



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndonga & another v Ngeru & 2 others (Environment & Land Case  
1031 of 2013) [2023] KEELC 22448 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22448 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1031 OF 2013  
AA OMOLLO, J  
DECEMBER 20, 2023**

**BETWEEN**

**SCHOLASTICA WAITHERA KAMAU ..... 1<sup>ST</sup> PLAINTIFF**

**JANE WAMBUI NGERU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KIBASUI NDONGA ..... 1<sup>ST</sup> DEFENDANT**

**DENNIS NJAGI ..... 2<sup>ND</sup> DEFENDANT**

**DANIEL MAINGI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By notice of Motion dated 13<sup>th</sup> April, 2023 the Defendants seek the following orders:
  - a. Spent.
  - b. That leave be and is hereby granted to the firm of M/S Wilfred & Ngugi Associates Advocates to come on record for the Defendants/Applicants herein in place of the firm of the firm of Ng'ang'a Nyaga & Company Advocates.
  - c. That the Honourable Court be pleased to grant stay of execution of the Judgment/Orders/Decree issued on 24<sup>th</sup> September, 2022 pending hearing and determination of this Application.
  - d. That the Honourable Court be pleased to set aside the ex-parte Judgment delivered on 24<sup>th</sup> September, 2022 and direct that the hearing of the main suit be heard afresh and that the Defendants/Applicants herein be granted leave to file and serve their statement of Defence out of time.
  - e. That Buruburu Nziu Katulo Residents Association be enjoined in this matter.



- f. That costs of this application be provided for.
2. The application is supported by the grounds stated on the face of it and on the Affidavit sworn on 13<sup>th</sup> April, 2023 by Cyrus Ng'ang'a Chege the Chairman of Buruburu Nziu Katulo Road Residents Association. He deponed that the Defendants entered appearance in October, 2013 in this suit through the law firm of Ng'ang'a Nyaga & Company Advocates, which firm neglected to file a Defence on their behalf. The said Defendants' advocates on record was struck off the roll of advocates without their knowledge. Therefore, when the matter came up for hearing on 24<sup>th</sup> September, 2019 it proceeded ex-parte on 24<sup>th</sup> September, 2019 and the Defendants only came to know of it when they were served with a Bill of Costs on 9<sup>th</sup> March, 2023. It is the Applicant's case that they attempted to follow up on the matter but their emails went un-answered and they annexed a letter to that effect.
  3. He deponed that upon service of the Bill of Costs they searched for their erstwhile Advocates to no avail, and thus sought fresh legal representation hence the application for leave since there is a judgment on record. The Defendants have never been served with a notice of entry of judgment or notified of the stages of proceedings before the trial court and hence they were denied an opportunity for fair hearing. He further deponed that the Plaintiffs sued a non-existent entity known as Buruburu Phase V Residents and/or sued only 3 individuals on behalf of the entire estate/community without their express consent. That it is thus necessary for the Buruburu Nziu Katulo Road Residents Association be enjoined in this matter. The Applicant urged that the Defendants have a merit-worthy Defence and they sought leave to file and serve their Defence out of time. He deponed that the Defendants application was made in good faith and without unreasonable delay, and that they will suffer irreparably if this application is not allowed and the orders sought are not allowed.
  4. In response, the Plaintiffs filed a Replying Affidavit sworn by Jane Wambui Ngeru, the 1<sup>st</sup> Plaintiff herein. He deponed that the deponent of the Cyrus Ng'ang'a Chege, the deponent of the Defendants' Supporting Affidavit, was a stranger to this suit, thus he swore to matters not within his knowledge as he was not a party when this suit was filed. The Buruburu Nziu Katulo Road Residents Association had not been joined to the suit and thus it was also a stranger to these proceedings too.
  5. She also deponed that the judgement in the suit was delivered on 24<sup>th</sup> September, 2020 and not 24<sup>th</sup> September, 2022 and that they have already extracted the Decree. The court is thus functus officio. She deponed that this was a representative suit defended by the Defendants on record and the others who chose not to be joined after the advertisement was made. That on 15<sup>th</sup> December, the Plaintiffs obtained leave to have the Defendants herein defend the suit on behalf the residents of Buruburu Phase 5. Mr. Chege is bound by the judgment and if aggrieved he ought to have appealed it as he is and was always a party to the suit.
  6. She averred that there must be finality in litigation. Further, that there has been a delay of over 2 years hence the Applicants' intention in the instant application is to delay or defeat justice thus it ought not be allowed. She pointed out that there was no proof that the Defendants vigilantly followed up on this matter since it was filed 10 years ago. Setting out the history of the matter from the time of filing, the 1<sup>st</sup> Plaintiff indicated that the Defendants never once raised the issue of non-existence of the Buruburu Phase 5 Residents.
  7. The 1<sup>st</sup> Plaintiff indicated that the Defendants and/or their advocates stopped appearing in this matter as from 17<sup>th</sup> October, 2016 when this matter came up for ruling and the court noted that the Defendants did not appear despite being notified by the court. After judgment was entered, the Plaintiffs filed and served a Bill of costs and the Taxation Notice, but before taxation of the Bill of Costs the Defendants filed the present application. The 1<sup>st</sup> Plaintiff thus deponed that Mr. Chege,



who was not an active party in the suit, misrepresented material facts and deponed to facts not within his knowledge. Further, that the Authority to Plead is unsigned and thus its contents cannot be authenticated.

8. She states that she believes the Defendants have not followed up on their matter since 11<sup>th</sup> October, 2013 when they filed the Notice of Change of Advocates, and only wrote to their advocates on 21<sup>st</sup> March, 2023 after 10 years. In addition, that from the Certificate filed by the Applicant, the said Buruburu Nziu Katulo Residents Association was registered on 23<sup>rd</sup> November, 2020 one month after delivery of the judgment. The prayer for joinder is thus un-meritorious, and the draft Defence raises no triable issues. She deponed that the court heard and determined the matter on merit and delivered its judgment after which it became functus officio and the suit is further barred by the doctrine of res judicata. She urged the court to dismiss the application

### Submissions

9. The court directed that the Application would be heard by way of written submissions. In the Defendants' submissions, Counsel submitted that they were denied the right to a fair hearing under Article 50 of the Constitution. He submitted that they were also failed by their Advocates who did not communicate on his practicing status and offer a way forward and or otherwise provide the Defendants herein with alternative Counsel within the firm to take conduct of the matter. It was Counsel's submission that the neglect, error and or mistake of the Counsel on record should not be visited upon the litigants. Counsel relied on *Omwoyo v African Highlands & Produce Co. Ltd* (2002) 1 KLR, *Belinda Muras and 6 Others v Amos Wainaina* (1978) KLR and *Phillip Chemwolo and Another v Augustine Kubede* (1982-88) KLR 103 at 1040.
10. Counsel submitted that since they had filed a draft defence, the application should be allowed to give the Defendants a chance to defend their case properly and produce their own evidence. Counsel relied on *Tree Shade Motors Limited v D.T. Dobie and Company (K) Limited and Joseph Rading Wasambo*, Court of Appeal Civil Appeal No.38 of 1998. Counsel argued that it is in the interest of justice that this Application be allowed because as is clear from the face of the Pleadings, there is an indication of improper, malicious and deceitful practices in how the Plaintiff acquired title for the suit property. Counsel relied on *Danson Muriuki Kihara v Johnson Kabungo* [2017] eKLR, the Court held:-

“It is apparent from the authorities that a court of law will not interfere with contracts entered into by two consenting parties and the interest agreed upon unless the terms are on the face of it illegal, unconscionable, oppressive and fraudulent.”
11. Counsel urged that there is an obvious public interest which is reason enough to allow the Application. Counsel cited *Brian Asin & 2 others v Wafula W. Chebukati & 9 others* [2017] eKLR, where it was held that the Public Interest Litigation was designed to serve the purpose of protecting rights of the public at large.
12. In response, the Plaintiffs filed their submissions dated 23<sup>rd</sup> September, 2023. Counsel submitted that the application is fatally defective having been filed by an advocate who is not properly on record and offends Order 9 Rule 9 of the *Civil procedure rules (John Langat v Kipkemoi Tere & 2 Others* (2013) eKLR and *Simon Barasa Otieno v Jackson Onyango Obiero* (2016) eKLR). Counsel asserted that for the change of advocate at this stage, the outgoing advocate was to be served with the present application, but there is no proof that they were served as required. Further that there is no consent signed by the outgoing and incoming advocate to effect the desired change in representation.



13. Counsel avowed that the judgment was not ex-parte as the Defendants were heard before it was entered, and their only recourse is appeal. Counsel contended that the Application was an affront to the doctrine of finality which requires that litigation must come to an end (Court of Appeal Civil Application No. 307 of 2003, Rai v Rai). Further, that the Defendants were parties to the suit and never appealed the judgment hence the instant application is aimed at defeating the decree issued on 28<sup>th</sup> April, 2023. In addition, he submitted that the Court became functus officio after it entered judgment and no appeal was filed ([\*Telkom Kenya Limited v John Ochanda \(Suing on his own behalf and behalf of 966 Former Employees of Telkom Kenya Limited\)\*](#) (2014) eKLR). The Defendants are guilty of laches and sought to delay or obstruct the course of justice and he relied on *Mbogo & Another v Shah* (1968) EA 93, *Pitbon Maina v Mugiria* (1982-1988) 1 KAR 171 and [\*Benjob Amalgamated Ltd & Another v KCB\*](#) (2014) eKLR.
14. The Plaintiffs' Advocate also pointed out that Mr. Chege was not an active participant in the suit, authority to plead having been given to the 1<sup>st</sup> Defendant herein. Counsel was of the view that from the record, the Defendants were given an opportunity to be heard but refused to use it, therefore they inflicted the injury alleged upon themselves. Counsel also blamed the Defendants for failure to follow up the matter with their Advocates, instead they appointed the Advocates and went to sleep, and they cannot now blame Counsel for their inaction. Counsel submitted that if anything, the Defendants may pursue a suit for professional negligence against their advocate.
15. In conclusion, Counsel submitted that the Defendants never raised the fact that they were not properly sued from the beginning of the suit, and they cannot bring it up now. Furthermore, Counsel submitted that this suit was not one of public interest as alleged by the Defendants. He urged that the instant application be dismissed with costs.

### **Analysis and Determination**

16. Having looked at the Application, the reply thereto and submissions of the parties, the main issues for determination are:
  - i. Whether the firm of Wilfred & Ngugi Associates Advocates should be allowed to come on record?
  - ii. Whether the Applicant has established sufficient cause to warrant a grant of the orders sought.
17. Order 9 Rule 9 of the [\*Civil procedure Rules\*](#) provides that:-
 

“9. Change to be effected by order of court or consent of parties

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

  - (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
18. As has been held in various court decisions, the intent of Order 9 Rule 9 and 10 of the [\*Civil Procedure Rules\*](#) was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. There is thus a requirement



that all parties including the outgoing advocates should be served. The Defendants are entitled to representation of their choice and had the Defendants properly served the application on the outgoing advocates, this court would not have hesitated to grant leave to have the new advocate come on record. As it is there is no proof that the said firm of Advocates was served. Neither is there a consent filed between the two firms with regards to the change of advocates.

19. That aside, the outgoing advocate was appointed by the 3 Defendants appearing on the Plaint. The Deponent of the Supporting Affidavit alleges to be the Chairman of Buruburu Nziu Katulo Road, a stranger in these proceedings. From the Certificate of Registration R. 53348 annexed in his Supporting Affidavit, the said entity was registered on 23<sup>rd</sup> November, 2020. It was non-existent as at the time of filing the suit and therefore could not be a party to the suit filed in 2013. Since this matter is at its end, the judgment not having been set aside, the court does not see what use it would be to join the said entity to these proceedings.
20. Further, the court notes that the letter annexed to the Supporting Affidavit was authored by Mr. Dennis Njagi, the 1<sup>st</sup> Defendant, who had been given authority to plead on behalf of the two other defendants. While there may be a connection between the two individuals this being a representative suit and the Defendants were appearing on behalf of other residents of Buruburu Phase 5 and Mr. Chege the Deponent is also a resident of Buruburu, it is not clear why the 1<sup>st</sup> Defendant did not swear the Affidavit instead.
21. Also, the authority with which the said Mr. Chege claims to plead under is not signed and can therefore not confer authority on him to plead on behalf of the entity he claims to plead for. For these reasons, the court will decline leave to the firm of M/S Wilfred & Ngugi Associates Advocates to come on record unless the parties move the court properly. This alone should have settled the application herein, but as stated this was a representative suit. In [Lawrence Ndutu & 6000 others v Kenya Breweries Limited & another](#) [2012] eKLR, the court stated that:-

“This, therefore, clearly shows that a party who is otherwise affected by the representative suit has a choice as to whether to apply to join the suit or not. Where a person wants to be joined as a party, no problem should arise.”
22. The decision whether or not to set aside ex parte judgement is discretionary. This discretion is to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error. It is not however designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In [Shah v Mbogo and Another](#) [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
23. The court must however satisfy itself that the Applicant has demonstrated sufficient cause warranting setting aside of the ex-parte judgment. Sufficient cause in this case would mean that the Applicant did not act in a negligent manner or there was want of good faith on their part in view of the facts and



circumstances of a case. Further that the Applicant should not be found to have not have been diligent in the suit. In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held 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 straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

24. In addition the court must also take into consideration the facts and circumstances surrounding the suit and the Application to set aside. In *Mureithi Charles & another v Jacob Atina Nyagesuka* (2022) eKLR the court held that:-

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

25. In the instant application the grounds upon which the application to set aside the judgement was made were two-fold. First, it was contended that the Defendants were never notified of the stages of proceedings before the trial court, as a result, they were denied an opportunity to file their defence and tender evidence in support thereof. The suit herein was commenced by Plaintiff filed in court on 27<sup>th</sup> August, 2013. Summons to Enter Appearance were issued by this court on 28<sup>th</sup> August, 2013.

26. Thereafter, a Notice of Appointment of Advocates was filed on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by the firm of Chege Wainaina & Company Advocates, which firm filed a Replying Affidavit sworn by the 1<sup>st</sup> Defendant in response to the Plaintiffs Chamber Summons Application dated 27<sup>th</sup> August, 2023. No Defence was however filed to the Plaintiff in this suit. On 11<sup>th</sup> October, 2013 the Defendants



- filed a Notice of Change of advocates and appointed the firm of Ng'ang'a Nyaga & Co. Advocates, who on the same day also filed an Authority to Plead duly executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in favour of the 1<sup>st</sup> Defendants. Neither the first firm of Advocates nor the second one filed a Defence to the suit.
27. From the record, the last time the Defendants and/or their Advocates appeared in court in this matter, was 13<sup>th</sup> November, 2014. There are several Affidavits of Service in the court file indicating that the Defendants' Advocate was informed of the dates for hearing and mentions of the case, however the Advocate and the Defendants failed to appear. In the judgment delivered on 24<sup>th</sup> September, 2020 by Justice Okong'o, the learned Judge noted at page thereof that:-
- “The Nairobi City County was joined in the suit as interested Party by the court on its motion through an order made on 17<sup>th</sup> October, 2016. The Defendants and the Interested Party did not file defences or any response to the claim by the Plaintiffs although they were both represented in the suit by advocates. The suit came up for hearing on 24<sup>th</sup> September, 2019. Although the Defendants were served with a hearing notice, neither they nor their advocates appeared in court for the hearing.”
28. The Defendants were not only aware of this suit, but in the initial stages took part in the proceedings by appointing an advocate and filing a Replying Affidavit in response to an application. The Applicant has cited the case of *Law Society of Kenya v Martin Day and 3 others* [2015] eKLR, where Aburili, J. held that;
- “It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that Summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submits to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked.”
29. While this court wholly agrees with the Learned Judge's finding in the above case, it cannot be of any help to the Applicant. It is a fact that they were served with summons and duly appeared and participated in the suit until they stopped in 13<sup>th</sup> November, 2014 when they failed to attend court. They neglected to proceed in the matter.
30. In addition, the law is now well settled that in an application for setting aside ex parte judgment, the court must also consider whether the applicant has reasonable defence. This is not only means that there should be a Defence filed, but that the said Defence or if a draft defence is annexed to the application, raises triable issues. The Applicant is very aware of this and has in fact cited the case of *Tree Shade Motors Limited v D.T. Dobie and Company (K) Limited and Joseph Rading Wasambo*, Court of Appeal Civil Appeal No.38 of 1998, where the Court of Appeal stated as follows;
- “Where a draft defence is tendered with the application to set aside the default judgment the court is obliged to consider it to see if it raises a reasonable defence to the Plaintiff's claim. If it does, the defendant should be given leave to enter and defend.”
31. The Court of Appeal in the case of *Kenya Power & Lighting Co Ltd v Abdulhakim Abdulla Mohamed & another* [2017] eKLR further explained that: “The overriding consideration in an application to set aside a default judgment where the intended defence raises triable issues and, absent evidence of



intention or deliberate action by the Appellant to overreach, obstruct or delay the cause of justice, is to do justice to both parties... There was not even a remote suggestion that the Appellant would be unable to pay or would delay payment of the sum in question if after a full hearing it were found that the respondents are entitled to the money. The contested order, which demands that a party pay substantial sums of money in a claim which is yet to be proved and in respect of which the court has found that there is an arguable defence raising triable issues, does not appear to us in any way to advance or facilitate the just, proportionate, affordable and resolution of disputes as demanded by the overriding objective...”

32. This court has seen the Draft Defence annexed to the Application herein. The same only contains mere denials and does not in any way raise triable issues. The same cannot be ground for setting aside the Judgment delivered on 24<sup>th</sup> September, 2020.
33. On the second ground, the Applicant claimed that the Defendants claimed that there was a mistake by counsel, which should not be visited on them, especially considering that the said advocate was struck off the roll of advocates during the pendency of this suit. The Applicant submitted that, the Defendants, believing to have been enjoying the above right to fair hearing encompassed in Article 50 of the Constitution, they have come to learn very recently, that in fact, they were denied these rights. The truth however is that they chose to deny themselves this right.
34. Alleging that the failure to file a defence or pursue the case was an excusable mistake, the Applicant relied on *Belinda Muras and 6 Others v Amos Wainaina* [1978] KLR and *Phillip Chemwolo and Another v Augustine Kubede* [1982-88] KLR 103. The question therefore is whether the Defendants conduct herein amount to an excusable mistake. To answer it, the court must weigh the rights of the plaintiff who have judgment in their favour against the rights of the defendant to have their case heard and determined on the merits. From the foregoing discourse it is clear that the Defendants actions cannot be termed an excusable mistake. In addition, it is not enough for the Defendants to heap the blame entirely on their advocate, and the excuse of blaming counsel is no longer tenable in law. The Defendants ought to have demonstrated that they took tangible steps and exercised due diligence in following up on their case. In the case of *Rukenya Buuri v M'arimi Minyora & 2 others* (2018) eKLR, the Honourable Court held that blaming the former advocate is not enough. A litigant must be diligent enough to follow up how their case is being handled by their advocate.
35. Litigants are required to be diligent in protecting their interests. Going to sleep for over 10 years and not making any follow ups on the case are not actions of a diligent litigant. They cannot claim that they believed they were enjoying the right to fair hearing under Article 50 when they took no steps to enforce that right. The Defendants only woke up after they were served with the Bill of Costs herein. In *M'Mwirichia M'Angare v M'Ibiri M'Bogori & others; Standard Chartered Bank of Kenya Ltd (Interested Party)* [2018] eKLR the court made reference to the case of *Peter Kinyari Kihumba v Gladys Wanjiru Migwi & Another* C.A Civil Application No. NAI 121 of 2005 (6/05NYR) (unreported) Waki J.A, where it was held that;

“With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation.”

36. In the present Application, it is averred that the Defendants made attempts at following up on the matter from their erstwhile Advocates, but no response was forthcoming. As proof of this allegation, they have annexed a letter dated 21<sup>st</sup> March, 2023, 10 years after they entered appearance, seeking to know why a statement of defence was not filed and whether the Advocate was served with a judgment



notice. Where is the alleged effort? It is interesting that the Applicant in his submissions rightly quoted the case of *Omwoyo v African Highlands & Produce Co. Ltd* (2002) 1 KLR, where Ringera J. held (and this court agrees):-

“Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant’s advocates. This is a proper case where the Defendants remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment”.

37. To add on to that authority, in the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR, it was stated thus;

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

38. Moreover, the judgment was delivered on 24<sup>th</sup> September, 2020 and aside from laying the blame on counsel, no justifiable reason has been given for the delay in bringing the current application. The court’s discretion is not automatically exercised in favour of a litigant who is himself guilty of inexcusable delay and or has been let down by his advocate. This court entirely agrees with the findings of the Courts in the decisions above, and for that reason shall not grant the setting aside of the judgement as prayed.

39. Consequently, this court finds that the application dated 13<sup>th</sup> April, 2023 is wholly without merit and is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023**

**A. OMOLLO**

**JUDGE**

