



Kreative Concrete Products Limited Kenya v AEE Power S.A Ltd; Kenya Power & Lighting Company (Garnishee) (Commercial Case E387 of 2019) [2024] KEHC 672 (KLR) (Commercial and Tax) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E387 OF 2019
MN MWANGI, J
JANUARY 19, 2024**

BETWEEN

KREATIVE CONCRETE PRODUCTS LIMITED KENYA PLAINTIFF

AND

AEE POWER S.A LTD DEFENDANT

AND

KENYA POWER & LIGHTING COMPANY GARNISHEE

RULING

1. This ruling is with respect to two applications. The first application is the defendant's Notice of Motion dated 21st March, 2022 filed pursuant to the provisions of Sections 1A, 3A & 63(e) of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 10 Rule 11 of the *Civil Procedure Rules*, 2010 and all enabling provisions of the law seeking. The defendant seeks the following orders –
 - i. Spent;
 - ii. Spent;
 - iii. Spent;
 - iv. That this Honourable Court be pleased to set aside the default judgment of this Court entered on 14th September, 2021 and all consequential orders attendant thereto;
 - v. That the defendant be given unconditional leave to defend the suit and the suit be heard and decided on its merits; and



- vi. That the costs of this application be in the cause.
2. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn by Francis Kahumbi, the defendant's Project Manager on 21st March, 2022 & 9th June, 2022. In opposition thereto, the plaintiff filed a replying affidavit sworn on 13th May, 2022 by Paul Chirchir, the plaintiff's Chief Executive Officer.
 3. The second application is the plaintiff's Notice of Motion dated 27th June, 2022 brought under the provisions of Order 19 Rule 2 of the *Civil Procedure Rules*, 2010 and all enabling provisions of the law, wherein the plaintiff seeks the following orders –
 - i. Spent;
 - ii. That this Honourable Court be pleased to grant leave to the applicant to cross-examine Francis Kahumbi on the contents of his affidavit sworn on the 21st March, 2022;
 - iii. That this Honourable Court be pleased to grant leave for the cross-examination of Jared Biwott on the contents of the replying affidavit sworn by him on the 23rd of March, 2022; and
 - iv. That the costs of this application be borne by the respondents.
 4. The application is anchored on the grounds on the face of the Motion and is supported by an affidavit sworn on 29th June, 2022 by Paul Chirchir, the plaintiff's Chief Executive Officer. In opposition thereto, the defendant filed a supporting affidavit sworn on 29th November, 2022, by Francis Kahumbi, the defendant's Project Manager. The garnishee filed grounds of opposition dated 13th July, 2022 raising the following grounds–
 - i. That Order 19 Rule 9 of the *Civil Procedure Rules* provides that applications under Order 19 may be by Chamber Summons or orally in Court. The applicant/decree-holder has accordingly filed a Notice of Motion application in contravention of Order 19 Rule 9 and Order 51 Rule 1;
 - ii. That the garnishee's replying affidavit has not contravened the provisions of Order 19 of the *Civil Procedure Rules*;
 - iii. That the garnishee's replying affidavit is founded on the contractual relationship between the garnishee and the judgment debtor which intimates the contract was terminated thus no payment is due and payable to the judgment debtor;
 - iv. That the application by the applicant/decree holder, does not give particulars of the false statements deliberately made by the garnishee's deponent to mislead the Court and to defeat the applicant's attempt at execution;
 - v. The application does not meet the exceptional conditions required for a deponent to be cross-examined given that Order 19 permits the use of affidavits as evidence thus, the orders being sought ought not to be granted to the applicant/decree holder;
 - vi. The applicant's application is therefore in furtherance of a game of chance and fishing;
 - vii. That the application is without merit and parties ought to be allowed to proceed on the affidavits filed in this matter; and
 - viii. That the application is frivolous, an abuse of the Court process and ought to be dismissed with costs to the garnishee.



5. The applications herein were canvassed by way of written submissions. In respect to the application dated 21st March, 2022, the defendant's submissions were filed on 9th June, 2022 by the law firm of Kaplan & Stratton Advocates, whereas the plaintiff's submissions were filed by the law firm of Lilan & Koech Associates, LLP on 29th June, 2022.
6. In respect to the application dated 27th June, 2022, the plaintiff's submissions were filed on 11th October, 2022 by the law firm of Lilan & Koech Associates, LLP, whereas the defendant's submissions were filed on 6th December, 2022 by the law firm of Diana Chepkemoi Advocates.

Application dated 21st March, 2022.

7. Ms. Chepkemoi, learned Counsel for the defendant cited the provisions of Order 10 Rule 11 of the *Civil Procedure Rules*, 2010 and the Court of Appeal decisions in *Kingsway Tyres & Automart Ltd v Rafiki Enterprises Ltd* [1996] eKLR & *James Kanyिता Ndcritu & Another v Marios Philotas Ghikas & another* [2016] eKLR and submitted that this Court has unfettered discretion to set aside a default judgment. She further submitted that in this case, the defendant filed a memorandum of appearance in time but failed to file a defence on grounds that the parties herein were engaged in out of Court negotiations with the intention of settling this matter outside Court, a fact which is not denied by the plaintiff. Learned Counsel asserted that the said negotiations were held in utmost good faith.
8. The defendant's Counsel referred this Court to the case of *Crystal Motors (K) Limited v Occidental Insurance Company Limited* [2007] eKLR and stated that if at all the plaintiff was of the view that the said negotiations had failed, it was only fair and reasonable for it to have given the defendant a warning before applying for default judgment. She stated that in the absence of notice from the plaintiff of its intention to apply for default judgment on account of the defendant's failure to file a defence, this Court should exercise its unfettered discretion in favour of the defendant as provided for by law. Counsel relied on the Court of Appeal case of *Tree Shade Motors Limited v. D.T. Dobie & Company (K) Limited & Another* [1998] eKLR and submitted that the defendant's draft defence raises weighty and serious issues for trial, that would in themselves warrant the setting aside of the default judgment.
9. She submitted that the plaintiff stands to suffer no prejudice if the application herein is allowed since it will have the opportunity to have its case heard on its merits and prove the same on a balance of probabilities. She referred to the Court's holding in the case of *John Peter Kiria & Another v Pauline Kagwiria* [2013] eKLR. She cited the provisions of Article 159(2)(a) & (b) of the *Constitution* of Kenya, 2010 and submitted that the said provisions obligate the Court to do justice to all without undue regard to technicalities, which is the overriding objective of the Court enacted under Sections 1A and 1B of the *Civil Procedure Act*.
10. Mr. Ligami, learned Counsel for the plaintiff referred to the provisions of Order 10 of the *Civil Procedure Rules*, 2010 and the Court of Appeal decisions in *James Kanyिता Nderitu & another v Mario Philotas Ghikas & another* (*supra*) & *Sheikh t/a Hasa Hauliers v Highway Carriers Ltd* [1988] eKLR and submitted that before setting aside a default judgment, the Court must satisfy itself that the defendant was properly served and has shown sufficient cause why it failed to appear in Court or failed to file its documents. In addition, the Court should examine whether the intended defence raises triable issues and the prejudice likely to be suffered by both parties. He stated that in this case, it is not disputed that the defendant was duly served with the plaint and all accompanying documents by the plaintiff.
11. He relied on the case of *Wachira Karani v Bildad Wachira* [2016] eKLR and stated that in as much as the parties herein were engaged in out of Court negotiations, there was no agreement between them to stay the proceedings. Counsel stated that the defendant was not entitled to any notice by the plaintiff



- of its intention to request for judgment, and in any event, the case of *Crystal Motors (K) Limited v Occidental Insurance Company Limited* (*supra*) cited by the defendant in support of this allegation is distinguishable since in that case, the parties had provided to the Court a written agreement indicating the parties' consensus to stay proceedings, and they undertook to give each other notice if negotiations failed.
12. Mr. Ligami further stated that the above notwithstanding, the parties herein appeared before the Court on 2nd March, 2020 where the Court directed both parties to comply with pre-trial directions on or before 13th March, 2020, but the defendant failed to comply with the said directions. He contended that the defendant has been indolent because the plaintiff last heard from it on 28th January, 2020 on the issue of negotiations, but applied for default judgment on the 8th February, 2021 more than a year later. He contended that if the defendant had been vigilant, it would have filed its statement of defence within the said year. Counsel relied on the Court of Appeal decision in *Olympic Escort International Co. Ltd & 2 others v Parminder Singh Sandhu & another* [2009] eKLR and asserted that the defendant's draft statement of defence raises no triable issues.
 13. It was submitted by the plaintiff's Counsel that from the correspondence attached to the instant application, and more specifically, the e-mail dated 3rd February, 2020 from one Pablo Antonio Franco Hernandez, the defendant's local representative, addressed to James Muthui, the defendant admitted owing the plaintiff and sought to return some of the supplies to reduce the debt. Further, that the draft statement of defence in paragraph 6 states that the respondent supplied 8,007 poles as opposed to 12,000 poles, but it is noteworthy that the plaintiff's claim is for 8,007 poles and not 12,000 poles. Mr. Ligami cited the case of *Kinyunjuri Muguta v Wotoku Muguta* [2018] eKLR and submitted that the defendant has not sufficiently demonstrated the prejudice it stands to suffer, as merely stating that there is an imminent risk that the plaintiff will proceed to execute is not enough.
 14. Mr. Ligami stated that the plaintiff stands to suffer prejudice in the event the instant application is allowed as the defendant has wound up its operations in Kenya or is in the process of doing so. He further stated that the defendant has terminated most of its employees and the few that are still remaining have been serving notice periods. In addition, that the defendant no longer has any registered office in Kenya, having moved out or been removed from their offices at Norfolk Towers.
 15. Mr. Ligami contended that this application has been filed as a means by the defendant to bid time in order to abscond the jurisdiction of this Court, and in the unlikely event that this Court allows the application herein, it should do so on condition that the defendant deposits the decretal sum before it is allowed to file a statement of defence.

Application dated 27th June, 2022.

16. Mr. Ligami, learned Counsel for the plaintiff referred to the provisions of Order 19 Rule 2 of the Civil Procedure Rules, 2010 and submitted that the said provisions are not couched in mandatory terms, and this Court should take note of the use of the word "may" used to qualify the electiveness of such a position. He further submitted that Order 19 Rule 2 of the Civil Procedure Rules, 2010 was intentionally so drafted considering the overriding constitutional judicial prerogative to take into account substance over form, as captured under Article 159(2)(d) of the *Constitution* of Kenya, 2010. To this end, Counsel relied on the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2015] eKLR and asserted that this Court has the discretion to determine an application on its merits rather than on procedural technicalities.



17. It was stated by Counsel that Order 19 Rule 2 of the *Civil Procedure Rules*, 2010 empowers this Court to order the attendance for cross-examination of any deponent. He referred to the case of *GGR v HPS* [2012] eKLR and stated that an order for cross-examination may be sought when matters touching on fraud, mala fides, authenticity of the facts deponed, bad motive, among others are raised. He contended that in this case, the plaintiff has not only raised several issues touching on misleading/false information by the respective deponents but has also provided reason that the defendant has a bad motive in trying to set aside the default judgment. Further, Mr. Ligami stated that the garnishee's deponent falsely stated in its affidavit that there were no sums owing to the defendant when in fact the same deponent signed a reconciliation of accounts indicating matters to the contrary. Counsel asserted that bad motive can be inferred from non-disclosure of material facts which is relevant to the tangent of these proceedings.
18. Ms. Chepkemoi, learned Counsel for the defendant cited the provisions of Order 19 Rule 2 of the *Civil Procedure Rules*, 2010 and the cases of *G.G.R v H-PS* (*supra*) & *Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited (2)* [2006] 2 EA 6 and submitted that whereas Order 19 Rule 2 of the Civil Procedure Rules, 2010 allows for cross-examination of a deponent, the plaintiff ought to demonstrate that such cross-examination is warranted. She further submitted that the plaintiff has failed to highlight the special circumstances that warrant for the cross-examination of the defendant's deponent. She contended that instead, it has just stated that the defendant and the garnishee have provided false information without providing the said false information or providing any evidence contrary to what the defendant and the garnishee have provided.
19. Counsel stated that the plaintiff had an option of responding to the issues raised by the defendant and the garnishee in their responses by filing a further affidavit. She further stated that the plaintiff has failed to place any material before this Court showing that the intended cross-examination would serve the interest of justice. She contended that the plaintiff's allegation that the defendant is leaving this Court's jurisdiction is untrue, unverified and meant to misdirect this Court considering no evidence has been tendered in support of the said allegation. Ms. Chepkemoi asserted that the defendant is still within Kenya, thus still within the jurisdiction of this Court.

Analysis and Determination.

20. On consideration of the applications herein, the grounds on the face of the motions and the affidavits filed in support thereof, the replying affidavit by the parties and the grounds of opposition by the garnishee together with the written submissions by Counsel for the parties, the issues that arise for determination are-
 - i. Whether this Court should set aside the default judgment entered in favour of the plaintiff and grant the defendant leave to file a statement of defence out of time;
 - ii. Whether the plaintiff's application is fatally defective for taking the form of a Notice of Motion instead of a Chamber Summons; and
 - iii. Whether the deponents of the defendant's and the garnishee's affidavits should attend Court for cross-examination by the plaintiff.

Application dated 21st March, 2022

21. In the affidavit filed by the defendant sworn by Francis Kahumbi, the defendant's Project Manager, he deposed that on 17th March, 2022 the defendant's Advocates on record Messrs. Kaplan & Stratton Advocates were served with a Notice of Motion application dated 18th March, 2022 indicating that default judgment was entered for the plaintiff against the defendant on 14th September, 2021.



22. He averred that since the commencement of the suit, the plaintiff and the defendant have been engaging in negotiations with a view of settling the dispute out of Court. He further averred that the general agreement between the parties was that the suit would be stayed pending the outcome of the said negotiations.
23. It was stated by Mr. Kahumbi that after the commencement of the suit, the defendant paid a portion of the debt claimed by the plaintiff in good faith. He further stated that he has been informed by Mr. James Muthui, an Advocate of the High Court and a Partner at Kaplan & Stratton Advocates for the defendant, that the firm had prepared a draft statement of defence for filing on 4th March, 2020, but it was not filed due to the said negotiations.
24. He asserted that Mr. Pablo Antonio Franco Hernandez, who was handling the negotiations with the plaintiff has since left the employment of the defendant hence the delay in the progress of the negotiations. Mr. Kahumbi deposed that the defendant disputes a large portion of the debt claimed by the plaintiff
25. In the plaintiff's replying affidavit sworn by Paul Chirchir, the plaintiff's Chief Executive Officer, he deposed that the plaintiff filed an application dated 29th October, 2019 seeking arrest of the Directors/ local representatives of the defendant before judgment and subsequently, the defendant engaged the plaintiff in negotiations.
26. He averred that by 28th January, 2020 the plaintiff and the defendant had reconciled their various positions and the plaintiff came up with a summary of the said reconciliation which was sent to the defendant's director, one Pablo Hernandez and the defendant's Operations Manager, Ann Wangui, vide an email dated 28th January, 2020.
27. Mr. Chirchir further averred that on 2nd March, 2020 the plaintiff withdrew its application seeking arrest before judgment in favour of the aforementioned negotiations. That on the same day, the Court directed parties to comply with pre-trial directions before 13th March, 2020.
28. It was stated by Mr. Chirchir that Mr. Pablo Antonio Franco Hernandez is the only natural Director and shareholder of the defendant hence it is inconceivable that he left and is no longer aware of the defendant's operations. Mr. Chirchir further stated that the defendant has moved out or has been removed from their registered offices at Norfolk Towers and they have not secured an alternative office to date.
29. The plaintiff contended that it is apprehensive that the defendant is winding up its operations in Kenya and will soon abscond this Court's jurisdiction. The deponent contended that the defendant's draft statement of defence raises no triable issues as the defendant avers in its draft statement of defence that payments were to be done by KPLC.

Application dated 27th June, 2022.

30. The plaintiff in its supporting affidavit sworn by Paul Chirchir, its Chief Executive Officer, deposed that on 23rd March, 2022 the garnishee's Project Manager filed his replying affidavit in response to the Notice of Motion application dated 8th March, 2022. However, the said replying affidavit contained false statements deliberately made to mislead this Court and to defeat the plaintiff's claim.
31. He averred that before the negotiations between the plaintiff and the defendant collapsed, the garnishee and the defendant were in talks concerning the reconciliation of amounts due to the defendant. He further averred that the garnishee and the defendant conducted a joint reconciliation exercise in April 2020 regarding sums owing in the subject contract.



32. He deposed that as a result of the aforesaid reconciliation, it was established that there are still sums outstanding and/or owing to the defendant from the garnishee. The plaintiff contended that in as much as the garnishee claims that the defendant did not complete the contract, the two parties agreed to pay for works that were completed by the defendant and the materials it supplied.
33. Mr. Chirchir deposed that evidence has not been tendered in support of the allegation that the defendant has since concluded its operations in Kenya, as that can only be elicited through cross-examination of Francis Kahumbi.
34. The defendant in its replying affidavit sworn by Francis Kahumbi, its Project Manager, deposed that the instant application has failed to highlight the special circumstances that warrant cross-examination of the defendant's deponent. Further, that the application does not highlight the specific circumstances or paragraphs in either the defendant's or garnishee's affidavits that require cross-examination by the plaintiff.
35. He stated that in as much as the plaintiff avers that the defendant and the garnishee have provided false information, it has failed to highlight the specific false information they have presented and/or provide evidence contrary to their averments. He stated that the plaintiff had the option of responding to the issues raised in the defendant's and garnishee's responses by filing a further affidavit.
36. Mr. Kahumbi averred that the plaintiff has failed to place any material before this Court to show that the intended cross-examination would serve the interest of justice. He further averred that the defendant clearly indicated that the said Pablo Antonio Franco Hernandez left AEE Power, Kenya to join AEE Power Togo in West Africa, and as such, the defendant's operations are still ongoing.
37. The deponent asserted that the plaintiff would not suffer any prejudice in the event the orders for cross-examination are denied as all the evidence has been provided by way of affidavits.
- Whether this Court should set aside the default judgment entered in favour of the plaintiff and grant the defendant leave to file a statement of defence out of time.
38. Setting aside of default judgments is provided for under the provisions of Order 10 Rule 11 of the *Civil Procedure Rules*, 2010, which states as hereunder-

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

39. In as much as this Court has the discretion to set aside a default judgments, the said discretion must be exercised judiciously and is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a party that has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. That was the Court's holding in the case of *Shah v Mbogo & Another* [1967] EA 116 p. 123.
40. The defendant was duly served with the plaint and all its accompanying documents by the plaintiff. Thereafter, the defendant filed a memorandum of appearance but did not file a statement of defence within the prescribed timelines. As a result, the plaintiff applied for default judgment vide a letter dated 8th February, 2021. Interlocutory judgment was entered on 30th August, 2021 for the plaintiff against the defendant. The defendant submitted that failure to file a statement of defence to the suit was occasioned by the fact that it and the plaintiff were engaging in out of Court negotiations with a view of settling the dispute between them out of Court.
41. The plaintiff does not deny that it was engaged in out of Court negotiations with the defendant, however it contends that the defendant has been indolent. This is because the negotiations between



it and the defendant collapsed on 28th January, 2020 and the plaintiff applied for default judgment on 8th February, 2021. This means that the defendant had approximately one year to file a statement of defence but it failed, neglected and/or refused to do so. Further, that on 19th February, 2020, the Court directed the parties herein to comply with pre-trial directions before 13th March, 2020 but the defendant still did not comply with the said directions.

42. It is worth of note that when dealing with an application for setting aside an interlocutory judgment, Courts have to consider whether a defendant's statement of defence raises triable issues or if it is only meant to frustrate the plaintiff. It was held by the Court in the case of *Patel v EA Cargo Handling Services Ltd* (1974) EA 75 as follows -

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

43. Further, in the case of *Thorn PLC v Macdonald* [1999] CPLR 660, cited by the Court in *International Air Transport Association & another v Roskar Travel Limited & 3 others* (Civil Case E457 of 2020) [2022] KEHC 200 (KLR) the Court of Appeal highlighted the principles to be considered when dealing with an application for setting aside a default judgment as hereunder -

- “(i) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
- (ii) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
- (iii) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and
- (iv) prejudice (or the absence of it) to the claimant also has to be taken into account.”

44. It was submitted by the defendant that the failure and/or delay in filing a statement of defence was occasioned by the fact that the plaintiff and the defendant were engaging in out of Court negotiations in an attempt to settle the dispute between them out of Court. The defendant does not deny that it was engaged in out of Court negotiations with the defendant but avers that there was no agreement between the parties herein to stay these proceedings, hence the defendant ought to have filed its statement of defence.

45. It is evident from the record and the affidavits filed by the parties that there was no communication by either party that the negotiations had collapsed. To the contrary, the plaintiff averred that by 28th January, 2020, it and the defendant had reconciled their positions and it came up with a summary of the said reconciliation and sent it to the defendant vide an email dated 28th January, 2020.

46. The defendant deposed that it was not aware that default judgment had been entered against it until 17th March, 2022 when its former Advocates on record were served with a Notice of Motion application



- dated 8th March, 2022, which indicated that default judgment had been entered for the plaintiff against the defendant on 14th September, 2021, a fact which is not disputed by the plaintiff.
47. It is the aforementioned application which prompted the defendant to file the instant application on 21st March, 2022, approximately five (5) days later. From the foregoing, I am satisfied that the instant application was filed timeously and without any unreasonable delay. Further, I am satisfied by the defendant's explanation on the reasons behind the delay in filing a statement of defence. I find that the said delay was not deliberate and/or meant to obstruct or delay the course of justice.
48. The plaintiff's claim against the defendant is that between 22nd September, 2017 and 30th August, 2018, it entered into a contract with the defendant for the supply of pre-stressed concrete poles. The defendant assigned the plaintiff a local portion of Kshs. 224,050,920.00 to supply 12,000 concrete poles for the last mile connectivity project. On diverse dates, the plaintiff made deliveries of 8,253 poles at a cost of Kshs. 18,670.91 per pole and raised invoices totaling to Kshs. 154,091,020.00 and Kshs. 24,654,563.00 for VAT. The plaintiff averred that it has since received payment of Kshs. 102,088,241.57 from the Kenya Power & Lighting Company Limited (KPLC) and Kshs. 33,506,306.00 from the defendant bringing the total payment received to Kshs. 135,591,548.00 and leaving a balance of Kshs. 43,154,548.00, that is due and owing to the plaintiff from the defendant.
49. In its draft statement of defence, the defendant admitted having entered into a contract with the plaintiff, but denied the contents of paragraph 7 of the plaint and averred that the plaintiff supplied 8,007 certified poles against the total of 12,000 poles agreed between them under the terms of the agreement. It further averred that the consideration for supply of the poles was to be paid by KPLC directly to the plaintiff upon fulfilment of its obligations under the supply agreement, which the plaintiff partially fulfilled. From the foregoing disceptations, I am persuaded that the defendant's statement of defence contains bonafide triable issues, such as the quantities of pre-stressed concrete poles that were supplied to the defendant by the plaintiff, and who between KPLC and the defendant was required to make payments to the plaintiff for the said supply.
50. On whether the defendant shall suffer prejudice in the event the default judgment entered in its favour against the defendant is set aside and the defendant is granted leave to defend this suit, I am of the considered view that it shall not. This is because the plaintiff will have an opportunity to file a reply to the defendant's statement of defence and cross-examine the defendant's witnesses (if any), at the hearing of the main suit. The defendant on the other hand stands to be prejudiced if the orders sought in its application are not allowed as the plaintiff will execute the default judgment and the resultant decree against it, without affording it an opportunity to be heard and/or respond to the plaintiff's claim.
51. In the end, this Court finds that the defendant has made out a case for grant of an order for setting aside the default judgment entered against it on 30th August, 2021.
52. Having found that the application for setting aside the default judgment is merited, this Court shall not determine the other issues of cross-examining the deponents of the defendant's and garnishee's affidavits as the plaintiff's application automatically collapses in the absence of a judgment against the defendant.
53. This Court finds that the application dated 21st March, 2022 is merited, whereas the application dated 27th June, 2022 has been overtaken by events. As a result, I make the following orders -
- i. The default judgment entered on 14th September, 2021 and all consequential orders against the defendant are hereby set aside;



- ii. The defendant is at liberty to file its statement of defence and all compliance documents within 30 days from today;
- iii. The defendant shall pay thrown away costs of Kshs. 30,000/- to the plaintiff within 30 days from today failure to which the default judgment of 14th September, 2021, together with the resultant decree and all ex parte proceedings shall remain in force.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Willy h/b for Mr. Ligami for the plaintiff

No appearance for the defendant

Ms B. Wokabi – Court Assistant.

