Satia v Kemboi & another (Environment & Land Case 14 of 2015) [2023] KEELC 18903 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18903 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 14 OF 2015

FO NYAGAKA, J

JULY 25, 2023

BETWEEN

EMMANUEL SATIA ..... PLAINTIFF

AND

YOHANA KEMBOI ..... 1ST DEFENDANT

HON. ZIPPORAH KITTONY ..... 2ND DEFENDANT

RULING

The Application

1. The 2nd Defendant/Applicant moved this Court vide its application dated 04/05/2023. It was brought under Sections 3A of the *Environment and Land Court Act* and Order 10 Rule 11 of the *Civil Procedure Rules*. It sought the following reliefs:

    a. .... spent.

    b. .... spent

    c. That the judgement entered against the Defendant/Applicants herein on 3rd February, 2022 and all consequential orders be set aside and the suit be heard on its merits.

    d. Cost of this Application be provided for.

2. The Application was supported by the grounds on the face of it and the Supporting Affidavit of Hon. Zipporah Kittony, the 2nd Defendant. The gravamen of the Application was that the Plaintiff's suit proceeded to hearing in their absence and the Court delivered its judgement on 03/02/2022. That despite having on record learned counsel whom the Applicants had instructed to enter appearance and filed defence, no notice of hearing date was ever given to them hence they did not attend court to prosecute their defence.

3. Further, that as a result, the Applicants only came to learn of the existence of the judgement, belatedly, after the Respondent invaded the suit property in an attempt to plough it. In essence the Applicants contended that they were not given an opportunity to be heard and their failure to attend court was caused by the lack of communication from their learned counsel, as they failed to notify them of the date of the hearing. Further, the Defendants raised another ground that they had a meritorious defence which raised triable issues and the ends of justice favoured the grant of the orders sought.

4. In the Supporting Affidavit, besides deponing to the contents of the grounds of the application, the Applicant deponed that she took the oath on her behalf and that of the 1st Defendant. She swore that both had no notice of the hearing date and therefore could not have been present in Court. That their failure to attend Court was as a result of their Advocate not notifying them of the hearing date.

The Response

5. The Application was opposed by way of a Replying Affidavit sworn by the Respondent on 15/05/2023 and a Supplementary one that he swore on 09/06/2023. The Respondent contended that the Application was an outright abuse of the court process, a waste of precious judicial time and had no merit. He added that the contention by the 2nd Defendant that suit was heard "ex parte" and that the Defendants learnt of the judgment belatedly was extreme dishonesty. He argued that throughout the course of the proceedings the Defendants were represented by learned Counsel. That this was evinced by the fact that on 29/06/2017 the 2nd Defendant applied to be enjoined in this suit and vide a consent recorded in it she was enjoined. He annexed to the Affidavit a copy of the Application and marked it as ES1. That equally she filed a defence on 17/7/2017. He annexed and marked as ES2 a copy of the Defence. That even after the Court ordered for a site visit of the suit property by the surveyor, their representative was equally present. He annexed and marked as ES3 a copy of the Surveyor's Report. He further deponed that the Defendants' learned Counsel was duly served with the hearing notice for the hearing which was slated on 15/11/2021 and return of service filed in Court for it to ascertain the fact.

6. He averred that even after judgement was entered, costs of the suit were assessed, the Defendants failed to pay them, the Court issued warrants of attachment and the Applicant's property proclaimed for attachment. That only after did the 2nd Defendant's son fully settle the taxed costs to avoid further execution as against the 2nd Defendant. He annexed and marked as ES4 (a) and (b) copies of the warrants and proclamation.

7. The Plaintiff swore that after the entry of the judgment the Applicant set upon employing dirty tricks by lodging a complaint with the Directorate of Criminal Investigations (DCI) at the Kitale Police Station. It led to the Respondent being summoned by two officers, whose names and mobile contact numbers he gave, to explain his actions. Similarly, on 18/10/2022 the DCI officers once again summoned the Respondent to their offices wherein he was given copies of recorded statements made by the 2nd Defendant and her witnesses regarding the suit parcel of land. He annexed and marked as ES5 (a), (b) and (c) a set of four copies of statements recorded by the 2nd Defendant, one Stephen Masaeki Kiboi dated 17/05/2022, one John Kemboi Mulwa which was undated, and one Rogers Imo Cherokot dated 18/05/2022. He deponed that on the occasions he was summoned to the DCI he explained how he acquired the parcel of land in issue.

8. The Respondent deponed that he had always been in possession of the land. He annexed and marked as ES6 (a) and (b)photographs of maize crops and building materials deposited on the land to evidence the status thereof at the time. He stated further that he took possession of the parcel (Plot No. 957) in 2003. Lastly, he deponed that on the material date the suit came for further hearing the Defendant's learned counsel was duly served, and litigation ought to come to an end.

Supplementary Affidavits

9. In response to the Replying Affidavit, the 2nd Applicant swore a Supplementary Affidavit on 02/06/2023 by which she repeated that the suit was heard ex parte and judgment delivered on 03/02/2023. As for this one she did not depone that she swore it on behalf of the 1st Defendant. She deponed that she was never represented by Ms. Kidiavai & Company Advocates throughout the proceedings. She deponed further that it had been brought to her attention by the current Advocates that on 22/06/2021, 07/10/2021, 28/10/2021, 15/11/2021, 07/12/2021, 16/03/2022, 10/05/2022 and 17/05/2022 her former advocates were neither present nor was she represented or informed of their prolonged absence in court.

10. Her further deposition was that her former learned counsel Ms. Kidiavai & Co. Advocates tried to file a document titled "Notice of Secession to Act" (sic) but which was never served on her and the Court confirmed that it was not a document recognized in law as a procedure for a lawyer ceasing to act for a client. She swore that on 29/10/2021 when the Plaintiff's Advocates served a hearing notice on the former advocates for the hearing of 15/11/2022 they received the notice under protest that they no longer had instructions on behalf of the Defendants. She annexed and marked as HZK 1A and 1B copies of the hearing notice and Affidavit of Service thereof. That when the matter came up for mention for compliance about written submissions the same was neither served nor was an Affidavit of Service filed. Similarly, when the mention of 07/12/2022 was made, only the Plaintiff's learned counsel attended and the matter was fixed for judgment on 03/02/2022 but the judgment notice was never issued nor was an Affidavit of Service filed.

11. The 2nd Applicant deponed that she had no knowledge of what was going on in Court yet all along she believed the law firm of Ms. Kidiavai & Co. Advocates fully represented her. She deponed that the 1st Defendant had never been communicated to as well since he was ill from the year 2021 to June, 2022 which period he was in coma. She annexed and marked HZK 2A - D copies of medical documents and receipts in respect of the said Defendant.

12. She discounted the Plaintiff's deposition that he paid for her flight ticket from Nairobi and she challenged him to prove the fact. She refuted ever paying for any assessed costs as deponed by the Plaintiff. She stated that she had no ill intentions when she lodged a complaint with the DCI in Kitale because to her she had no idea how the Plaintiff trespassed onto her parcel No. 942.

13. In his Supplementary Affidavit sworn on 9/06/2023, the Plaintiff deponed that the Defendants were fully represented by Ms. Kidiavai & Co. Advocates throughout the proceedings and the said counsel was duly served with the hearing notice. That after her goods were proclaimed the 2nd Defendant approached the firm of Ms. Nyachoti & Co. Advocates and she was advised to pay the costs. That on 09/07/2022 when she failed to pay the 1st instalment the Applicant communicated to the said law firm. He annexed and marked as ES1 a copy of the email letter. Subsequent to the email, the 2nd Defendant's son Kiprono Kittony paid the costs through his Mpesa line (given). He stated that the Report to the DCI was made after the 2nd Defendant realized that the matter had been finalized.

Submissions

14. The Applicants filed their written submissions on 05/06/2023 wherein, in summary, they submitted they satisfied the conditions for the grant of stay of execution as required under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. They urged this Honourable court to allow its Notice of Motion as prayed. I will not take time to rehash the submissions herein because, as is it clear from the face of the

Application the issue in it was not about stay of execution but setting aside a judgment. Thus, the Applicant's written submissions were clearly irrelevant.

15. However, in the oral submissions learned counsel made on their behalf he argued that they brought the Application under Order 12 Rule 7 of the *Civil Procedure Rules*. He stated that on 15/11/2021 when the suit was heard the Defendants were represented by the law firm of Ms. Kidiavai & Co. Advocates who had been served with a hearing notice dated 15/10/2021. That learned counsel on record received it under protest on account of the fact that they did not have instructions from the Defendants. That learned counsel should have filed an Application under Order 9 Rule 13 of the *Civil Procedure Rules* to notify the Defendants of the intention to cease acting. When the matter was heard subsequently, the Defendants were unaware of the hearing date.

16. Learned counsel argued that the former law firm should have filed an application to cease acting for the Defendants and since they did not, the Defendants could not be faulted for non-attendance. He argued further that the law firm for the Plaintiffs did not serve the Defendants personally thus the judgement entered was irregular. He argued that the judgment could not meet the prerequisites of Article 50 of the *Constitution* of Kenya.

17. He discounted and doubted the existence on the record of the notice to attach property or the proclamation notice. As a result, he stated that the Defendants moved the Court only immediately upon realizing the existence of the impugned Judgment. Lastly, he stated that land was emotive and the matter should be determined on merits. He stated that the Plaintiff would not be prejudiced if the orders were granted. The Respondents equally filed their written submissions on 05/06/2023. He reiterated the contents of his Replying Affidavit and those in the Supplementary Affidavit. He submitted that the Application was an outright abuse of the court process and a waste of precious judicial time and that if indeed the Applicants were really aggrieved with the judgment of this Honourable court, they would have moved it when the warrants of attachment of property were issued, executed and proclamation done by the auctioneer. They further submitted that the judgement entered was not an ex parte one as purported by the Applicants because the Defendants fully participated in the proceedings and were represented by learned Counsel on all occasions. To further buttress the point, they submitted that the matter was fully heard and witnesses even cross- examined by the Defence Counsel. They urged this Court to find that the instant Application was misconceived and made after inordinate delay.

18. In addition to the written submissions the Respondents argued that the judgment was not an ex parte one. Further, that throughout the proceedings the Defendants were represented from 2015 by the law firm of Ms. Kidaivai & Co. Advocates and that the hearing of 15/11/2021 was a further hearing when a witness was recalled.

19. Learned counsel contended that the advocates on record were duly served and an Affidavit of Service filed. She argued that the protest on the hearing notice did not negate the service. The advocates did not inform the court that they intended to cease acting for the Defendants. Thus, it was neither here nor there that the Plaintiff ought to have served the Defendants. They stated that a Notice to Cease Acting is not a document recognized in law.

20. About the existence of the warrants of attachment, they submitted that due to the fact that the Defendants paid upon being served with them in July, 2022 they could not claim to be unaware of the judgment until May, 2023. They argued that the copies of statements the Defendants filed with the DCI rather than appealing the judgment were proof that they were aware of the judgment.

21. Learned counsel accused the Defendants of being dishonest. They argued that when the Court sent a team for the visit of the land the Defendants sent representatives to the ground. She argued that the

2nd Defendant even asked for her flight ticket from Nairobi to be paid. She then contended that the Applicants were represented throughout the proceedings and should have appealed the judgment if they felt aggrieved with it.

Issues, Analysis And Disposition

22. I have considered the Application, the Affidavits in support, Reply and Supplementary thereto, the law and the submissions by learned counsel on behalf of their respective clients. The Application seeks the setting aside of judgement delivered on 03/02/2022 and all consequential orders to enable the suit to be heard on its merits. I am of the view that two issues lie before me for determination. These are:

    a. Whether the Defendants gave reasonable ground(s) warranting the setting aside of the judgment of delivered on 03/02/2022.

    b. Who pays the costs of the Application?

a.Whether the Defendants gave reasonable ground(s) set aside the judgment of 03/02/2022

23. As a preliminary point, it is worth noting that the instant Application was brought under Order 10 Rule 11 of the *Civil Procedure Rules* which provides for setting aside a judgment entered in default of appearance or defence as opposed to Order 12 Rule 7. Order 12 Rule 7 which provides for the setting aside of a judgment entered on account of non-attendance of a party as is the case herein.

24. I am alive to the position taken by Courts that, in the interest of substantive justice, wrong cited notwithstanding the Court has a duty to consider an application within and as though filed under the correct provision(s) of the law. This is based on the objective interpretative of the substantive justice principle as embedded in Article 159 (2) (d) of the *Constitution*, 2010. The Sub-Article provides-

> "In exercising Judicial authority, courts and tribunal shall be guided by the following principles: Justice shall be administered without undue regard to procedural technicalities."

25. But that provision should not be used to rubbish and disdain the correct position of the law that applications should be brought under the correct provisions. To depart from that would be an indirect way of breeding a society and profession that does not follow the law, it is careless and lazy. As was correctly put by, and I fully agree with, the Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* [2013] eKLR, when it held that;

> "It is not open for parties to pitch tent, for no apparent reason and even on obviously clear situations, at Article 159 (2) (d) of the *Constitution*. We do not consider Article 159 (2) (d) of the *Constitution* to be a panacea, nay, a general white-wash that cures and mends all ills, misdeeds and default of litigation".

26. Additionally, in Mumo Matemu v Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012, a five judge Bench of the same Court held that,

> "In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

27. I have called to light and guidance the two authorities above for the reason that the Applicants relied on irrelevant provisions in bringing the instant Application. They based it on Sections 3A of the *Environment and Land Court Act*, a provision which, with all due respect does not exist in law hence abhorrently pulled as a fast one to the Court, and Order 10 Rule 11 of the *Civil Procedure Rules* which reads as follows, "Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

28. The latter provision calls on the Court to examine the import of the entire Order (10) of the *Civil Procedure Rules* in order for one to think and look back to understand the basis of moving the Court under it. The Order is on "Consequence of Non-Appearance, Default of Defence and Failure to Serve". In essence the provision is invoked only where the Applicant did not enter appearance and file a defence, and the matter proceeds ex parte to the judgment stage or he/she entered appearance but fails to file a Defence and the matter proceeds in his/her absence to judgment.

29. In the instant case, the two Defendants appointed learned counsel who came on record for them. He not only filed Defence on their behalf as instructed but also participated in the hearing of the case at one time when he cross-examined PW1. The hearing that the Applicants complains of having taken place on 15/11/2021 was one where they did not attend for further hearing of the matter and prosecution of their defence. That does not fall within the purview of Order 10. Instead, it should be under Order 12 of the *Civil Procedure Rules*, particularly, Rule 3 thereof which then resulted in a judgment which the Applicants should have applied to set aside under Rule 7.

30. Having said the above, I will treat the citing of the wring provisions as an infraction which, for the sake of the interest of justice, I have to excuse, but certainly not on the basis of continued and future infractions. To this end I therefore proceed to consider the application under Order 12 Rule 7 of the *Civil Procedure Rules*.

31. It is clear from the record that the Defendants filed their amended Defence, and other accompanying pleadings, and participated through her former Counsel - Ms Kidiavai & Company Advocates in the hearing of the Plaintiff's case on 7/3/2018 wherein they even cross-examined PW1. Further hearing took place on 15/11/2021 when the Plaintiff's case was closed upon the testimony of PW2 being taken. The Defendants testimony was not taken due to their failure to attend court on the material date, though her learned counsel was duly served. The Court prepared judgement and delivered it on the 03/02/2022.

32. As such, the Defendants seek to set aside the said judgement, so as to allow them to present their evidence. The Defendants blame the predicament they find themselves in on the lack of service of the notice of hearing and turn to the fact of learned Counsel failing to notify them of the hearing date.

33. If the Applicant's allegations are true to the extent they state, then Order 12 of the *Civil Procedure Rules* addresses this scenario. In particular, Order 12 Rule 2 (a), provides that;

> " If on the day fixed for hearing, after the suit has been called out for hearing outside the court, only the Plaintiff attends, if the court is satisfied-
>
> a. that notice of hearing was duly served, it may proceed ex parte."

34. The above provision is the one applicable herein because they did not attend Court, the matter was called out and neither did their representative attend the hearing. Then in a bit to remedy the situation

that may be deemed aggrieving to the Defendant who fails to attend Court and Order 12 Rule 7 of the *Civil Procedure Rules* kicks in to provide 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."

35. As is clear from the provision, there are no specific reasons that ought to be given by a party who moves the Court to intervene in such a situation so as to be availed of the prayer of setting aside. It is left to the discretion of the Court and that is why the term "may" which is permissive has been used in the provision. All that the Court has to do is, in balancing the interests of justice, to impose such terms as are just in the circumstances of the case. Thus, each case has to be treated on its own merits. But as the law, the discretion though wide has to be exercised judiciously.

36. Again, the purpose of the discretion is to further the ends of justice. In *John Mukuha Mburu v Charles Mwenga Mburu* (2019) eKLR wherein the case of *Shah v Mbogo* (1979) EA 116 was cited, it held that the discretion is very wide. The Court also stated thus:

> " .....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

37. Thus, in *Patel v E.A. Cargo Handling Services Limited* (1974) EA 75, cited with approval in the case of *Stephen Wanyee Roki v K-Rep Bank Limited & 2 others* (2018) eKLR the Court held as follows:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, 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 condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

38. In the case of *Esther Wamaitha Njihia & 2 others v Safaricom Limited* [2014] eKLR, the learned Judge, citing the case of *Stephen Ndichu v Monty's Wines and Spirits Ltd* [2006] eKLR, held as follows:

> " The principles governing the exercise of judicial discretion to set aside ex-parte Judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See *Patel v EA Cargo Handling Services Ltd* [1974] EA 75). The 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 cause of justice (See *Shah v Mbogo* [1969] EA 116). The nature of the action should be considered, the Defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration v Gasyali* [1968] E. Way. 300). It also goes without saying that the reason for failure to attend should be considered."

39. Consequently, the question this Honourable Court is supposed to answer as it determines the instant Application is whether the Defendants have given justifiable grounds to warrant the exercise of its discretion in their favour.

40. In this instant case, whereas the Applicants gave at first a wrong impression that the suit was heard ex parte, the record shows, as was summarized above, that the Defendants filed a Defence and later amended it and the suit was part-heard as at the date when the Defendants did not attend Court. At first, they claimed that they were not represented by any advocates. But the Court record bears that the firm of Ms. Kidiavai & Company Advocates represented them all through until after judgment. The said law firm took over the instructions on behalf of the 1st Defendant from Ms. Okile & Company Advocates who had taken over the matter on his behalf from Ms. Simiyu Wafula & Company Advocates on 03/06/2015 and filed his Defence on 12/04/2016.

41. On 29/06/2017 through the law firm of Ms. Kidiavai & Company the 2nd Defendant applied to be enjoined as such. On 17/07/2019 the application was allowed by consent of the parties thereby enjoining the 2nd Defendant, and on 21/07/2017 the Plaintiff amended his Plaint in accordance with the orders of the Court. On 18/09/2017 the 1st Defendant instructed Ms. Kidiavai & Co. Advocates to take over the defence from Ms. Okile & Co. Advocates. They filed a Notice of Change of Advocates and an Amended Defence the same date and from then on, they represented the Defendants up to after judgment when the current Advocates took over the conduct of the Defence from them. In terms of Order 9 Rule 1 Civil Procedure Rules, the Defendants having appointed the said law firm to act for them they cannot claim otherwise as long as the said Advocates were on record.

42. The record further bears that the hearing notice was served upon the Defendants' Advocates. They protested that they did not have instructions. They did not attend Court after that. The Defendant's argued that the Advocates' failure to attend Court on their behalf made them disadvantaged in terms of them not being given an opportunity to present a good defence. Further, they argued that the said Advocates did not serve them with a hearing notice hence their failure to attend Court was a mistake of Advocates and not their own hence they should not be punished for the lawyer's mistakes.

43. The record shows that after the judgment was duly entered, the Plaintiff's Advocate drew a party and party Bill of Costs. It was filed and fixed for taxation on 10/05/2022 when it was adjourned to 17/05/2022. On that date it was argued in the presence of both learned counsel for the parties and fixed for ruling on 31/05/2022. Further, it was sworn by the Respondent that after the taxation of the party and party costs, he commenced execution. Ms. Igare Auctioneers proclaimed the goods of the Defendants.

44. In a bid to forestall the execution, the 2nd Defendant's son, one Kiprono Kittony paid the sum of Kshs. 100,300/= as a settlement of the taxed costs. This was evidenced by the Mpesa Statement of the Auctioneer which was annexed to the Supplementary Affidavit of Emmanuel Satia sworn on 9/06/2023. This was not refuted by the Applicants.

45. Two points come out strongly from the contention by the Applicants and their conduct after the judgment was entered into. These are that their participation in the taxation process shows clearly that they were aware of the judgment and accepted its terms. They cannot now turn to challenge it even after partly complying with the decree. Secondly, there was no evidence at all by way of an Affidavit by the previous Advocates on record that indeed they did not inform the Applicants of their hearing notice or that they failed in their professional duty to update the clients about the hearing date. Such serious allegation ought to have been backed by an Affidavit by learned counsel. Gone are and should be the days when clients pitched tent, without backing it with evidence, in the argument that their

learned counsel failed to carry out their duty. If indeed learned counsel fails to perform his duty it is not a mistake that should be used to the prejudice of the innocent party.

46. In regard to failure to attend Court as a reason for setting aside a judgment, *Wachira Karani v Bildad Wachira* [2016] eKLR the Court defined sufficient cause therein as follows: -

> " The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

47. In instant case, there is no reasonable explanation given by the Defendants as to why they failed to attend court to defend the suit. They cannot feign ignorance of the fact that the suit was for hearing on the material date.

48. The Applicants, in the Supplementary Affidavit sworn by the 2nd Defendant on 2/06/2023, deponed and contended that the 1st Defendant was not served with the hearing notice as he was very ill from the year 2021 to June, 2022 when he was in coma. She annexed and marked as HZK-2A, 2B, 2C and 2D copies of medical records of the alleged illness. I analyzed with anxiety the said documents since they intended to bring out an important point about the reason for failure to communicate with learned counsel. First, document HZK-2A was a copy of full hemogram Report on John Kemboi. It was issued by Cherangany Hospital on 07/06/2022 at 9:15 AM. Second, annexture HZK-2B were copies of receipts purported to be issued 07/06/2022 (three of them bore this date) and 09/06/2022 (two of them bore this date). Third, annexture HZK-2C is CT Scan Receipt issued by the Perazim Diagnostic Centre on 06/06/2022. Fourth, annexture HZK-2D is a copy of an Ultra Sound Report issued by the said Diagnostic Centre on 06/06/2022.

49. As is clear from the documents above, all the dates they related to were between 06/06/2022 and 09/06/2022. With all due respect there is no medical evidence to show that the said John Kemboi was ill from the year 2021 and how that illness could have prevented him from following up his case with the lawyers. Even so, the deponent did not give a reason for her failure to follow up the case with the advocates, if indeed the 1st Defendant was bed-ridden during the time. I find that the records are a mere device aimed at confusing the Court about the communication required of both counsel and clients.

50. In any event they have not demonstrated to this Court that they were diligent in following up their matter with their Advocates before the material date, if at all they could be heard to say that their lawyers failed them. Had they been diligent they ought to have known the times and requirements when the matter was in Court. In *Bi-Mach Engineers Ltd v James Kahoro Mwangi* (2011) eKLR, the Court stated a client's duties vis-a vis his learned Counsel, and I am prepared to and I agree with the decision. It stated that:

> " The applicant had a duty to pursue his advocate to find out the position of the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocate. It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter."

51. Moreover, the Applicants moved the Court to set aside the judgment and therefore the entire proceedings whereas they were aggrieved with the decision of the Court to proceed on 15/11/2021.

It is the humble view of this Court that for the Applicants to use the proceedings of the said date to set aside the entire proceedings of the case including wherein their ably and actively participated is malicious, mischievous and an abuse of the process of the Court and this Court cannot be hoodwinked into doing that.

52. The upshot of the foregoing is that the Court finds that the Notice of Motion dated 03/05/2023 is not merited.

b. Who pays the costs of the Application?

53. It clear that the instant Application has failed. Since costs follow the event, the Applicants will bear the costs of the Application.

54. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS DAY 25TH DAY OF JULY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE