



Reli Savings and Credit Co-operative Society Ltd v Sinohydro Corporation Limited (Environment and Land Case Civil Suit 90 of 2015) [2023] KEELC 17905 (KLR) (12 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17905 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT 90 OF 2015
SO OKONG'O, J
JUNE 12, 2023**

BETWEEN
RELI SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD PLAINTIFF
AND
SINOHYDRO CORPORATION LIMITED DEFENDANT

RULING

1. The Plaintiff brought this suit on April 14, 2015 through a plaint dated April 10, 2015 seeking among other prayers; a permanent injunction restraining the defendant, its agents, representatives, assigns or any other persons acting through its direction from trespassing upon continuing to trespass upon, excavating murram or in any other way interfering with the Plaintiff's possession and use of all that parcel of land known as Kanyakwar Residential Plots/Kisumu Block 17 (hereinafter referred to as "the suit property") and compensation for violation of the Plaintiff's right to property. The Defendant entered appearance through Bruce Odeny & Company Advocates on May 5, 2015. It is said that the Defendant subsequently filed a Defence which was a general denial and never filed witness statements. I have not seen the defence on record.
2. The Plaintiff's suit was heard and the court entered judgment in favour of the Plaintiff against the Defendant on March 18, 2022. Although the Defendant's advocates then on record participated at the hearing of the matter, the Defendant never tendered any evidence at the trial. The said advocates' application to cease acting for the Defendant for want of instruction was dismissed by the court for non-attendance and their application for adjournment to file a fresh application was also dismissed. A subsequent application for adjournment to give the said advocates time to trace the whereabouts of the Defendant was similarly disallowed.
3. In its judgment, the court found that the Defendant had trespassed on the suit property and occasioned damage and degradation to the same. The court issued an injunction restraining the Defendants from trespassing upon the suit property or in any other way interfering with the Plaintiff's possession and



use of the property. The court also awarded the Plaintiff Kshs 317,000,000/- together with interest as general damages together with the costs of the suit. The Plaintiff filed a bill of costs that was taxed on October 13, 2022 at Kshs 5,104,375/-. The Plaintiff thereafter applied for execution and attached the monies held in the Defendant's accounts at Equity Bank and Kenya Commercial Bank on November 22, 2022 to satisfy the decretal amount together with interest.

4. Following the said attachment, the Defendant filed an application by way of a Notice of Motion dated December 2, 2022 seeking the following orders;
 - a. Spent.
 - b. That the Honourable court be pleased to adopt the consent order between the firm of Bruce Odeny & Co. Advocates and the firm of MNM Advocates LLP allowing the latter to come on record for the Defendant.
 - c. That the Honourable Court be pleased to lift the Garnishee *Order Nisi* issued on November 22, 2022 pending the hearing and determination of this Application.
 - d. That this Honourable Court be pleased to issue an order of stay of the Garnishee proceedings and any other execution pending the hearing and determination of this Application.
 - e. That the court be pleased to set aside all the proceedings and judgment delivered on March 18, 2022 against the Defendant on such terms as may appear just to the Honourable Court.
 - f. That the court be pleased to re-open the case and grant the Defendant leave to present its case for determination on merits.
 - g. That the costs of this Application be provided for.
5. This is the application that is before the court for determination. The application was based on the grounds set out on the face thereof and on the supporting affidavit of Xia Anquan sworn on December 2, 2022. The Defendant contended that it learnt of the existence of this suit when a Garnishee Nisi issued herein on November 22, 2022 was served upon its bankers, Equity Bank Limited and Kenya Commercial Bank Limited thereby freezing the operations of the said accounts. The Defendant averred that although the firm of Bruce Odeny & Company Advocates came on record in the matter for the Defendant, the Defendant had not been in contact with the said firm of advocates for several years and it was not clear how the firm was instructed by the former officers of the Defendant. The Defendant averred that there was no communication on its record between it and the said firm of advocates. The Defendant averred that the case was heard and determined without its participation despite its presence within the jurisdiction of the court. The Defendant averred that the subject matter of this suit was land for extraction of murram for road construction. The Defendant averred that as far as it was concerned, it paid consideration for the murram that it excavated and it completed the project that it was working on several years ago.
6. The Defendant averred that its business had come to a halt as a result of the Garnishee Order Nisi issued by the court at the instance of the Plaintiff that had frozen the operation of its said accounts. The Defendant averred that its business was poised to suffer great financial loss as it had various projects that it was undertaking whose conclusion had been put in jeopardy. The Defendant averred that it was at risk of breaching its contractual obligations following the stalling of the said projects. The Defendant averred that it was locked out of its funds in the attached accounts and it was not able even to pay salaries to its employees.
7. In his affidavit, Xia Anquan who described himself as the Defendant's Assistant Director and Business Manager, stated that he was in charge of co-ordination of the projects that were being carried out



by the Defendant in the country including any legal disputes. He stated that around November 24, 2022, the Defendant's bankers brought to his attention an order issued by this court on November 22, 2022 freezing the operation of the Defendant's bank accounts pursuant to a judgment issued by this court. He stated that he contacted the Defendant's advocates on record, MNM Advocates LLP who briefed him on the nature of the claim in this suit and the advocates on record for the Plaintiff and the Defendant.

8. He stated that he personally and through the Defendant's advocates on record followed up the matter with the firm of Bruce Odeny & Company Advocates and it became apparent that there was no communication between the Defendant and the said firm leading to the suit progressing without adequate representation of the Defendant. He stated that the firm of Bruce Odeny & Company Advocates wrote to the Defendant but used the wrong postal address. He stated that the Defendant's postal address was PO Box 24446-00100 Nairobi while the letters by the firm of Bruce Odeny & Company Advocates to the Defendant were addressed to PO Box 2446-00100 Nairobi. He stated that the said letters that were all written after the delivery of the judgment herein were not received by the Defendant. He stated that no letter was written to it by the said firm during the progress of the case.
9. He stated that it was apparent that although the firm of Bruce Odeny & Company Advocates was on record for the Defendant in this matter, there had been no contact between the said firm of advocates and the Defendant for years and it was not clear how the said firm got instructions to represent the Defendant as there was no communication between the firm and the Defendant.
10. He stated that he had managed to gather information on the subject matter of this suit. He stated that the Defendant leased a parcel of land for excavation of murram for the construction of roads from one, Michael Owino Abwao and made payments in respect thereof. He stated that as far as the Defendant was concerned, the agreement between it and the said Michael Owino Abwao was actualised, consideration paid and the Defendant's projects completed several years ago without any hitches. He stated that from the foregoing, the Defendant was in darkness as to what was going on in this suit. He stated that the firm of advocates which was on record for the Defendant appears to have had difficulties communicating with the Defendant and the firm even made an application to cease acting for the Defendant but the application was never brought to the attention of the Defendant and was not acted upon.
11. He stated that the Defendant was prejudiced with the judgment of the court and the subsequent orders and asked the court to exercise its inherent powers to afford the Defendant a chance at the seat of justice.
12. The application was opposed by the Plaintiff through a Replying Affidavit sworn by Ben Charles Auch on December 15, 2022. The Plaintiff denied that the Defendant was not aware of this suit. The Plaintiff averred that when it realised that the Defendant had entered the suit property owned by the Plaintiff and was excavating murram therefrom day and night, the Defendant's project manager was confronted and asked to stop the exercise to no avail.
13. The Plaintiff averred that it sought the assistance of the police but was advised that the dispute was of a civil nature and should be resolved by the court. The Plaintiff averred that they instructed their advocates on record who wrote a demand letter to the Defendant to stop the trespass but they never heeded the demand. The Plaintiff averred that it was forced to file this suit together with an application for an injunction on April 14, 2015. The Plaintiff averred that the court issued an order of injunction against the Defendant. The Plaintiff averred that the said order was served upon the Defendant at its then offices in Kisumu and despite the service, the Defendant continued with the trespass. The Plaintiff averred that the Defendant thereafter appointed the firm of Bruce Odeny & Company Advocates to act for it in the matter which firm entered appearance and filed pleadings on its behalf.



14. The Plaintiff averred that the advocates for the parties thereafter entered into negotiations with a view to resolve the dispute amicably but no agreement was reached on the restoration of the Plaintiff's damaged parcel of land. The Plaintiff averred that the allegation that Mr Xia Anquan was not aware of the suit was not correct since other senior personnel of the Defendant were aware of the suit and it was not the business of the Plaintiff to know how they communicated in the Defendant company.
15. The Plaintiff averred that at the trial, after the Plaintiff's case was closed, the Defendant was given a date for the hearing of its case on which date, the Defendant did not present any evidence. The Plaintiff averred that judgment in the matter was delivered on March 18, 2022 in favour of the Plaintiff and the Plaintiff's Bill of Costs was taxed on October 13, 2022 at Kshs 5,104,375/=. The Plaintiff averred that it was after that that the Plaintiff applied for execution of the decree through the attachment of the money held in the Defendant's bank accounts.
16. The Plaintiff averred that the Defendant's representatives requested for a meeting with the advocates for the Plaintiff at Eka Hotel in Nairobi which meeting was attended by the Plaintiff's Advocate Mr Yogo. The Plaintiff reiterated that it was not true that the Defendant was not aware of this suit. The Plaintiff averred that Defendant's Safety Manger could not have attended meetings aimed at resolving the dispute out of court if the Defendant was not aware of the suit. The Plaintiff averred that the Defendant was all along represented in the matter by an advocate. The Plaintiff averred that the said advocate had not sworn any affidavit stating that he was unable to contact the Defendant. The Plaintiff averred that the Defendant's application had no basis. The Plaintiff averred that the Defendant had also not demonstrated that it had a defence on merit to the Plaintiff's claim. The Plaintiff averred that no evidence had been placed before the court showing that the persons with whom the Defendant entered into an agreement for the extraction of murrum from the suit property owned the property.
17. The Defendant filed a supplementary affidavit on January 25, 2023 also sworn by Xia Anquan. In the supplementary affidavit, the Defendant admitted that it had in its employment one, Pedro Osangiri as its Safety Manager. The Defendant contended however that the said employee did not have the authority to make any decisions purported to have been made by him in the replying affidavit. The Defendant averred that the Plaintiff's allegation that the Defendant continued with the excavation of the murrum even after it was served with a court order to stop supports the Defendant's position that its top management was not aware of the suit otherwise, they would have not continued with the excavation. The Defendant averred further that although the court record shows that the firm of Bruce Odeny & Company Advocates was acting for the Defendant, the said firm's representation was neither known nor sanctioned by the management of the Defendant which was not aware of the existence of the suit until its bankers were served with Garnishee order.
18. The Defendant denied that there were negotiations between the Defendant and the Plaintiff with a view to settling this suit out of court. The Defendant averred that in any event, the Defendant could not negotiate with the Plaintiff regarding the restoration of the suit property because the Plaintiff was a stranger to the Defendant and was not the owner of the property. The Defendant averred that if there was to be any negotiation, the Defendant could negotiate only with the rightful owners of the suit property who leased out the property to it. The Defendant averred that the application by the firm of Bruce Odeny & Company Advocates to cease acting for the Defendant because he had lost contact with the Defendant was clear evidence that there was no communication between the firm and the Defendant.
19. The Defendant's application was heard by way of written submissions. The Defendant filed its submissions on January 25, 2023 while the Plaintiff filed its submissions in reply on January 30, 2023. The Defendant submitted that it was not properly represented in this suit since its top management



was not aware of the suit or the appointment of the law firm of Bruce Odeny & Company Advocates to act for the Defendant in the suit. The Defendant submitted that the instructions given to the said firm must have originated from persons who had no authority to give such instructions. The Defendant submitted that the application by the said law firm to cease acting was clear evidence that the firm was not properly instructed. The Defendant submitted that the fact that the law firm lacked instructions was further illustrated by the fact that the firm filed a skeleton defence on behalf of the Defendant and nothing more. The Defendant submitted that even if the junior officers of the Defendant may have been aware of the suit, they did not bring the same to the attention of the directors of the Defendant for appropriate action. The Defendant submitted that such omission should not be used to penalise the Defendant. The Defendant submitted that now that the Defendant's directors are aware of the suit and have taken measures to present themselves to court and to respond to the suit, they should be granted the opportunity to present their evidence so that the court can reach a just decision based on the merit of the case. The Defendant submitted that it was just to set aside the judgment and allow the Defendant to file a proper defence and tender its evidence so that the matter is determined on merit. The Defendant submitted that it would suffer prejudice and it would amount to a miscarriage of justice if the orders sought were not granted. The Defendant submitted that the Plaintiff did not stand to suffer irreparably as it could be reasonably compensated by costs for any delay occasioned.

20. The Defendant relied on among others the following cases in support of its submissions; [Edney Adaka Ismail v Equity Bank Limited](#) [2014] eKLR, [Patel v EA Cargo Handling Services Ltd.](#) [1974] EA, [Fursys \(K\) Ltd v Systems Integrated Ltd t/a Symphony](#) [2005] eKLR and [Winnie Wambui Kibinge & 2 Others v Match Electricals Ltd](#)[2012] eKLR.
21. In its submissions in reply dated January 30, 2023, the Plaintiff submitted that the Defendant was properly represented in this suit by the firm of Bruce Odeny & Company Advocates. The Plaintiff submitted that there was no evidence that the firm of Bruce Odeny & Company Advocates acted without instructions. The Plaintiff submitted that the management dysfunction of the Defendant was not a legal issue for deliberation by the court and the issue as to which staff had authority to do what in the company was an internal affair of the Defendant. The Defendant submitted that if the firm of Bruce Odeny & Company Advocates acted without instructions, there was no evidence that the Defendant had lodged a complaint against the firm with the Disciplinary Committee of the Law Society of Kenya. The Plaintiff submitted that the fact that the Defendant's current advocates sought permission from the firm of Bruce Odeny & Company Advocates to come on record means that the firm of Bruce Odeny & Company Advocates was properly on record. The Plaintiff submitted that since the firm of Bruce Odeny & Company Advocates was properly on record for the Defendant, the quality of the firms' service to the Defendant was not for the court to determine. The Plaintiff contended that the fact that the firm did not render good service could not be a ground for the grant of the orders sought. In support of this submission, the Plaintiff cited [Five Forty Aviation Ltd v Erwan Lanof](#) [2019] eKLR.
22. The Plaintiff submitted further that there would be no justification for setting aside the judgment entered herein and allowing the Defendant to file a proper defence. The Plaintiff submitted that there is no draft amended Defence annexed to the application to enable the court to determine what the Defendant call "a proper defence" which it seeks to file. The Plaintiff submitted that the Defendant had exhibited an agreement for lease of land for extracting murran that it entered into with one, Michael Owino Abwao but the same did not show the land parcel that was the subject of the agreement. The Plaintiff submitted that the alleged Michael Owino Abwao did not file any affidavit to support his alleged ownership of the parcel of land the subject of the said lease. The Plaintiff submitted that applications for adjournments that were made by the firm of Bruce Odeny & Company Advocates for the reason that the firm wished to withdraw from acting for the Defendant were mere tactics employed



to obtain adjournment and that although the said firm was given an opportunity to withdraw from acting for the Defendant, it did not withdraw.

23. The Plaintiff submitted that the Defendant had failed to show any good reason why the court ought to revisit the matter and set aside the proceedings when they were given adequate time and opportunity to present whatever evidence they had in support of their case. In support of this submission, the Plaintiff relied on *Dickson Opola Okumu v Tom Odhiambo Odari & Another* [2019] eKLR.

Analysis and determination:

24. I have considered the Defendant's application together with the affidavits filed in support thereof. I have also considered the affidavit filed by the Plaintiff in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties. The Defendant's application was brought under Article 159 of the Constitution, Section 3A of the *Civil Procedure Act* and Order 9 and Order 51 Rule 1 of the *Civil Procedure Rules*. Article 159 of the *Constitution* deals with judicial authority while Section 3A of the *Civil Procedure Act* deals with the inherent power of the court. Order 9 of the *Civil Procedure Rules* deals with recognized agents and advocates. Order 51 of the *Civil Procedure Rules* deals generally with applications. The principal order sought by the Defendant is the setting aside of the proceedings leading to and the judgment entered herein on March 18, 2022 and consequential orders. The Defendant's application is brought on the ground that the hearing of the suit took place and judgment was entered against it without its participation. The Defendant has therefore sought an order for the setting aside of the said proceedings and judgment so that the suit may be heard afresh on merit.

25. I am of the view that the application should have been brought under Order 12 Rule 7 of the *Civil Procedure Rules* which gives the court power to set aside a judgment entered without the participation of a party or without one of the parties being heard. Order 12 Rule 7 of the *Civil Procedure Rules* provides as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

26. The powers conferred on the court under Order 12 Rule 7 of the *Civil Procedure* are discretionary. The burden was upon the Defendant to establish that there exists sufficient ground to warrant the setting aside of the proceedings and the judgment delivered herein on March 18, 2022.

27. In *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018]eKLR the court 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.”

28. In *Patel v EA Cargo Handling Services Ltd*(supra) the court stated that:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgement he does so on such terms as may be just ... 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.”



29. In *Shah v Mbogo* [1967] EA 116 the court stated that:

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

30. The Defendant had a duty to persuade this court that it deserved the exercise of its discretion. From what I can gather from the two affidavits filed by the Defendant, the reason for its failure to participate in the hearing of this suit was a lack of communication between it and the firm of Bruce Odeny & Company Advocates which had been instructed to act for the Defendant by the officers of the Defendant at its Kisumu office. According to the replying affidavit by the Plaintiff, the Summons to Enter Appearance and the injunction application were served upon the Defendant’s Safety Manager, Pedro Osangiri at Usoma in Kisumu. This fact was not refuted by the Defendant. The Defendant’s only contention was that Pedro Osangiri was a junior officer of the Defendant who had no authority to instruct an advocate or to negotiate an out-of-court settlement of the dispute. Neither Pedro Osangiri nor Bruce Odeny filed an affidavit in the application before the court. The court can only assume that since it was Pedro Osangiri who was served with Summons herein, he must have been the one who gave instructions to the firm of Bruce Odeny & Company Advocates to act for the Defendant in this matter. The firm of Bruce Odeny & Company Advocates entered appearance on May 5, 2015 and filed a defence on behalf of the Defendant. It is not clear as to what level Pedro Osangiri fell in the Defendant’s chain of command. As the Plaintiff had submitted, that is an internal matter which the court need not concern itself with. What is important is that he was an officer of the Defendant, he was served with Summons and he instructed a firm of advocates to act for the Defendant.

31. That said, from the evidence on record, it is clear that there was a breakdown of communication between the firm of Bruce Odeny & Company Advocates and the Defendant after the said firm entered appearance and filed a defence. On July 6, 2020, the firm of Bruce Odeny & Company Advocates filed an application to cease acting for the Defendant on the ground that after he was instructed by the Defendant on May 5, 2015 which was the date when he entered appearance, the Defendant had “gone underground” and had not issued further instructions to the firm. The firm argued that it could not continue to act for the Defendant without instructions. The said application was dismissed for non-attendance on December 14, 2020. When the matter came up for hearing on April 27, 2021, Mr Odeny from the firm of Bruce Odeny & Company Advocates informed the court that he had lost communication with the Defendant and sought an adjournment and leave to file a fresh application to cease acting for the Defendant. Mr Odeny’s application was dismissed and the hearing of the matter proceeded. After the close of the Plaintiff’s case on October 6, 2021, Mr Odeny once again informed the court that the Defendant had relocated from Kisumu and as such he required another date for the Defendant’s case. The matter was adjourned to October 12, 2021 for the hearing of the defence case. On that date, Mr Odeny once again told the court that the Defendant had relocated from Kisumu and that he required 4 months presumably to trace the Defendant. The court declined to adjourn the matter and Mr Odeny had no alternative but to close the Defendant’s case without tendering any evidence.

32. From the letters attached to the Defendant’s affidavit, it appears that the firm of Bruce Odeny & Company Advocates sent letters to the Defendant asking for instructions through a wrong postal address. The Plaintiff has not contested the fact that the Defendant’s correct postal address is P.O.Box 24446-00100 Nairobi. This is the postal address in the agreements that are attached to the said affidavit. The Postal address of P.O. Box 2446-40100 Nairobi that the firm of Bruce Odeny & Company



Advocates used to send letters to the Defendant was therefore not the Defendant's address and it is not surprising that the Defendant did not receive the letters.

33. What I have before me is therefore a case of lack of communication between the Defendant and its advocates that was caused in my view by inadequate instructions. It is not clear to the court why the firm of Bruce Odeny & Company Advocates did not take down the full particulars of the Defendant's physical, postal and e-mail addresses and its contact persons in Kisumu and Nairobi while taking instructions. It is also not clear why the Defendant's employee who gave instructions to the firm of Bruce Odeny & Company Advocates did not inform the directors of the Defendant in Nairobi of the case after the Defendant relocated its Kisumu offices to Nairobi. In *National Bank of Kenya Ltd. v. E. Muriu Kamau & another* [2009]e KLR the court stated that:

“there is plainly a duty on all advocates to exercise exceptional care in handling matters on behalf of their clients.”

34. In *Shabbir Din v. Ram Parkash -Anand* [1955]22 EACA 48 Briggs JA stated at page 51 as follows:

“...In particular, mistake or misunderstanding of the appellants' legal advisers, even though negligent may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of that particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.’

35. In *Philip Chemwolo & Another v. Augustine Kubende* (1982 – 88) 1 KAR 1036, Apaloo, J.A stated as follows:

“...Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the right of the parties and not for the purpose of imposing discipline.”

36. In the circumstances of this case, I am inclined to exercise my discretion in favour of the Defendant. The Defendant has demonstrated that there was a genuine breakdown of communication between it and its erstwhile advocates. The Defendant has demonstrated that it has an arguable defence against the Plaintiff's claim. The damages awarded to the Plaintiff in the judgment sought to be set aside is Kshs 317,000,000/- exclusive of costs and interest. I am of the view that it would serve the wider interest of justice if the Defendant is given an opportunity to defend itself against such a huge claim. The court would however impose conditions to ensure that the Plaintiff is not prejudiced. In this regard, the court is not inclined to set aside the proceedings leading to the impugned judgment. The Defendant participated fully in the said proceedings through its former advocates who cross-examined all the witnesses who testified on behalf of the Plaintiff. Setting aside the proceedings will contribute to a further delay in this suit that has been pending in court for the last 7 years. The Defendant which is a Chinese State-owned Corporation that keeps moving offices from one location to another will also have to furnish security for the settlement of any judgment that may be entered against it having regard to the fact that after the judgment is set aside, its bank accounts that were attached would be discharged. The Defendant will also have to pay thrown-away costs.



Conclusion:

37. In conclusion, I hereby make the following orders on the Defendant's application dated December 2, 2022;
1. The firm of MNM Advocates LLP is granted leave to come on record in this matter for the Defendant in place of the firm of Bruce Odeny & Company Advocates pursuant to the consent filed in Court on December 5, 2022. The leave shall take effect from December 5, 2022.
 2. The judgment delivered herein on March 18, 2022 is set aside.
 3. The hearing of the suit is re-opened and the Defendant is granted leave to call its witnesses.
 4. The Defendant shall file its witness statements, and list and bundle of documents within 45 days from the date hereof.
 5. The hearing of the suit shall proceed from where Ombwayo J. reached with the Plaintiff's case unless the parties agree to start the hearing of the suit afresh. The Plaintiff shall however be at liberty to recall any witness and to call additional witnesses before the commencement of the hearing of the Defendant's case. The witness statement for the Plaintiff's new witnesses if any shall be filed within 45 days from the date hereof.
 6. The Defendant shall pay to the Plaintiff thrown away costs and the costs of the present application assessed at a total sum of Kshs 100,000/- within 45 days from the date hereof.
 7. The Defendant shall also deposit into an interest-earning joint bank account in the names of the advocates on record for the Plaintiff and the advocates for the Defendant a sum of Kshs 50,000,000/- as security for any decree that may be passed against the Defendant in this suit. The said deposit shall be made within 45 days from the date hereof.
 8. The Garnishee Order Nisi issued herein on 22 November 2022 shall stand discharged upon the Defendant complying with the conditions set out in orders 6 and 7 above.
 9. In the event that the Defendant fails to comply with the conditions set out in orders 6 and 7 above or any of them within the stipulated period, orders 2, 3, 4, 5, 6, 7 and 8 above shall automatically stand set aside and the judgment of the court delivered herein on March 18, 2022 shall stand reinstated and the Plaintiff shall be at liberty to proceed with the execution.

DELIVERED AND DATED AT KISUMU ON THIS 12TH DAY OF JUNE 2023

S. OKONG'O

JUDGE

The ruling read through Microsoft Teams Video Conferencing platform in the presence of;

M. Ojuro h/b for Mr Yogo for the Plaintiff

Mr Bwire h/b for Mr Ooko for the Defendant

Ms. J. Omondi-Court Assistant

