Kenya Anti- Corruption Commission v Bernsoft Limited & 2 others (Environment & Land Case 168 of 2009) [2024] KEELC 800 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEELC 800 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 168 OF 2009

LL NAIKUNI, J

FEBRUARY 8, 2024

BETWEEN

KENYA ANTI- CORRUPTION COMMISSION ..... PLAINTIFF

AND

BERNSOFT LIMITED ..... 1ST DEFENDANT

EQUITRONICS LIMITED ..... 2ND DEFENDANT

SAMMY SILAS KOMEN MWAITA ..... 3RD DEFENDANT

RULING

I. Introduction

1. There are two (2) applications before this Honorable Court for hearing and determination. The first one is the Notice of Motion application dated 16th March, 2023 and amended on 15th May 2023 instituted by Bernsoft Limited and Equitronics Limited the 1st and 2nd Defendants/ Applicants herein under the provisions of Sections 80,1A,1B, 3A,63(e) and 100 of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 10 rule 11, Order 45, Order 51 Rule 1 of the Civil Procedure Rules. Cap 21 Laws of Kenya. Whist, the second application is dated 15th May, 2023 filed by Sammy Silas Komen Mwaita, the 3rd Defendant/Applicant herein under the provisions of Order 12 Rule 7 Order 22 rule 22 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 respectively.

2. Upon service of the afore - said applications, while opposing both of them, the Plaintiff/Respondent filed a 26 Paragraphed Replying Affidavit dated 22nd March and 6th June 2023 respectively. The Honourable Court shall be dealing with the replies in depth at a later stage of this Ruling. For good order, and arising from the similarity on the subject matter, the Honourable Court opted to handle the applications simultaneously and render an omnibus decision herein.

II. The 1st and 2nd Defendant/Applicant's case

3. The 1st and 2nd Defendant/ Applicants sought for the following orders:-

    a. Spent.

    b. Spent.

    c. Spent.

    d. That the Honourable Court be pleased to unconditionally set aside and/or vacate the Judgment and/ or decree delivered, entered and/ or obtained against the 1st and 2nd Defendants on 16th February, 2023 and/ or any other and all consequential orders thereof and the 1st and 2nd Defendants be granted leave to file their defence.

    e. That the Honourable Court be pleased to order the Plaintiffs to effect proper service of the Summons, Plaint and all the accompanying documents upon the 1st and 2nd Defendants.

    f. That the costs of this Application be in the cause.

4. The application is premised on the grounds, testimonial facts and the averments made out under the 20 Paragraphed Supporting Affidavit of ENOCK TUITOEK the Director of the 2nd Defendant/ Applicant herein who averred as follows that:-

    a. On the 16th February, 2023 this Honourable Court delivered Judgment against the Defendants without having given the 1st and 2nd Defendants/Applicants a right of audience. Annexed in the affidavit and marked as "BE – 3" was a copy of the Judgment.

    b. The 1st and 2nd Defendants/Applicants and/ or their agents had never had notice of the present court proceedings at all. No pleadings and/or summons were ever served upon them at any stage of the proceedings and/or at all.

    c. The 1st and 2nd Defendants/Applicants were never aware of the basis of the suit and/or the subject matter thereof and had been condemned unheard contrary to the principles of justice.

    d. They came to learn of the proceedings and Judgment when their Advocates appearing in a different suit during negotiations which were being conducted on a without prejudice was informed that there was a Judgment against his Clients in another suitwhereupon they were given the suit of instance case number details. Upon perusal of the court file, they were shocked to learn that the Law firm of Messrs. Kadima & Company Advocates had entered appearance on their behalf yet they had no knowledge of the suit and had not therefore given any instructions to any firm of Advocates.

    e. The Memorandum of Appearance dated 23rd June, 2009 as entered by the Law firm of Messrs. Kadima & Company Advocates was bare of instructions, null and void ab initio.

    f. It was the 1st and 2nd Defendants/Applicants' apprehension that the irregularities surrounding the entry of appearance on their behalf without any form of instructions and the lack of proper service of summons and pleadings as provided for under the Civil Procedure Rules, 2010 was an orchestrated plan by the Plaintiff to mislead the Honourable court into giving a Judgment in their favour on the guise of uncontroverted evidence when indeed they had robbed the

Defendants/Applicants' of their day in court and their right to fair trial as guaranteed under *the constitution* of Kenya.

g. The rules on service of summons and pleadings were never followed to the latter and/ or adhered to at all. The unscrupulous acts by the Plaintiff/Respondent around the lack of service and/ or the irregularities thereof were intended to win the favour of the court from the back door.

h. The Plaintiff/Respondent had extracted a decree, and had proceeded to execute against the Defendants/Applicants on the basis of an irregular Judgment.

i. If the Plaintiff/Respondent was allowed to execute, the 1st and 2nd Defendants/Applicant would suffer a greater injustice as they would have been condemned unheard contrary to the principles of natural justice and the provisions of *the Constitution*.

j. The 1st and 2nd Defendants/Applicants had a defence which raises triable issues. Therefore, it was pertinent and for the interest of justice that the Defendants/Applicants be given an opportunity to file their defence and had their day in court. Annexed hereto and marked as "BE – 6" was a copy of the draft Defence.

k. The 1st and 2nd Defendants/Applicants had been greatly prejudiced by the Judgment delivered herein and it was only just and fair that the orders sought in the application of instance be allowed as prayed failure to which the 1st and 2nd Defendants/Applicants were prone to suffer immensely and irreparably.

l. It was for the interests of justice and fairness that the present Application be allowed as prayed.

m. The application of instance had been made without undue delay and the same had merit and the prayers sought, if granted, would not occasion any prejudice on the part of the Plaintiff/ Respondent.

n. The principles of natural justice and the provisions of *the Constitution* of sought herein were not granted.

o. This Honourable Court to exercise its powers in favour of the 1st and 2nd Defendants/ Applicants and not shut its eyes to an injustice that may be occasioned due the acts of an unscrupulous Plaintiff/Respondent.

III. The Plaintiff/ Respondent's Response to the Notice of Motion application by the 1st and 2nd Defendants dated 16th March, 2023.

5. The Plaintiff/Respondent opposed the application by the 1st and 2nd Defendants/Applicants through a 26th Paragraphed Replying Affidavit dated 22nd March, 2023 of Songole B.asingwa, an Advocate of the High Court of Kenya and practicing as such at the Ethics and Anti-Corruption Commission (EACC) with six (6) annexures marked as "SBA - 1 to 6" annexed thereto where she averred as follows:-

a. The 1st and 2nd Defendants/Applicants were misleading the Honourable Court. Further, they were being dishonest when they indicated that they were never served with the Summons to Enter Appearance.

b. When the suit was first filed on 9th June, 2009, the Defendants/Applicants first instructed the Law firm of Messrs. Muriungi & Company Advocates to enter appearance on its behalf. From the affidavit was a letter attached and marked as "SBA – 1" dated 19th June, 2009 to that effect.

c. Messrs. Muriungi & Co. Advocates in their letter acknowledged that its client had seen in the newspaper that they had been sued and had therefore instructed them to represent it. The said law firm however never filed a Memorandum of Appearance thereafter.

d. On 16th July,2020 the Law firm of Messrs. Kadima & Company Advocates made an application to cease acting for the 1st and 2nd Applicants/Defendants. From the affidavit was annexed a copy of the application marked as "SBA -3".

e. On 29th November, 2021 when the application to cease acting was to be heard, the said firm failed to attend court and never prosecuted its application. Therefore, the said Law firm remained on record for of the 1st and 2nd Defendants/ Applicants.

f. The Plaintiff/Respondent had always effected service upon the Law firm of Messrs. Kadima & Company Advocates who formally and on record appeared before court for the 1st and 2nd Defendants/Applicants'.

g. The Plaintiff/Respondent had at all material time of hearing of the suit served upon the Defendants/ Applicants hearing notices for the matter which had always been acknowledged. From the affidavit were notices and Affidavits of service annexed therein and marked as "SBA – 4".

h. The Defendants/ Applicants were properly served by way of advertisement placed in the local newspaper of "the Daily Nation" edition of 17th June, 2009 hence the reason for Messrs. Kadima & Company Advocates entering appearance on the behalf of the 1st and 2nd Defendants/Applicants. Annexed in the affidavit was a copy of the advertisement and affidavit of service marked as "SBA – 5".

i. The 1st and 2nd Defendants/Applicants were served by way of substituted service after the Plaintiff/Respondent had made a formal application as required under the provision of Order 5 Rule 17 of the Civil procedure Rules, 2010 and the orders were granted to that effect. Annexed in the affidavit was a copy of the said Court Order marked as "SBA – 6".

j. The 1st and 2nd Defendants/Applicants were served personally as provided for under the provision of Order 5 Rule 17 (2) of the Civil Procedure Rules, 2010 which was clear that the substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.

k. The fact that the 1st and 2nd Defendants/Applicants instructed several lawyers to appear in the matter showed that indeed it was aware of the matter and could not therefore at this juncture turn around and plead otherwise.

l. From the foregoing it was clear that the 1st and 2nd Defendants/Applicants was well aware of the matter and the onus of ensuring participation in court to prosecute the matter was on him and not the Plaintiff/Respondent herein.

m. The 1st and 2nd Defendants/Applicants herein were at all material times of the hearing of the suit fully represented and accorded the opportunity to be heard through their appointed Advocates.

n. The Defendants/Applicants application was vexatious. It was brought as an afterthought just to deny the Plaintiff/Respondent from realizing its decree.

o. The Defendants/Applicants application was a technical gimmick and a theatrical maneuver intended to defeat the ends of justice which technicality was abhorred by the provision of Article 159 (2) (d) of *the Constitution* of Kenya, 2010.

p. The Defendants/Applicants application should not be allowed as it's filed with the intention of defeating justice and it's in the public interest that the same should not be allowed.

q. The Application herein if allowed would prejudice, hinder and risk the recovery of the subject suit parcel of land which is public property belonging to Kenya Civil Aviation Authority which should at all material times be in occupation by staff of the said institution.

r. When a party filed a Memorandum of Appearance it was deemed to have due notice of the institution of a suit. Therefore the 1st and 2nd Defendants/Applicants could not purport that it received the Judgment in shock when all along it knew the suit existed.

s. The provision of Order 7 Rule 1 of the Civil Procedure Rules, 2010 was clear that when a Defendant filed a Memorandum of Appearance in person or through their Advocate, the time within which a Defence was to be filed started running, and the issue of whether he had been served with Summons to enter appearance or not became inconsequential.

t. The Honourable Court is a Court of Justice and the 1st and 2nd Defendants/Applicants were trying to cage it by rules of procedure which will cause hardship and injustice to the Plaintiff/ Respondent.

u. In any event if the said Advocate was irregularly on record, or had filed the Memorandum of Appearance without instructions from the 1st and 2nd Defendants/Applicants then their recourse was against that Advocate in accordance with the provisions of the *Advocates Act*.

v. The 1st and 2nd Defendants/Applicants application was unmeritorious, frivolous and an abuse of court process whose objective it to waste of court's precious judicial time hence should be dismissed with costs to the Plaintiff/Respondent.

IV. The 3rd Defendant/ Applicant's case

6. The 3rd Defendant/ Applicant seeks for the following orders:-

a. Spent.

b. Spent.

c. Pending the hearing and determination of this suit there be and is hereby issued an Order setting aside the orders made on 29th November 2021, 7th March 2022 and 18th July 2022 and subsequent Judgment delivered on 16th February 2023 and the suit be re - opened for hearing on merit.

d. Costs of this application be provided for.

7. The application was premised on the grounds, testimonial facts and the averments by the 20 Paragraphed Supporting Affidavit of SAMMY SILAS KOMEN MWAITA, the 3rd Defendant/ Applicant herein. The Applicant averred that:

i. The hearing Notice were never served upon the 3rd Defendant/Applicant herein.

ii. The court proceeded Ex - Parte for hearing on 29th November, 2021, 7th March 2022, 18th July 2022 without according the 3rd Defendant/Applicant an opportunity to be heard on merit.

iii. In the said Judgment he was ordered to pay colossal amount of Thirty Million Kenya Shillings (Kshs. 30,000,000/-) to be shared between among the Defendants and he was personally as 3rd Defendant/Applicant to pay a sum of Kenya Shillings Five Million (Kshs 5,000,000/-) without being accorded an opportunity to being heard on merit

iv. The Applicant was never notified of the hearing date to enable him.

v. He immediately appointed the Law firm of Messrs. T.K. Rutto & Co. Advocates P.O. Box 14580 - 00100 Nairobi to peruse the court file and make this Application now before the court on his behalf. His then advocates on record Messrs. Kadima & Co. Advocates had filed an application to ceased acting dated 16th January 2020 which application he had never been served with and not aware of the same.

vi. A further perusal of the Court Proceedings and records reveals the matter proceeded ex-parte on 29th November, 2021, 7th March 2022, 18th July, 2022 and that from the record the Law firm of Messers. Kipkenda & Co. Advocates were served whom he had never appointed to act on his behalf.

vii. During the hearing on 29th November, 2021, 7th March 2022 and 18th July, 2022 there was no representation on his part since he was never served with any Hearing Notices and or notification or information about the hearing of the case by then his Advocates on record Messrs. Kadima & Co. Advocates.

viii. Non – attendance of court on 29th November, 2021, 7th March, 2022 and 18th July 2022 was not deliberate as he was never notified of the same and or aware.

ix. The matter in circumstances proceeded ex-parte without according him an opportunity to be heard on merit and he was further denied a fair trial and access to justice.

x. The Applicant is desirous to prosecute and defend this case and the evidence of the Plaintiff/ Respondent.

xi. He stands to suffer irreparable loss and harm if the orders prayed for are not granted as he had been condemned to pay colossal amount of Five Million Kenya Shillings (Kshs.5,000,000/-) while discharging his official duties and never had an opportunity to be heard on merit and further payment of Thirty Million Kenya Shillings (Kshs. 30,000,000/-) as general damages to be shared between the Defendants.

xii. The Applicant's Defence filed court raises reasonable and liable issues.

xiii. He had been crucified for performing official duty and he had no and still have no personal interest in the matter before court, as he never knew the beneficiaries of the suit land in question.

xiv. This Application was made in good faith and in the interest of justice. The right to be heard before an actual decision was taken against a person was fundamental and permeated on the entire justice system.

xv. The non-attendance to court for hearing was not deliberate on the part of the Applicant.

xvi. No prejudice shall be occasioned to the Plaintiff/Respondent if the orders prayed for were granted.

SUBPARA xvii.

The Applicant would comply with reasonable conditions that the court may give.

V. The response by the Plaintiff/ Respondent to the Notice of Motion application by the 3rd Defendant dated 15th May, 2023

8. The Plaintiff/ Respondent opposed the application through a 44 Paragraphed Replying Affidavit sworn by SONGOLE B.ASINGWA, an Advocate of the High Court of Kenya and practicing as such at the Ethics and Anti-Corruption Commission (EACC) dated 6th June, 2023 with twelve (12) annexures marked as "SBA -1 to 12" where she averred that:-

    a. The 3rd Defendant/Applicant was misleading the Honourable court. He was being dishonest when he indicated that the Applicant was never notified of the hearing dates.

    b. When the suit was first filed on 9th June, 2009, the 3rd Defendant/ Applicant first instructed the Law firm of Messrs. Kadima & Company Advocates to enter appearance on its behalf. Attached in the affidavit was a Memorandum of Appearance marked as "SBA - 1".

    c. On 10th July, 2009 the 3rd Defendant/Applicant filed a Statement of Defence. Attached herewith and marked as "SBA – 2" was a copy of the said Defence.

    d. On 13th July, 2009 the 3rd Defendant/Applicant through his appointed Advocates; Messrs. Kadima & Company Advocates filed a Notice of Preliminary Objection and a Replying Affidavit duly executed by the Applicant in response to the Plaintiff's/Respondent's application and Plaint. Annexed in the affidavit were copies of the said pleadings marked as "SBA – 3".

    e. The 3rd Defendant/Applicant filed submissions relating to the Plaintiff's application and the same were filed in Court on 23rd March, 2010. Annexed in the affidavit was a copy of the application marked as "SBA – 4".

    f. The matter came up for hearing of the Plaintiff's/Respondent's application seeking injunctive orders on 8th July, 2010 where the Applicant was ably represented by his Counsel.

    g. On 13th November, 2019 the 3rd Defendant/Applicant was ably represented when the matter came up for directions before this Honourable Court.

    h. On 16th July, 2020 the Law firm of Messrs. Kadima & Company Advocates made an application to cease from acting for the 3rd Defendant/Applicant. Annexed in the affidavit was a copy of the application marked as "SBA – 5".

        i. The said Law firm never prosecuted its application. Thus, the import of it would be it continued being on record on behalf of the 3rd Defendant/Applicant to date.

    j. The Plaintiff/Respondent had always effected service upon the firm of Messrs. Kadima & Company Advocates who appeared before court for the 3rd Defendant/Applicant. Annexed in the affidavit were copies of the hearing notices and affidavits of service marked as "SBA – *6*").

    k. On 9th March, 2021 the Law firm of Messrs. T.K Rutto & Company Advocates filed a notice of preliminary objection dated 2nd March, 2021 challenging the jurisdiction of the Court in dealing with various matters including the subject suit.

    l. The Honourable court dismissed the notice of objection and ordered for hearing to proceed in all matters including the present suit. Annexed in the affidavit was a copy of the said ruling marked as "SBA – 7".

m. Pursuant to the direction of the Honorable Court this matter was scheduled for mention on 6th October, 2021 wherein the 3rd Defendant/Applicant Advocate was present in Court and parties were given a hearing date for 29th November, 2021. On 29th November, 2021 the suit came up for hearing and the Defendant/ Applicant was ably represented by his Advocate who were present in Court for hearing. The matter thereafter was scheduled for further hearing on 7th March, 2022, a date that was issued by this Honorable Court with the consent of all parties including the 3rd Defendant/Applicant.

n. Despite the 3rd Defendant/Applicant being present when the Honorable Court issued the above-mentioned date he never appeared in court on 7th March, 2022. The Applicant was misleading the Honorable court by indicating that the matter proceeded for hearing on 7th March, 2022. The same was not true as Counsel for Plaintiff/Respondent sought for Court's leave to file a notice of change of Advocates and the same was granted. The matter was then scheduled for hearing on 18th and 19th July, 2022. On 28th March, 2022 the Applicant was informed of the above hearing dates and service was effected upon both the Law firms of Messrs. Kadima & Company Advocates and Messrs. T.K Rutto Advocates. Annexed in the affidavit were copies of the hearing notice marked and email extracted and marked as "SBA – 8" and "SBA – 9".

o. Service was effected on the Law firm of Messrs. T.K Rutto Advocates as they had initially filed another application in ELC Civil Suit 180 of 2009 seeking that various matters be stayed including the subject suit. Annexed herewith were copies of the said application and letter and marked as "SBA – 10". The Applicant herein had been filing various frivolous applications deliberately delay the matter for hearing.

p. Three days to the above-mentioned hearing dates (18th and 19th July, 2022), the Law firm of Messrs. T.K Rutto Advocate filed compliance documents upon the Plaintiff/Respondent. The Applicant could not therefore at this juncture purport to having not been given adequate opportunity to defend himself. Annexed in the affidavit was a copy of the email extract marked as "SBA – 11". The Plaintiff/Respondent had at all material times of hearing of the suit served upon the 3rd Defendant/Applicant hearing notices for the matter which had always been acknowledged.

q. The provision of Order 12 Rule 2 of the Civil procedure Rules, 2010 is clear on procedure for hearing a matter where only the Plaintiff has attended court. When the matter was closed for hearing the Plaintiff/Respondent prepared and served upon the 3rd Defendant/ Applicant with their submissions which were received by both the Law firm of Messrs. Kadima & Company Advocates and Messrs. T.K Rutto Advocates. Annexed in the affidavit was a copy of an extract of the submissions marked as "SBA – 12".

r. From the foregoing it was clear that the 3rd Defendant/Applicant was well aware of the matter but chose not to appear in court and could not therefore turn around and state otherwise. The onus of ensuring that he appeared in court to prosecute the matter was on him and not the Plaintiff/Respondent.

s. The 3rd Defendant/ Applicant herein was at all material times of the hearing of the suit fully represented and accorded the opportunity to be heard through his appointed Advocates.

t. The 3rd Defendant/Applicant could not therefore describe himself as a party who was denied a chance to be heard. At all material times he was notified of the existence of the suit, filed a Statement of Defence, list of documents all these in preparation of the hearing. He

was even notified of the hearing date but in most of the instances he failed to seize the chance.The overriding objective of the Civil Procedure Rules, 2010 as stipulated in the provision of Sections 1A of the *Civil Procedure Act*, Cap. 21 is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. This objective could not have been served by delaying hearing of the suit further as a result of the 3rd Defendant/Applicant's conduct.

u. The 3rd Defendant/Applicant's application was baseless, vexatious and brought with malice as an afterthought just to deny the Plaintiff/Respondent from realizing its decree. The 3rd Defendant/Applicant application was a technical gimmick and a theatrical maneuver intended to defeat the ends of justice which technicality was abhorred by the provision of Article 159 (2) (d) of *the Constitution* of Kenya, 2010. The 3rd Defendant/ Applicant's application should not be allowed as it was filed with the intention of defeating justice. It was in the public interest that the same should not be allowed. Re-opening the suit for hearing would prejudice the Plaintiff/ Respondent since the Applicant's intention was to fill gaps in evidence already produced by the Plaintiff/Respondent.

v. The 3rd Defendant/Applicant was not being honest to this Honourable Court by indicating that Judgement in the matter was delivered without notice to it. The Honourable Court issued a notice on Judgement on the 10th February, 2023. Annexed in the affidavit was the email extract on notice and marked as "SBA – 12".

w. The 3rd Defendant/Applicant was aware that the matter had been active since the year 2009 and never raised any objections until after Judgement had been delivered. The application offended the principles of equity that delay defeats equity as equity aids the vigilant not the indolent. The application by the 3rd Defendant/Applicant was already overtaken by events as the Plaintiff/ Respondent already executed the decree by registering the same at the Land's Registry. The 3rd Defendant/Applicant admitted in his Replying Affidavit that he was not interested in the suit parcel as such he should let the Plaintiff/Respondent proceed with execution.

x. The Application herein if allowed would prejudice, hinder and risk the recovery of the subject suit parcel of land which was public property belonging to Kenya Civil Aviation Authority which should at all material times be in occupation by staff of the said institution. The 3rd Defendant/Applicant had not met the threshold for being granted Orders of stay as provided for under the provision of Order 42 Rule 6 of the Civil Procedure Rules, 2010.

y. Should the Court be inclined to allow the Applicant's application then the same should be on condition that the Applicant deposits in court the sum of damages that the court directed him to pay in the Judgement delivered on 16th February,2023. The 3rd Defendant/Applicant application was unmeritorious, frivolous, vexatious and an abuse of court process whose objective it to waste court's precious judicial time hence should be dismissed with costs to the Plaintiff/Respondent.

VI. Submissions

9. On 25th May, 2023 while all the presence of the parties in Court, they were directed to have the two (2) Notices of Motion applications dated 16th March and 15th May, 2023 be disposed of by way of written submissions. Pursuant to that, all the parties obliged and on 19th September, 2023 and a ruling date was reserved on notice by Court accordingly.

A. The written submissions of the 1st and 2nd Defendants/Applicants to the Application dated 16th March, 2023

10. The 1st and 2nd Defendants/Applicants through the Law firm of Messrs. S.S. Osman & Company Advocates filed their submissions dated 16th June, 2023. M/s. Osman Advocate commenced the submission by stating that on the 16th February, 2023 this Honourable Court delivered Judgment against all the Defendants. The 1st and 2nd Defendants/Applicants had never had notice of the present court proceedings at all prior to the delivery of the Judgment. No pleadings and/ or summons were ever served upon them at any stage of the proceedings and/or at all. Upon perusal of the court file, the 1st and 2nd Defendants/Applicants were shocked to learn that the Law firm of Messrs. Kadima & Company Advocates had entered appearance on their behalf yet they had no knowledge of the suit and had not therefore given any instructions to any firm of Advocates.

11. In view of the above and the fact that the 1st and 2nd Defendants/Applicants filed a Notice of Motion Application dated 16th March, 2023 seeking the following orders;

    a. Spent.

    b. Spent.

    c. Spent.

    d. That The Firm ofm/s.S. S Osman & Company Advocates,express House, 1St Floor, Left Wing,ganjoni, Off Moi Avenue P.O BOX 40925-80100,Mombasa be allowed to come on record on behalf of the 1st and 2nd Defendants in this suit.

    e. That the Memorandum of Appearance dated 23rd June, 2009 filed by the firm of Kadima & Company Advocates is null and void ab initio having been filed without instructions and all documents filed by the said firm of Advocates on behalf of the 1st and 2nd Defendant be struck out and be expunged from the record.

    f. That the Honourable Court be pleased to unconditionally set aside and/or vacate the judgment and/or decree delivered, entered and/or obtained against the 1st and 2nd Defendants on 16th February, 2023 and/or any other and all consequential orders thereof and the 1st and 2nd Defendants be granted leave to file their defence.

    g. That the costs of this Application be in the cause.

12. The Plaintiff/Respondent filed a Replying Affidavit and a further Replying Affidavit sworn by M/s. Songoloe B. Asingwa, an Advocate of the High Court of Kenya on 22nd March, 2023 and 23rd May, 2023 respectively. The Plaintiff/Respondent, in the aforementioned Affidavits alleged as follows:-

    a. The Applicants had first instructed the Law firm of Messrs. Muriungi & Company Advocates and they attached a letter dated 19th June, 2009 marked as exhibit 'SBA-1'.

    b. The Law firm of Messrs. Kadima & Company Advocates was on record for the Applicants and all hearing notices and documents in relation to the matter were being served upon the said firm of Advocates.

    c. The 1st and 2nd Defendants/Applicants were served by way of substituted service through advertisement in the local newspaper of "The Daily Nation" edition of 17th June, 2009 the reason why the Law firm of Messrs. Kadima & Company Advocates came on record.

13. In response to the Replying Affidavits, the 1st and 2nd Defendants/Applicants filed a Supplementary Affidavit sworn on 17th April, 2023 by Enock Tuitoek and John Ayabei whose contents, the Learned Counsel quoted in verbatim;

> "4. That in response to Paragraphs 3, 4 and 5 of the Replying Affidavit, the contents thereof are misleading for the following reasons;
>
> a) The 1st and 2nd Defendants have never instructed any firm of Advocates as claimed since they had no knowledge of the suit.
>
> b) The said firm of Muriungi And Company Advocateshas never represented the 1st and 2nd Defendants in this suit and/or any other matter at all and that the said firm of Advocates is unknown to us.
>
> c) The said Annexure 'SBA - 1' referred to by the Plaintiff Respondent is a letter where the said firm of Muriungi and Company Advocates is enquiring which Bernsoft Limited was sued by the Plaintiff since there were two companies with the same name. The said firm never entered appearance for any party in this matter and they had written the letter following instructions from a different Bernsoft Ltd and not the 1st Defendant herein.
>
> 5. Thatin response to Paragraphs 7, 8, 9 and 10 of the Replying Affidavit he wished to reiterate the contents of the Supporting Affidavit to the Notice of Motion dated 16th March, 2023 and state as follows;
>
> a. That the 1st and 2nd Defendants have never instructed the firm of Kadima & Company Advocates at any stage at all and the said firm of Advocates has never acted for the 1st and 2nd Defendants in any matter at all.
>
> b. That the said Application to cease acting and the suit as a whole were never within the knowledge of the Defendants as the same were never served upon them.
>
> 6. Thatin response to Paragraphs 11, 12 and 13 of the Replying Affidavit, we are advised by our Advocates on record which counsel we verily believe to be true that the law on service of summons upon a corporation were never followed as it was provided for under the Civil Procedure Rules (Rev.2009). That before an order for substituted service is granted; the Plaintiff applying for the said order must establish and prove that the Summons could not be served in accordance with any of the preceding rules.
>
> 7. Thatthe Plaintiff deliberately ignored the law on service and in an orchestrated plan full of malice proceeded to seek an order for substituted service with knowledge that it was next to impossible for the Defendants to know of the advertisements so as to proceed with the suit as an undefended cause and to justify the irregular judgment obtained against the Defendants.

8. Thatthe contents of paragraph 14 of the Replying Affidavit are utterly false and misleading. I reiterate that the 1st and 2nd Defendants have never appointed any Advocate to represent them in this suit. The said firm of Kadima & Company advocates were never instructed by the 1st and 2nd Defendant herein; Whereas, the firm of Muriungi and Company Advocates were representing a different entity and not the 1st Defendant herein.

9. Thatin response to Paragraphs 15 to 23 of the Replying Affidavit, we wish to state that the contents thereof are misleading and untruthful. We are advised by our Advocates on record which Counsel we verily believe to be true that it is a settled principle of law that procedural justice is the foundation and bedrock of substantive justice and a court of law cannot be made partisan to the murky phrase "the end justifies the means".

10. That We are advised by our Advocates on record which Counsel we verily believe to be true that it is a settled law that statutory bodies and all arms of government are subject to the rule of law and cannot devise their own rules contrary to the provisions of the law.

11. That in response to paragraph 24 of the Replying Affidavit, we are advised by our Advocates on record which Counsel we verily believe to be true that an illegality cannot be condoned merely because there is a remedy.

12. That we urge the Honourable Court to disregard the Plaintiff/ Respondent's replying affidavit and for the interests of justice and fairness that the present Application be allowed as prayed.

14. The Law firm of Messrs. Kadima & Company Advocates never filed any response to the Application of instant and they further ignored the correspondences made to them requesting for an explanation on why they proceeded to enter appearance in a manner where they had no instructions to do so.

15. The Learned Counsel submitted that the Law firm of Messrs. Kadima & Company Advocates entered appearance on behalf of the 1st and 2nd Defendants without instructions. The said Law firm could not impose itself on parties who had not issued them with instructions to act on their behalf. Further, the Plaintiff/Applicant could not compel the Applicants to accept representation from a Law firm of Advocates they never instructed. To buttress his point, the Learned Counsel cited the case of:- "J Mbugua Mburu & Associates Advocates v City Star Shuttle Limited [2021]eKLR" whereby the court observed as follows;

> " 18. The general rule is that it is not the business of the Courts to tell litigants which Advocates should or should not act for them in a particular matter as each party to a litigation has the right to choose his or her own Advocate and unless it is shown to a Court of law that the interests of justice would not be served if a particular Advocate were allowed to act in the matter, the parties must be allowed to choose their own counsel.
>
> 19. It is however clear that Advocates can only act in a matter where they have been instructed either expressly or by implication.
>
> ...Where for example it is proved to the satisfaction of the Court that legal proceedings were commenced by or on behalf of an incorporation by an

Advocate contrary to or in the absence of the instructions of an incorporation it is trite in this jurisdiction that such proceedings are liable to be struck out with costs being borne by the Advocate concerned. This was the position in Tavuli Clearing & Forwarding Limited v Charles Kalujjee Lwanga Nairobi (Milimani) HCCC No. 585 of 2004."

16. The Learned Counsel prayed for the Honourable Court to declarethe Memorandum of Appearance filed by the Law firm of Messrs. Kadima & Company Advocates null and void ab-initio and strike out the same and any other documents filed thereof.

17. On the issue of setting aside of the Judgment, the Learned Counsel submitted that the Honourable Court has the discretion to set aside the Judgment herein even if it was found to be regular and all consequential orders thereto. It was a draconian measure to deny the Defendants their day in court. On this point, they relied on the case of "Signature Tours & Travel Limited v National Bank of Kenya Limited [2018] eKLR" where the Court observed as follows;

> " In the case of James Kanyiita Nderitu & Another [2016] eKLR, the court of Appeal stated thus:
>
> "From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgement that is regularly entered and one which is irregularly entered. In a regular default Judgement, the Defendant will have been duly served with summons to enter appearance or to file defence, resulting in default Judgment. Such a Defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default Judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default Judgment, and will take into account such factors as the reason for failure of the Defendant to file his Memorandum of Appearance or Defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended defence raises triableissues; the respective prejudice each party is likely to suffer and whether of the whole it is in the interest of justice to set aside the default Judgment. among others. See Mbogo & Another v Shah [1968] EA 98, Patel v E.A. Cargo Handling services Ltd [1975] E.A. 75, Chemwolo & Another v Kubende [1986] KLR 492 and CMC Holdings v Nzioka [2004] I KL.R 173."

18. The Learned Counsel submitted that they were never served with the Summons and/or Plaint at all. The Plaintiff/Respondent on the other hand claimed that they served the summons by way of substituted service through advertisement. The Suit was filed in June, 2009 together with a Chamber Summons Application under certificate of urgency where the Plaintiff/Respondent sought for Ex - Parte orders preserving the suit property pending hearing and determination of the Application and the Summons be served by way of advertisement. The Court granted the Ex - Parte orders on the 10th June, 2009. The Applicable law on service of Summons and pleadings when the suit was filed was the Civil Procedure Rules (Rev.2009). The then provision of Order V Rule 2 and Order V Rule 17 of the Civil procedure Rules, 2010 provides for service on corporations and substituted service respectively. They quoted the provisions in verbatim;

> " Order V rule 2-Service on Corporations;
>
> "2. Subject to any other written law, where the suit is against a corporation the summons may be served-
>
> (a) on the secretary, director or other principal officer of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 2 (a),by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation, or if there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation."

Order V Rule 17 Substituted Services:

"17. (1) Where the Court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the Defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(2) Substituted service under an order of the court shall be as effectual as if it had been made on the Defendant personally.

(3)Where the court makes an order for substituted service it shall fix such time for the appearance of the Defendant as the case may require.

(4)Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No. 23 of Appendix A with such variations as the circumstances require."

19. The Learned Counsel submitted that the provision of Order V rule 2 as captured above in verbatim, provides for several options for serving a corporation including service through the last known postal address. The 1st and 2nd Defendants/Applicants' last postal address was known to the Plaintiff/Respondent. The address was in the documents filed by the Plaintiff/Respondent in their List of documents, the records at the lands office and even the registrar of Companies. Yet the Plaintiff/Respondent chose to unprocedurally move the court seeking to serve the Summons by way of advertisement. The big question that lingers is WHY?Service by advertisement was provided for under Order V rule 17 on substituted service and only permitted where the Plaintiff was unable to effect service as per the preceding rules. In the instant case, the Plaintiff/Applicant never ever made any attempt to effect service as provided for under the provision of Order V Rule 2 of the Civil Procedure Rules, 2010 so as to give them a right of seeking service by way of substituted services. The Plaintiff/Respondent perhaps thought that being an institution of its statute it was above the law and decided to put the cart before the horse by flouting the rules of procedure and the law in all aspects.

20. The Learned Counsel submitted that it was a settled principle of law that procedural justice was the mode partisan to the murky phrase "the end justifies the means". Further, that it was a settled law that statutory bodies and all arms of government were subject to the rule of law and could not devise their own rules contrary to the provisions of the law.It begged to question what a coincidence it was that the summons were advertised on the 19th June, 2009 a Friday and the law firm of Messrs. Kadima & Company Advocates rushed to enter appearance without instructions from the Defendants immediately the following week on 23rd June, 2009 a Tuesday. Further, the said Law firm of Advocates filed an Application to cease acting in the year 2020,11 years down the line but decided not to prosecute

the application and therefore remained on record without instructions and at the same time never participated in the proceedings. Surprisingly, the said Law firm of Advocates, having purportedly rendered services to the 1st and 2nd Defendants/Respondents for all those 11 years never sought to be paid. They never filed any application for taxation of the bill of costs against the 1st and 2nd Defendants/ Applicants. Were they being paid by third parties with whom they were acting in collusion to defeat justice? Perhaps the Plaintiff/Respondent's agents?

21. The Learned Counsel submitted that it was evident that the whole proceedings commenced by the Plaintiff/Respondent were strategically planned to ensure that the Defendants had no chance and/ or opportunity to participate in the proceedings so as to make it a child's play for the Plaintiff/ Respondent in prosecuting the case and procure a win on a self-glorified easy peasy argument –'the suit is undefended, it must therefore succeed'. The service of the summons was improper and an orchestrated plan to defeat justice. Therefore, the Judgment delivered on the 16th February, 2023 was irregular and must be unconditionally set aside and the 1st and 2nd Defendants given a chance to file and prosecute their defence which has merit.

22. The Learned Counsel asserted that the 1st and 2nd Defendants/Applicants had a merited Defence and they should be allowed to defend the suit. To support their legal position, they relied on the case of:- "Moniks Agencies Limited v Kenya Airports Authority (KAA)[2019] eKLR" where the Court observed as follows and relied on the flowing authorities in making its decision;

> " a) Kingsway Tyres & Automart Ltd v Rafiki Enterprises Ltd. Civil Appeal 220 of 1995;
>
> "Notwithstanding the regularity of an ex parte judgment, a Court may set aside the same if a Defendant shows he has reasonable defence on its merits".
>
> b) Shah v Mbogo [1967]EA 116
>
> "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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".

23. The Learned Counsel urged the Honourable Court to be guided by the case of: "Signature Tours & Travel Limited v National Bank of Kenya Limited [2018] eKLR where the court held that:-

> " In my considered view, and taking into account all the circumstances of this case, I find that there is an irregular default Judgment entered by this court. An irregular Judgment is be to be set aside by the court ex debito justiae as a matter of judicial duty to remedy the situation. In order to uphold the integrity process, I do set aside the default Judgment entered on 7th December, 2017."

24. In conclusion, the Learned Counsel opined that this Honourable Court be afforded a right of audience to ventilate their defence pursuant to the cordial principles and values of natural justice, *the Constitution* of Kenya, amongst other relevant pieces of legislation. As thus the Learned Counsel prayed that the Judgment herein and all other consequential orders thereto should be unconditionally set aside and the 1st and 2nd Defendants/Applicants should be given a chance to defend the suit herein to conclusion. The Learned Counsel prayed that the 1st and 2nd Defendants/ Applicants application dated 16th March 2023 be allowed as prayed. The 1st and 2nd Defendants/ Applicants indicated it would entirely rely on these written submissions, the contents of the Supporting Affidavit sworn on 16th

March, 2023 and the Supplementary Affidavit sworn on 17th April, 2023 and the grounds set out in the Notice of Motion Application dated 16th March, 2023.

B. The written submissions of the 3rd Defendant to the Notice of Motion application dated 15th May, 2023

25. The 3rd Defendant/Applicants through the Law firm of Messrs. T.K. Rutto & Company Advocates filed their Written submissions dated 8th November, 2023. Mr. Ruto Advocate commenced the submission by stating that on the 3rd Defendant/Applicant filed a Notice of Motion application under a Certificate of Urgency dated 15th May 2023 inter alia seeking for the afore – stated orders.

26. On the background, the Learned Counsel submitted that on 13th November, 2019, Kadima Advocate indicated to court of his intention to cease acting for the 3rd Defendant and subsequently filed his Application to cease acting on 16th January, 2020 and was yet to serve the 3rd Defendant/Applicant. However, the same Application dated 16th January, 2020 was dismissed for non-attendance and on 16th October, 2021, the Court totally gave different directions and indicated the Law firm of 3rd Defendant Kadima Advocates would be compelled to continue representing the 3rd Defendant. Why the firm of Messrs. Kipkenda & Co. Advocates was compelled to pay CAF and witness expenses of Kenya Shillings Ten Thousand(Kshs. 10,000/-)only remained a mystery as the said Law firm was and never had been on record for either the 1st, 2nd nor 3rd Defendants herein. On 29th November, 2021, 7th March 2022 and 18th July, 2022, the matter proceeded ex-parte without Notice to either the 1st, 2nd, nor the 3rd Defendant/Applicant. From the record, the Affidavit of Service dated 17th March 2022 sworn by George Njoroge, confirm to have served Messrs. Kipkenda & Co. Advocates and Messrs. Kadima Advocates but there was no attachment of Hearing Notice. The ex-parte hearings resulted to a Judgment being delivered on 16th February, 2023 prompting the 1st, 2nd and 3rd Defendants/Applicants to file their respective Applications. The 1st and 2nd Defendants/Applicants Application was Amended Application dated 27th April 2023 and their Submissions were the ones dated 16th June 2023.

27. The Learned Counsel submitted that they were not opposed to the 1st and 2nd Defendants/Applicants' Application and totally associated themselves with the said Submissions. The 3rd Defendant/Applicant filed his Notice of Motion Application under Certificate of Urgency dated 15th May 2023 together with the Supporting Affidavit, Consent to come on record and Notice of change of Advocate. The same is opposed by the Plaintiff and not opposed by the 1st and 2nd Defendant/Applicant.

28. The Learned Counsel humbly submitted that this Honourable Court delivered its Judgment on 16th February, 2023 and made the finding that the suit property known as Land parcel 2396-MN/1/2415 and MN/1/2396 situated in Bamburi, Mombasa, be reverted to the Kenya Civil Aviation Authority because it is alleged to be the Government Land. Among other orders were:-

    a. That an order made herewith for the 1st, 2nd and 3rd Defendants to pay the general damages and Mesne Profits for a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/=) only for the loss of user for the suit property covering all that period of the 22 years they had been in its illegal possession and/or occupation from the year 2002 to date within the next sixty (60) days from the date of delivery of this judgment hereof.

    b. That an order be and is hereby made for the 3rd Defendant herein, by then the duly appointed as the Commissioner for Lands in the Ministry of Lands and Settlement, a public officer to personally pay a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) only for the liability, abuse of office and breach of tort of misfeasance in office within the next sixty (60) days from the date of the delivery of this Judgment hereof.

c. That cost of this suit be borne by the 1st, 2nd and 3rd Defendants.

29. The Learned Counsel submitted that the Applicant stated that he learned of the Court's decision on 24th February 2023, when its current Advocates on record representing the 3rd Defendant/Applicant on other matters were served by the Plaintiff/Respondent with a letter indicating its intention to proceed with execution of the Decree of this Honourable Court. Further, the Applicant states that in arriving at its decision, it was not given a chance to be heard and ventilate its case on merit during the hearing of the suit on divers dates of 29th November 2021, 7th March 2022 and 18th July 2022. It attributes this to the fact that it was not notified of the hearing date nor were its then Advocates on record M/s. Kadima & Co. Advocates who had expressly indicated to court they wished to cease acting for the 3rd Defendant/Applicant for lack of proper instructions. Therefore, the hearing proceeded in his absence. He was equally not informed about the directions made on the filing of written submissions on the suit as such none were filed and the Court only relied on the Plaintiff/Respondent's submissions in arriving at its decision.The Applicant had also sworn a Supporting Affidavit to affirm his position.

30. The Learned Counsel further submitted that the Applicant now prayed that this Court sets aside its Judgment and consequently the case be reopened for the hearing of the 3rd Defendant/Applicant's case. Similarly same orders are prayed for by the 1st and 2nd Defendants/Applicant herein.

31. On the law, the Learned Counsel submitted that the Application was brought under the provision Order 12 Rule 7, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Cap. 21 and Article 159 of *the Constitution* of Kenya, 2010 and all enabling provisions of the law.

32. On whether the Application should be allowed as prayed, the Learned Counsel relied on the provision of Order 12 Rule 7 of the Civil Procedure Rules, 2010. He reiterated that it was trite that the test for the correct approach in an application to set aside a default judgment is; firstly, whether there was a defense on merit; secondly, whether there would be any prejudice, and thirdly what is the explanation for the delay. This test was set in the Court of Appeal in the case of "Mohammed & Another v Shoka [1990] KLR 463". In "Shah v Mbugo [1967] E.A. 166" the court of Appeal held that:

> " This discretion to set aside as ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it's not designed to assist the person who has deliberatelysought whether by evasion or otherwise to obstruct or delay the cause of justice.
>
> "29. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit."

33. Further, the Learned Counsel submitted that the court held that for such Orders to be issued inter alia the court must be satisfied with 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.

34. Similarly, in the case of:- "Patel v EA Cargo Handling Services Ltd [1974]EA75" the Court stated as follows;

> " There are no limits or restrictions on the judge's discretion to set aside or so on such terms as may be just. The main concern of the Court is to do fetter the wider discretion given to it by the rules."

35. The Learned Counsel submitted that from the brief facts of his case, the Applicant ably demonstrated to this Court that its failure to participate in the hearing of the suit was due to a sufficient cause. The Applicant had pleaded that it was not notified that the matter was scheduled for hearing on 29th November, 2021 and 18th July 2022, the non-attendance was not deliberate. Additionally, the Applicant's former Advocates on record were not aware of the hearing date, and neither did they make any steps to follow up on the status of the suit nor did they notify the Applicant in the Circumstances.

36. The Learned Counsel acquiesced that while determining whether there was a sufficient cause or not, the Court ought to 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 perpetrated based on the judgment impugned before it. In furtherance of the overriding objectives of this Court, we rely on 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."

37. The right to a fair hearing is well enshrined in *the Constitution* of Kenya. 2010. A party to a suit should be accorded an opportunity to be heard, it has filed its Defence and which raised triable issues. It is therefore only fair and just and in theinterest of justice that the Applicant was heard and the issues raised on the Defence heard on merit. The Courts have held time and again that a triable Defence was not one that must succeed but one that raises triable issues. The Learned Counsel further acquiesced that that whether the Defence had merit was best left to the trial Court to test its veracity at the hearing of the case and as such, he urged this Court to set aside its judgment and hear the Applicant's case to establish the veracity or otherwise of its case on merit.

38. Further, the Learned Counsel relied on the decision by Justice Adoyo of the High Court of Uganda in "Transafrica Assurance Co Limited v 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."

39. The Learned Counsel implored upon this Honourable Court to be guided by the decision of the Court of Appeal in "CMC Holdings Ltd v James Mumo Nzioka [2004] eKLR", 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"

40. The Learned Counsel submitted that disputes ought to be determined on merits and that lapses ought not necessarily to debar a litigant from pursuing his rights. He reiterated that the reason offered by the Applicant was 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 had expressed the desire to be heard, the opportunity of defending this suit. No prejudice would be occasioned upon the Plaintiff if the Orders sought herein are not granted, and damages (if any can) ably be remedied by an award of damages.

41. In conclusion, the Learned Counsel submitted that the fundamental duty of the Court was 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 was a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a party against whom a claim or charge was made must be given a reasonable opportunity of appearing and presenting its case. The Learned Counsel prayed that the Notice of Motion application dated 15th May, 2023 was allowed as prayed.

VII. Analysis and Determination

42. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has framed the following issues for determination.

    a. Whether the Notice of Motion dated 16th March and 15th May, 2023 meets threshold required for setting aside of the orders made on the 29th November, 2021, 7th March. 2022 and 18th July, 2022 and subsequent judgment delivered on 16th February, 2023 and the suit be re-open for hearing on merit.

    b. Whether the Honourable Court can grant leave for the Defendants' to file their Defence.

    c. Who will bear the Costs of Notices of Motion applications dated 16th March, 2023 and 15th May, 2023.

Issue No. a). Whether the Notice of Motion dated 16th March and 15th May, 2023 meets threshold required for setting aside of the orders made on the 29th November, 2021, 7th March. 2022 and 18th July, 2022 and subsequent judgment delivered on 16th February, 2023 and the suit be re-open for hearing on merit.

43. Under this Sub – heading, the Honorable Court deciphers that the main Substratum in this matter is mainly setting aside an alleged irregular Judgement delivered in default and allowing the case to proceed on thereof. Ideally, the decision of this Court was rendered on the basis of a proceeding that took place for non attendance of the Defendants herein.

44. The Courts are guided by the provisions of Article 159(2)(d) of *the Constitution* and Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases.The provision of Order 10, of the Civil Procedure Rules, 2010, addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. The provision of Order 10 Rule 4 of the Civil Procedure Rules, 2010 empowers Courts to enter interlocutory Judgment in cases where the Plaint was drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. On the other hand, rule 9 gives the Plaintiff the leeway to set down a

suit for hearing where no appearance was entered for other suits not provided for by this Order. Under Order 10 Rule 10 provides that in cases where a Defendant has failed to file a defence, Rules 4 to 9 shall apply with any necessary modification. While Rule 11 empowers the court to set a side or vary a Judgment that has been entered under Order 10.

45. Legally speaking, the Honourable Courts have the discretionary power to set aside ex parte judgment with the main aim being that justice should prevail. The Courts are not required to consider the merits of a defence in an application of this nature, although the Applicant has a Defence to the Counter - Claim which it should be allowed to be heard on merit. Therefore, courts ought to look at the draft Defence to the Plaint and accompanying witness statements before proceeding to give its ruling as to whether the Applicant's defence raises triable issues. In "Patel v E.A. Handling Services Ltd [1974] EZ 75" and "Tree Shade Motor Ltd v D.T. Dobie Co. Ltd CA 38 of 1998" and "Mania v Muriuki [1984] KLR 407" the courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error.

46. The principles of setting aside Ex - Parte Judgments are well established. In the case of "Esther Wamaitha Njihia & 2 others v Safaricom Limited [2014] eKLR" 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 v 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 v 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 v Gasyali. It also goes without saying that the reason for failure to attend should be considered."

47. The issues for determination are as to whether the Defendant was properly served with Summons to Enter Appearance, whether the Defendant has shown sufficient cause why he/she neither filed a Defence nor attended court during the hearing of the suit and finally whether the Defendant has a defence with triable issues. This is well stated far as concerns the legal principles.

48. Now turning to the instant case. From the record, the 1st and 2nd Defendants/Applicant aver that on the 16th February,2023 this Honourable court delivered judgment against the Defendants without having given the 1st and 2nd Defendant/Applicants a right of audience. The 1st and 2nd Defendants/ Applicants and/ or their agents claim that they had never had notice of the present court proceedings at all. No pleadings and/or summons were ever served upon them at any stage of the proceedings and/ or at all. They held that they were never aware of the basis of the suit and/or the subject matter thereof and had been condemned unheard contrary to the principles of justice. According to them and the testimonies adduced herein, they came to learn of the proceedings and Judgment when their Advocates appearing in a different suit during negotiations which were being conducted on a without prejudice was informed that there was a Judgment against his Clients in another suit whereupon they were given the suit of instance case number details. Upon perusal of the court file, they were shocked to learn that the Law firm of Messrs. Kadima & Company Advocates had entered appearance on their behalf yet they had no knowledge of the suit and had not therefore given any instructions to any firm of Advocates.

49. According to the 1st and 2nd Defendants/Applicants', the Memorandum of Appearance dated 23rd June, 2009 as entered by the Law firm of Messrs. Kadima & Company Advocates was bare of instructions, null and void ab initio. It was apprehension by the 1st and 2nd Defendants that the irregularities surrounding the entry of appearance on their behalf without an form of instructions and the lack of proper service of summons and pleadings as provided for under the Civil Procedure Rules was an orchestrated plan by the Plaintiff/Respondent to mislead the Honourable court into delivering a Judgment in their favour on the guise of uncontroverted evidence when indeed they had robbed the Defendants' of their day in court and their right to fair trial as guaranteed under *the constitution* of Kenya.

50. The 3rd Defendant/Applicant on the other hand argued that the hearing Notice were never served upon the 3rd Defendant/Applicant. The court proceeded ex-parte for hearing on 29th November, 2021, 7th March 2022, 18th July 2022 without according the 3rd Defendant an opportunity to be heard on merit. In the said Judgment he was ordered to pay colossal amount of Thirty Million Kenya Shillings (Kshs. 30,000,000/-) only to be shared between the Defendants and he was personally as 3rd Defendant to pay Kenyan Shillings Five Million (Kshs 5,000,000/-) only without being accorded an opportunity to being heard on merit. The 3rd Defendant was never notified of the hearing date to enable him. His then advocates on record M/S. Kadima & Co. Advocates had filed an application to ceased acting dated 16th January 2020 which application he had never been served with and not aware of the same. A further perusal of the Court Proceedings and records reveals the matter proceeded ex-parte on 29th November, 2021, 7th March 2022, 18th July, 2022 and that from the record the Law firm of Messrs. Kipkenda & Co. Advocates were served whom he had never appointed to act on his behalf.

51. The Plaintiff on the other hand had contended that the Applicants were misleading the Honourable court and that they were being dishonest when they indicated that they were never served with the summons to enter appearance. When the suit was first filed on 9th June, 2009, the 1st and 2nd Defendants/Applicants first instructed the Law firm of Messrs. Muriungi & Company Advocates to enter appearance on its behalf and they attached a letter marked as "SBA -1" dated 19th June, 2009 to that effect while the 3rd Defendant/Applicant first instructed the Law firm of Messrs. Kadima & Company Advocates to enter appearance on its behalf. Messers. Muriungi & Co. Advocates in their letter acknowledged that it was the client who had seen in the newspaper that they had been sued and had therefore instructed them to represent it. The said law firm however never filed a memorandum of appearance thereafter. On 10th July, 2009 the 3rd Defendant/Applicant filed a defense (attached herewith was a defence marked as "SBA – 2".

52. On 16th July, 2020 the Law firm of Messrs. Kadima & Company Advocates made an application to cease acting for the Defendants - aannexed and marked as "SBA – 3". On 29th November, 2021 when the application to cease acting was to be heard, the said firm failed to attend court and never prosecuted its application. Therefore, it remained on record for of the 1st and 2nd Applicants/Defendants. The Plaintiff/Respondent has always effected service upon the Law firm of Kadima & Company Advocates who appeared before court for the 1st and 2nd Defendant/Applicant's. The service was by way of substituted means pursuant to the provision of Order 5 Rule 17 of the Civil Procedure, 2010 and was in the Daily Nation newspaper of the 17th June, 2009.

53. This adequate proof that the Applicants were properly served with summons to enter appearance together with the Plaint. From the records, it is true that the 3rd Defendant/Applicant filed his Satement of Defence dated 10th July, 2009. There is an affidavit of service sworn by Oscar A. Angote (then

an Advocate of the High Court of Kenya, but now a sitting Judge) dated 19th June, 2009 where the advocate averred that:-

> " 2. That on or around 12th June, 2009 I received a court order in the suit herein according to which, inter alia, the Defendants were to served the summons to enter appearance, the Plaint, the interim application for injunction and the interim orders obtained ex parte by way of advertisement was annexed in the Daily Nation or the East African Standard.
>
> 3. That on 17th June, 2009, the Defendants were duly served, in accordance with the order aforesaid, by means of the said advertisement in the Daily Nation of the material date. A copy of the advertisement is annexed herewith and marked JS – 1."

54. The provision of Order 12 Rule 7 of the Civil Procedure Rules, 2010 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".

55. The court has discretion to set aside Judgment upon such terms that may be just. The terms must not cause injustice to either the applicant or the respondent. "Mulla, The Code of Civil Procedure" has illuminated the grounds for setting aside an ex parte decree and what constitutes sufficient cause for setting aside an ex parte judgement/decree. Essentially, setting aside an ex parte judgement is a matter of the discretion of the court. The question is as to whether the applicant has shown any sufficient cause to enable the court exercise its discretion in her favour. The applicant claims that she was not served with summons to enter appearance and that the documents relied on are forgeries. The court record shows that the applicant was properly served but she did not take any action of filing a response within the stipulated period.

56. In the case of "Mungai v Gachuhi & another [2005] eKLR" cited with approval in the case of "Signature Tours & Travel Limited v National Bank of Kenya Limited" the court held that:-

> " a court's decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their presentations concluded unless they elect to forego the opportunity".

57. It is rather evident from the facts that the 1st and 2nd Defendants/Applicants chose to forego the opportunity to be heard by though entering appearance but failed to file Defence within the stipulated period. Whilst, the 3rd Defendant/Applicant though filed their Defence but failed to call evidence to it. The Applicants further neither attended court nor offered any reasonable explanation for the same despite having been duly served with a hearing notices. Where the Plaintiff gives its evidence in support of its case but the Defendant fails to call any witness in support of its allegations then the Plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In the case of:- "Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007" Ali-Aroni, J. citing the decision in "Edward Muriga Through Stanley Muriga – Versus - Nathaniel D. Schulter Civil Appeal No. 23 of 1997" held that:

> " In this matter, apart from filing its Statement of Defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the Statement in the Defence therefore remains

mere allegations.....Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

58. The fact that a defence is held as mere allegations in no way lessens the burden on the Plaintiff to prove her case. The court in the case of "Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR" the court stated:

> " I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.
>
> (See Kirugi and Another v Kabiya and Others [1983] e KLR).

59. I am guided by what the Court of Appeal stated regarding the failure of the Defendant to call witnesses to support its defence in "Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau NRB CA Civil Appeal No. 87 of 2014 [2016] eKLR" as follows:

> " We would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the Defendant's failure to call evidence, the Court must be satisfied that the Plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the Defendant. Where the Defendant has subjected the Plaintiff or his witnesses to cross - examination and the evidence adduced by the Plaintiff is thereby thoroughly discredited, Judgment cannot be entered for the Plaintiff merely because the Defendant has not testified. The Plaintiff must adduce evidence, which in the absence of rebuttal evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the Plaintiff is not entitled to Judgement merely because the Defendant has not testified."

60. As for the 3rd Defendant/Applicant, I find that he has completely failed explain why he never attended court when he was needed to. Therefore, I am only left to discern that he negligently avoided proceedings and the Judgment was entered being that he had already filed his statement of defence. Thus, he the opportunity for him to plead with the Honourable Court to set aside the proceedings and the Judgment of thus Honourable Court is absolutely not available for him whatsoever. The train has already left the station, I am afraid. I need say no more. Likewise, as regards the 1st and 2nd Defendants, I find that the Applicants have also failed to meet the fundamental threshold for the setting aside of ex - parte Judgments as clearly demonstrated in law. For that reason, their application and prayers sought ought to fail. But be that as it may, in the interest of Justice, fairness, Equity and Conscience, I will proceed to examine and opine on the Defence by the 1st and 2nd Defendants/Applicant.

61. On whether the applicant has a defence with triable issues. I have looked at the draft Defence by the 1st and 2nd Defendants/Applicants which has general denials and claiming that the title was lawfully and validity obtained at a valuable consideration by an innocent Purchaser for value. There are myriad authorities on this aspect and which Court would wish to accord the 1st and 2nd Defendant/Applicant an opportunity to be heard whatsoever.

62. In the case of "John Mukuha Mburu v Charles Mwenga Mburu [2019] eKLR" the court held that:-

> " it is trite that the test for the correct approach in an application to set aside a default Judgment are; firstly, whether there was a Defence on merit, secondly, whether there would

be any prejudice and thirdly what is the explanation for the delay. This guide was set in the court of appeal case of Mohammed & another - v Shoka [1990] KLR 463".

63. In the instant case, the 1st and 2nd Defendant/Applicant have only explained that they were not served as the reason for the delay of bringing this application. Judgment in this case was delivered on 16th February, 2023 and the application was filed on 16th March, 2023 by the 1st and 2nd Defendant which a period of one month.The general principle is that an applicant should not suffer due to a mistake of its Counsel. This was the position in the case of:- "Lee G. Muthoga v Habib Zurich Finance (K) Limited & Another, Civil Application No. Nair 236 of 2009" where it was held that:

> " it is widely accepted principle of law that a litigant should not suffer because of his Advocate's oversight."

64. Likewise, in the case:- "Winnie Wambui Kibinge & 2 Others v Match Electricals Limited Civil Case No. 222 of 2010" the Court held that:

> " It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit."

65. Additionally, in the case "Mohamed & Another v Shoka [1990] KLR 463" the Court set out the tenets a court should consider in entering interlocutory Judgment to include:

i. Whether there is a regular Judgment;

ii. Whether there is a Defence on merit;

iii. Whether there is a reasonable explanation for any delay;

iv. Whether there would be any prejudice.

66. The issue of regular Judgment was addressed in the case "Mwala v Kenya Bureau of Standards EA LR [2001] 1 EA 148", where the court stated;

> " to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was in inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debit justiciae for a court should never countenance an irregular judgment on its record."

67. In the cases of "Patel v E.A. Handling Services Ltd (1974) EZ 75" and "Tree Shade Motor Ltd v D.T. Dobie Co. Ltd CA 38 of 1998" and "Thayu Kamau Mukigi v Francis Kibaru Karanja [2013] eKLR", the court stated as follows:

> " on the second prayer of the defendant that he be granted leave to file his defence and counter claim, I will be guided by the principles elucidated in the case of Tree Shade Limited -v- DT Dobie Co. Ltd. CA 38/98 where the court held that when an ex-parte judgment was lawfully entered the court should look at the draft defence to see if it contained a valid or reasonable defence."

68. The law and procedure is clear that where a party has failed to enter appearance or filed a defence within the stipulated period, then such a party can move the court to set aside the ex parte proceedings. It is also within the court's discretion to look at each case on its own merits and decide whether such party meets the threshold for setting aside ex parte judgments. A party cannot be allowed to disregard court processes and come to court to set aside what has been done regularly as per the set down procedures. Such party cannot take steps backward to fulfill his or her own omission or commission. The court is cognizant of the fundamental right to be heard which must be guarded but it must also not lose sight of the right to access to justice for all which should be dispensed expeditiously.

69. The Court's power to set aside a Judgment is exercised with a view of doing justice between the parties. Reliance is placed on the case of, "Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede [1982-1988] KAR", where the Court held:

> " The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties"

70. In the case of "Kimani v MC Conmell [1966] EA 545", the Court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues. Further in "Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal [2014] eKLR", the Court stated that the purpose of clothing the court with discretion to set aside ex-parte judgment is:

> " To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..."

71. In the case of "Patel v EA Cargo Handling Services Ltd (Supra)", the Court stated that the main concern of the court is to do justice to the parties, and it will not impose conditions on itself to fetter the wide discretion given to it by the Rules.

72. The Court in "Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR" stated that "it is not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of litigation". This was the same position held in the case "Ruga Distributors Limited v Nairobi Bottlers Limited HCCC 534 of 2011", where court stated that "it is not enough for a party to blame their advocates but to show the tangible steps taken by him in following up his matter."

73. I am not persuaded that the applicants have made out a case for the granting of the discretionary orders to set aside the interlocutory entered herein. My considered opinion is that the reasons advanced by the Applicants for the delay are not plausible and have no merit in view of the fact that they had not tendered any documentary proof nor otherwise to show that they had no knowledge of this matter neither that they never instructed the Law firm of Messrs. Kadima and Company advocates or any other firm in that matter. In the case of:- "Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd [2018] eKLR", the Court stated as follows on the subject of delay: -

> " If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim."

74. In the case of, "Law v St Margarets Insurance Ltd [2001] EWCA Civ 30, LTL", the Court of Appeal allowed judgment in default to be set aside despite the Defendant's solicitors' procedural errors in failing to file an acknowledgment of service and in failing to ensure that the statement of truth in relation to the evidence in support of the application was signed by the right person. However, this being a land matter and on the consideration founded under the overriding objectives anchored under the provisions of Article 159 (1) & (2) of *the Constitution* of Kenya, 2010, Sections 3 & 13 of the Environment and *Land Act*, No. 19 of 2011; Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, No. 6 of 2012 whereby it is required that the default Judgment be set aside in order to enable the merits of the defence to be determined.

75. In deciding whether to impose such a condition, the court will consider factors such as whether there was any delay in applying to set aside, doubts about the strength of the defence on the merits, and conduct of the Defendant indicating a risk of dissipation of assets see, "Creasey v Breachwood Motors Ltd [1993] BCLC 480)". As to the amount, this is in the court's discretion, which should be exercised by applying the overriding objective. However, a condition requiring payment into Court of a sum that the Defendant will find impossible to pay ought not to be ordered, as that would be tantamount to refusing to set aside see, "M. V. Yorke Motors v Edwards [1982] 1 WLR 444" and "Training in Compliance Ltd v Dewse [2000] LTL 2/10/2000)".

76. In the instant case, there was no dispute that the Applicants were properly served with the plaint filed in 9th June, 2009. However, I note that this suit is not one of liquidated damages neither is it one for pecuniary damages hence no interlocutory judgment could be lawfully entered. Taking note that the draft Defence in my opinion raises triable issues, in this scenario it would be in the interest of justice, if the parties were heard fully on the merit of their respective claims. I however suggest that the matter should be heard expeditiously in order that justice is seen to be done. None of the Advocates should further delay the matter unnecessarily.

Issue No. b). Who will bear the Costs of Notices of Motion applications dated 16th March, 2023 and 15th May, 2023.

77. It is trite law that the issue of Costs is at the discretion of the Court. The Black Law Dictionary defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

78. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows;-

> " (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for good reason otherwise order."

79. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

80. Additionally, the provision provides for 'costs of and incidental to all suit or application' which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

81. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of:- "Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR" the court noted that;

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

82. In this case, as Court finds that the costs of the Notice of Motion application dated 16th March, 2023 shall be in the cause while the costs of the Notice of Motion application dated 15th May, 2023 shall be paid to the Plaintiff by the 3rd Defendant.

VIII. Conclusion & Disposition

83. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience.

84. Having said that much, in order to achieve expediency and being that this matter is a fairly old matter having been filed in 2009 and in the interest of justice and the parties it is my considered opinion that the Honourable Court's judgment delivered on 16th February, 2023and/ or any other and all consequential orders be set aside in the following conditions:-

    a. That the Notice of Motion application dated 16th March, 2023 by the 1st and 2nd Defendants be and is hereby found to have merit and hence allowed.

    b. That the Notice of Motion application dated 15th May, 2023 by the 3rd Defendant be and is hereby found to lack merit and thus dismissed.

    c. That the 1st and 2nd Defendants Statement of Defence shall be deemed to be properly filed and served and upon payment of the prerequisite Court filing fees.

    d. That the 1st and 2nd Defendant/Applicants shall serve the said Statement of Defence within two (2) days of this order.

e. That the 1st and 2nd Defendant shall pay the Plaintiff throw away costs a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000.00/-) within the next two (2) days from the date of delivery of this Ruling hereof.

f. That in default of compliance with order given in (c), (d) and (e) then the order vacating the interlocutory judgment shall automatically lapse without further reference to the to Court;

g. That the matter be set down for case management conference on priority basis – on 14th March 2024 and for the matter to be concluded 60 days from this order on 19th June, 2024.

h. That the cost of the costs of the Notice of Motion application dated 16th March, 2023 shall be in the cause while the costs of the Notice of Motion application dated 15th May, 2023 shall be paid to the Plaintiff by the 3rd Defendant right away.

It Is So Ordered Acordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MISCROSOFT TEAMS AT MOMBASA THIS 8TH DAY OF FEBRUARY 2024.

.....

HON. MR. JUSTICE L. L. NAIKUNI

ENVIROMNENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Yumna, the Court Assistant;

b. M/s. Songole Advocate for the Plaintiff/Respondents

c. M/s. Osman Advocate for the 1st and 2nd Defendants/Applicants

d. Mr. Kibet Advocate for the 3rd Defendant/Applicant