



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL SUIT NO. 56 OF 2015**

**(Coram: Odunga, J)**

**FITIDIS GROUP OF COMPANIES LIMITED.....1<sup>st</sup> PLAINTIFF**

**LIGHT STEEL BUILDING KENYA LIMITED.....2<sup>nd</sup> PLAINTIFF**

**VERSUS**

**CIVICON COMPANY LIMITED.....DEFENDANT**

**RULING**

1. On 5<sup>th</sup> February, 2020, this Court delivered a judgement in this matter in which it expressed itself as hereunder:

**“In the premises, while I dismiss the counterclaim, I hereby enter judgement for the Plaintiffs against the Defendant in the sum of USD 292,041.88. The said sum will accrue interest at court rates from the date of filing suit till payment in full. The Plaintiff will also get the costs of both the suit and the counterclaim.”**

2. By Notice of Motion dated 16<sup>th</sup> September, 2021, the Defendant herein moved this Court seeking the following orders:

- 1) This application be certified urgent and it be heard *ex parte* in the first instance.**
- 2) The firm of Kitoo & Associates Advocates be allowed to come on record for the defendant.**
- 3) Pending the *inter partes* hearing and determination of this application, the execution of the decree of the court dated 20<sup>th</sup> July, 2020 be stayed.**
- 4) The judgment of the court delivered and all *ex parte* proceedings be set aside.**
- 5) The plaintiff’s case and the defendant’s case be reopened and be heard *de-novo*.**
- 6) The costs of this application be provided for.**

3. The said application was supported by an affidavit sworn by **Geoffrey Njue**, the Chief Finance Officer of the Defendant. According to him, on 10<sup>th</sup> September, 2021, the Defendant/Applicant received communication from Equity Bank that they had been served with a garnishee order concerning the Defendant’s bank accounts for recovery of Kshs. 45,092,059.51 being the decretal sum as per the decree of this court. Immediately, the Defendant/Applicant tried reaching out to their advocates then on record, Nyachoti & Co. Advocates, for a status of the case but none was forthcoming. Thereafter, the Defendant/Applicant sought the services of the firm of Kitoo & Associates to look into the file. Upon perusal of the court file, the applicant learnt that the suit proceeded for hearing without their participation or their previous advocate and the court delivered an *ex parte* judgment. The Applicant also learnt that the plaintiff’s advocates filed a garnishee application against the defendant and prosecuted it without the knowledge and participation of the defendant or their erstwhile advocates.

4. The defendant therefore averred that it was condemned unheard and that the execution of the decree of the court against a party who has not been heard on its defence is oppressive and goes against the natural rules of justice. The deponent asserted that the purported execution of the Decree in this suit against the Defendant/Applicant is not proper since the Defendant/ Applicant was not given an opportunity to be heard due to the mistakes of its previous advocate. Furthermore, despite the previous Applicant’s advocate filing an application to cease from acting, the Plaintiff has never served the Defendant/ Applicant with any mention or hearing notices directly thereafter.

5. It was contended that the said Judgment and the decree dated and issued on 20<sup>th</sup> July, 2020 emanating therefrom is not proper for the following reasons;

- a. That the Defendant/ Applicant was not accorded an opportunity to be heard despite having put in a defence in time through their previous advocate.
- b. That the Defendant's /Applicant's previous advocate did not inform the Applicant of the judgment and consequent decree issued on 20<sup>th</sup> July, 2020.
- c. That despite the previous Applicant's advocate filing applications to cease from acting, the Plaintiff has never served the Defendant/ Applicant with any mention or hearing notices directly.
- d. That despite the Applicant's previous advocate receiving the draft decree under protest, stating that he was no longer on record, the Plaintiff never took the initiative to serve the Defendant directly with a notice of entry of judgment and a draft copy of the subsequent decree.

6. The Applicant lamented that it stands to suffer irreparable harm if the Application is not certified urgent and the injunctive Orders sought in Prayer 2 and 3 of this Application granted. It also risks execution of the garnishee order thereby losing its money unlawfully, illegally, irregularly and without due procedure as the judgment is in itself irregular since the Applicant was not given an opportunity to be heard due to the mistake of the previous counsel.

7. The Defendant was of the view that the balance of convenience favours granting of the injunctive Orders in prayer 3 of the Application for reasons **THAT**:-

- a. The Applicant's rights will have irreversibly and irredeemably been prejudiced and compromised if this Court was to allow the irregular judgment and consequent decree to stand and the Applicant to lose its monies through unlawful, illegal, irregular and unprocedural process unknown in law.
- b. There is sufficient jurisprudence emanating from Superior, Appellate and Supreme Court(s) that where the Court has been satisfied that the Rights of an Applicant has crystallized, the same ought to be protected by way of an injunction.

8. The Defendant averred that since it was not given an opportunity to be heard on his case despite filing a defence in good time and this Court is entitled and enjoined to set aside the judgment, *ex debito justitiae*, as a matter of right since the Defendant has demonstrated, from the defence on record, that it has a viable defence to the Plaintiff's Complaint, which Defence raises triable issues warranting the determination of this Court of the matters therein on merits.

9. It was deposed, based on legal advice, that the right of the Applicant to a fair hearing based on merits weighs more given that this right is non-derogable and illimitable and this Application has been brought at the earliest possible opportunity without any undue delay. To him, this Application satisfies the legal tests warranting issuing of the orders sought in this Application and we plead with hence the Court ought to grant the same the Application has been brought at the earliest opportunity possible without any unreasonable delay.

10. In opposition to the application, the Plaintiffs filed the following grounds of opposition:

- 1) That the application herein is frivolous, vexatious, fatally defective and an abuse of the Court process.**
- 2) That the Applicant continues to come to this Court with unclean hands having failed and or refused to comply with previous orders as issued by this Honourable Court.**
- 3) That the matters which are subject of this application have been heard and determined and therefore the matter is *res judicata*.**
- 4) That the application lacks merit and should be dismissed with costs.**
- 5) That the application is aimed at delaying the execution and restricting the decree holder from enjoying the fruits of their judgment.**

11. They also relied on a replying affidavit sworn by **Christakis Fitidis** the CEO of the Respondents/Decree Holders. According to the deponent, the claim against the Judgment Debtor was filed in this court on 19<sup>th</sup> November 2015 and the Defendants (now Judgment debtor) was properly served. It was further averred that the Judgment debtor participated in the case to the extent that they filed a Defence and a counterclaim but failed to adduce evidence in that regard. As a result, the court made a determination not to rely on the Defence or the counterclaim.

12. Following the issuance of the judgment, the Respondent extracted a decree dated 20<sup>th</sup> July 2020 which decree and the judgment were duly served on the counsel on record for the Judgment debtor. Consequently, garnishee proceedings were commenced and this court issued a garnishee order nisi on 22<sup>nd</sup> December 2020. It was deposed that the Applicant's Advocates were duly served with the garnishee application and the order nisi but neither the Judgment Debtor nor the Garnishee filed any response to the application.

13. The Deponent averred that the Applicant has not filed in evidence the application by the Judgment's debtor former counsel to stop acting

and has not filed any evidence to show whether that application was heard and determined. To the deponent, the Judgment Debtor was given adequate avenue to defend the claim together with the resultant garnishee application but failed, neglected and or blatantly refused to do so and is therefore not prejudiced in any way. To him, this application is only as a result of the ruling issued by this Court on 1<sup>st</sup> September 2021 and reeks of influence from the garnishee and is clearly an afterthought on the part of the Judgment Debtor. It was his view that the application has been brought very late in the day and in fact there was no intention to make such an application were it not for the success of the application against the Garnishee.

14. In the deponent's view, the Judgment Debtor lacks any bonafide reason that would raise any triable issue and the decree holder should be allowed to enjoy the fruits of the decree as issued by this Honourable Court.

15. The court was therefore urged to find that the application should fail as it lacks any merit and reeks of lethargy and bad faith on the part of the Applicant.

16. On behalf of the Applicant, while reiterating the contents of the supporting affidavit, reliance was placed on Section 1B (1) of the **Civil Procedure Act** as read with Section 1A of the **Civil Procedure Act** and Article 159(2)(d) of the Constitution and it was submitted that in administering justice the focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases. According to the Applicants, Order 10, Rule 11 of the **Civil Procedure Rules** empowers the Courts to set aside or vary Judgment that has been entered under Order 10 of the Rules.

17. It was submitted that courts have discretionary powers to set aside or vary an ex parte Judgment with the main aim being justice should prevail for all and this is further cemented by Article 159 (2)(d) of the Constitution which provides that justice should be administered without undue regard to procedural technicalities. Reference was made to **Python Waweru Maina vs. Thuka Mugiria [1983] eKLR, Patel vs. EA Cargo Handling Services LTD (1974) EA 75, 76 BC, David Kiptanui Yego & 134 Others vs. Benjamin Rono & 3 Others [2021] eKLR** and **Mwala vs. Kenya Bureau of Standards EA LR (2001) 1 EA 148.**

18. According to the Applicant, its previous Advocate on record filed an Application to cease from acting for the Applicant/Judgment Debtor and despite being in knowledge of this the Respondents did not serve any Mention, Hearing Notices and Notice of Entry to Judgment on the Applicant/ Judgment Holder thus denying them a chance to be heard. Further, the draft decree was received under protest by Nyachoti & Co. Advocates who stated that they were no longer on record and that the Garnishee Application proceeded without the knowledge of the Applicant/Judgment Debtor.

19. It was therefore submitted that the Judgment was irregular and ought to be set aside not as a matter of discretion but ex debito justitiae.

20. Where there is some good reason, it was submitted that it is well settled that the Court has discretion to set aside an ex parte judgment and can only happen if the Applicant is not using the Court to delay the course of justice as was held in **Shah vs. Mbogo [1969] EA 116, 123.**

21. According to the Applicant, the general principle is that an Applicant should not suffer from the mistakes of Counsel on record. This submission was based on **Lee G. Muthoga -vs- Habib Zurich Finance (K) Ltd & Another, Civil Application No. Nair 236 of 2009** and **Winnie Wambui Kibinge & 2 Others -v- Match Electricals Limited Civil Case No. 222 of 2010.**

22. It was submitted that the Applicant/Judgment Debtor has offered a reasonable explanation that the Counsel on record failed to perform their duties and this therefore should not be visited upon the Applicant/ Judgment Debtor.

23. As to whether the Judgment should be varied or set aside the Applicant submitted that there was a Defence on record raising triable issues hence the ex parte Judgment ought to be set aside for the Applicant/Judgment Debtor who is the Defendant to be heard. Reference was made to the case of **Sebei District Administration -v- Gasyali & others (1968) EA 300.**

24. In this case it was submitted that the Defence on record indeed raises triable issues thus eliciting the sentiments of the Constitution to access justice as imbued in Article 48 and right to a fair hearing under Article 50 thereof. It was contended that justice must be done to all parties based on the case of **David Kiptanui Yego & 134 Others Vs Benjamin Rono & 3 Others [2021] eKLR.**

25. On the issue whether the Defendant should be allowed to defend the claim, it was submitted that the Respondents/Decree Holders will not suffer any prejudice if the Application is allowed as prayed.

26. On behalf of the Respondents, it was submitted that the claim against the Judgment Debtor was filed in this court on 19<sup>th</sup> November 2015 and the Defendants (now Judgment debtor) was properly served. Judgment was issued by the Court on the 5<sup>th</sup> day of February 2020. It was submitted that the Judgment debtor participated in the case to the extent that they filed a Defense and a counterclaim but failed to adduce evidence in that regard. A decree was extracted dated 20<sup>th</sup> July 2020 and both the decree and the judgment were duly served on the counsel on record for the Judgment debtor. Further the applications relating to the Garnishee were also served on counsel in this regard.

27. It was submitted that whether or not to set aside a judgment is upon the court's discretion and the discretion has to be exercised judicially, the principles therefor dependent on whether or not the judgment to be set aside is a regular or irregular judgment. A judgment will be regular if summons served and no appearance and/or defence was filed while lack of service or proper service will render the judgment irregular. In the instant case, the Applicants actually filed a defence but failed to adduce evidence in this case. The Respondents relied on the case of **Elizabeth Kavere & another vs. Lilian Atho & Another [2020] eKLR,** for the distinction between a regular and irregular judgment.

28. In the present case, it was submitted, it is not in dispute that the Applicant was served with the summons to enter appearance as well as

the Memorandum of claim and this is evidenced by the fact that the Applicant appointed the firm of Nyachoti and Company Advocates who entered appearance and accordingly filed a defence and counterclaim. The principles to be applied therefore are those that relate to a regular judgment.

29. Regarding setting aside of a regular judgment, the Respondents relied on the case of **David Kiptanui Yego & 134 others v Benjamin Rono & 3 others [2021] eKLR** in which the learned trial judge cited with approval the case of **Kenya Commercial Bank Ltd -v- Nyantange & Another (1990) KLR 443**

30. It was contended that the Court interrogated the defence and counterclaim hence there is reason for the judgment to be set aside.

31. Regarding mistake of counsel, it was submitted that there is no evidence provided in the application to support such averments neither has there been evidence that the Advocate ceased acting for the Applicant and therefore this should not be an excuse because cases do not belong to advocates but to clients and it is therefore incumbent upon the client to always keep themselves updated on the progress of their cases. A client cannot go to slumber then seek to blame their advocates for their own inaction. In support of this contention, the Respondents relied on the case of **Elizabeth Kavere & Another vs. Lilian Atho & Another [2020] eKLR** in which the case of **Pithon Waweru Maina vs. Thuka Mugiria [1983] eKLR**.

32. To the Respondent, even where it is the advocate's fault, the cause of action has to lie against the advocate in an action for negligence against the individual advocate but not in setting aside the judgment where the judgment was entered regularly. To reinforce this argument, the Respondents relied on the case of **David Kiptanui Yego & 134 Others vs. Benjamin Rono & 3 Others** (supra).

33. Regarding costs, reliance was placed on section 27 of the ***Civil Procedure Act*** which provides that costs are at the discretion of the court and that costs follow the event. The Decree Holder having proved their case against the Respondent on a balance of probability, it was submitted that they are, in the circumstances, also entitled to costs. They therefore prayed that the court exercises its discretion in their favour in dismissing the Application with costs to the Respondents herein.

#### **Determination**

34. I have considered the issues raised in this application. That the decision whether or not to set aside *ex parte* judgement is discretionary is not in doubt. In this case there is no allegation that the Applicant was not served either with summons or the pleadings. In fact, the Applicant did enter appearance and filed a defence and counterclaim. It is also not contended that the Applicant's legal representative on record was never notified of the hearing date. What is contended is that there was on record an application by the said legal representative to cease acting and that in these circumstances, the Applicants ought to have been served. With due respect this argument fails to appreciate the provisions of Order 9 rule 5 of the ***Civil Procedure Rules*** provides that:

***A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.***

35. On the other hand, Order 9 rule 13 of the ***Civil Procedure Rules*** provides that:

***(1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last-known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly: Provided that, unless and until the advocate has—***

***(a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and***

***(b) procured the order to be entered in the appropriate court; and***

***(c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.***

***(2) From and after the time when the order has been entered in the appropriate court, any document may be served on the party to whom the order relates by being filed in the appropriate court, unless and until that party either appoints another advocate or else gives such an address for service as is required of a party acting in person, and also complies with this Order relating to notice of appointment of an advocate or notice of intention to act in person. (3) Any order made under this rule shall not affect the rights of the advocate and the party as between themselves.***

36. It is therefore clear that an application to cease acting does not amount the order to cease acting. In effect the firm of Nyachoti & Co. Advocates was on record until the said firm was replaced. Service on that firm must therefore be deemed to have been good service.

37. In this case, on 19<sup>th</sup> February, 2019, **Miss Nduati** represented the Plaintiffs while **Miss Serem** held brief for **Mr Nyachoti** for the Defendant. **Miss Serem** applied for adjournment on the ground that upto the previous day **Mr Nyachoti** was looking for his client (read the Defendant/Applicant) and as a result, had applied to cease acting. The application having been dismissed the matter proceeded to hearing. In

those circumstances, the hearing that proceeded cannot be termed as having been conducted *ex parte*. It was therefore held in **Din Mohamed vs. Lalji Visram & Co. (1937) 4 EACA. 1** that if counsel duly instructed, on being refused an adjournment, elects to leave the Court and takes no further part in the case, that fact does not constitute the proceedings *ex parte*. It was further held that until notice of change of advocate is given, the former advocate shall be considered the advocate of the party until the issue of the decree.

38. In **Remco Limited vs. Mistry Jadva Parbat & Co. Ltd. & 2 Others Nairobi (Milimani) HCCC No. 171 of 2001 [2002] 1 EA 233** the Court set out the principles guiding setting aside *ex parte* judgements as follows:

(i). if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside *ex debito justitiae* (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.

(ii). if the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 [now Order 10 Rule 11] of the Civil Procedure Rules.

39. The matter is further explained in the case of **Mwala vs. Kenya Bureau of Standards EA LR (2001) 1 EA 148**, where it was held 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 consideration 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 in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but *ex debito justitiae* for a court should never countenance an irregular judgment on its record.”

40. That was the position adopted in the case of **Elizabeth Kavere & Another vs. Lilian Atho & Another [2020] eKLR**, where the court expressed itself as follows;

“The court respectfully accepts the principle of law set out in the Court of Appeal **James Kanyita Nderitu & Another v. Marios Philotas Ghikas & Another (2016) eKLR** urged by the counsel for applicant that the irregular default judgment, that is one in which the judgment debtor not been heard by reason lack of proper service of summons is one which the court should set aside *ex debito justitiae*. However, as held in **Philip Keiptoo Chemwolo & Another v. Augustine Kubende, Court of Appeal Civil Appeal No. 103 of 1984**, it also the settled practice of court to require as defense on the merits, so called *prima defense*, where it is sought to set aside a judgment which is entered regularly.”

41. That discretion to set aside a regular judgement is however unfettered and the only consideration is that the same be exercised upon such terms as are just. That such discretion is unfettered was discussed in the case of **David Kiptanui Yego & 134 Others vs. Benjamin Rono & 3 Others [2021] eKLR** and by Bosire, J (as he then was) in **Kenya Commercial Bank Ltd -v- Nyantange & Another (1990) KLR 443** where he held that:

“Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an *ex-parte* judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.” The discretion of a court to set aside or vary *ex-parte* judgment entered in default of appearance or defense 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 v Bank of Baroda & Tetezi House Ltd [2018] eKLR**. 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.

Similarly, in the case of, **Thorn PLC -v- Macdonald [1999] CPLR 660**, the Court of Appeal stipulated the following guiding principles:

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 defense 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.”

42. Therefore, one must distinguish between a default judgement, an irregular judgement and a regular judgement. A default judgement is one which is entered as a result of failure by the Defendant to take a step in the proceedings. It may be a default in entering appearance or defence or a default in attending court when the matter is listed for hearing. A default judgement may therefore be either irregular or

irregular. An irregular judgement is one which ought not to have been entered at all and may include cases where the law prohibits entry of judgement such as where a final judgement is entered when what ought to have been entered is an interlocutory judgement or where an interlocutory judgement is entered where the circumstances and the law do not contemplate the entry of a judgement at all. A regular judgement is where the judgement is entered though as a result of a default on the part of the Applicant, but the Respondent had nothing to do with such default. Therefore, where the judgement is irregular the court has no option but to unconditionally set the same aside. Where, however, the same is regular, the court exercises its discretion which discretion is to be exercised upon terms that are just.

43. Therefore, notwithstanding the regularity of the judgement, it was held in **Pithon Waweru Maina vs. Thuka Mugiria [1983] eKLR** and **Patel vs. EA Cargo Handling Services Ltd (1974) EA 75, 76 BC**, that:

**“The Court has a very wide discretion under the Order and Rule and there are limits and restrictions on the discretion of the Judge except that if the judgment is varied it must be done on terms that are just.”**

44. In considering whether or not to exercise the discretion, the court looks at the conduct of the application since as was held in in **Shah vs. Mbogo [1969] EA 116, 123**:

**“This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”**

45. In this case, it is true that the counsel for the Applicant had intimated that he intended to cease acting for the Applicant on the ground that he was unable to get sufficient instructions to proceed with the matter. That application was, however not prosecuted. Whereas the failure by a party to properly instruct counsel may well be construed as an attempt by the party to deliberately, whether by evasion or otherwise, to obstruct or delay the course of justice, in this case, the Applicant contends that it was not aware of the proceedings. The Applicant not only filed the defence but also had a counterclaim against the Respondents.

46. I agree with the position adopted in **David Kiptanui Yego & 134 Others vs. Benjamin Rono & 3 Others** (supra), where the Court addressed itself as follows;

**“I note that the Applicants Advocate admits that the failure to enter appearance/file a defence was on their part, citing inadvertent mistake. It is a general law that Advocate’s failure to execute his client’s instructions amounts to professional negligence. This was the position in Water Painters International -v- Benjamin Ko’goo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries (2014) eKLR, where the Court stated that; “...in the words of justice Ringera in Omwoyo vs African Highlands & Produce Co. Ltd (2002 J) KLR, time has come for the legal Practitioners to shoulder the consequences of their negligent acts of omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of negligence of the defendant’s Advocates. This is a proper case where the Defendant’s remedy is against its Advocate, while suing advocates for professional negligence and not setting aside the judgment.”**

47. In arriving at my decision, I am, however, guided by the decision of the Court of Appeal in **CMC Holdings Ltd vs. Nzioki [2004] KLR 173** where it was held that:

**“In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant’s unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant’s input...What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant’s appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the**

**appeal should have been allowed”.**

48. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.

49. In considering whether or not to set aside the default judgement a judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is *prima facie* defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See Bouchard International (Services) Ltd vs. M’mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.

50. As was held in Sebei District Administration -v- Gasyali & others (1968) EA 300:

**“the nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the Court.”**

51. Taking into account all the circumstances of this case I am satisfied that the justice of the case mandates that the defendant be given an opportunity of being heard. A court of justice, it has been held, has no jurisdiction to do injustice. See M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000 and Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.

52. I have said enough to show that I find merit in the Notice of Motion dated 16<sup>th</sup> September, 2021. Accordingly, the Judgement entered herein is hereby set aside. However, being a regular judgement, this Court is required to do so upon terms that are just not only be just to the defendant but to the plaintiff as well. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.

53. The conditions that commend themselves to me are that the defendant pays thrown away costs i.e. costs that have been incurred by the Respondent consequent upon the judgement, such costs to be assessed and paid immediately. I further direct that Applicant to deposit half of the decretal sum in a joint interest earning account in the names of the advocates for the parties or to secure bank guarantee from a reputable financial institution to cover the said sum pending the finalisation of this suit within 45 days from the date of this ruling and in default the application shall be deemed to have been dismissed with costs.

54. It is so ordered.

**RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 27TH DAY OF JANUARY, 2022**

**G V ODUNGA**

**JUDGE**

**Delivered the absence of the parties.**

**CA Susan**