Pampa Grill Limited & another v North Lake Limited & another (Environment and Land Case Civil Suit 73 of 2018) [2023] KEELC 17304 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17304 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 73 OF 2018

SO OKONG'O, J

MAY 11, 2023

BETWEEN

PAMPA GRILL LIMITED ..... 1ST PLAINTIFF

PAMPA CHURRASCARIA (UNDER ADMINISTRATION) LIMITED .... 2ND PLAINTIFF

AND

BUENA BIZZ LIMITED ..... 1ST DEFENDANT

NORTH LAKE LIMITED ..... 2ND DEFENDANT

RULING

1. The 1st plaintiff and the 1st defendant entered into a lease agreement for a term of five (5) years and three (3) months commencing on 1st September 2012 and terminating on 30th November 2017 in respect of all that parcel of land known as L.R No. 330/352, Nairobi (hereinafter referred to only as "the suit property"). The 1st plaintiff leased the suit property from the 1st defendant for the purposes of a restaurant business that was operated by the 2nd plaintiff. The plaintiffs brought this suit against the defendants through a plaint dated 19th February 2018 which was amended on 13th November 2019. In their amended plaint, the plaintiffs averred that the 1st plaintiff incurred expenses to the tune of Kshs. 37,401,998.33 in repairing and renovating the suit property which amount the 1st defendant had not refunded to it. The plaintiffs averred that by a letter dated 18th September 2017, the 1st defendant informed the 1st plaintiff that it did not intend to renew the 1st plaintiff's lease in respect of the suit property upon its expiry on 30th November 2017. The plaintiffs averred that despite this notice, the 1st plaintiff paid to 1st defendant a sum of Kshs. 430,691/- on account of rent for the month of December 2017 which payment was accepted by the 1st defendant.

2. The plaintiffs averred that through a letter dated 7th December 2017, the 2nd defendant informed the 1st plaintiff through its advocates, Munyalo Muli & Company Advocates that the 2nd defendant had

entered into a contract with the 1st defendant to lease the suit property and had paid rent to the 1st defendant for the premises. The plaintiffs averred that through the said letter from its advocates, the 2nd defendant demanded possession of the suit property from the plaintiffs. The plaintiffs averred that on or about 4th January 2018, the 1st plaintiff paid the 1st defendant a sum of Kshs. 1,292,073/- which was equivalent to three months' rent as a further security deposit in the expectation that the 1st defendant would renew its lease in respect of the suit property.

3. The plaintiffs averred that on 15th January 2018, the 2nd plaintiff filed a suit at the Business Premises Rent Tribunal and obtained an order in Nairobi BPRT Case No. 40 of 2018("the tribunal suit") restraining the 1st defendant from interfering with its quiet possession of the suit property pending the inter-partes hearing of an application for injunction that it had filed in the said suit. The plaintiffs averred that on the same date namely, 15th January 2018, the 1st defendant moved to the Chief Magistrates Court at Nairobi and irregularly obtained an ex-parte order in Nairobi CMCC No. 9414 of 2017 ("the lower court suit") for the eviction of the 1st plaintiff from the suit property pending the inter-partes hearing of an eviction application that the 1st defendant had filed before that court. The plaintiffs averred that on 18th January 2018, Siuma Auctioneers acting on the instructions of the 1st defendant executed the said irregular order from the lower court by illegally and irregularly evicting the plaintiffs forcefully from the suit property.

4. The plaintiffs averred that during the said forceful eviction, some of the plaintiffs' properties were stolen while others were seriously damaged. The plaintiffs averred that the goods that were stolen and those that were destroyed were valued at Kshs. 11,942,455/-. The plaintiffs averred that their forceful eviction from the suit property was illegal and irregular for various reasons among them that; at the time of the eviction, there was an existing order issued by the Business Premises Rent Tribunal ("the tribunal") restraining the 1st defendant from interfering with the 2nd plaintiff's occupation of the suit property and that the 1st defendant had accepted the rent for the month of December, 2017 in the sum of Kshs. 430,691/- and a further security deposit in the sum of Kshs. 1,292,073/-. The plaintiffs averred further that at the time of their eviction, the 1st defendant had not refunded to the 1st plaintiff the sum of Kshs. 37,401,998.33/- that it had incurred in repairing and renovating the suit property at the commencement of its tenancy and a sum of Kshs. 900,000/- that the 1st plaintiff had paid as the first security deposit under the lease that expired. The plaintiffs averred further that the said eviction orders were obtained by the 1st defendant from the lower court through misrepresentation and concealment of material facts.

5. The plaintiffs averred that after their unlawful eviction by the defendants from the suit property using the said orders that the 1st defendant had obtained irregularly from the lower court, the 1st defendant mischievously and fraudulently withdrew the lower court suit in which it had obtained the said eviction orders without serving the application pursuant to which the said orders had been issued upon the 1st plaintiff to enable it to defend itself. The plaintiffs averred that the said lower court suit was withdrawn by the 1st defendant so as to conceal the illegal and irregular manner in which the said eviction orders were obtained.

6. The plaintiffs averred that during their forceful eviction from the suit property, some items such as CCTV cameras, safe, generator, power backup, Brazilian Grill and the hoods in steel water tanks remained in the suit property. The plaintiffs averred further that after their forceful eviction, some of their items including chimneys, wine racks, grill mortars, water pumps, computers, shelves, horse pipe, permanent grill, tents and fixed furniture, DSTV and Zuku dishes, CCTV cameras and safe all valued at Kshs. 3,278, 000/- were converted by the defendants to their own use. The plaintiffs averred further that they lost a lot of items through destruction and theft during the eviction that

included; stock at the bar, water, sodas, juices, beers, liqueurs, blended whisky, cognac, malt whisky, Irish whisky, Canadian whisky, American whisky, brandy, aperitifs, gin, vodka, rum, tequila, wines, cigarettes, operating equipment, meat stock in stores and freezer all valued at Kshs. 8,664,455/-. The plaintiffs averred that the total value of their properties that were either converted, destroyed and/or stolen by the defendants were estimated at Kshs. 11, 942,455/-.

7. The plaintiffs averred further that they suffered loss of profits estimated at Kshs. 61,223,995/- for 2018 financial year. The plaintiffs averred that as a consequence of the 1st defendant's breach of the plaintiffs' legitimate expectation that their lease would be renewed and their subsequent illegal forceful eviction from the suit property by the defendants, the plaintiffs had suffered loss, mental anguish, anxiety and had been deprived of their constitutional right to utilize the suit property.

8. The plaintiffs sought judgment against the defendants for;

   a. Kshs. 37,401,998.33 being the amount incurred by the 1st plaintiff in the repairs and renovation of the suit property.

   b. Kshs. 900,000/- being the first security deposit.

   c. Kshs. 430, 691/- being the rent for December, 2017.

   d. Kshs. 1,292,073/- being further security deposit.

   e. Kshs. 61,223,995/- being loss of profits for the year 2018.

   f. Kshs. 11,942,455/- being the value of the goods/assets converted, stolen and/or destroyed or damaged during the illegal eviction.

   g. Interest on the above.

   h. General and punitive damages.

   i. Costs of the suit plus interest.

9. The defendants were served with Summons to enter appearance and appointed the firm of Masore Nyang'au & Co. Advocates to act for them in the suit. The said firm of advocates did not file a defence on behalf of the defendants to the plaintiffs' claim. The suit was fixed for formal proof and the defendants' advocates on record, Masore Nyang'au & Co. Advocates were duly served with a hearing notice. The defendants' said advocates failed to attend court for the hearing. The court allowed the hearing of the matter to proceed the absence of the defendants' advocates notwithstanding. After the close of the plaintiffs' case, the court directed the parties to make closing submissions in writing. The plaintiffs filed their submissions on 24th August 2020 while the defendants did not file submissions. The court fixed the matter for judgment on 11th February 2021.

10. While perusing the file for the purposes of preparing the judgment, the court noted from the record that on 26th April 2018, the firm of W.G. Wambugu & Co. Advocates had filed a notice of change of advocates dated 25th April 2018 through which the said firm took over the conduct of the defendants' case from the firm of Masore Nyang'au & Co. Advocates. It was not clear to the court from the record whether the plaintiffs' advocates had been served with the said notice of change of advocates by the firm of W.G. Wambugu & Co. Advocates. The court was not aware of this notice of change of advocates until it started the process of preparing the judgment.

11. Due to the lack of clarity regarding the defendants' representation, the court felt that it was not safe to proceed with the writing of the judgment that it had reserved. The court felt that if it was true that it was the firm of W.G. Wambugu & Co. Advocates that was on record for the defendants and that the

plaintiffs' advocates had been informed of this change of advocates, then the hearing of the suit that took place on the basis that the defendants were represented by the firm of Masore Nyang'au & Co. Advocates would be irregular and liable to be set aside.

12. For that reason, the court made an order on 11th February 2021 inviting the firm of Mutua, Nyongesa & Muthoka Advocates for the plaintiffs and, Masore Nyang'au & Co. Advocates and W.G. Wambugu & Co. Advocates on behalf of the defendants to address the court on the issue of representation of the defendants in this matter after which the court would give further directions regarding the pending judgment. The said advocates appeared before the court as directed and addressed the court on the issue. After considering their representations, the court held that the firm of advocates that was on record for the defendants was Masore Nyang'au & Co. Advocates. The court thereafter in the presence of the said advocates for the parties fixed the matter for delivery of the judgment that was pending on 10th June 2021. The judgment was delivered as scheduled.

13. The court entered judgment for the plaintiffs against the defendants for;

> " 1. Kshs. 900,000/= being the first security deposit.
>
> 2. Kshs. 1,292,073/= being further security deposit.
>
> 3. Kshs. 11,942,455/= being the value of or compensation for the plaintiffs' goods or assets that were converted, stolen, destroyed and/or damaged during the illegal eviction.
>
> 4. Kshs. 5,000,000/= being general and punitive damages for illegal eviction.
>
> 5. Interest on 1 and 2 above at court rates from the date of filing suit and on 3 and 4 above at court rate from the date hereof until payment in full.
>
> 6. Costs of the suit."

14. After the delivery of the said judgment, the plaintiffs filed a bill of costs that was taxed by the Deputy Registrar on 24th March 2022 at Kshs. 803,087.40.

15. What is now before the court is the 1st defendant's Notice of Motion application dated 20th December 2021 seeking; a stay of execution of the judgment and decree of the court made on 10th June 2021 pending the hearing and determination of the application, an order setting aside the judgment delivered by the court on 10th June 2021 and leave for the 1st defendant to file its defence out of time. The application was brought on the grounds on the face thereof and on the supporting affidavit of Grace Wambui Weru sworn on 20th December 2021. The 1st defendant (hereinafter referred to as "the applicant") averred that it was previously being represented by W.G.Wambugu & Co. Advocates and that the hearing of the suit proceeded ex-parte and judgment was entered for the plaintiff against the defendants on 10th June 2021 for a total sum of Kshs. 19,134,528/-. The applicant averred that the said judgment was irregular since the applicant was not served with Summons to Enter Appearance. The applicant averred further that it was also not served with a notice of entry of judgment. The applicant averred that its previous advocates were instructed by an auctioneer and as such there was lack of proper communication with the said advocates which resulted in the said advocates not filing a defence on behalf of the applicant. The applicant averred that the delay in the filing of the present application was occasioned by attempts by the directors of the applicant to obtain information to support the application. The applicant averred that mistakes of its previous advocates should not be visited against it. The applicant averred that it had a good defence to the plaintiffs' claim which raised triable issues. The applicant averred that the 2nd plaintiff was under administration by an administrator appointed

through Gazette Notice dated 11th April 2017. The applicant averred that no leave was obtained from the administrator prior to the filing of this suit by the 2nd plaintiff. The applicant averred that the goods and equipment that the plaintiffs claimed to have been destroyed or stolen were taken over by the said administrator.

16. In its affidavit in support of the application, the applicant stated that after Summons to Enter Appearance was served upon the applicant, the firm of Masore Nyangau & Co. Advocates filed a notice to act for the defendants. The applicant stated that the said firm neither filed a defence on behalf of the applicant nor kept the applicant informed of the progress of the case. The applicant averred that the said firm was taking instructions from Siuma Auctioneers rather than from the applicant. The applicant stated that it instructed the firm of W.G.Wambugu & Co. Advocates to take over the conduct of the matter from the said firm of Masore Nyangau & Co. Advocates and the said firm filed a notice of change of advocates on 25th April 2018. The applicant stated that in July 2021, W.G.Wambugu & Co. Advocates informed it that judgment had been delivered against it in this matter. The applicant stated that it later learnt that the suit was heard without its participation. The applicant stated that it was at that point that it instructed its present advocates to take over the conduct of its defence from W.G.Wambugu & Co. Advocates. The applicant stated that the delay in filing the present application was due to a dispute that it had with the previous advocates over retainer fees. The applicant averred that it was after its advocates now on record obtained the file from W.G.Wambugu & Co. Advocates that it learnt that no defence was filed on its behalf although it had a good defence to the plaintiffs' claim. The applicant averred that its previous advocates, Masore Nyangau & Co. Advocates failed to advise it properly on the matter as a result of which the matter was heard and determined without its participation. The applicant averred that an administrator was appointed over the 2nd plaintiff by Jamii Bora Bank Limited (now Kingdom Bank Limited) through a Gazette Notice dated 11th April 2017. The applicant averred that the suit by the 2nd plaintiff was brought contrary to the law. The applicant averred that it had a good defence to the plaintiffs' claim. The applicant averred that the plaintiffs were evicted peacefully in the presence of the police and that nothing was stolen or destroyed as claimed in the amended plaint. The applicant averred that the assets of the 2nd plaintiff that were allegedly destroyed and stolen had actually been put up for sale by the administrator aforesaid on 27th March 2018 through Ideal Auctioneers. The applicant averred that its application had merit and that it should be given an opportunity to defend the suit. The applicant averred that it was willing to comply with any condition that the court may impose for granting the orders sought.

17. The applicant's application was opposed by the plaintiffs through grounds of opposition dated 8th July 2022. The plaintiffs contended that the limb of the application seeking a stay of execution had no basis as the applicant had not lodged an appeal against the judgment of the court and had also not tendered any security for the performance of the decree. The plaintiffs averred that the issues that were raised by the applicant as a basis for its application had been raised and conclusively determined by the court. The plaintiffs contended that litigation must come to an end.

18. The application was heard by way of written submissions. The applicant filed its submissions dated 19th July 2022 while the plaintiffs filed submissions dated 26th July 2022. The applicant submitted that the plaintiffs did not file an affidavit in response to the issues of fact raised in the application. The applicant submitted that the grounds of opposition filed by the plaintiffs did not respond to the issues raised in the affidavit in support of the application. The applicant submitted that the contents of the said affidavit were not controverted by the plaintiffs. The applicant submitted that the power to set aside judgment is discretionary and that it is to be exercised so as to avoid injustice and hardship resulting from error, accident or excusable mistake. The applicant cited a number of authorities in support of this submission. The applicant submitted that the setting aside of the judgment of 10th June 2021 was

being sought on two grounds namely; that the applicant was not notified of the hearing date by its former advocates and that the applicant had a defence to the plaintiffs' claim that raised triable issues. The applicant reiterated that the judgment sought to be set aside was an irregular judgment because the applicant was not informed of the hearing date. The applicant submitted that the mistakes of its former advocates should not be visited upon it. The applicant urged the court to find that failure by the applicant to attend court was as a result of an excusable mistake. The applicant submitted that even if the court found that the judgment sought to be set aside was regular, the court still had the discretion to set it aside the applicant having demonstrated the existence of a defence on merit to the plaintiffs' claim. The applicant urged the court to allow the application.

19. The plaintiffs filed their submissions dated 26th July 2022. The plaintiffs submitted that it was not necessary for them to file an affidavit in response to the application since the facts of the case were on record and that their grounds of opposition referred to both fact and law. The plaintiffs submitted that failure on their part to file a replying affidavit did not mean that they had admitted the facts deposed in the affidavit in support of the application. The plaintiffs averred that the applicant had filed an application dated 15th March 2021 seeking to set aside the formal proof, arrest the delivery of judgment and refer the dispute to arbitration. The plaintiffs submitted that the applicant did not disclose this application to the court. The plaintiffs submitted that the grounds advanced by the applicant in its application as a basis for setting aside the judgment of the court differed from the grounds in its submissions. The plaintiffs submitted that the applicant had come up with a new case in its submissions.

20. The plaintiffs submitted that the judgment sought to be set aside was a regular judgment. The plaintiffs cited the Court of Appeal decision in *James Kanyiita Nderitu & another v. Marios Philotas Ghikas & another* [2016] eKLR on the principles to be applied by the court on an application seeking to set aside a regular judgment. In that case the court stated as follows:

> ...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 others...
>
> 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."

21. The plaintiffs submitted that the conduct of the applicant disentitled it to the exercise of the discretionary powers of the court. The plaintiffs submitted that the applicant did not explain its failure to file a defence. The plaintiffs submitted that in the absence of such explanation, there was no basis for setting aside the judgment of 10th June 2021. The plaintiffs submitted further that the application was brought after an inordinate delay which was not explained. The plaintiffs submitted further that the applicant had not demonstrated that it had a defence that raised triable issues. The plaintiffs submitted that what the applicant ought to have answered was whether the eviction of the plaintiffs from the suit property was conducted lawfully. The plaintiffs submitted that no evidence was placed before the court to prove the legality of the said eviction. The plaintiffs submitted that the applicant had raised merely technical issues in its proposed defence. The plaintiffs submitted that they would suffer more prejudice compared to the applicant if the orders sought by the applicant were granted. The plaintiffs urged the court to dismiss the applicant's application.

Analysis and determination:

22. The parties' submissions were in respect of two applications. I made it clear to the parties in my directions of 12th July 2022 that the application in respect of which they were to file submissions was the applicant's Notice of Motion dated 20th December 2021. The application sought both a stay of execution and the setting aside of the judgment made on 10th June 2021. The applicant's application for stay dated 25th April 2022 in respect of which the parties have also submitted was superfluous. This ruling is therefore limited only to the applicant's Notice of Motion application dated 20th December 2021.

23. I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the grounds of opposition filed by the plaintiffs in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the various authorities cited in support thereof. The application was brought principally under Order 10 Rule 11 and Order 12 Rule 7 of the *Civil Procedure Rules* which deal with the setting aside of interlocutory judgments, judgments entered on formal proofs and judgments entered in the absence of a party. Order 10 Rule 11 of the *Civil Procedure Rules* gives the court discretionary power to set aside interlocutory judgments entered in default of appearance or defence and judgments entered after formal proof upon terms as are just. Order 12 Rule 7 of the *Civil Procedure Rules* on the other hand gives the court power to set aside judgment entered in the absence of a party. In *Patriotic Guards Ltd. v James Kipchirchir Sambu* [2018] eKLR the Court of Appeal stated as follows:

> It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

24. The principles that the court applies in applications for setting aside ex parte orders and judgments were set out in *Shah v. Mbogo* (1967) E.A 116 as follows:

> .... the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice."

25. In *Patel v. E. A. Cargo Handling Services* [1974] E. A 75, the court stated as follows at page 76 regarding the court's power to set aside *ex parte* judgments:

> The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as in the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view a defence that must succeed, it means as Sheridan J. put it "a triable issue: that is an issue which raises a prima facie defence and which should go to trial for adjudication."

26. In *Peter Ngugi Kabiri v. Esther Wangari Githinji & another*, Nyeri CA No. 36 of 2014, the court stated that:

> There are various principles of law that fall for consideration in this appeal namely the right to be heard on merit; litigation must come to an end; a litigant must take steps to prosecute his claim promptly; no party is allowed to abuse the court process; justice must be administered without undue regard to technicalities and the need for substantive justice between the parties. It is not in dispute that the appellant's claim has never been heard on merit since 1995...; it is not in dispute that the Originating Summons was dismissed for non attendance on the part of the appellant's counsel on the date scheduled for hearing; it is not in dispute that the appellant is still in occupation of five (5) acres of the disputed properties and he has lived thereon for over 50 years.

27. A right to a hearing is a fundamental right and as this Court stated in the case of *Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 others*, Nyeri C.A. No. 18 of 2013, "The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law". On the facts of this case, a balance needs to be struck between the right to be heard and the principle that a litigant should prosecute his claim promptly and there should be no abuse of the court process."

28. It is on the foregoing principles that the applicant's application falls for consideration. In paragraph 13 of her affidavit in support of the application, the applicant's director admitted that the applicant was served with Summons to Enter Appearance. The applicant's said director has also admitted that the applicant appointed two law firms, Masore Nyangau & Co. Advocates and W.G.Wambugu & Company Advocates to act for the applicant in this suit. In the previous rulings that the court made herein prior to the delivery of the judgment sought to be set aside, the court found that the applicant's advocates who were on record were duly served with the pleadings and the hearing notices during the hearing of the suit in which the applicant never participated. It follows from the foregoing that the judgement entered herein on 10th June 2021 was a regular judgment and not an irregular judgment as claimed by the applicant. As the Court of Appeal stated in *James Kanyiita Nderitu & another v. Marios Philotas Ghikas & another*(*supra*), in an application to set aside a regular judgment, the applicant must give an explanation for its failure to enter appearance or file a defence within the prescribed period and any delay in the filing of the application. The applicant must also demonstrate that it has an arguable defence to the plaintiff's claim. The judgment sought to be set aside was delivered on 10th June 2021 in the presence of the applicant's advocates. According to the applicant, it was made aware of this judgment in July 2021. The present application was filed on 21st December 2021 six (6) months from the date of the judgment and five (5) months after the applicant was made aware of the judgment. The applicant has not come up with a clear explanation why it took it 5 months to file an application

to set aside the judgment of 10th June 2021. The applicant has mentioned a dispute with its previous advocates over retainer and the time it took it to look for evidence to support the application as the reasons for the delay in filing the application. This explanation is not reasonable. There is no evidence that the applicant had a dispute with its previous advocates over fees. The firm of W.G. Wambugu & Co. Advocates which is said to have represented the applicant last before its current advocates took over filed an application dated 26th July 2021 to cease acting for the applicant on the ground that the applicant had withdrawn instructions and had taken its file from the firm. The applicant having received its file from the said firm of advocates in July 2021 a month after the date of judgment, I am unable to see how a dispute over retainer with the said advocate could have delayed the filing of the present application.

29. On the claim that the applicant was looking for evidence to support the application, the applicant was aware all along of the existence of this suit and had even defended the interlocutory injunction application that was brought by the plaintiffs. The applicant who claims to have an arguable defence to the plaintiffs' claim cannot be taken seriously when it claims that it took it 5 months to look for evidence in support of the present application. For the foregoing reasons, it is my finding that the applicant has not given a reasonable explanation for the inordinate delay in the filing of the present application.

30. For its failure to file a defence and appear in court for the hearing, again, apart from blaming its previous advocates for not keeping it informed of the court proceedings, no explanation has been given why the said advocates did not file a defence. In *Stephen Ndungu Kimungu v. James Muigu & another* [2018] eKLR this court stated as follows:

> The hard question that must be answered is who should take responsibility for a party's advocate's failure to perform his professional duties? Is it the opposite party or the court? I believe that the answer would depend on the circumstances of each case. There cannot be a general rule. In the circumstances of this case, I am of the view that the advocate concerned should not only bear the blame but should also carry the loss and damage if any arising from the consequences of his neglect of duty. The justice train can no longer be delayed, stopped, derailed or re-routed by the parties or their advocates. Once the train takes off on a scheduled trip, those left behind must bear the consequences of their failure to get on board."

31. I am of the view that as much as the mistake of an advocate should not be visited on his client, it is not fair to visit such a mistake on the court or the other party. I am of the view that a mere averment that the applicant's advocates failed to file a defence without more is not an explanation why no defence was filed. On whether the applicant has an arguable defence to the plaintiff's claim, a part from the technical issues raised by the applicant, no defence on merit has been demonstrated. The plaintiffs' case was that they were unlawfully evicted from the suit property as a result of which they suffered loss and damage. The applicant has not persuaded me on a prima facie basis that the eviction of the plaintiffs was lawful. The applicant has not convinced me that the lower court order on the basis of which the plaintiffs were evicted was a lawful order. I have also not seen any merit in the applicant's claim that the eviction of the plaintiffs was conducted peacefully. The applicant has also not satisfied me that the 2nd plaintiff's goods that were to be sold by its administrator on 27th March 2018 were the same items that were the subject of its claim herein under the head of destroyed and stolen goods. There is also no evidence that the suit by the 2nd Plaintiff was not authorised by the administrator.

32. On prejudice, I am of the view that the plaintiffs stand to suffer more prejudice if the orders sought by the applicant are granted. The plaintiffs were forcefully evicted from their business premises 5 years ago. A judgment was entered in their favour herein on 10th June 2021 after a trial. Setting aside the said

judgment will mean that the hearing of the suit will have to start afresh at an added cost to the plaintiffs leave alone the delay in bringing a closure to the dispute. For the applicant, it has only itself to blame. It was given an opportunity to defend itself that it did not utilise.

Conclusion:

33. Due to the foregoing, it is my finding that a case has not been made out for the setting aside of the judgment entered herein on 10th June 2021. The applicant's Notice of Motion application dated 20th December 2021 is therefore without merit. The application is dismissed with costs to the plaintiffs.

DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF MAY 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Makokha for the Plaintiffs

Ms. Kinyua h/b for Mr.Munge for the 1st Defendant

N/A for the 2nd Defendant

Ms. J. Omondi-Court Assistant