Paul Otieno Nyamodi* [2014] KEHC 7913 (KLR), the Court, while finding the explanation for delay was not entirely sufficient, nonetheless, proceeding to set aside a regular judgement because it was in the interests of justice to allow the defendant to be heard on the merits, particularly where the prejudice to the plaintiff could be compensated by an award of costs. I find a similar approach to be warranted here. The potential injustice of shutting out a defendant with an



arguable defence on a significant point of law such as in duplum rule outweighs the prejudice caused by the delay, which can be remedied.

31. In exercise of the Court's unfettered discretion under Order 10 Rule 11 of the Civil Procedure Rules, and having considered the totality of the circumstances, I am satisfied that the Applicant has demonstrated an arguable defence. For the foregoing reasons, I make the following orders:
- i. The Notice of Motion dated 28 November 2022 is hereby allowed;
 - ii. The interlocutory judgement entered herein on 6 September 2019, the decree issued pursuant thereto, and all consequential orders, including the order of this Court dated 23 November 2022 committing the 2nd Defendant/Applicant to civil jail are hereby vacated and set aside in entirety;
 - iii. If at all the 2nd Defendant/Applicant is still incarcerated, then an order is hereby issued for his immediate and unconditional release, unless he is otherwise lawfully held;
 - iv. The Defendants shall file and serve their Defence(s), witness statements, and list of documents within 14 days from the date hereof;
 - v. The Defendants shall pay throwaway costs of Kshs 30,000/= within 30 days from the date hereof. In default of such payment, the Application dated 28 November 2022 shall stand dismissed, and the orders herein shall automatically be vacated without further reference to the Court;
 - vi. Costs of this Application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 29 DAY OF AUGUST 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Plaintiff/Respondent: Ms. Gecaga h/b Mr. Ogunde

1st Defendant/Respondent: N/A

2nd Defendant/Applicant: N/A

Court Assistant: Lucy Mwangi

