



REPUBLIC OF KENYA



KENYA LAW

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Mawe Mbili Limited v Equity Bank Kenya Limited & another (Commercial Case 70 of 2018) [2025] KEHC 4687 (KLR) (Commercial and Tax) (4 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4687 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 70 OF 2018**

MN MWANGI, J

APRIL 4, 2025

BETWEEN

MAWE MBILI LIMITED PLAINTIFF

AND

EQUITY BANK KENYA LIMITED 1ST DEFENDANT

JEAN FRANCOIS RAYMOND LOUIS DAMON 2ND DEFENDANT

RULING

1. The 2nd defendant filed an application by way of Notice of Motion dated 14th February 2024 under the provisions of Articles 50 and 159(2)(d) of *the Constitution* of Kenya, Sections 1A, 1B, 3 & 3B of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Orders 12 and 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law. The applicant prays for the following orders –
 - i. Spent;
 - ii. That Jacqueline Mack Damon, the 1st and 2nd respondents or anyone acting on their behalf or under their name (sic) be restrained from interfering or otherwise dealing with the accounts held with the 2nd respondent pending the hearing and determination of this application;
 - iii. That Jacqueline Mack Damon, the 1st and 2nd respondents or anybody acting on their behalf under their name (sic) be restrained from interfering or otherwise dealing with the accounts held with the 2nd respondent pending the hearing and determination of this suit;
 - iv. That the order of the Honourable Court made on 13th February 2024 dismissing the applicant's counterclaim be set aside together with all other consequential orders thereto;



- v. That the order of the Honourable Court made on 13th February 2024 marking the matter as settled and case closed be set aside together with all other consequential orders thereto;
 - vi. That and (sic) be issued reopening the case file herein and the applicant's counterclaim be set down for hearing;
 - vii. That the said counterclaim be reinstated for hearing;
 - viii. That the consent dated 7th October 2020 and adopted by the parties be deemed as still in force until the hearing and determination of the applicant's counterclaim; and
 - ix. That the costs of this application be in the cause.
2. The application is supported by an affidavit sworn on 14th February 2024 by the 2nd defendant, Mr. Jean Francois Raymond Louis Damon. He averred that on 7th October 2020 they adopted a consent to the effect that he and Ms Jacqueline Mack Damon or anybody acting on their behalf under their names be restrained from interfering or otherwise dealing with the accounts held with the 2nd defendant pending the hearing and determination of the suit. He claimed that despite the said consent, Ms Damon continued to invent new ways to access the funds in the said account for her own benefit to his exclusion and that of the other Directors.
 3. He averred that on 12th May 2023, Ms Damon and one Solomon Avina passed the impugned resolution to the effect that Ms Damon would be the sole signatory to the plaintiff's account held by the 1st defendant. He contended that Ms Damon approached the Bank with the said minutes to have the mandate on the account changed so that she could withdraw funds, and that being notified of the said minutes, he wrote a letter dated the 12th June 2023 to the 1st defendant notifying it of the suit herein, and warning it against complying with the demands by Ms Damon.
 4. The 2nd defendant deposed that he was informed by his Advocate that this matter came up for hearing on 13th February 2024 at 11.30 a.m. but his Advocate failed to notify him. He contended that when the matter previously came up for hearing on 6th July 2023 his Advocate failed to diarize the date despite having recorded the correct details in her Court attendance sheet.
 5. The 2nd defendant averred that as a result of his Advocate's failure to diarize the date, the Counsel present misguided the Court leading to the matter being marked as settled and case closed, and his counterclaim was dismissed.
 6. He stated that as a result of the Orders of 13th February 2024, Ms Damon approached the 1st defendant to withdraw funds from the plaintiff's account held at the 1st defendant Bank, which funds are the subject of the suit.
 7. He deposed that he and Ms Damon are co-directors in the plaintiff with 96% shareholding. He stated that the 1st defendant in a haste wrote to the Court on the same day seeking to extract the Orders, which it has since extracted with the motive of releasing funds to the said Ms Damon.
 8. He opined that if the matter is not immediately reopened, the orders of 13th February 2024 set aside, his counterclaim reinstated and set down for hearing, the plaintiff stands to suffer irreparably as Ms Damon continues to use the plaintiff's monies for her own benefit.
 9. He stated that he had filed the application herein timeously and prayed for the mistake of his Counsel not to be visited on him as he has always been ready and available to proceed with the hearing of the counterclaim. He urged this Court to allow his counterclaim to be heard on merits, to ensure fair and just administration of justice.



10. The plaintiff filed a replying affidavit sworn on 8th April 2024 sworn by Ms Jacqueline Mack Damon, a Director of the plaintiff company. She contended that the 2nd defendant's application is moot having been overtaken by events on the grounds that the 1st defendant has since granted the plaintiff access to the funds in the accounts the subject of the suit, pursuant to a resolution passed on 12th May 2023 appointing her as the sole signatory, rendering prayers 2 and 3 of the Motion spent.
11. She averred that by dint of the Orders of 13th February 2024 which saw the plaintiff's suit as against the 1st defendant withdrawn and the 2nd defendant's counterclaim dismissed, and the file thereby closed, the consent entered into on 7th October 2020 barring the parties from accessing the funds in the accounts the subject of the suit pending determination of the suit automatically abated, and as such, prayer No. 8 of the Motion is spent.
12. Ms Damon deposed that reinstatement of the 2nd defendant's suit will be an exercise in futility and a waste of scarce judicial time given that the change of mandate to the accounts that form the subject of the suit has since been effected by the 1st defendant. She contended that there is no live dispute between the parties to be determined by this Court, a fact buttressed by paragraph 17 of the 2nd defendant's supporting affidavit, where he confirms that the funds which the plaintiff has since accessed are the subject matter of the suit thus confirming that the application as it stands is moot.
13. Ms Damon contended that the set of facts predicating the prayers sought in the counterclaim have since been overtaken by events as the directorship and shareholding of the plaintiff has since been changed with the 2nd defendant no longer being a majority shareholder and Messers Jackson Matupe and Steve Jodaya the other two Directors having been stripped of their directorship pursuant to a decision rendered in HCCOMM E655 of 2021 Jacqueline Mack Damon vs Jean Francois Louis Damon and 5 others by Justice Mabeya on 10th March 2023.
14. Ms Damon also contended that the 2nd defendant's application is fatally defective on account of the defective supporting affidavit sworn by the 2nd defendant, who has deposed to matters not within his knowledge, and more particularly, in respect to the circumstances surrounding his Counsel's non-attendance in Court on 13th February 2024. Ms Damon contended that the 2nd defendant's Counsel should have sworn an affidavit explaining the circumstances of her non-attendance, which has not been done.
15. Ms Damon stated that her Advocate had advised her that re-opening of the 2nd defendant's counterclaim and setting the same down for hearing will be an exercise in futility as the substratum of the same has been defeated, and the process culminating in the eventual change of mandate of the accounts that form the subject of the suit and the plaintiff's grant of access of the funds being above board. She outlined the events that had transpired since the Court Orders issued on 13th February 2024.
16. In paragraph 6(i) to (v) of her affidavit, she averred that the 2nd defendant does not stand to suffer irreparably should the Motion not be allowed as the process enumerated in paragraph 6 of her affidavit was above board and in strict conformity with the law.
17. Ms Damon stated that in any event, there is HCOMM E655 of 2021 pending litigation between herself, the 2nd defendant and 5 others in respect to the company's affairs to which the plaintiff, the 2nd defendant and herself are parties, which suit will provide the 2nd defendant with an avenue of exhaustively litigating any further disputes in respect to the company's affairs.
18. She deposed that her Advocate had advised her that if the 2nd defendant has suffered any prejudice, he still has recourse against his Advocates professionally before the disciplinary arms of the Law Society



of Kenya or even through institution of civil proceedings for negligence. She prayed for the application herein to be dismissed.

19. The 1st defendant filed a replying affidavit sworn on 7th June 2024 by Mr. B. Kiama Njiru, the 1st defendant's Advocate. He stated that the suit between the parties herein was instituted by the plaintiff vide a plaint dated 12th February 2018 as against the 1st defendant for interalia, unlawful freezing of the plaintiff's bank account. He stated that the suit also joined the 2nd defendant for allegedly forging the plaintiff company's resolution and restraining him from withdrawing funds from the plaintiff Bank account for his own use. Mr. Kiama averred that the 2nd defendant responded to the plaintiff's suit on 24th October 2020 with a counterclaim as against the plaintiff for interalia, damages for breach of Director's duties.
20. Mr. Kiama deposed that the matter came up for hearing on 13th February 2024 when the plaintiff's Counsel on record made an oral application to withdraw the suit against the 1st defendant, and this Court allowed the said oral application and ordered that the suit be marked as withdrawn with costs to the 1st defendant. He pointed out that this Court dismissed the 2nd defendant's counterclaim for want of attendance and ordered that the case file be marked as closed.
21. Counsel urged this Court to strike out the 1st defendant's name from the application herein as it does not concern it. He pointed out that the instant application seeks reinstatement of the counterclaim which is between the plaintiff and the 2nd defendant.
22. He averred that the 2nd defendant's Advocates' failure to organize themselves should not be burdened upon the 1st defendant as the hearing date of 13th February 2024 was taken by consent of the parties on 6th July 2023. He stated that the 2nd defendant's failure to diarize the hearing date is not a valid reason to re-open the case.
23. The Advocates for the parties herein filed written submissions to support their positions. The 2nd defendant's submissions were filed by the law firm of CKN Advocates LLP. The plaintiff's submissions were filed by Kimani & Muchiri LLP, whereas the 1st defendant's submissions were filed by Maina Rogoi & Co. Advocates.
24. Ms Nyabuto, learned Counsel for the 2nd defendant submitted that the 2nd defendant's Counsel though having been present in Court on 6th July 2023 when the hearing date for 13th February 2024 was given, failed to diarize the said date. She ascribed the same to being an honest mistake on the part of Counsel. She stated that dismissal of the 2nd defendant's counterclaim led to closure of the case file upon the order being extracted.
25. She stated that Ms Jacqueline Damon, the co-director of the plaintiff who filed the current suit in the name of the plaintiff without its authority, presented to the 1st defendant the impugned minutes of 12th May 2023 and withdrew funds from the account of the plaintiff held at the 1st defendant Bank, which funds are the subject matter of the suit between the parties herein.
26. Counsel further stated that the 2nd defendant has always been ready and willing to defend the claim and prosecute his counterclaim. She urged this Court to be lenient on the 2nd defendant, by allowing the instant application which has been brought without undue delay. She relied on the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010 and Section 3A of the *Civil Procedure Act* in urging this Court to reinstate the counterclaim by the 2nd defendant.
27. She cited the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, on the fundamental duty of the Court to do justice between the parties. She also cited the case of *Phillip Chemowolo & another*



- v Augustine Kubende [1986] KLR, in urging this Court not to take out the mistake of the 2nd defendant's Counsel against the 2nd defendant.
28. She prayed for the consent dated 7th October 2020 to be reinstated so that the 2nd defendant and the plaintiff herein or anyone acting on their behalf under their names are restrained from interfering or otherwise dealing with the accounts held by the plaintiff with the 1st defendant, pending the hearing the hearing and determination of the suit. She relied on the case of *Giella v Cassman Brown & Company Ltd* [1973] E.A, to support her prayer. She stated that the subject matter of the suit was balances in USD and Kenya Shillings held with the 1st defendant belonging to the plaintiff.
 29. Ms Nyabuto submitted that the 2nd defendant invested 99 % in the business from his inheritance, and that he is a Director of the plaintiff and if the counterclaim is not reinstated, he will not be able to access the funds to revive the business and to recoup his investment.
 30. Counsel contended that failure to reinstate the suit will allow Ms Damon to approach the 1st defendant and empty the accounts of the company causing irreparable damage to the 2nd defendant. She stated that Ms Damon had obtained the impugned resolution claiming to be the only signatory to the company accounts. Counsel contended that the other Director with 1% shares, Mr. Solomon Avina is mentally ill and incapable of passing any company resolution making the resolution held by Ms Damon null and void.
 31. As to the averment by the 1st defendant that it should be struck out of this application, Ms Nyabuto submitted that there is currently no suit until the same is reinstated, and the said defendant should make its application to have its name struck out after reinstatement of the suit. She pointed out that the subject matter of the suit is the money being held by the 1st defendant and any orders issued by the Court will touch on it.
 32. She stated that upon reinstatement of the 2nd defendant's claim, the 2nd defendant can apply to have Ms Damon make a refund of all the monies withdrawn for her personal use to the detriment of the company and that will affect the 1st defendant who released the money without any valid documentation and/or order of the Court. Counsel prayed for costs of the instant application.
 33. Mr. Muchiri, learned Counsel for the plaintiff, contended that the instant application is moot for reason that the orders being sought herein have been overtaken by events following the Ruling delivered by Judge Mabeya in HCCOMM E355 of 2021.
 34. He stated that the case in issue against the 1st and 2nd defendants was withdrawn by the plaintiff on 13th February 2024, and that the 2nd defendant's counterclaim was properly dismissed for want of prosecution due to non-attendance of his Advocate.
 35. Mr. Muchiri stated that the reasons advanced by the 2nd defendant by attributing his Counsel's non-attendance in Court when the matter came up for hearing are insufficient to warrant the re-opening of the 2nd defendant's case since the hearing date was taken by consent of the parties herein on 6th July 2023 when they appeared in Court.
 36. Counsel stated that the 2nd defendant's assertion that his Advocates did not record the matter due to the non-availability of an office diary for the year 2024 is not a plausible explanation as the hearing date was issued in the year 2023, and it behoved the 2nd defendant through his Advocates on record to have diligently taken note of the said date if at all he was interested in prosecuting the said counterclaim.



37. Mr. Muchiri further stated that the absence of the 2nd defendant's Counsel due to lack of an office diary does not absolve the applicant of the repercussions of non-attendance since taking note of the set timelines is an administrative function which is within the control of the 2nd defendant's Advocates.
38. He contended that it is apparent from the circumstances herein that the 2nd defendant has not been following up on his matter with his Advocates on record to ensure that the same is prosecuted within the scheduled time provided by this Court. He submitted that although as a general principle the mistake of an Advocate should not be visited upon a litigant, the principle is not applicable in blanket form.
39. He further submitted that the 2nd defendant was the author of his own misfortune due to laxity on his part in following up on the prosecution of the counterclaim with his Advocates, hence invoking the said principle at this juncture is an afterthought and preposterous. He cited the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, and *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR, to support his assertion.
40. Mr. Muchiri also submitted that the 2nd defendant will not suffer any prejudice if the orders being sought are not granted since he will have recourse against his Advocates on record on account of their professional negligence for failure to attend Court and prosecute his counterclaim as per his instructions. He relied on the case of *Duale Mary Ann Gurre v Amina Mohamed Mahamood & another* [2014] eKLR, to bolster his submissions.
42. As to whether the 2nd defendant has met the threshold of being granted injunctive orders, Mr. Muchiri cited the case of *Mrao v First American Bank of Kenya Limited & 2 others* [2003] eKLR, where the Court of Appeal defined what a prima facie case is.
41. He contended that there was no material placed before this Court by the 2nd defendant to show that one of the plaintiff's Directors Ms Jacqueline Damon, the authorized signatory to the bank accounts held at the 1st defendant Bank, and a co-director of the applicant, withdrew the money held at the 1st defendant Bank for her personal use rather than for the benefit of the company.
42. Mr. Muchiri submitted that the issues relating to the purported withdrawal from the bank accounts and the company premises having been gutted by fire as raised in the counterclaim are similar to the ones raised by the 2nd defendant in his defence and reply in the derivative action case No. HCCOMM E655 of 2021 hence re-opening the case and reinstating the counterclaim would pose the risk of having two conflicting judgments from different Courts of concurrent jurisdiction.
43. As to whether the 2nd defendant will suffer irreparable loss if an injunction is not granted restraining Ms Damon from operating the 1st respondent's bank accounts, Mr. Muchiri submitted that the 2nd defendant had not efficiently demonstrated that he will suffer a loss that cannot be adequately compensated by an award of damages since the issues raised in the instant application are based on the alleged monetary transactions, and in the event that the derivative suit is heard and determined, the 2nd defendant will have recourse from the Court or by filing a recovery suit against his co-director to recover the money.
44. He cited the case of *JM V SMK & 4 others* [2022] eKLR, where Odunga J., (as he then was) defined what "irreparable loss" is. Counsel contended that the 2nd defendant had not sufficiently demonstrated that he will suffer irreparable loss given that the plaintiff is still a going concern.
45. In support of his submissions that the balance of convenience tilts in favour of the plaintiff, Mr. Muchiri cited the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others* [2016] eKLR. He asserted that the balance of convenience tilts in favour of the plaintiff because the



- orders that were granted in the derivative suit HCOMM E655 of 2021, restraining any illegal dealings with the company rendered the suit among the parties herein moot since the issues raised in the 2nd defendant's counterclaim are similar to the others presented to the Court for determination in the derivative suit.
46. Counsel contended that the Court Orders of 13^h February 2024 dismissed the substratum of the suit between the parties herein, and contended that re-opening the suit would pose a risk of conflicting judgments from different Courts of concurrent jurisdiction. He asserted that the 2nd defendant had not met the threshold for being granted orders for injunction.
 47. As to whether the 2nd defendant should have sworn the supporting affidavit on the non-attendance of his Advocate on 13th February 2024, Mr. Muchiri stated that those were facts not within the 2nd defendant's knowledge which rendered the supporting affidavit to be defective. He urged this Court to disregard the same. To support his arguments he cited the case of Barrack Ofulo Otieno v Instarect Limited [2015] eKLR.
 48. In urging this Court to dismiss the present application for lack of merits, Mr. Muchiri relied on Section 27(1) of the Civil Procedure Act and prayed for costs of application.
 49. Mr. Okoli, learned Counsel for the 1st defendant submitted that from a reading of Order 7 Rule 3 of the Civil Procedure Rules, 2010 and the case of the County Government of Kilifi v Mombasa Cement Limited [2017] eKLR, the 1st defendant was not a proper party in the present application.
 50. He cited the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and urged this Court to strike out the 1st defendant from the instant application seeking the reinstatement of the counterclaim as the 1st defendant is not a party to the said counterclaim. Counsel however proceeded to submit on other issues in the event that this Court did not agree with the proposal to strike out the 1st defendant.
 51. In submitting on the issue of whether the case should be re-opened, he cited the provisions of Order 12 Rule 5 of the Civil Procedure Rules, 2010 which states what happens when a defendant or some defendants fail to attend Court.
 52. He also relied on the case of Thathini Development Company Limited v Mombasa Water & Sewerage Company & another [2022] eKLR, which provides the rationale for dismissal of suits for want of prosecution. Counsel submitted that from the rationale in the foregoing case, an inexcusable and unreasonable cause for delay of a matter before Court would warrant a dismissal of the same. He submitted that the reason given by the applicant of mis-diarization of the hearing date is an example of an inexcusable reason.
 53. Mr. Okoli stated that on 6th July 2023, and by the consent of all the parties including the 2nd defendant's Counsel, the case was scheduled for hearing to take place on 13th February 2024, and it was upon the applicant and his Advocate to make sure that the matter was diarized properly to ensure attendance. Counsel contended that failure to do so is not a valid reason to re-open the case file. He cited the case of Ruga Distributors Limited v Nairobi Bottlers Limited [2015] eKLR where Aburilli J., cited the decision by Kimaru J., (as he then was) in Savings & Loans Limited v Susan Wanjiru Muritu Nairobi HCC 397/2002.
 54. Mr. Okoli expressed the view that this Court correctly ordered the closure of the file since it was apparent that the 2nd defendant was not interested in the matter. He urged this Court not to re-open the matter on the ground advanced that the applicant's Counsel made an inexcusable mistake. He prayed



for the 2nd defendant's mistake not to be burdened on the 1st defendant. He prayed for the application herein to be dismissed with costs.

Analysis And Determination

55. I have considered the application dated 14th February 2024 filed by the 2nd defendant. I have also considered the supporting affidavit, the replying affidavits as well as the written submissions filed by the parties' Advocates. The issues for determination are if the 2nd defendant's counterclaim should be reinstated and if an order for injunction should issue.
56. I will first deal with preliminary issues. On the issue raised by the plaintiff on the affidavit sworn by the 2nd defendant having been deposed to matters not within his knowledge as he was not in Court on 13th February, 2024 when his suit was dismissed, that may be so, I however wish not to dwell on procedural technicalities but to deal with the substance of the application. The 2nd defendant averred that his Advocate on record informed him that the matter came up for hearing on 13th February 2024 but she failed to diarize it, and that he believed the said information.
57. The 2nd issue that I wish to deal with at a preliminary stage is the argument contained in the plaintiff's affidavit and submissions that HCCOMM E655 of 2021 contains orders issued by Hon. Judge Mabeya restraining any illegal dealings with the company, and that the said Ruling renders the present suit moot. That is not a matter that I can consider at this stage as the application that is before me seeks reinstatement of the counterclaim filed by the 2nd defendant which I dismissed on 13th February 2024 for non-attendance in Court, by his Advocate. For the said reason, it is only after reinstatement of the said counterclaim that such an argument about the existence of orders in HCCOMM E655 of 2021 can arise.
58. The other preliminary issue that I need to address is on the 1st defendant's proposition that it should be struck out of the present application. I note that the said issue was raised by the 1st defendant in its replying affidavit and submissions which I must say is irregular, as there is no formal application before me for determination of that issue. It must also be noted that the 2nd defendant maintains that the money allegedly withdrawn by Ms Damon was from the plaintiff's account that is domiciled with the 1st defendant.
59. On the issue of reinstatement of the 2nd defendant's counterclaim, I dismissed it on 13th February 2024 being the day the main suit and the counterclaim were scheduled for hearing in open Court. The Advocates for the plaintiff and the 1st defendant attended Court, but the Counsel for the 2nd defendant though having been present in Court on 6th July 2023 when the hearing date was given, did not attend Court on 13th February 2024. The 2nd defendant therefore suffered the fate he did, due to negligence of his Advocate. The reason given for the 2nd defendant's and his Advocate's failure to attend Court was non-diarization of the hearing date.
60. It was stated by the 2nd defendant that the hearing date was given in June 2023 (sic) for a hearing scheduled for 13th February 2024. It was claimed that as at June 2023 (sic), the diaries for the year 2024 were not available thus the non-diarization.
61. I must say that the reason given for non-diarization of the hearing date is flimsy and the most implausible excuse that I have come across in my several years sitting as a Judge. It is common knowledge and I do take Judicial Notice of the fact that at this day and age, e-diaries exist and an Advocate does not have to have a physical diary for the succeeding year in order to diarize a case listed for hearing even a year from the date of issuance of a hearing date. I agree with the observation made by Mr. Muchiri



for the plaintiff that the reason given for non-diarization of the hearing date by the 2nd defendant's Counsel is indeed preposterous.

62. Having said so, and the alleged non-diarization notwithstanding, the 2nd defendant herein had a duty to follow up on his case to find out when it was scheduled for hearing. He seemed not to have done so.

63. In the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2025] eKLR, it was held as follows on the duty of a litigant-

“it is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.” (Emphasis added).

64. Further, in the case of *Savings And Loans Limited v Susan Wanjiru Muntu Nairobi HCCC 397 of 2002 Kimaru J.*, (as he then was) stated thus-

“Whereas it would constitute a valid excuse for the defendant to claim that he had been let down by her former Advocates failure to attend court on the date the application was filed for hearing, it is trite that a case belongs to a litigant and not to her Advocates. A litigant has a duty to pursue the prosecution of his or her case. (Emphasis added).

65. This Court cannot set aside the Order for dismissal of the suit, solely on the ground of mistake by Counsel for the 2nd defendant. I say so because the said defendant has the recourse to sue his Advocates for professional negligence if he so wishes.

66. As was held in the two cases I have cited in this Ruling, it is the duty of a litigant to constantly check with his/her Advocate on the progress of his/her case. Bearing in mind that on 6th July 2023, I fixed the case in issue for hearing on 13th February 2024, it means that for seven (7) months, the 2nd defendant did not follow up on his case with his Advocates to find out when it was scheduled for hearing. Had he made enquiries of the same from his Advocates, and if indeed Ms Nyabuto Advocate had mis-diarized the hearing date, she could have easily accessed the Court Tracking System (CTS) to check on the date scheduled for hearing.

67. In addition, the 2nd defendant filed his application on the basis that the suit was marked “as settled”. Had Ms Nyabuto perused the Court file and gone through the proceedings of 13th February 2024 she would have seen that the case was not marked “as settled”, as was erroneously updated on the CTS by my Court Assistant. She would have established from the Court proceedings that the plaintiff's case was marked as withdrawn and the 2nd defendant's counterclaim was dismissed due to non-attendance.

68. Having noted that the case in issue was filed in the year 2018 and had not been prosecuted since then, and on the day it was scheduled for hearing, the other parties and their Advocates were available in Court, but the 2nd defendant and his Counsel failed to attend Court, I am not persuaded that I should exercise my discretion in favour of the 2nd defendant herein by reinstating his counterclaim.

69. In the end, it is my finding that the 2nd defendant is not deserving of the order sought for reinstatement of his counterclaim. That being the case, the issue of whether an injunction should issue or not becomes moot.

70. The application dated 14th February 2024 is hereby dismissed with costs to the plaintiff and the 1st defendant.

It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF APRIL 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Ndubi h/b for Ms Nyabuto for the 2nd defendant/applicant

Mr. Kanyoni for the plaintiff/1st respondent

Mr. Nyambega for the 1st defendant/2nd respondent

Ms B. Wokabi – Court Assistant.

