REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 140 OF 2008

GIDEON MOSE ONCHWATI.....PLAINTIFF/RESPONDENT

VERSUS

KENYA OIL CO. LTD.....1ST DEFENDANT/APPLICANT

NATION MEDIA GROUP….....2ND DEFENDANT

RULING ON REVIEW AND SETTING ASIDE JUDGMENT

1. On 2nd July 2015, this court delivered a judgment in favour of the plaintiff/respondent herein Gideon Mose Onchwati against the defendants Kenya oil Company Ltd and Nation Media Group Ltd, jointly and severally, for the defamation of character (libel) and awarded him kshs 15,500.000 general damages inclusive of exemplary damages and damages in lieu of an apology. The plaintiff was also awarded costs of the suit and interest.

2. In the same judgment, the court dismissed the counterclaim filed by the 1st defendant against the plaintiff, with costs.

3. The judgment followed a full trial/hearing which commenced on 16th December 2014 in the presence of the 2nd defendant's counsels Mr Mogere jointly appearing with Mr Angwenyi. The 1st defendant's counsel had been served. It was represented by R.H. Wanga and Company Advocates. The case proceeded to hearing after 12.00 pm upon the court satisfying itself that the 1st defendant's counsel had been served for the hearing on 9th May 2014 but there was no representation in court.

4. The plaintiff testified, represented by Mrs Madahana Advocate, he produced exhibits, was cross examined by Mr Mogere and closed his case after which the 2nd defendant's counsel Mr Mogere also closed his client's case, indicating to court that his client had no evidence to offer in the case.

5. The court then noted that as the 1st defendant's counsel was served with the hearing notice for that day and had failed to attend court, their case was marked as closed since they had not tendered any evidence in defence.

6. The plaintiff's and the 2nd defendant's counsels were then directed to file and exchange written submissions and all parties advocates appeared on 9thFebruary 2015 to confirm compliance.

7. On the latter date, Mr Gitaka advocate holding brief for Mr Wanga for the 1st defendant attended court and asked the court to allow them more time to file their client's submissions. The court granted

the 1st defendant's counsel 7 days to file and serve their written submissions and also directed that they pay shs 3,000 court adjournment fees and attendance costs for the plaintiff and the 2nd defendants.

8. The court slated the matter for mention on 3rd March 2015 to confirm compliance. Come 3rd March 2015 and all parties counsels attended court with Mr Nduati holding brief for Mr Wanga for the 1st defendant. He intimated to court that Mr Wanga was in the process of filing his submissions, while requesting that the file be placed aside which the court acceded to. Shortly thereafter, the 1st defendant's written submissions were availed to court and evidence of payment of court adjournment fees exhibited. As the court diary was already full, the court fixed the matter for mention on 30th April 2015 to fix a judgment date.

9. On 30th April 2015, all parties were represented in court with the 1st defendant being represented by Mr Karogo holding brief for Mr Wanga and the court set the judgment date for 2nd July 2015 at 2.30 pm.

10. On 2nd July 2015 at 2.30 pm, the court dutifully delivered the judgment to the parties in open court but on that day, the 1st defendant was not represented in court.

11. On 5th August 2015 which was one month and three days after the delivery of judgment on 2nd July 2015, the 1st defendant filed a notice of motion dated 4th August 2015 under certificate of urgency seeking for temporary stay of execution of the judgment of 2nd July 2015 and any subsequent proceedings; Review and or setting aside of the judgment entered against the 1st defendant on 2nd July 2015 pending hearing and final determination of the application interpartes; Reopening of the plaintiff's case for denovo hearing on priority basis and to grant the 1st defendant an opportunity to participate in the trial by defending the suit and prosecuting its counter claim; Costs.

12. The grounds upon which that application is premised are that the 1st defendant only learnt of the said judgment through the Standard Newspaper of 22nd July 2015 and that it did not participate in the trial owing to a failure on the part of its previous advocates to inform them about the hearing date; That the 1st defendant had filed all its pleadings and was keen on defending the suit as well as prosecuting its counterclaim; That the 1st defendant shall suffer if the application is rejected as the right to defend the suit and prosecute its counterclaim will be prejudiced occasioning it irreparable harm, driving it away from the seat of justice, denying it an opportunity to be heard; condemning it unheard contrary to the dictates of natural justice and that the plaintiff was about to execute decree which would subject the 1st defendant to hardship and irreparable loss and damage; That the 1st defendant's failure to participate at the trial is excusable and the court should exercise its discretion by granting the applicant an opportunity to defend the action; That the 1st defendant has a good defence and counter claim and should be given an opportunity to defend the suit; That there is a good and sufficient cause for the setting aside of the judgment and or review the same together with all other consequential orders; That the application was made diligently and without unreasonable delay in light of the circumstances of the case; That no prejudice would be occasioned to the plaintiff if the orders sought are granted; That it is in the interest of justice and fairness that the judgment and all other consequential orders are set aside and or reviewed.

13. The grounds are further supported by the affidavit of Olympia Kuindwa, the Legal Services Manager of the 1st defendant Kenya Oil Company Ltd reiterating the grounds as reproduced herein above, which affidavit annexed an extract of a newspaper report in the Standard Newspaper for 22nd July 2015 on page 6 headed **"Kenol Kobil" Nation to pay shs 51 million for defamation.**

14. The matter was initially placed before Honourable Mbogholi J the Presiding Judge of the Civil Division during the vacation in Mombasa. The learned judge certified the matter as urgent and granted a temporary stay of execution pending interpartes hearing and final determination of the application. The application was then served on all the other parties.

15. The plaintiff filed a replying affidavit on 17th September 2015 sworn by Gideon Mose Onchwati

on 16th September 2015 opposing the 1st defendant's motion and contending that contrary to the affidavit of Olympia Kuindwa in paragraph 1, the plaintiff had not authorized the said deponent to swear that affidavit; That there was no denial that a hearing notice was served on the 1st defendant counsel; That the suit had been in court for 8 years yet there was no effort by the 1st defendant to find out its progress hence it was not being candid; That the 1st defendant did not file any documents or statements of witnesses to support their claim that they have a good defence and or their readiness to prosecute their counterclaim and defend the suit; That the alleged recklessness or negligence by the 1st defendant's counsel can be addressed through the disciplinary process of the Law Society of Kenya and a separate suit for damages filed; That the 1st defendant's counsel's alleged negligence should not be visited on the plaintiff as litigation must come to an end; That the plaintiff's reputation and name continues to suffer/being tarnished yet the 1st defendant was only interested in wading off the monetary aspect of the judgment; and that the application was meant to delay the disposal of the suit and an abuse of the court process.

16. The 2nd defendant Nation Media Group who had initially intimated that they were appealing against the judgment of 2nd July 2015 as per their letter to court of 31st July 2015 requesting for typed copies of proceedings and judgment ,filed a replying affidavit on 6th November 2015 sworn by Sekou Owino its legal officer supporting the 1st defendant applicant's application and asserting that only the 1st defendant had the facts that would have assisted the court in justly determining the dispute because the 1st defendant in a bid to trace the plaintiff caused the 2nd defendant to publish the said public notice subject of the defamation proceedings; That as the 1st defendant did not participate in the hearing; the court was deprived of all facts leading up to the publication of the public notice; That the 1st defendant should not suffer for mistakes of the previous advocates who did not notify them of the hearing date especially where consequences are grave as in this case; That had the 1st defendant led evidence, it would have demonstrated that the public notice was not defamatory and therefore it should be accorded a fair trial by setting aside the judgment and the suit reopened *denovo* as no prejudice will be suffered by the plaintiff and that it is in the interest of justice that the application be allowed.

17. The plaintiff also filed a replying affidavit to the affidavit of Sekou Owino contending that the latter had not shown authority to swear the affidavit. Further, that the 2nd defendant who had acted independently in the matter was now trying to shift liability to the 1st defendant/applicant.

18. The plaintiff also maintained that in any event the 1st defendant's counsel attended court and participated in the proceedings by filing written submissions after being granted more time by the court to file the written submissions.

19. That the 2nd defendant is abusing court process by going beyond what the 1st defendant has alleged yet it never sought for indemnity against the 1st defendant; that the defendants are hell bent to delay the case and prejudice the plaintiff yet the 2nd defendant had even filed notice of appeal and sought for typed proceedings for appeal purposes on 10th July 2015.

20. On 8th February 2016 the plaintiff's counsel also filed grounds of opposition to the motion by the 1st defendant contending that the application is bad in law for want of authorization, ambiguity, has no merit, abuse of court process and is meant to delay and /or otherwise delay the disposal of the suit. Decree in this matter was issued on 5th April 2016.

21. The 1st defendant/applicant filed a supplementary affidavit on 16th May 2016 but the record does not show that leave of court was ever sought or obtained to file any further or supplementary affidavit, which affidavit annexes the authority to swear affidavit given to Olympia Kuindwa Kiplagat by the 1st defendant/applicant. The authority is dated 4th August 2015.

22. I had the privilege of hearing and determining the suit herein and the judgment which is sought to be reviewed and or set aside was therefore written and delivered by myself in the Civil Division of the High Court before I was deployed to the Judicial Review Division of the High Court. The matter was mentioned before Honourable Thuranira J and parties agreed to dispose of the application by way of

written submissions but they raised the issue of jurisdiction to review the judgment and as a result, the file was placed before Mbogholi J who directed that the file be placed before me to hear and determine the application which I hereby gladly do.

23. The 1st defendant filed its submissions on 11th November 2016; the plaintiff filed on 7th November 2016 and reply submissions on 14th November 2016 while the 2nd defendant filed its submissions on 27th January 2017. I also directed all parties to send their submissions in soft copy formats which they dutifully did.

THE IST DEFENDANT/APPLICANT'S SUBMISSIONS

24. The 1st Defendant/Applicant made submissions based on the following provisions:

a. Section 3A of the Civil Procedure Act which provides that:

> ***"Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."***

b. Order 12 Rule 7 of the Civil Procedure Rules 2010 which provides that:

> ***"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."***

c. Order 45 of the Civil Procedure Rules, 2010 which provides as follows:

1. Any person considering himself aggrieved-

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.

25. **The applicant relied on MULLA,** ***The Code of Civil Procedure*** on the grounds for setting aside an *ex parte* decree and what constitutes ***sufficient cause*** for setting aside an *ex parte* judgment/decree.

26. According to the applicant, setting aside an *ex parte* judgment is a matter of the discretion of the court, as was held in the case of ***Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd*** where the court citing relevant cases on the issue held *inter alia*:-

> ***''The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). 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 vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."***

27. It was further submitted that in the case of ***Shah vs Mbogo and Ongom vs Owota*** the court held that

for such Orders to issue *inter alia* the court must be satisfied about one of the two things namely:-

> ***a. either that the defendant was not properly served with summons; or***
>
> ***b. that the defendant failed to appear in court at the hearing due to sufficient cause.***

28. It was submitted that in the latter case, the court defined what constitutes *sufficient cause* and in this respect it stated thus:-

> ***"Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.***
>
> ***Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions."***

29. It was submitted that this finding was stated with authority by **Hon. J.M. Mativo in Nyeri HCCC 101 of 2011 Wachira Karani Vs. Bildad Wachira.**

30. Reliance was also placed on the decision of Court of Appeal of Tanzania in the case of ***The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others*** discussing what constitutes ***sufficient cause*** had this to say:-

> ***"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant."***

31. The applicant further relied on the case of ***Daphene Parry vs Murray Alexander Carson*** *where the court* had the following to say:-

> ***'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, ..."***

32. Further reliance was placed on the decision by **Justice Adoyo** of the High Court of Uganda in ***Transafrica Assurance Co Ltd vs Lincoln Mujuni*** *wherein the learned judge* stated:-

> ***"The rationale for this rule lies largely on the premise that an ex parte judgment is not a judgment on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing."***

33. The applicant emphasized that the well-established principles of setting aside interlocutory judgments were laid out in the case of ***Patel vs East Africa Cargo Handling Service*** where **Duffus,V.P.** stated;

> ***"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 is 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 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."

34. In this matter, it was submitted that the discretion of the court in setting aside its Judgment of 2nd July, 2015 is not disputed. That such discretion is founded in law under Order 12 Rule 7 of the Civil Procedure Rules. That what is contested is whether the Applicant had demonstrated ***'sufficient cause'*** to warrant the exercise of the court's discretion in its favour. Counsel relied on the Supreme Court of India case of ***Parimal vs Veena*** *which attempted to describe what was* ***"Sufficient cause"*** when it observed that:-

*"**Sufficient cause**" is an expression which has been used in large number of statutes. The meaning of the word "**sufficient**" is "**adequate**" or "**enough**", in as much as may be necessary to answer the purpose intended. Therefore the word "**sufficient**" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "**sufficient cause**" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "**not acting diligently**" or "**remaining inactive.**" However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

35. It was submitted that the court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it.

36. It was submitted by the applicant's counsel that the test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. That 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 strait-jacket formula of universal application. Therefore, that the defendant must demonstrate that he was prevented from attending court by a sufficient cause.

37. In the present suit, it was submitted that the Applicant had offered a candid and frank explanation as to why they did not participate in the trial despite having filed all its pleadings. That it was keen on defending the suit as well as prosecuting its Counter Claim and had complied with all pre-trial requirements but owing to a failure on the part of its previous advocates to inform them about the Hearing date, they lost the opportunity to do so. That they only learnt of the said Judgment through the Standard Newspaper of 22nd July, 2015.

38. It was submitted that the Applicant's former Advocates were served with the instant Application but chose not to respond and/or attend Court and that an Affidavit of Service to this effect was filed on **8th September, 2015.**

39. It was therefore submitted that it was as a result of the Applicant's former advocates conduct that the Applicant lost an opportunity to defend the suit and prosecute its counter-claim. Further, that it was as a result of this inexcusable conduct by its former counsel that drove the applicant away from the seat of justice as it was condemned unheard. Reliance was placed on the court of appeal decision in the case of ***Richard Ncharpi Leiyangu vs IEBC & 2 others*** *where it was stated:-*

"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice…

…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. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"

40. The applicant's counsel also relied on ***CMC Holdings Ltd vs James Mumo Nzioka,*** *where the Court of Appeal held inter alia:-*

"The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"

41. Further reliance was placed on the Court of Appeal decision in ***Wenendeya vs Gaboi*** in reinstating an appeal that had earlier been dismissed for non-attendance, stating that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights. it was submitted that the reason offered by the Applicant is valid and excusable and that therefore this court should hold that it would be unjust and indeed a miscarriage of justice to deny the Applicant, which has expressed the desire to be heard, the opportunity of defending this suit and prosecuting its Counter Claim.

42. It was submitted that the fundamental duty of the court is to do justice between the parties and that in fulfilling this fundamental duty, parties should each be allowed a proper opportunity to put their cases forward and have the same determined on merit. That it is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a party against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting its case.

43. That if this principle be not observed, the party affected is entitled, *ex debito justiciae,* to have any determination which affects it set aside. it was submitted that the instant application was made diligently and without unreasonable delay in light of the circumstances of this case. That Judgment was delivered on 2.7.2015. The Applicant learnt of it through a daily newspaper on 22nd July, 2015 albeit having been misreported. It then sought to find out the status of the matter from its then Advocates before moving with haste to file the instant Application on 5th August, 2016.

44. The 1st defendant Applicant submitted that as a result of its former advocate's conduct of failing to inform it of the hearing date, it lost its opportunity to tender evidence on both its Defence and Counter claim **filed on 7th May, 2009** which raised triable issues, as observed by the court in its Judgment of 2nd July, 2015 (p.34), that ***'a mere Defence without evidence to support the action taken is nothing.'***

45. It was submitted that for all intents and purposes, without the Applicant adducing evidence in support of its position, the Plaintiff's suit was undefended and proceeded *exparte* against the Applicant. Reliance was placed on the case of **Maina & Muriuki HCCC. No. 1079 of 1980** where Justice O'Kubasu (as he then was) held that on *exparte* proceedings the Court is vested with wide discretion to set aside an *exparte* judgment on such terms as are just and it must be satisfied that there is a valid defence.

46. Further, that in the case of **Shabir Din vs. Prakash Anand (1955) 22 EACA**, the Court held that a litigant should not be punished for the Advocate's faults.

47. It was thus submitted that the above decisions were cited with authority by Lady Justice Joyce Aluoch (as she then was) in **HCCC No. 313 of 2000 Mwaniki & 2 others *vs* Gicheha & 3 others. It was further submitted that t**he 1st Defendant in its Statement of Defence and Counter claim, **filed on 7th May, 2009** had stated that the publications that were the subject of this suit were factual, truthful and for these reasons, they were justified. That the Applicant further stated that the publications amounted to **qualified privilege** as they were fair, accurate and published without malice as they were made by the Applicant in their capacity as the Plaintiff's employer. Further, that the Applicant had pleaded that it

made those publications from a sense of duty owed to its clients, trading partners and business associates.

48. From the foregoing it was submitted that that the Applicant's Statement of Defence and Counter claim raised triable issues. Further, that the Applicant's Counter Claim of **USD. 1,690,623** was based on particulars of fraud made out against the Plaintiff, and which could only have been proven at the Hearing, and which the Applicant remains keen on pursuing.

49. Counsel for the applicant submitted that it is not in dispute that the conduct of the 1st Defendant's former advocates boarders on professional misconduct and/or negligence. However, the suggestion by the Plaintiff/Respondent that they ought to pursue the Applicant's former lawyers with a complaint for professional negligence would not cure the injustice that saw the case determined without them tendering evidence at the trial.

50. That after learning of this Judgment through the Standard newspaper of 22nd July, 2015, despite it having been misreported, the Applicant moved with haste and filed the instant Application on 5th August, 2015 through different advocates, who also filed an application seeking leave to come on record as Advocates for the Applicant filed simultaneously with the instant application.

51. It was concluded that **f**rom the foregoing the reason offered by the Applicant in not participating in the hearing is valid and excusable. the applicant's counsel urged the Court to hold that it would be unjust and indeed a miscarriage of justice to deny the Applicant, which has expressed the desire to be heard, the opportunity of defending this suit and prosecuting its Counter Claim. The court was urged to allow the application as prayed.

THE 2ND DEFENDANT'S SUBMISSIONS

52. According to the second defendant, the 1st Defendant's motion of 4th August, 2015 seeks to have the Plaintiff's case re-opened in order to give the 1st Defendant an opportunity to defend the suit and prosecute its counterclaim.

53. The 2nd defendant supported the 1st defendant's motion seeking to reopen the case contending that the 1st Defendant did not participate in the trial, but it that was not their fault. That the blame lay with their former advocates who failed to inform them of the trial and this had grave consequence on both them and the 2nd Defendant. The 2nd defendant submitted that the mistake of an advocate should not be visited on their client, especially not where stakes are as high as in the present case.

54. The second defendant submitted that this was a dispute between an employee and employer, the Plaintiff and the 1st Defendant who were the principal protagonists in the dispute, but that only one of them participated in the trial – the Plaintiff. That the plaintiff gave his side of the story and it was unchallenged. That the 2nd Defendant could not adequately challenge it. That they did not know what transpired behind the scenes. That they could only explain why they were justified to publish the notice but that the 2nd defendant could not explain the genesis of the dispute, which information lay with the 1st Defendant.

55. It was submitted on behalf of the 2nd defendant that there was further prejudice suffered by the 2nd Defendant as a result of the lack of participation by the 1st Defendant in the proceedings. That without all parties, the Court was unable to obtain sufficient evidence on the role played by each party in the publication of the notice and that as a result of this, the Defendants were held jointly and severally liable for the publication.

56. It was submitted that were the Court to hear the other side then it would become clear why the position of the 2nd Defendant, a party who merely published the notion, was very different to that one of the 1st Defendant.

57. It was further submitted that:

For instance, the Court imputed malice from the fact that the notice was published in 3 different publications. That this element of malice and its consequences was imposed on the 2nd Defendant, yet it was only the 1st Defendant who caused the notice to be published in 3 publications. That only the 1st defendant could explain why this was done.

58. In the present case, it was submitted that justice will only be done if the evidence of all parties is taken and considered before a decision is made by the Court. That there was a mistake made by the 1st Defendant's former advocates, but that it is a mistake that can be remedied by the appropriate award of damages. Reliance was placed on **Philip Chemwolo & Anor. Vs Augustine Kubende (1982 – 88) KAR 103** where Apaloo JA rendered himself thus,

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that 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 rights of the parties and not for the purpose of imposing discipline."***

59. It was submitted that there has been no allegation of fraud on the part of the 1st Defendant made by the Plaintiff in his Replying Affidavit. That there is also no indication that the motion before this Court is an attempt by the Plaintiff to overreach. That it is a genuine attempt to bring the full facts of this case to the attention of the Court.

60. Further, it was submitted that any inconvenience caused to the Plaintiff can be remedied by a payment of costs, as this inconvenience bares no comparison to that which would be suffered by the Defendants if there is evidence that demonstrates the notice was not false but justified.

61. The 2nd defendant further submitted that there exists a legal means to remedy the mistake of the 1st Defendant's former advocates, and that they are aware that it would cause great inconvenience to the Court and to the Plaintiff, but that the greater evil would be to cause a possibly unjust judgment to remain in the record of the Court.

62. In light of the foregoing, the 2nd defendant urged the court to allow the motion of 4th August, 2015.

THE PLAINTIFF/RESPONDENT'S SUBMISSIONS

63. The plaintiff's counsel submitted urging the court to determine the following issues:

> **a. Whether this Honourable Court has Jurisdiction to hear and determine the present Application for review under Order 45 Rule 1 of the Civil Procedure Rules?**

64. On the above issue, it was submitted that courts have held many times that Jurisdiction is everything and without it the Court has no power to make any further step and must down its tools. **(See the Owners of the Motor Vessel Lilian 'S' vs. Caltex Kenya Ltd (1989) KLR 1), Nyarangi J. held as follows;**

> ***"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decided the issue right away on the material before it"***

65. That in order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the ***Civil Procedure Rules***, certain requirements must be met. The said provision provides as follows:

"(1) Any person considering himself aggrieved—

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b.----------

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

66. The plaintiff's counsel further submitted that Section 80 of the Civil Procedure Act states that a review Application should be made to the same court that passed or made the Order/Decree and the court may make such Order as it thinks fit. And O.45 r. provides such review shall be handled by the Judge who heard the matter unless the Judge is not attached to the Station

[Order 45, rule 2.] To whom applications for review may be made. 2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

67. The Plaintiff/Respondent contended that this Honourable Court lacks Jurisdiction to entertain this Application for review given that the judge who heard and determined the suit was still in the same station. Reliance was placed on **Francis Origo & Anor vs. Jacob Kumali Mungalia [2000] Eklr**, where the court observed,

"A review should normally, under the Relevant rules, go before the judge whose judgment or order is to be reviewed. However, where such a judge is no longer attached to the Court the review maybe heard by any other judge attached to the court at the time it is called up for hearing…"

68. It was submitted that the application before the Court was in any event untenable, even if the court had jurisdiction to hear it because, firstly, prayer 2 of the application which states;

***THAT** this Honorable Court be and is hereby pleased to review and/or set aside the Judgment entered against the 1st Defendant/Applicant herein on 2nd July, 2015 pending the hearing and final determination of this Application.*

69. That this prayer is interlocutory in that it expresses itself as being contingent to the hearing and final determination of the Application. That i**t is not a substantive prayer to set aside and /or set aside the judgment**. That setting aside and or reviewing a Judgments a substantive application in and of itself and cannot be dealt with as an interlocutory prayer. Secondly that the jurisdiction of the court under the Order 45 of the Civil Procedure Rules is restricted to the grounds set out in the said order which are well

outlined in Rule 1 thus:-

> ***Discovery of new and important matter or evidence which,*** *after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made* ***or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

70. **That the Applicant is enjoined to satisfy any of the three grounds of (a)*Discovery of new and important matter or evidence (b)some mistake or error apparent on the face of the record(c)other sufficient reason***

71. That the Applicant /2nd Defendant made no attempt to show by its grounds or Supporting Affidavit any of these grounds***. Reliance was placed on Mulla*** **on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726,** where it is stated thus:

> ***"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."***

72. On **account of some mistake or error apparent on the face of the record**, it was submitted that in **Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002,** the Court held that:

> " ***a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an*** *elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. "*

73. Or **for any other sufficient reason**, it was submitted that the phrase, "sufficient cause" was stated in the Supreme Court of India in the case of ***Parimal vs. Veena*** which was quoted with approval in the case of **Auto Selection (K) Ltd & 2 Ors vs. John Namasaka Famba (2016) eKLR** as being ;-

> ***"Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word, "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which then the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of the case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive". However, the facts and circumstances of each must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously"***

74. That 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. Thus, that an Applicant must demonstrate that he was prevented from taking the steps in question by a sufficient cause, as expressed by Mativo. J in **Auto Selection (K)**

Ltd & 2 Ors vs. John Namasaka Famba (2016) eKLR.

75. Consequently, the Respondent/Plaintiff's counsel submitted that the Applicant/1st Defendant has not satisfied/ met the conditions requisite for a review application to be successful as per Order 45 rule 1 and that this Honourable Court has no reason to exercise its' discretion in favour of the Applicant.

76. On the alternative ground of setting aside; it was submitted that the grounds given are with due respect inadequate to enable the Court exercise its' Jurisdiction. That it is worth noting that this was a Defamation suit that was finally heard and determined after 9 (Nine) long years of non-co-operation by the 1st Defendant/Applicant despite being served with the hearing notices and failure to appear in Court during the trial. That the Court record states that on 30th November 2011 before Mwera J, **"1ST defendant stated: we shall not be adducing evidence."**

77. That in this case, No witness statements or documents were filed in proof of the serious claim made against the Plaintiff's reputation and the equally serious Counterclaim.

78. That on the day of hearing despite service the Applicant/1st Defendant did not attend and that despite being served with submissions and appeared on 9th of February 2015 through its counsel, it asked for time to file submissions which it did on 3rd of March 2015 following which judgment was given. Therefore it was submitted that the Applicant thus fully participated in the trial. That there must be an end to litigation and that the Applicant/Respondent cannot eat and also keep its cake. Reliance was placed on the Court of Appeal decision by **Musinga JA** in **Equity Bank vs. West Link MBO Limited,** wherein it was held:

> ***"Courts of law exist to administer justice and in so doing they must balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met"***

79. It was submitted that the Applicant is abusing the Court process to vex the Plaintiff and put him to expense. That the Plaintiff is being gravely prejudiced by the Applicant/Defendant and that there was a need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice. That the court is not powerless to grant relief, when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit more so to stall the dilatory tactics adopted in the process of hearing a suit, and to do real and substantial justice to the parties to the suit.

80. The plaintiff's counsel submitted that the record of the court will show that the Application under consideration being brought under certificate of Urgency has not been prosecuted by the Applicant who has been enjoying *exparte* stay orders to the detriment of the Plaintiff.

81. That the delay has been deliberate and that the Plaintiff has had to pay the court adjournment fees payable by the Applicant in order to move this application and that even the submissions have not been made by the Applicant forcing the Plaintiff/Respondent to file theirs first hence the Applicant has not come to the Court with Clean hands and does not deserve the Court's sympathy. Reliance was placed on the Court of Appeal decision in the case of **Richard Nchapai Leiyangu vs. IEBC & 2 Ors**, where the Court expressed itself as follows:-

> ***"we agree with the noble principles which goes further to establish that the court's discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."***

82. Thirdly it was submitted that it was evident that the Applicant's citing **Sections 1A & 3A** of the Civil Procedure Act, which provide the Overriding Objectives of the Act, commonly known as the Oxygen principle will not avail to have prayer 3 of the motion in **that Section 1A** of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya.

Consequently, Order 12 Rule 2 which provides on Hearing and Consequence of Non-attendance regards that where **only** the Plaintiff attends, and the court is satisfied that the Notice of Hearing was duly served, it may proceed ex parte; thus it is the discretion of the court to proceed ex parte.

83. In the present suit, it was submitted that the Applicant deliberately failed to attend the hearing and prosecute their Defence and Counterclaim and thereby refusing to avail itself of the court process. Further that no evidence was placed on the record even by way of witness statements or documents. That **even now** no such evidence has been advanced to warrant the rehearing of the suit. That the Application is an afterthought and a waste of judicial time.

84. In addition, it was submitted that it is well captured in the Judgment delivered on the **2nd of July 2015 by the court at page 13 and 15,**

> ***"The 1st defendant(Applicant) did not participate at the hearing as they did not attend court despite service of a hearing notice upon their counsels…At the close of the Plaintiff's case, the defendants offered no evidence in defence…" [Emphasis added].***
>
> ***"That a mere defence without any evidence to support the positions taken by the defendants is nothing…parties must tender evidence in support of the allegations. This is a principle espoused in the Court of Appeal decision in the case of JOHN WANAINA KAGWE VS. HUSSEIN DAIRY LTD – MOMBASA CIVIL APPEAL NO. 215 OF 2010, per Githinji, Makhandia & Murgor JJA."***
>
> *That the court further added* ***"neither can submissions on points of fact support a party's case where no evidence is adduced to prove that fact which is alleged****"*

85. It was submitted that the 4th prayer presumes and directs that the case be reopened and heard. That it is preemptive and does not require the court to do anything except to abide with the 1st Defendant/Applicant's will. That this is a watering down of the authority of the court by assuming its' role as final arbiter.

86. That the affidavit purportedly sworn with authority yet stated to be sworn on behalf of Plaintiff and no resolution by the 1stDefendant/Applicant neither to institute the counterclaim nor to authorize the firm of Kipkenda& Co. Advocates to act on their behalf or bring this application. That this was a serious omission that strikes at the bonafide of the Applicant in bringing this application. T**he case of Affordable Homes Africa Limited vs Ian Henderson & 2 Others HCCC No 524 of 2004,** was cited where Njagi J observed:

> ***" as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders; and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers (see the decision of the Court in Automatic Self-Cleansing Filter Syndicate v. Cunningham [1906] Ch.34, CA.); that it was therefore necessary to examine a particular company's articles of association to ascertain wherein lies the power to manage the company's affairs, for therein also lies the power to sanction the commencement of court actions in the name of the company."***

87. That the Court (Njagi J) observed that it was common ground that there was no authority from the Board Directors to institute the suit, and consequently, he held as follows*:*

> ***"The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff."***

88. It was further submitted that in **Bugerere Coffee Growers Ltd vs Sebaduka & Another (supra)**, in dismissing the suit the court held:

> ***"when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in the case. The Court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action."***

That at more so, on the 4th of August 2015, Messrs. Kipkenda & Co. Advocates filed a Notice of Change of Advocates after seeking leave of the court to be properly on record, indicating that they had been instructed to take over the conduct of this matter on behalf of the 1st Defendant/Applicant.

89. The Plaintiff submitted that the Applicant's counsel had not explained how he was instructed by the Applicant since there was no official letter appointing the firm or resolution to that effect. The Plaintiff relied on the decision of Okwengu, J. in **KYANZAVI FARMERS COMPANY LIMITED vs. MANGU NGOLO HCCC No. 128 of 2008 Milimani Commercial Courts** where the Learned Judge held, *inter alia*:

> ***"Where an advocate is appointed to undertake the conduct of any proceedings on behalf of the company as a recognized agent such appointment must be made under the company seal. In this case it had been alleged that there was no such authority to institute these proceedings. It would have been a simple matter for the advocate who has instituted these proceedings to swear an affidavit verifying the source of his authority. However no such affidavit has been availed nor has any resolution of the company appointing him as an agent been availed. The sum total is that no authority to institute these proceedings in the name of the company has been demonstrated to this court and the suit is therefore incompetent."***

90. That in that decision the court also cited with approval the decision of Kimaru J. in **GATIMU FARMERS COMPANY LIMITED vs. SOLOMON MBUGUA & ANOTHER [2004] eKLR** where it was held that a company can only act through a resolution passed by its directors

91. Consequently, it was submitted that there ought to be a resolution from the Board of Directors of the Company (Applicant) indicating their intention to change Advocates from Messrs. R. H. WANGA & CO. to the current Advocates (Kipkenda & Co.) on record, thus limiting their locus to sue and represent the Applicant in the suit.

92. It was therefore the Respondent/Plaintiff's Submission that the Application dated 4th August 2015 should be dismissed with costs as it lacks merit, is an abuse of the court process and the threshold of Order 45 of the Civil Procedure Rules has not been met.

DETERMINATION

93. I have considered all the forgoing. The issue for determination is whether the application by the 1st defendant applicant has merit.

94. According to the applicant, the matter proceeded to hearing in its absence because for unknown reasons, its advocate did not inform it of the hearing date to enable it avail witnesses to counter the claim and prosecute the counterclaim which raises triable issues. Further, that mistake of counsel should not be visited upon the client. it was further averred that the applicant had complied with all pretrial requirements and that even after its advocate being served with the application by the current advocate for leave to come on record, the firm of Wanga advocates never appeared. Further, that it is in the interest of justice that the application be allowed.

95. the 2nd defendant supported the 1st defendant's motion and urged the court to allow the application so

as to accord both the defendants an opportunity to defend the suit and that only the 1st defendant had evidence to counter the allegations leveled against the defendants jointly and severally.

96. The plaintiff vigorously opposed the motion contending that the 1st defendant had earlier intimated to court that it had no evidence to offer and that despite being accorded an opportunity to comply with pretrial requirements, it never filed any witness statements or documents that it intended to rely on at the trial.

97. it was further contended that the test for review had not been met and more so, that there was no authority or company resolution passed and signed for the advocate currently on record to represent the 1st defendant which is an incorporated company.

98. The substantive law regarding review of a judgment or order of the court is to be found in section 80 of the Civil procedure Act and the procedural law is Order 45 of the Civil Procedure Rules which stipulate that:

> ***"Any person considering himself aggrieved-***
>
> > ***b. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
> >
> > ***c. A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review."***

99. Under Order 12 Rule 7 of the Civil Procedure Rules, where judgment is entered for the plaintiff in the absence of the defendant, the defendant may apply for setting aside of the exparte judgment.

100. Setting aside an *ex parte* judgment is a matter of the discretion of the court, as was held in the case of ***Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd*** where the court citing relevant cases on the issue held *inter alia*:-

*‘‘The discretion is free and the main concern of the courts is to do justice to the parties before it (see **Patel vs E.A. Cargo Handling Services Ltd**.) 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see **Shah vs. Mbogo**). 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 vs Gasyali.** It also goes without saying that the reason for failure to attend should be considered."*

in ***Shah vs Mbogo*** *and* ***Ongom vs Owota*** the court held that for such Orders to issue *inter alia* the court must be satisfied about one of the two things namely:-

> *a. either that the defendant was not properly served with summons; or*
>
> *b. that the defendant failed to appear in court at the hearing due to* ***sufficient cause.***

The court defined what constitutes *sufficient cause* and in this respect it stated thus:-

> ***"Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order,***

necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions."

101. In this case, it is clear that the main ground upon which the applicant seeks to set aside the judgment of this court is for sufficient cause as it has not been alleged that there is any error apparent on the face of the record.

102. In ***Patel vs East Africa Cargo Handling Service*** **Duffus,V.P.** stated;

"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 is 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 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"

103. As to what constitutes sufficient cause, ***'sufficient cause'*** to warrant the exercise of the court's discretion, the case of the Supreme Court of India case of ***Parimal vs Veena*** *attempted to describe what was* ***"Sufficient cause"*** when it observed that:-

*"**Sufficient cause**" is an expression which has been used in large number of statutes. The meaning of the word "**sufficient**" is "**adequate**" or "**enough**", in as much as may be necessary to answer the purpose intended. Therefore the word "**sufficient**" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "**sufficient cause**" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "**not acting diligently**" or "**remaining inactive.**" However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

104. The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it.

105. 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

106. Applying the above principles to this case, the court notes that from the onset, the 1st defendant alerted the court on 30th November 2011 before Mwera J, that it would not be adducing evidence. That was before pretrial directions were given. The question therefore, is, what kind of defence or counterclaim was the 1st defendant is claiming in this application, was triable? Or raised triable issues?

107. Further, when Hon Waweru J handled the matter, he directed parties to the suit to comply with pretrial requirements but only the plaintiff complied by filing witness statements and documents to be

relied on as exhibits at the hearing. The defendants never filed any single witness statement or document.

108. Even in the old dispensation before the 2010 Act, and Rules, parties to civil disputes in the High Court were never allowed to produce documents which they never discovered/disclosed to the adverse party by filing and serving to the other party and the matter going through the process of discovery at the hearing of Summons for Directions.

109. In this case, when the date set for hearing was served upon the defendants, only the plaintiff and the second defendant attended court for the hearing. The hearing commenced and the plaintiff closed his case. The second defendant never called any evidence. The 1st defendant was absent hence the court ordered its case closed and parties were directed to file written submissions.

110. The 1st defendant's counsel appeared in court and sought time to file written submissions which the court granted. Its counsel proceeded and filed detailed submissions urging the court to dismiss the plaintiff's suit with costs.

111. In this application, the applicant/1st defendant has carefully crafted the reasons for failure to attend court during the hearing of the suit leaving out the issue of the filed submissions and subsequent attendance in court by the Firm of Wanga & co Advocates.

112. In addition, the second defendant who even filed a notice of appeal is now hanging on the ***"evidence which the 1st defendant ought to have adduced" to exonerate it*** because it is the one in the know on why it paid the 2nd defendant to publish the plaintiff's name as a wanted person. It is also the same 2nd defendant that dutifully attended court on the hearing date but never mentioned to court that it would not be in a position to proceed with the hearing because the 1st defendant was not in court.

113. The 2nd defendant then raises the issues of how the court erred in law and fact in arriving at its decision. The question is whether the 1st defendant honestly and sincerely intended to remain present when the case was being heard. In my humble view, the two defendants are hell bent to connive and collude to obstruct the course of justice for the plaintiff who has remained in court corridors for over 9 years.

114. This court also finds that there is before it an appeal camouflaged as an application for review in the sense that the 2nd defendant in supporting the motion by the 1st defendant claims that: ***"There was further prejudice suffered by the 2nd Defendant as a result of the lack of participation by the 1st Defendant in the proceedings. Without all parties, the Court was unable to obtain sufficient evidence on the role played by each party in the publication of the notice. As a result of this, the Defendants were held jointly and severally liable for the publication. It is our humble submission, that were the Court to hear the other side then it would become clear why the position of the 2nd Defendant, a party who merely published the notion, was very different to that one of the 1st Defendant. For instance, the Court imputed malice from the fact that the notice was published in 3 different publications. This element of malice and its consequences was imposed on the 2nd Defendant, yet it was only the 1st Defendant who caused the notice to be published in 3 publications. They are the only ones who could explain why this was done In the present case, justice will only be done if the evidence of all parties is taken and considered before a decision is made by the Court."***

115. Assuming that the 1st defendant had all the intentions to appear and defend the suit and or prosecute its counterclaim, nothing prevented it from annexing any witness statement or document it intended to rely on at the hearing, for purposes of demonstrating before this court that it had a triable issue in its defence and or counterclaim.

116. Discretion of this court shall not be exercised to assist a party who seeks to frustrate the plaintiff's quest to accessing justice and to reaping the fruits of his lawful judgment. In this case, it is not about lapses or mistakes of counsel to inform the 1st defendant to attend court. There is no evidence to show that the 1st defendant, prior to the impugned hearing had ever sought to know from its counsel the

progress of the case. There is also no indication that the applicant had fully paid its advocates and that the advocates failed to conduct the case diligently. If that were the case, the applicant would have annexed evidence of legal fees payment. And if it is true that the advocate for the applicant was negligent, he would not have filed submissions urging the court to dismiss the plaintiff's case with costs.

117. The applicant has not said that the submissions filed on its behalf by its then advocates on record were inadequate or that the advocate filed those submissions without the client's authority. It is for those reasons that I find that there is no sufficient cause demonstrated to warrant the court to review its judgment and or set aside the judgment as to do so would be sitting on my own appeal since the 1st defendant fully participated in the hearing of the case, its advocate indicated to court at the pretrial stage that it would not be adducing any evidence and chose when to be present and when not to be present in the proceedings. The applicant's counsels were equally represented in court on the judgment date.

118. Besides that, there is no authority signed by the 1st defendant for the advocates currently on record to represent the 1st defendant. The supplementary affidavit filed was without leave of court and no leave was sought to validate the filed affidavit which is hereby struck out.

119. The plaintiff's objection as to the jurisdiction of the court to review the judgment was overtaken by events as the file was placed before the judge who heard and determined the judgment which is sought to be reviewed. The objection is overruled. In addition, the period of review or setting aside "pending hearing and determination of this application" as contained in the prayers is a mere technical error which is curable by Article 159 of the Constitution as it does not concern the substance of the application which I have determine.

120. In the end, In the premise, I find the application herein devoid of merit and dismiss it with costs to the plaintiff/ respondent.

Dated, signed and delivered in open court at Nairobi this 22nd day of March, 2017.

R.E.ABURILI

JUDGE