

KENYA / JUDGMENT

Omunda v Abubakar

[2026] KEMC 839 (KLR)

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COURT

Magistrate's Court

BEFORE

EM Mwamuye

CASE / FILE NUMBER

Civil Case E1316 of 2025

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Omunda v Abubakar (Civil Case E1316 of 2025) [2026] KEMC 839 (KLR) (27 August 2026) (Ruling)
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[2026] KEMC 839 (KLR) Republic of Kenya In the Mombasa Law Courts Civil Case E1316 of 2025
EM Mwamuye, SRM August 27, 2026 Between Meshack Omunda Plaintiff and Mohamed
Abubakar Defendant

Ruling

1. Before this Court is the Defendant/Applicant's Notice of Motion dated 8 th June 2026. The application principally seeks the setting aside of the ex parte judgment delivered on 30 th April 2026, stay of execution of the said judgment and consequential orders, leave for KRK Advocates LLP to come on record for the Defendant, leave for the Defendant to defend the suit, and an order deeming the annexed draft Statement of Defence duly filed and served upon payment of the requisite court fees. 2. The application is supported by the affidavit of Mohamed Abubakar, sworn on 8 th June 2026. The Applicant's principal contention is that he was never served with summons to enter appearance or the pleadings in this suit and that he only became aware of the proceedings after judgment had been entered against him. He avers that he has an arguable defence raising triable issues and that he stands to suffer substantial prejudice if execution proceeds without his being afforded an opportunity to be heard. 3. The application is opposed by the Plaintiff/Respondent through a Replying Affidavit sworn by Meshack Omunda on 22 nd June 2026. The Respondent's position is that the Applicant was duly served with summons to enter appearance and the requisite court documents, that affidavits of service were filed, and that after service the Applicant contacted the Respondent's advocates and stated that he had forwarded the documents to his insurer, who would take up the matter. 4. The application was thereafter canvassed by way of written submissions. The Plaintiff filed submissions opposing the application, while the Defendant filed submissions dated 20 th July 2026 in support thereof.

Background

5. The suit arises from a road traffic accident said to have occurred on 4 th April 2024 along Ras Kisauni Road at Kengeleni near Cooperative Bank in Mombasa. The Plaintiff's claim was that he was riding motorcycle registration number KMGL 064S when motorcycle registration number KTWG 166Y, allegedly associated with the Defendant, negligently joined the highway and knocked him. 6. The court record as reproduced in the judgment indicates that interlocutory judgment was entered against the Defendant on 25 th February 2026 following his failure to enter appearance and file a defence. The matter thereafter proceeded to formal proof on 15 th April 2026. Judgment was ultimately delivered on 30 th April 2026. 7. The Court awarded the Plaintiff: KShs. 1,200,000 as general damages for pain, suffering and loss of amenities; KShs. 500,000 for diminished earning capacity; KShs. 336,000 for future medical expenses; and KShs. 106,760 as special damages. The total award was therefore KShs. 2,202,760, together with costs and interest. The Applicant now seeks to reopen those proceedings. The Applicant's Case 8. The Applicant maintains that he was not served with summons or pleadings and was therefore denied an opportunity to participate in the proceedings. 9. His written submissions further particularise that contention. He states that the alleged service was by WhatsApp, that he did not receive the documents transmitted through that platform, and that he was never personally served. 10. He also challenges the alleged electronic service on the basis that there were allegedly no blue ticks evidencing receipt or delivery of the documents and that there was no proof that the number used belonged to him. 11. More specifically, the Applicant submits that the police abstract records his telephone number as 072295466, the last digit being unclear, whereas the affidavit of service sworn by Naliaka Nanjali allegedly refers to telephone number 0722954166. He argues that the discrepancy casts doubt on whether service was in fact effected upon him. 12. The Applicant additionally relies upon his draft Statement of Defence. He denies ownership of motorcycle registration number KTWG 166Y, denies the occurrence and circumstances of the accident as pleaded, denies negligence and vicarious liability, and seeks to put the Plaintiff to strict proof. He further seeks a second medical examination of the Plaintiff. 13. He argues that those matters amount to genuine triable issues which ought to be determined at a full hearing. 14. On prejudice, the Applicant contends that the decretal sum of KShs. 2,202,760 is substantial and that if execution proceeds, he may have difficulty recovering the money should he later succeed. He states that the Plaintiff's physical address or place of abode is unknown and further offers to furnish such reasonable security as the Court may order. The Respondent's Case 15. The Respondent opposes the application on the basis that the Defendant was properly served and simply failed to act. 16. He maintains that after service, the Defendant personally contacted his advocates and stated that the documents had been forwarded to his insurer, who would deal with the claim. The Respondent therefore argues that the Defendant's assertion of non-service is an afterthought. 17. The Respondent submits that the interlocutory judgment and subsequent final judgment were therefore regular and that the Court ought not to disturb them. 18. The Respondent further submits that the Applicant has not established sufficient cause for his

default and has not demonstrated accident, inadvertence or excusable error. His position is that whatever happened between the Defendant and his insurer after service is a matter between them and cannot be visited upon the Plaintiff. 19. The Respondent also challenges the draft defence, submitting that it consists of general denials and raises no bona fide triable issue warranting the reopening of the proceedings. 20. On stay, the Respondent submits that the Applicant has not demonstrated substantial loss and had, at the time of filing his submissions, not offered security. He therefore asks the Court to allow him to enjoy the fruits of the judgment. 21. Significantly, however, the Respondent makes an alternative prayer that should the Court be inclined to exercise its discretion in favour of the Applicant, the Applicant be ordered to pay KShs. 30,000 as thrown-away costs before the orders for stay or leave to defend take effect. Issues for Determination 22. Having considered the application, the supporting and replying affidavits, the draft defence, the respective submissions and the authorities relied upon, the issues arising for determination are: a. Whether the judgment entered on 30 th April 2026 ought to be set aside; b. Whether the draft Statement of Defence raises triable issues; c. Whether the Applicant is entitled to stay of execution; and d. What orders should be made as to costs. Whether the Judgment Should Be Set Aside 23. The application is principally anchored upon Order 10 Rule 11 of the Civil Procedure Rules, which gives the Court discretion to set aside or vary a judgment entered in default and any consequential decree or order upon such terms as are just. The Applicant relied, inter alia, upon *Patel v E.A. Cargo Handling Services Ltd*, *Shah v Mbogo*, *Philip Chemwolo & Another v Augustine Kubende* and the other authorities annexed to the submissions. 24. The authorities cited by both parties substantially agree on two propositions. First, where a default judgment is irregular because there was no proper service, the Court ought ordinarily to set it aside. Secondly, even where a default judgment was regularly obtained, the Court retains a wide judicial discretion to set it aside where justice so requires, taking into account matters such as the explanation for the default, the nature of the proposed defence, prejudice to the respective parties, delay and the overall interests of justice. 25. The Court of Appeal principle reproduced in the Applicant's authorities is that a regular judgment will not usually be set aside unless there is a defence on the merits; in that context a defence on the merits means a defence raising a triable issue, not necessarily one which must ultimately succeed. 26. Similarly, the decision relied upon in *Philip Chemwolo & Another v Augustine Kubende* emphasises that procedural blunders should not, without more, prevent a party from having its case determined on the merits where the situation may adequately be remedied by an award of costs. 27. In the present matter, service is sharply contested. The Respondent states on oath that summons and pleadings were duly served and that the Defendant thereafter telephoned counsel and confirmed that he had forwarded the documents to his insurer. 28. On the other hand, the Defendant denies receipt of the documents and has specifically challenged the electronic service relied upon. He points to the absence of proof of receipt, questions whether the telephone number used belonged to him and raises an apparent discrepancy between the telephone number appearing in the police abstract and that allegedly appearing in the affidavit of service. 29. The Court has carefully considered the material placed before it. The

record supplied in respect of this application contains repeated assertions that affidavits of service were filed, but the substantive contents of the affidavit of service upon which the disputed WhatsApp service is founded have not been placed before this Court in the material presently under consideration. What is before the Court are competing assertions concerning that service. 30. In those circumstances, the Court is hesitant to make a definitive finding that the judgment was unquestionably irregular solely upon the Applicant's denial. Equally, given the specific challenge to the telephone number and the alleged electronic service, the Court is not persuaded that the service issue can simply be dismissed as frivolous. 31. Ultimately, however, it is unnecessary to determine the application solely upon whether the judgment was regular or irregular because, even assuming in the Respondent's favour that the judgment was regularly obtained, the Court must still consider whether the circumstances otherwise justify exercise of its discretion under Order 10 Rule 11. Whether the Draft Defence Raises Triable Issues 32. I have considered the draft Statement of Defence annexed to the Applicant's Supporting Affidavit. The defence is not limited to a bare denial of quantum. The Applicant disputes the Plaintiff's allegation that he was the registered, actual, beneficial or insured owner of motorcycle registration KTWC 166Y. The Applicant also denies the manner in which the accident is alleged to have occurred and puts in issue whether motorcycle KTWC 166Y was involved as pleaded. 33. In the alternative, the Applicant pleads negligence and contributory negligence against the Plaintiff, including allegations concerning control of motorcycle KMGL 064S, failure to stop or swerve, overspeeding and failure to observe the Highway Code. 34. The Applicant further contests the injuries, special damages and future medical expenses and expressly seeks a second medical examination of the Plaintiff. Whether those defences will eventually succeed is not the question at this interlocutory stage. The test is whether they raise issues which ought to be ventilated at trial. 35. In *Koskei v Koskei* [2026] KEELC 752 (KLR), which was annexed to the Applicant's submissions, the Court reiterated that a defence raising triable issues need not be one that will ultimately succeed; it is sufficient that it raises a reasonable defence requiring adjudication. 36. The same decision also reiterated that where a proposed defence raises triable issues, denial of a hearing ought to be a measure of last resort, with costs available in an appropriate case to compensate the successful party for delay. 37. Applying those principles, I am satisfied that the issues of ownership of KTWC 166Y, involvement of the said motorcycle, negligence, contributory negligence and causation are not matters that can properly be characterised as mere cosmetic denials. 38. Ownership and liability in particular go to the root of the Plaintiff's cause of action. If established at trial, they could substantially affect or defeat the claim. 39. The question whether the Defendant can ultimately establish those matters is for trial. At this stage, the Court need only be satisfied that they deserve investigation through evidence and cross-examination. 40. I therefore find that the draft defence raises bona fide triable issues. Delay 41. Judgment was delivered on 30 th April 2026, while the application to set it aside was filed on 8 th June 2026. The period involved is approximately five weeks. In my view, that period cannot, in the circumstances of this case, be characterised as inordinate or unreasonable delay. This distinguishes the present circumstances from cases where a party

remained inactive for many months or years before seeking the Court's intervention. Prejudice and the Interests of Justice 42. I have also weighed the prejudice likely to be suffered by either party. The Plaintiff suffered serious injuries and obtained judgment after prosecuting the matter to formal proof. He has a legitimate interest in the finality of litigation and in enjoying the fruits of a judgment obtained in his favour. 43. Setting aside the judgment will inevitably delay that enjoyment and require him to return to Court to prove his claim in contested proceedings. That prejudice is real. 44. However, on the other side is a Defendant facing a decree for KShs. 2,202,760 together with costs and interest, while raising a defence which disputes ownership, involvement and liability. If he is shut out and his defence ultimately contained genuine answers to the claim, the prejudice would be considerably more difficult to reverse after execution. 45. The authorities annexed by the Applicant, including *Dejrene Enterprises Ltd v P.N. Mashru Co. Ltd & Another*, emphasise that even where regularity is contested, a litigant who demonstrates an intention to defend, approaches the Court without inordinate delay and presents triable issues should, in an appropriate case, be afforded a hearing on the merits. 46. The Court is equally mindful that judicial discretion is not intended to reward deliberate evasion or obstruction. However, the material presently before the Court does not establish that the Applicant deliberately chose to allow judgment to be entered merely for purposes of obstructing or delaying justice. 47. Even if the Respondent's version is accepted that the Applicant forwarded the pleadings to his insurer, that circumstance would demonstrate that the Applicant expected the matter to be taken up by the insurer. It would not, without more, extinguish the Court's discretion where the resulting judgment is substantial and the intended defence raises genuine triable issues. 48. The Court therefore considers that justice will be better served by reopening the matter on appropriate terms rather than permanently shutting the Defendant out. 49. This conclusion does not diminish the Plaintiff's judgment or the injuries he proved at formal proof. It merely recognises that in a contested civil claim, particularly where liability and ownership are specifically challenged, determination after hearing both sides is preferable where the prejudice caused by reopening the matter can adequately be compensated by costs. Stay of Execution 50. The Applicant sought stay of execution pending hearing and determination of the application. Having now determined that the judgment and the consequential decree ought to be set aside, the prayer for stay is substantially overtaken by events. There can be no execution founded upon a judgment which has been set aside. The Court therefore need not separately determine whether the Applicant satisfied every element advanced by the Respondent under Order 42 Rule 6. Terms Upon Which the Judgment Will Be Set Aside 51. Order 10 Rule 11 expressly permits the Court to impose such terms as are just. The Plaintiff has already undergone formal proof, obtained judgment and incurred additional costs in opposing the present application. The Respondent himself proposed, in the alternative, an award of KShs. 30,000 as thrown-away costs should the Court exercise its discretion in the Applicant's favour. I consider that proposal reasonable. 52. It compensates the Plaintiff, at least in part, for the inconvenience and expense occasioned by reopening the proceedings while preserving the Defendant's right to have his defence determined on merit. 53. I am not persuaded that it would be proportionate at this stage to

require the Defendant to deposit the entire decretal sum as a precondition to defending a claim in which ownership and liability themselves remain disputed. The Applicant shall therefore pay KShs. 30,000 as thrown-away costs to the Plaintiff.

Disposition

54. In the result, the Notice of Motion dated 8 th June 2026 succeeds on terms. Accordingly, I make the following orders: a. The interlocutory judgment entered against the Defendant on 25 th February 2026, the judgment delivered on 30 th April 2026, the resultant decree and all consequential orders are hereby set aside. b. KRK Advocates LLP are granted leave to come on record for the Defendant/Applicant. c. The Defendant/Applicant is granted leave to defend the suit. d. The draft Statement of Defence annexed to the Supporting Affidavit shall be filed and served within fourteen (14) days from the date of this ruling upon payment of the requisite court filing fees. e. The Defendant/Applicant shall pay to the Plaintiff/ Respondent KShs. 30,000 as thrown-away costs within fourteen (14) days from the date of this ruling. f. The prayer for stay of execution is marked as spent, the judgment and consequential decree having been set aside. g. In default of compliance with either order within the stipulated period, the orders setting aside the interlocutory judgment and final judgment shall automatically stand discharged, the judgment of 30th April 2026 shall revive, and the Plaintiff shall be at liberty to execute. h. Upon compliance with the foregoing orders, the matter shall proceed to pre-trial directions and thereafter hearing. i. Save for the thrown-away costs of KShs. 30,000 awarded above, the costs of the application shall be in the cause. Orders accordingly. DELIVERED VIA MICROSOFT TEAMS AT MOMBASA THIS 27 TH AUGUST 2026. HON.E.M. MWAMUYE SENIOR RESIDENT MAGISTRATE

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