



REPUBLIC OF KENYA



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Halake v Mugambi t/a Kiogora Mugambi & Co advocates (Civil Case E003 of 2025) [2025] KEHC 12324 (KLR) (28 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12324 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CIVIL CASE E003 OF 2025
FR OLEL, J
AUGUST 28, 2025
IN THE MATTER OF THE ADVOCATES ACT
AND IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR REPAYMENT OF MONIES RECEIVED AND HELD BY THE ADVOCATES IN TRUST FOR THE CLIENT

BETWEEN

MARY HIRBO HALAKE APPLICANT

AND

**KIOGORA MUGAMBI T/A KIOGORA MUGAMBI & CO
ADVOCATES RESPONDENT**

RULING

A. Introduction

1. The application before this court for determination is the Respondent/Applicant Notice of Motion application dated 10th June, 2025 brought pursuant to provisions of Sections 1A, 1B, 3, 3A and 63(e), all of the *Civil Procedure Act*, Order 36 Rule 10, Order 51 Rule 1, all of the Civil Procedure Rules and all other enabling provisions of law. The applicant prays for orders that:-
 - a. That this Court be pleased to set aside the default Judgment, decree, and all other consequential orders made on 21.05.2025 in these proceedings and do allow the defendant unconditional leave to defend this suit and raise a preliminary objection attached herein.
 - b. That the costs of this Application be provided for.
2. This application is supported by the grounds advanced on the face of the said application and the Supporting affidavit of the Advocate/Applicant, dated 10th June, 2025, where he avers that a miscarriage of justice had occurred in this matter, as he was never served with summons to enter appearance and/or the pleadings filed herein. He only became aware of this when he was notified by his



- colleague, who had bumped into the Judgment already delivered against him while browsing through case law at the Kenya Law Report website.
3. The Applicant further averred that the Plaintiff had no locus to sue him as the sums claimed were held on behalf of her daughter, one, Sara Jibo Kangori, and was an issue which had previously been determined by the DCI, Marsabit, who made findings to the effect that it was the said Sara Jibo Kangori, who had been receiving monies he had periodically deposited into her account domiciled at Equity Bank, Marsabit Branch, Account Number XXXXXXXXXXXXX and thus was the rightful person to claim the balance of sums purported to be due and owing.
 4. The Applicant also faulted the Plaintiff for moving to court prematurely, without first exhausting remedies available through the Law Society of Kenya and/or the Advocates' Complaint Commission as established under Section 53 of the *Advocates Act*. He urged the court to grant the orders sought to enable him to get an opportunity to ventilate his defence, which raised triable issues and also exhaust his right to be heard as espoused under Article 50(1) of *the Constitution* of Kenya 2010.
 5. This Application was vehemently opposed by the Respondent through her comprehensive Replying Affidavit dated 25th June 2025. She averred that the Advocate/Applicant represented her in Marsabit Elc Case No. 2 OF 2020 and on his instructions, she had on 26th June, 2020 personally transferred Kshs. 2,000,000/= from her KCB Account No. XXXXXXXXXXXXX into the Applicant's Firm Account held at IDLM Bank Account Number XXXXXXXXXXXXX. This affirmed that indeed an Advocate/Client relationship did exist and debunked the Applicant's contention that Sara Jibo Kangori, her daughter, was his client.
 6. The Respondent further clarified that based on her instructions issued vide her letter dated 6th August, 2021, she directed the advocate to pay the refund due to her into her daughter's account held at Equity Bank - Marsabit Branch, Account Number XXXXXXXXXXXXX. It could therefore not be assumed that she had abdicated her role as the principal/client-owned money.
 7. She further refuted the Applicant's assertion that he had not been served with the pleadings filed in this matter and annexed various Affidavits of Service sworn by her Process Server, one Hassan Adano Sharamo, who explained how he effected service upon the Advocate, physically at his Meru town office, through his email, kiogora@kiogora-advocates.com, and his personal phone number 07XXXXXXXX. She reiterated that the mode of service effected was sound and approved by Order 5, Rule 22(b) & (c) of the Civil Procedure (Amendment) Rules 2020, which provided for electronic mail service or service through mobile-enabled massaging services to the defendants, last known by Email and phone number.
 8. Therefore, the Applicants contention that he had learnt of the instant case through a colleague, who had bumped into the same while searching for case law, was dishonest/disingenuous and had to be taken with a pinch of salt.
 9. Finally, the respondent also urged the court to note that it was not mandatory for her to make a first port of call, at the Advocates Complaints Commission and had rightly moved court under Order 52, Rule 4 of the Civil Procedure Rules, 2010, which allowed her to seek for accounts and delivery of money from her Advocate. This court, therefore, had exercised its jurisdiction properly in hearing and determining her case, and thus urged this court to dismiss the Application under consideration with costs, as it was clear that the Applicant's aim was to frustrate and prevent her from enjoying the fruits of her Judgment.



B. Analysis and Determination

10. I have carefully considered the Application, its Supporting Affidavit, the Respondent's Replying Affidavit, and the only issue that arises for determination is whether the Judgment entered herein in favour of the Respondent should be set aside, Ex debito justitiae, and/or whether the Applicant should be granted unconditional leave to defend the present suit.
11. The courts are guided by the provisions of Article 159(2)(d) of *the Constitution* and Sections 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient, and expeditious disposal of cases. Order 10 of the Civil Procedure Rules, 2010, addresses the issue of consequences of non-appearance, default of defence, and failure to serve by a party. Order 10, Rule 4 empowers Courts to enter interlocutory judgment in cases where the Plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. On the other hand, Rule 9 gives the Plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this Order. Order 10, Rule 10 provides that in cases where a defendant has failed to file a defence, Rules 4 to 9 shall apply with any necessary modification. While Rule 11 empowers the court to set aside or vary a Judgment that has been entered under Order 10.
12. Courts have the discretionary power to set aside an ex parte Judgment, with the main aim being that justice should prevail. The Courts are required to consider the draft defence to the plaint and accompanying witness statements before proceeding to give its ruling as to whether the Applicant's defence raises triable issues. (See the cases of Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -vs- Augustine Kubede [1982-1988] KAR, Tree Shade Limited -vs- DT Dobie Co. Ltd. CA 38/98 & Kenya Commercial Bank Ltd -vs- Nyantange & Another [1990] KLR 443).
13. The discretion of a court to set aside or vary ex parte Judgment entered in default of appearance or defence is a free one and is intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. This was the position in Rayat Trading Co. Limited -vs- Bank of Baroda & Tetezi House Ltd [2018] eKLR, where it was held that in the exercise of this discretion, the Court will consider inter alia if:-
 - i. The Defendant has a real prospect of successfully defending the claim; or
 - ii. It appears to the court that there is some other good reason why;
 - iii. The Judgment should be set aside or varied; or
 - iv. The Defendant should be allowed to defend the claim
14. Similarly, in the case of Thorn PLC -vs- Macdonald [1999] CPLR 660, the Court of Appeal stipulated the following guiding principles:-
 - i. While the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
 - ii. Any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside.
 - iii. The primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and,
 - iv. Prejudice (or the absence of it) to the claimant also has to be taken into account.



15. In the case of *Mohamed & Another -vs- Shoka* [1990] KLR 463 the Court further set out other tenets it should consider in setting aside interlocutory Judgment to include:-
- i. Whether there is a regular Judgment;
 - ii. Whether there is a defence on merit;
 - iii. Whether there is a reasonable explanation for any delay;
 - iv. Whether there would be any prejudice.
16. The issue of regular and/or irregular Judgment was addressed in the case *Mwala -vs- Kenya Bureau of Standards* EA LR [2001] 1 EA 148, where the Court stated that:-
- “To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte Judgment. Where the judgment sought to be set aside is a regular one, then all the above considerations as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justice for a court should never countenance an irregular judgment on its record.”
17. From the evidence placed before the court, it is clear that on diverse dates between March, 2025 and May, 2025, the Applicant was duly served with the Originating summons, various mention notices, and hearing notice physically at his office in Meru, electronically through his Email address, kiogora@kiogora-advocates.com, and also through his phone Number 07XXXXXXXX. The various filed affidavits of service sworn by Hassan Adano Sharmo (the licensed court process server) adequately prove this fact. The Judgment entered against the Applicant was thus regular and proper.
18. The Applicant’s explanation as to why he opted not to file his response to the Originating Summons (OS) Application is disingenuous and regrettably, he did not file a draft defence, which is fatal to his cause as the court has no means of knowing if the same raises triable issues. Be that as it may, the issues raised by the Applicant especially as to who between the respondent and her daughter was his client, was adequately addressed by the Respondent, who clarified that she was the Applicants client in Elc Case No.2 OF 2020 and on 26th June 2020, paid him Kshs. 2,000,000/= directly from her KCB Account No. XXXXXXXXXXXX into his into the firm Account held at IDLM Bank Account Number XXXXXXXXXXXX.
19. This clear rebuttal leaves no doubt as to who was the Advocate's client, and the objection raised thereto is obviously a red herring, meant to keep the respondent away from her seat of Judgment. I also do find and hold that the Respondent properly moved court through the originating summons filed and cannot be faulted in any manner for not pushing her claim through the Advocates' Complaint Commission.

C. Disposition

20. The upshot is that, I do find and hold that the judgment entered herein against the Applicant on 21st May, 2025 is valid and regular. The application dated 10th June, 2025 is misconceived in law, lacks merit, and the same is dismissed with costs to the Respondent.



21. The said costs are assessed at Kshs. 30,000/= all inclusive.

22. It is so ordered.

READ, SIGNED, AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 28TH DAY OF AUGUST, 2025.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED VIA THE VIRTUAL PLATFORM, TEAMS THIS 28TH DAY OF AUGUST, 2025.

In the presence of;

Presentfor Applicant

.....for Respondent

JulieCourt Assistant

