



**Chege & another v Kibui (Environment & Land Case  
1257 of 2016) [2025] KEELC 4976 (KLR) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 4976 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1257 OF 2016**

**OA ANGOTE, J**

**JULY 3, 2025**

**BETWEEN**

**GODFREY WAINAINA CHEGE ..... 1<sup>ST</sup> PLAINTIFF**

**KARAGITA (EA) COMPANY LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ROBERT WANJAU KIBUI ..... DEFENDANT**

**RULING**

1. Vide a Notice of Motion dated 4<sup>th</sup> April 2025, brought pursuant to the provisions of Article 50 of *the Constitution*, Order 51 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act* the Defendant/Applicant seeks the following reliefs:
  - i. That leave be granted to the Defendant in ELC Suit No. 1257 of 2016 to enter an appearance and to be represented by Advocates of his choice.
  - ii. That execution proceedings be struck out.
  - iii. That the Judgement delivered on the 12<sup>th</sup> May 2022 and the subsequent decree orders granted to the Plaintiffs be set aside.
  - iv. That the proceedings leading to the impugned judgement dated 12<sup>th</sup> May 2022 be struck out.
  - v. That the cost of this application be provided.
2. The grounds of this application are set out on its face and in the Affidavit sworn by Robert Wanjau Kibui, who deposed that the Defendant/ Applicant instituted a suit, Milimani Civil Suit 2330 of 2016 against the 2<sup>nd</sup> Plaintiff to prevent it from trespassing, taking possession, subdividing, selling, alienating, transferring or dealing with the suit property. This suit was filed by the firm of Wangui Kuria & Co.



- Advocates. The Defendant asserted that he later came to learn that CMCC 2330 of 2016 was dismissed on 31<sup>st</sup> May 2024 for want of prosecution.
3. Robert Wanjau Kibui deponed that unbeknown to him, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs filed this suit on 11<sup>th</sup> October 2016 over the same property and that no service was effected on him nor was any notice given to him, although the record shows that the firm of Wangui Kuria & Co. Advocates filed a Notice of Appointment of Advocates in this matter on 5<sup>th</sup> January 2017.
  4. He maintained that the firm of Wangui Kuria & Co. Advocates had no instructions to represent him and that at no time during the subsistence of the suit did the firm disclose the existence of the suit to him.
  5. According to the Defendant, on 23<sup>rd</sup> June 2021, when the matter came up for defense hearing, the firm of Wangui Kuria & Co. Advocates represented to the court that they had lost contact with him; that at no time did the firm of Wangui Kuria & Co. Advocates seek to find him nor did they place any calls or write any letters to him and that during all that time, he kept following up on the matter in CMCC No. 2330 of 2016.
  6. He further deponed that as per the typed proceedings, on 29<sup>th</sup> September 2021, the Plaintiff's advocates introduced another advocate on record, as one Mr. Kinyua h/b for Kivali who was said to be representing him. The Defendant stated that there is no Notice of Change of Advocates nor a Notice of Appointment of Advocate for a new firm of lawyers purporting to represent him.
  7. Robert Wanjau Kibui averred that he came to learn from the filings by the Plaintiffs that the firm of Ntoiti Kirui & Co. Advocates located in Dune Plaza Kangundo Road was representing him after the purported cessation by Wangui Kuria & Co. Advocates; that the purported firm of advocates had no instructions and is not known to him and that the phone number listed for Ntoiti Kirui & Co. Advocates, 0719545373 is the same phone number belonging to Ruth Wangui Kuria, the principal advocate at Wangui Kuria & Co. Advocates.
  8. The Defendant stated that he instructed his advocates currently on record to establish the existence of the firm of Ntoiti Kirui & Company Advocates from the Law Society of Kenya vide a letter dated 25<sup>th</sup> March 2025. He averred that the Law Society of Kenya responded vide a letter dated 26<sup>th</sup> March 2025, where they confirmed that there are no advocates who have declared to be practicing in the name and style of Ntoiti Kirui & Company Advocates.
  9. He asserted that although he did not participate in these proceedings, the decree has sought to be enforced against him without being accorded a hearing and that he only came to know of the matter when he was informed that auctioneers were being sent to his premises with the aim of evicting him and his family from the property in execution of the decree procured in this suit.
  10. The Plaintiff/Respondent opposed the application through a Replying Affidavit dated 14<sup>th</sup> April 2025 and sworn by Mureithi Ndirangu, an Advocate of the High Court of Kenya and an Associate in the firm of King'ori Kariuki & Co. Advocates, which has the conduct of this matter on behalf of the Plaintiffs. He deponed that the application is misconceived and an abuse of the court's process.
  11. Mureithi Ndirangu deponed that this suit was filed on 12<sup>th</sup> October 2016 and the Defendant filed a Defence dated 16<sup>th</sup> January 2016 through the firm of Wangui Kuria & Co. Advocates; that when this matter was listed for hearing on 25<sup>th</sup> February 2020, Mr. Mwangi holding brief for Ms. Wangui appeared in Court for the Defendant and the matter proceeded with the Plaintiff's case and that the Court directed that the defence was to proceed on 30<sup>th</sup> June 2020.



12. The Plaintiff's counsel deponed that on 30<sup>th</sup> June 2020, he appeared before Justice Obaga for hearing but there was no appearance by the Defendant or the Defendant's advocates; that the court then directed that further hearing was to proceed on 2<sup>nd</sup> November 2020 and that he prepared and served a hearing notice upon the Defendant's advocates to enable them appear for the hearing on the said date.
13. The Plaintiff's Counsel asserted that when the matter came up for hearing on 2<sup>nd</sup> November 2020 and on 15<sup>th</sup> March 2021, counsel holding brief for Ms. Wangui for the Defendant, one Mr. Mwangi and another Mr. Gitonga, sought for adjournments on the grounds that the Defendant's witness was indisposed and that the court allowed the adjournments on both instances.
14. He stated that when the matter came up for hearing on 23<sup>rd</sup> June 2021, Mr. Mwangi, holding brief for Ms. Wangui, informed the court that the Defendant's counsel had lost contact with their client and they sought time to file an application to cease acting for the Defendant; that the court allowed the application for adjournment and ordered the Defendant's counsel to file and serve the application to cease acting within 14 days from the said date and that the hearing of the application was fixed on 29<sup>th</sup> September 2021.
15. The Plaintiff's Advocate averred that prior to the scheduled hearing, on 27<sup>th</sup> September 2021, he received an email from the firm of M/S Ntoiti Kirui & Co. Advocates informing them that they had been appointed to act for the Defendant in this case and they attached a Notice of Change of Advocates and a letter dated 27<sup>th</sup> September 2021.
16. It was deposed that when this matter came up for hearing on 29<sup>th</sup> September 2021 before Hon. Justice Angote, Mr. Kinyua holding brief for Mr Ntoiti Kirui appeared for the Defendant and informed the court that they had been appointed to act for the Defendant; that the said counsel further informed the court that it was a part heard case and that the court directed that the proceedings be typed and fixed the matter for hearing on 25<sup>th</sup> November 2021.
17. The Plaintiff's counsel deponed that on 24<sup>th</sup> November 2021 at 18.16pm, a day before the hearing date, he received an email from the firm of M/s Wangui Kuria & Co. Advocates notifying them that they would be seeking adjournment on the grounds that the Defendant is indisposed and they would not be in a position to proceed and that the same firm later wrote a letter dated 25<sup>th</sup> November 2021 at 8.27am requesting that they disregard the previous letter and that they should note that the firm of Ntoiti Advocates are on record for the Defendants.
18. It was deponed that later that morning during call over, Mr. Kinyua holding brief for Mr. Ntoiti for the Defendant appeared virtually and stated that he was not ready to proceed and sought an adjournment on the grounds that the witness was indisposed and was sitting for an examination that day and that the court declined to allow the application and directed that the parties appear physically in court at 11.00am for further hearing.
19. Mureithi Ndirangu stated that he appeared in court with Mr. Mbatia holding brief for Mr. Ntoiti for the Defendant; that the Defendant was however not present in court; that the court declined to adjourn the matter and that in the absence of the Defendant, the court ordered that the defendant's case be closed. Parties were thereafter directed to file submissions and this matter was mentioned on 23<sup>rd</sup> February 2022 and the court gave a judgement date of 12<sup>th</sup> May 2022.
20. The Plaintiff's counsel stated that the Defendant had filed a matter concerning the suit land at Milimani Nairobi Civil Suit No. 2330 of 2016 which he had instituted against the 2<sup>nd</sup> Defendant and that he was aware that the firm of Wangui Kuria & Co. Advocates was instructed by the Defendant and represented him in the said suit.



21. It was deponed that in that matter, a ruling was delivered by the lower court on 27<sup>th</sup> June 2016 in which Hon. I. Omenge (S.R.M.) held that the court lacked jurisdiction to hear and determine the suit; that the court advised that parties were at liberty to refer the matter to the Environment and Land Court and that the Defendants thereafter did not take any steps to prosecute the said suit, despite their statement to the contrary.
22. The Plaintiff's Advocate averred that the Defendant's claims that neither the firms of Wangui Kuria & Co. Advocates nor Ntoiti Kirui & Co. Advocates were instructed by him have neither been supported nor confirmed by affidavits by the said advocates and that Wangui Kuria & Co. Advocates sought leave of court to cease acting for the Defendant and also acknowledged vide an email to the Plaintiff's advocates that they were aware that the firm of Ntoiti Advocates had come on record for the Defendant in their place.
23. He further stated that a copy of the Plaintiff's final submissions were served upon the firm of Ntoiti Kirui & Co. Advocates on 16<sup>th</sup> February 2025 and they stamped the Plaintiff's copy; that when the Plaintiffs filed this case, summons were issued by this court on 13<sup>th</sup> October 2016 and served on 16<sup>th</sup> December 2016 and that although in her Supporting Affidavit the Defendant deposed that he was not aware of this suit save for the matter in the Chief Magistrates Court, Civil Suit No. 2330 of 2016, a glance at the signature on the court summons shows that it is the same signature on the Supporting Affidavit sworn by the Defendant.
24. Mr. Ndirangu highlighted that the firm of Wangui Kuria & Co. Advocates not only filed a Defence, but also filed a list of documents and a witness statement signed by the Defendant filed on 23<sup>rd</sup> February 2017, which the Defendant has not denied signing.
25. Through a Further Affidavit dated 5<sup>th</sup> May 2025, Robert Wanjau Kibui, the Defendant, reiterated that that he did not issue any instructions to the firm of Wangui Kuria & Co. Advocates to act on his behalf in this matter.
26. It was his deposition that as indicated by the Plaintiff's Counsel, the service of summons was to his mother, Margaret Wanjau, who is not a party to this suit.

### **Submissions**

27. The Defendant/Applicant's Counsel submitted that service of summons is made to a party to invite them to come to court to defend a suit that they have been sued. Counsel relied on Section 20 of the [Civil Procedure Act](#) as well as Order 5 Rule 8 of the Civil Procedure Rules which prescribes that service shall be on a defendant in person or on his agent.
28. Counsel submitted that summons were never served upon the Defendant personally, neither did he have any authorized agent who accepted service on his behalf. It was submitted that while Order 5 Rule 8(2) provides that service may be served upon an advocate who has instructions to accept service and to enter appearance to the summons, the Applicant did not issue such instructions to any counsel and that it is trite that a party has to demonstrate that it has made several attempts to serve a defendant personally and that all attempts have been unsuccessful.
29. Counsel relied on the case of *Filomena Afwandi Yalwala vs Indumuli & another* [1989] eKLR where Nyarangi JA held that the best service is personal service. Counsel submitted that the Respondent did not demonstrate that they attempted to effect service upon the Defendant personally to no avail. It was submitted that the purported service was therefore inadequate.



30. It was further submitted that while the Plaintiff/Respondent deponed that they served the Defendant's mother, the Defendant's mother through her affidavit denied receiving any summons or even being aware of this matter, and that the Plaintiff has not demonstrated that the Defendant's mother was an empowered agent to receive such service.
31. Counsel relied on the case of Frigonken Ltd vs Value Pak Food Ltd HCCC No. 424 of 2010, where it was held that if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular judgement liable to be set aside by the court ex debito justitiae. The case of Kabutha vs Mucheru HCCC No. 82 of 2002 (Nakuru) was also relied upon.
32. Applicant's Counsel submitted that no proper service was done and the irregular judgement ought to be set aside as a matter of right, because the Applicant should be granted his day in court to defend himself in this suit.
33. Counsel referred to the case of Kenya-Anti-Corruption Commission vs Bernsoft Limited & 2 others [2024] KEELC (KLR) where the court considered the case of Tavuli Clearing & Forwarding Limited vs Charles Kalujjee Lwanga Nairobi (Milimani) HCCC No. 585 of 2004, in which the court struck out the proceedings where it was found that counsel acted without instructions.
34. Counsel reiterated that the Defendant never issued instructions to the firm of Wangui Kirui & Co Advocates or to the firm of Ntoiti Kirui & Co. Advocates and that the Law Society of Kenya found no record of any advocate practicing under the name of Ntoiti Kirui & Co. Advocates.
35. Counsel submitted that it was further surprising that the firm of Wangui Kuria & Co. Advocates has never filed any application to cease acting for the Defendant nor have they filed an application for taxation of the bill of costs against the Applicant.
36. Counsel submitted that two different firms of advocates cannot share a common number unless they are acting together and that in this this matter, the counsel who purported to enter appearance on behalf of the Defendant from the firm of Ntoiti Kirui & Co. Advocates included in their pleadings a phone number which was registered in the name of the previous counsel, being Wangui Kuria, the principal advocate at Wangui Kuria & Co. Advocates.
37. Counsel urged that it is in the interests of justice that the irregular judgement entered in this matter be set aside and the proceedings thereto be struck off and the Applicant be granted his day in court to defend his suit.
38. The Plaintiff's/Respondent's Counsel reiterated the averments set out in the Replying Affidavit sworn by Mureithi Ndirangu for the Plaintiff. It was submitted that there had been a delay of three years on the part of the Defendant since the judgment was delivered.
39. Counsel submitted that the Defendant has not demonstrated sufficient cause why the court should consider the application seeking for stay of execution and setting aside the judgment delivered on 12<sup>th</sup> May 2022 and to have the proceedings leading to the judgement struck out.
40. According to the Plaintiff's Counsel, the Plaintiff stands to suffer prejudice if the orders sought are granted because this matter was determined three years ago.
41. It was the Plaintiff's Counsel's submission that given the Defendant's failure to appear in court severally, he cannot claim that he has been condemned unheard and that he is undeserving of the court's discretion being exercised in his favour.



42. The Plaintiff's Counsel confirmed that the Defendant had filed a matter concerning the suit land at Milimani Nairobi Civil Suit No. 2330 of 2016 which he had instituted against the 2<sup>nd</sup> Defendant and that he was aware that the firm of Wangui Kuria & Co. Advocates was instructed by the Defendant and the said advocates represented the Defendant in the said suit.
43. The Plaintiff's Counsel submitted that the Defendant has in his Supporting Affidavit deponed that he had instructed the firm of Wangui Kuria & Co. Advocates to represent him in Civil Suit No. 2330 of 2016 at Milimani Chief Magistrates Court; that the said law firm was therefore known to him and that the said firm was aware that the firm of Ntoiti Advocates had come on record for the Defendant in their place.
44. It was submitted that the inability or failure of the Defendant to defend this suit on several occasions and the delay in filing this application is not mere inadvertence and this court should find that the lapses are serious and fundamental in nature.
45. The Plaintiff's Counsel argued that there is no plausible reason that has been advanced by the Defendant for failing to participate in the proceedings. Counsel relied on the case of *Dancan K. Owino t/a Bio Path Healthcare vs Breeze Petroleum Station Limited* [2024] KEHC 3831 (KLR) where the court held that a party cannot claim to have been denied a right to be heard when it is his own actions or omissions that prevented him from accessing justice.

### **Analysis and Determination**

46. Upon consideration of the application dated 4<sup>th</sup> April 2025, the Replying Affidavit filed by the Plaintiff and the submissions filed, the issues for the determination by this court are as follows:
  - a. Whether this court should set aside the judgment dated 12<sup>th</sup> May 2022 and its subsequent orders.
  - b. Whether the proceedings leading up to the judgement should be struck out.
47. The Defendant has opposed the judgment of this court delivered on 12<sup>th</sup> May 2022 and the preceding proceedings, on the basis that he was not aware of the existence of this suit, despite his purported representation by the firm of Wangui Kuria & Company Advocates and thereafter, Ntoiti Kirui & Co. Advocates. He contended that he was not served with the summons to appear in this suit nor was he served with any of the pleadings to this suit.
48. The Defendant has challenged his alleged subsequent representation by the firm of Ntoiti Kirui & Co. Advocates, which he contended did not file a Notice of Change of Advocates nor a Notice of Appointment of Advocates. The Defendant has argued that the firm of Ntoiti Advocates is non-existent and noted that the phone number indicated for the said firm is the same as that of Ruth Wangui, of Wangui Kuria & Co. Advocates.
49. The Plaintiffs have opposed the application. They contended that the Defendant admitted that the firm of Wangui Kuria & Co. Advocates is known to him and represented him in the earlier suit, CMCC No. 2330 of 2016. They argued that the Defendant's Advocate duly filed a Defence, a list of witnesses and a witness statement on his behalf, though the said statement was not signed.
50. The Plaintiffs contended that the Defendant failed to appear in court on several occasions, and is undeserving of the discretion of this court.



51. This court delivered judgment in this matter on 12<sup>th</sup> May 2022, allowing the Plaintiffs’ suit. The record shows that when this matter was scheduled for defence hearing, the matter was adjourned due to the Defendant’s non-appearance. This was on 2<sup>nd</sup> November 2020, 15<sup>th</sup> March 2021 and 23<sup>rd</sup> June 2021.
52. When this matter subsequently came up for hearing on 25<sup>th</sup> November 2021, the court considered the multiple adjournments on account of the Defendant’s absence and declared that the Defendant’s case be closed.
53. This was in exercise of the powers accorded to the court, prescribed under Order 12 Rule 2 of the Civil Procedure Rules, where a Defendant fails to attend hearing. It states as follows:
- “If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—
- (a) that notice of hearing was duly served, it may proceed ex parte;
  - (b) that notice of hearing was not duly served, it shall direct a second notice to be served; or
  - (c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.”
54. Order 12 Rule 7 of the Civil Procedure Rules, 2010 gives this Court discretion to reinstate a suit that has been dismissed and stipulates as follows:
- “Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
55. The discretion to set aside judgment can to be exercised to avoid injustice arising from an excusable error, mistake or error. The case of *Shah vs Mbogo* (1979) EA 116 gives guidelines on the exercise of the said discretion. It states thus:
- “I have carefully considered in relation to the present application the principles governing the exercise of the Court’s discretion to set aside a judgment obtained ex parte. 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 cause of justice.”
56. Similarly, in the case of *Patel vs EA Cargo Handling Services Ltd* (1974) E A 75 the court stated as follows:
- “There are no limits or restrictions on the judge’s discretion to set aside or vary an ex parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wider discretion given to it by the rules.”
57. It is trite that a court must exercise its discretion judiciously, upon certain legal principles, according to the circumstances of each unique dispute and with the aim of doing real and substantial justice to the



parties in a suit. This was held by the Court of Appeal in *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR:

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

58. The court in *Wachira Karani vs Bildad Wachira* [2016] eKLR was of the view that an Applicant seeking to have the court set aside its orders ought to satisfy the court that they have sufficient cause. As to what constitutes sufficient cause, the Court of Appeal in the case of *BML v WM* [2020] eKLR, stated thus:

“What amounts to sufficient cause depends on the circumstances of each case and the court is called upon to exercise its discretion depending on the said circumstances. Musinga, JA in the case of *The Hon. Attorney General v the Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 (ur) defined sufficient cause to be:

“Sufficient cause” or “good cause” in law means: .... the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See *Black’s Law Dictionary*, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

Similarly, the Supreme Court of India in the case of *Parimal v Veena* [2011] 3 SCC 545 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.”

59. The Defendant has opposed the initial service of summons to his mother, Margaret Wanjau as well as to the law firm of Wangui Kuria and Company Advocates and his representation in this matter by the said law firm.

60. The Plaintiff adduced a copy of the Summons to Enter Appearance in this suit, which were signed received on 16<sup>th</sup> December 2016. The Plaintiff’s counsel contended that the signature on the court



summons is the same signature as that on the Supporting Affidavit sworn by Margaret Wangui Wanjau dated 4<sup>th</sup> April 2025.

61. In the Supporting Affidavit sworn by Margaret Wangui Wanjau against the Plaintiff's application dated 25<sup>th</sup> March 2025, she averred that the Defendant is her son and that she has been living in the suit property since 2009 to date. She deponed that she was not aware of the existence of this suit and that she was only aware of CMCC No. 2330 of 2016 which the Defendant had filed against the 2<sup>nd</sup> Plaintiff.
62. The Plaintiff has urged this court to find that service was lawfully effected on the Defendant's mother. Order 5 Rule 8 of the Civil Procedure Rules provides that wherever it is practicable, service shall be made on the Defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
63. Order 5 Rule 12 of the Civil Procedure Rules, however, provides that service may only be effected on an adult member of the Defendant's family after a reasonable number of attempts have been made to serve the Defendant and the Defendant cannot be found.
64. The Plaintiff has not pleaded nor presented any evidence of failed attempts to serve the Defendant personally, which necessitated service to be effected upon the Defendant's mother.
65. All the same, the Defendant and his mother have both averred that they live on the suit property. It must have been during the efforts of effecting service upon the Defendant that his mother, who was living with him, received the Summons to Enter Appearance on his behalf.
66. The Defendant has objected that the signature appended on the summons to enter appearance was indeed executed by his mother. He invited this court to compare the said signature as against that on the Supporting Affidavit sworn by Margaret Wanjau. This court cannot, however, determine on the face of documents, whether the signatures are genuine or forgeries.
67. It was upon the Defendant to subject the said documents to an expert document examiner and to present the findings of such evaluation to this court. In the absence of such proof, this court cannot enter a finding as to the validity of the signature on the Summons to Enter Appearance or the validity of his signature in the purported witness statement which he also challenged.
68. On this basis, this court is satisfied that service was lawfully effected upon the Defendant, who was living with his mother as at the time the summons to enter appearance were received by his mother.
69. Further, this court is satisfied that upon the said service of the summons to enter appearance being served on the Defendant through his mother, the firm of Wangui Kuria & Co. Advocates filed a Notice of Appointment of Advocate on 5<sup>th</sup> January 2017 as well as a Defence dated 12<sup>th</sup> January 2017.
70. Although the Defendant denied issuing instructions to the firm of Wangui Kuria & Co. Advocates in this suit, the Defendant and his mother deponed that the firm of Wangui Kuria & Co. Advocates represented them in the suit before the magistrates court in CMCC No. 2330 of 2016. The question that arises from this assertion then is how the said law firm knew that the Defendant had been sued.
71. It is trite that advocates can only act in a matter where they have been instructed either expressly or by implication. This was held in *George Miyare t/a Miyare & Company Advocates vs Nyando Power Techniques Limited* [2017] KEHC 8798 (KLR) as follows:

“It is however clear that advocates can only act in a matter where they have been instructed either expressly or by implication. Where there is a general retainer given to an advocate by a client, it does not fall in the mouth of the client to argue that there were no instructions given



to the advocate in respect of a particular matter falling within the series in which there was a general retainer unless it is shown that there were express instructions given to the advocate not to act in that particular matter. In that event, the onus of proving lack of instruction would be on the person alleging the same.”

72. It is evident that the said firm of Wangui Kuria & Co. Advocates was acting for the Defendant in the lower court. Indeed, the Defendant has not denied that it gave the said law firm instructions to act for him in the said matter, which was around the same time this suit was filed.
73. In my view, and considering that I have found that the Defendant was served with the summons to enter appearance through his mother, it is the finding of the court that the firm of Wangui Kuria & Co. Advocates had either express or implied instructions to act for the Defendant in this matter.
74. There is also the matter of the alleged withdrawal of Ms. Wangui Kuria Advocate from acting for the Defendant. The Plaintiff’s counsel deponed that on 23<sup>rd</sup> June 2021, one Mr. Mwangi, who was holding brief for Ms. Wangui, indicated that the Defendant’s counsel wished to cease acting for the Defendant.
75. The court directed that the application to cease acting for the Defendant be filed within 14 days. This court has considered its record and found that no such application was ever filed before this court.
76. The process of withdrawal of an advocate who has ceased acting for a party is provided for under Order 9 Rule 13 of the Civil Procedure Rules as follows:
  - “(1) Where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with this Order, the advocate may on notice to be served on the party personally or by prepaid post letter addressed to his last- known place of address, unless the court otherwise directs, apply to the court by summons in chambers for an order to the effect that the advocate has ceased to be the advocate acting for the party in the cause or matter, and the court may make an order accordingly: Provided that, unless and until the advocate has—
    - (a) served on every party to the cause or matter (not being a party in default as to entry of appearance) or served on such parties as the court may direct a copy of the said order; and
    - (b) procured the order to be entered in the appropriate court; and
    - (c) left at the said court a certificate signed by him that the order has been duly served as aforesaid, he shall (subject to this Order) be considered the advocate of the party to the final conclusion of the cause or matter including any review or appeal.
  - (2) From and after the time when the order has been entered in the appropriate court, any document may be served on the party to whom the order relates by being filed in the appropriate court, unless and until that party either appoints another advocate or else gives such an address for service as is required of a party acting in person, and also complies with this Order relating to notice of appointment of an advocate or notice of intention to act in person.”
77. The law firm of Wangui Kuria & Co. Advocates did not comply with the procedure described above. First, there is no evidence that they served a notice to the Defendant that they intended to cease acting



for him, and that the same was duly received. Secondly, the firm failed to file a Chamber Summons application under Order 9 Rule 13.

78. The record shows that when the matter came up in court on 29<sup>th</sup> September 2021, the court was informed that there was another advocate on record. However, a Notice of Change of Advocates was never filed by the firm of Ntoiti Kirui & Co. Advocates or any other firm of advocates.
79. The Plaintiff's advocate has all the same adduced a letter they received from an Advocate by the name Wairimu Giathi from the firm of Ntoiti Kirui & Co. Advocates dated 27<sup>th</sup> September 2021. Ms. Giathi indicated in the said letter that the firm of Ntoiti Kirui had taken over the matter for the Defendant and annexed to their letter a Notice of Change of Advocates.
80. Order 9 Rule 6 of the Civil Procedure Rules states that the party giving the Notice of Change of Advocate shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it). As stated, the said Notice of Change of Advocates was never filed before this court.
81. The Defendant herein wrote to the Law Society of Kenya through a letter dated 25<sup>th</sup> March 2025 and sought to ascertain the registration of the firm of Ntoiti Kirui & Co. Advocates. The Law Society responded through a letter dated 26<sup>th</sup> March 2025, and indicated that they did not have an advocate declared to be practicing in the name and style of Ntoiti Kirui & Company Advocates.
82. In a comedy of errors, this court has noted that the letter dated 24<sup>th</sup> November purportedly sent by Abigail Giathi for the firm Ntoiti Kirui & Co. Advocates was sent on the letterhead of Wangui Kuria & Co. Advocates. This then necessitated one Benard Nyaga to send an email on 25<sup>th</sup> November 2021 to the Plaintiff's advocates clarifying that it is Ntoiti Advocates who are on record for the Defendant and not Wangui Kuria.
83. This court also noted that in the letter dated 27<sup>th</sup> September 2021, through which Counsel Abigail Gaithi stated that Ntoiti Kirui & Co. Advocates had been appointed for the Defendant, she availed her phone number as 0719545373. This same phone number is indicated as the contact number for the law firm of Wangui Kuria & Co. Advocates.
84. It is then apparent that the firm of Ntoiti Kirui & Co. Advocates is of questionable existence and that the firm of Wangui Kuria & Co. Advocates acted contrary to their fiduciary duty in this matter. In *Serve in Love Africa (Sila) Trust vs David Kipsang Kipyego & 7 others* [2017] KEELC 3632 (KLR), the court highlighted that the four elements of the fiduciary duty are:
  - a. The duty of loyalty to the client.
  - b. The duty of confidentiality.
  - c. The duty to disclose to the client or put at the client's disposal all information within your knowledge that is relevant in order to act in the client's best interests.
  - d. The duty not to put your own or anyone else's interests before those of the client.
85. The evidence presented by the Defendant establishes that their Advocates, Wangui Kuria & Co. Advocates and the so-called firm of Ntoiti Kuria & Co. Advocates acted contrary to their professional duty. The Defendant would be well placed to file complaints of professional misconduct against the Advocates Wangui Kuria and Abigail Giathi before the Advocates Disciplinary Tribunal.



86. Although I have found that the Defendant did instruct the firm of Wangui Kuria & Co. Advocates to act for him, from the narration above, it is clear that the Defendant's suit was bungled at no fault of his own.
87. Although it has been three years since the judgment was entered, it would nonetheless be unjust to allow the judgment entered in this matter to stand, the same having been entered without hearing the Defendant's case, a situation which was brought about by the advocates who were in conduct of the matter on his behalf.
88. The injustice that would be visited on the Defendant due to the unprofessional conduct of the counsel would far outweigh the prejudice that the Plaintiff would suffer.
89. This court therefore finds that it is in the interest of justice that the judgment be set aside and the Defendant be allowed to appoint another advocate to represent him in this matter.
90. For the reasons given above, this court allows the Defendant's application and issue the following orders:
- a. Judgment delivered on the 12<sup>th</sup> May 2022 and the subsequent decree orders granted to the Plaintiff are hereby set aside.
  - b. The proceedings leading to the impugned judgment dated 12<sup>th</sup> May 2022 be and is hereby struck out.
  - c. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3<sup>RD</sup> DAY OF JULY, 2025.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Muriithi for Plaintiff/Respondent

Mr. Nyorogo for Defendant/Applicant

Mrs Ng'ang'a for Auctioneer

Court Assistant: Tracy

