**FTG Holland v Afapack Enterprises Limited & another (Civil Case 352 of 2012) [2023] KEHC 24652 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 24652 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**CIVIL CASE 352 OF 2012**

**MN MWANGI, J**

**JUNE 16, 2023**

**BETWEEN**

**FTG HOLLAND ..... PLAINTIFF**

**AND**

**AFAPACK ENTERPRISES LIMITED ..... 1ST DEFENDANT**

**AFA CHEMICAL LIMITED ..... 2ND DEFENDANT**

**RULING**

1. The defendants/applicants filed a notice of motion application dated July 1, 2022 pursuant to the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, order 9 rules 7, 9 & 10, order 12 rule 7 and order 51 rule 1 of the *Civil Procedure Rules, 2010*, articles 50(1) and 159(2)(d) of the *Constitution of Kenya* and any other enabling provisions of the law. The defendants seek the following orders –

    i. Spent;

    ii. Spent;

    iii. Spent;

    iv. That the honourable court be pleased to set aside the *exparte* judgement entered on July 13, 2020 and all consequent orders (sic); and subsequently order that the suit proceeds for hearing afresh as a defended case; and

    v. That all the costs in respect of this application to be in the cause.

2. The application has been brought on the grounds on the face of it and is supported by an affidavit sworn on July 1, 2022, by Aleem Sadrudin Fazal Rehemtulla, one of the directors of the 1st & 2nd

defendants. In opposition thereto, the plaintiff on August 31, 2022, filed a replying affidavit sworn by Andreas Nuijten, the plaintiff's local country representative.

3. The application was canvassed by way of written submissions. The defendants' submissions were filed on March 16, 2023 by the law firm of Remington Advocates LLP, whereas the plaintiff's submissions were filed by the law firm of Mohammed Muigai LLP on 24th April, 2023.

4. Mr. Otieno, learned Counsel for the defendants submitted that there existed a commercial relationship between the parties herein over the marketing and distribution of "Flower Transport Gel" (FTG) and other agricultural chemicals and equipment that were manufactured or procured by the plaintiff from the Netherlands. He further submitted that according to the plaintiff, FTG was a proprietary product, a water-based gel that could be used in the place of ordinary water to keep cut flowers fresh during transportation or general display.

5. He stated that *vide* an oral agreement, it was agreed that the defendants were to deploy their appreciation of the African market to familiarize the would-be consumers with the plaintiff's products, and the defendants would earn a certain commission. They further stated that sometime in the year 2011, there was a fall out between the plaintiff and the defendants in relation to pending invoices, supposedly issued on various dates from November 11, 2004 to April 17, 2011.

6. He submitted that on May 31, 2012, the plaintiff filed the suit herein against the defendants on account of unpaid invoices. He stated that in response to the suit against them, the defendants filed a joint defence and counterclaim against the plaintiff for unsettled loans and other expenses incurred by the defendants on behalf of the plaintiff. It was stated by Mr. Otieno that before this matter was set down for hearing, there was a disagreement between the defendant's representative and their Advocate at the time, Abbas Alihussein Esmail, who was then working at the law firm of Achach & Company Advocates. He further stated that from the proceedings, Mr. Esmail had filed an application to cease from acting, but the same had not been served upon the defendants' representative hence he was still on record for the defendants when the matter herein was set down for hearing.

7. It was stated that when this matter came up for hearing, Mr. Esmail walked out of Court before the hearing began, for reasons that he had filed an application to cease from acting. Mr. Otieno indicated that the hearing proceeded in the absence of Counsel for the defendants despite the fact that the application to cease from acting was still pending in Court and leave to cease from acting had not yet been granted. Mr. Otieno cited the provisions of order 9 rule 13 of the *Civil Procedure Rules, 2010* and submitted that an Advocate can only be deemed to have relinquished responsibility over a case once an application to cease from acting has been prosecuted and allowed. He contended that the defendants' former Advocates were still on record for the defendants during the hearing of the matter since their application to cease from acting had not yet been prosecuted.

8. He relied on the Court of Appeal decision in the case of *Njoroge & another v Njoroge & another* [2021] KECA 258 (KLR) and submitted that the expression of a desire to cease from acting through a chamber summons or a notice of motion application is not sufficient for the court to grant an order for leave to cease from acting if there is no evidence that the respondent was sufficiently notified of imminent departure of the Advocate. He contended that the application seeking leave to cease from acting was never served upon the defendants, as the defendants' former Advocates on record did not comply with the Court orders directing them to serve the said application by way of substituted service through an advertisement on a national publication with a reputable circulation (sic). He stated that as a result, the said application was not conclusively determined.

9. Counsel for the defendants stated that it was a mistake for the defendants' former Advocate on record to walk out of Court on the day of the hearing since his conduct led the defendants to lose an

opportunity to exercise their constitutional right to a fair hearing as provided for under article 50 of the *Constitution of Kenya* , 2010. He contended that in as much as in some circumstances a blunder by Counsel cannot be used as an excuse against due process, it is still recognized that a Court may consider rectifying a mistake attributable to Counsel in the interest of justice.

10. He referred to the Court of Appeal holding in the case of *Phillip Chemwolo & another v Augustine Kubede* [1982-88] KLR 103 referred to by Maureen Odero J., in *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others* [2018] eKLR and submitted that in distinguishing whether a particular mistake, inadvertence or misstep is attributable to Counsel or a litigant, the Court has to consider the general assumption that Counsel are better qualified to appreciate the nuances of litigation and the process of the Court, whereas litigants who rely on them for instruction are unlikely to foresee such mistakes and take steps in mitigation. In submitting that a Court can exercise its inherent power in accordance with the provisions of sections 1A, 1B, and 3A of the *Civil Procedure Act*, 2010 as read together with article 159(2)(d) of the *Constitution of Kenya* , 2010, Mr. Otieno relied on the case of *First National Finance Bank Limited v Universal Apparels (EPZ) Ltd & 2 others* [2017] eKLR.

11. He also relied on the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, where Mativo J., (as he then was), set aside an *exparte* hearing and the resultant judgement citing the inherent power of the Court to do justice. Mr. Otieno submitted that on several occasions, Courts have relied on the oxygen principle in setting aside default judgements or exparte hearings that result in judgements that are not founded on merit. He cited the case of *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR, where the Court of Appeal in allowing a similar application held that in an application to set aside an *exparte* judgment, the Court exercises its discretion in allowing or rejecting the same, and that the said discretion must be exercised upon reasons and it must be exercised judiciously.

12. Mr. Mwangi, learned Counsel for the plaintiff submitted that judgment in this matter was delivered on July 13, 2020 and the defendants filed the instant application two (2) years later after the plaintiff had commenced the process of execution hence the delay in filing the instant application is inexcusable. He stated that the defendants were aware that the hearing of this matter was to proceed on October 7, 2019 thus their attempt to blame their former Advocates on record for their own indolence should not be entertained by this Court. He cited the decisions in *Malindi Salt Works Limited v Rongai Workshop & Transport Limited* [2019] eKLR and *Kenya Shell Limited v Kiburu and another* [1986] KLR 410 and stated that a successful litigant should not be prejudiced by an indolent litigant by being denied the fruits of his judgment.

13. He referred this Court to the case of Savings and Loans Limited v Susan Wanjiru Muritu (Nairobi) (Milimani) HCCC No. 397 of 2002 and submitted that Courts have consistently held that litigants have the responsibility of following up on their own matters. Mr. Mwangi stated that the defendants' former Advocates on record had informed the defendants to instruct other Advocates as they intended to cease from acting for them, which communication was received by the defendants. In relying on the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, he submitted that the Court's discretion to set aside judgment is not intended to be exercised to assist a person guilty of dilatory conduct intended to obstruct or delay the course of justice.

14. It was stated by Mr. Mwangi that the instant application is an afterthought and it ought to be dismissed with costs. Further, that in the event this Court finds that the defendants' Counsel let them down, the defendants have an effective remedy in the realm of professional negligence.

**ANALYSIS AND DETERMINATION.**

15. This Court has considered the present application, the affidavit filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties. The issue that arises for determination is whether the exparte judgment should be set aside.

16. In their affidavit in support of the instant application, the defendants deposed that they were in a commercial relationship with the plaintiff where they were supposed to leverage on their understanding of the local and regional market for agricultural chemicals with a view of assisting the plaintiff in familiarizing their produce to potential consumers. They averred that out of the said understanding, they were not to incur any expenses in seeking viable markets for the plaintiff's goods. They also averred that it was agreed that the plaintiff would incur all costs in relation to getting the goods to the defendants, including payment of the applicable taxes or duties due to the Kenyan Government. They further deposed that it was agreed that in the event of any successful transactions, the defendants would remit the sums to the plaintiff, who would then pay them a commission and thereafter, the defendants would seek a relationship with such customers on behalf of the plaintiff.

17. It was stated by the defendants that sometime in the year 2006, the plaintiff started sending consignments without making arrangements to pay the applicable taxes and duties and as a result, the defendants took responsibility of the payment of such taxes for expediency purposes in the hope of being reimbursed after successful transactions. They further stated that for the invoices raised by the plaintiff, the 2nd defendant would make such payment as necessary, and in occasions, it would make such advance payments to keep the business going.

18. The defendants deposed that sometime in the year 2011, a dispute arose between them and the plaintiff regarding the outstanding invoices from the latter, the sums paid by the defendants in the nature of taxes and duties, and the advances that the 2nd defendant had made to the plaintiff. That in the year 2012, the suit herein was filed against the defendants for €314,660.20, allegedly from unpaid invoices and in response thereto, the defendants filed a defence and counterclaim seeking to dismiss the plaintiff's claim, and for judgment against the plaintiff for €118,731.50.

19. It was stated by the defendants that they appointed the law firm of Achach & Company Advocates, but when the matter came up for hearing, the 1st defendant's Advocate walked out of the proceedings and the hearing proceeded in the defendants' absence. They further stated that judgment was entered on July 13, 2020 in favour of the plaintiff, who extracted a decree without the knowledge and involvement of the defendants in violation of order 21 rule 8 of the *Civil Procedure Rules, 2010*. The defendants averred that the said decree was supposedly signed by the Deputy Registrar on December 2, 2019, several months before the judgment herein was entered on July 13, 2020.

20. The defendants deposed that the plaintiffs have since illegally and irregularly assessed the costs of the suit without going through taxation as expected under the rules of procedure and the statute. They further deposed that they are willing to cooperate and obey any other order that this Honourable Court may grant for purposes of protecting the interests of both parties, pending the hearing and determination of the main suit on merits.

21. The plaintiff in its replying affidavit deposed that both defendants were represented by the law firm of Achach & Company Advocates, and that the 1st defendant subsequently appointed the law firm of Kilukumi & Company Advocates and thereafter, Mr. Abbas Esmail Advocate to act for it, whereas Achach & Company Advocates continued to act for the 2nd defendant. The plaintiff averred that the matter herein was scheduled for case management conference on May 11, 2018, and on that day, its Advocates confirmed to the Court that it had complied with the pre-trial requirements but Counsel who was holding brief for the defendants informed the Court that the defendants' Advocates intended

to apply for leave to cease from acting. The plaintiff averred that the Trial Court fixed the matter herein for hearing on November 6, 2018 and directed the defendants' former Advocates on record to take the appropriate steps to prosecute their application.

22. It was stated by the plaintiff that the defendants' former Advocates, both Messrs Achach & Company Advocates & Abbas Esmail filed applications for leave to cease from acting dated 14th May, 2018, which were scheduled for hearing on 26th July, 2018. He further stated that in the affidavit in support of Mr. Abbas Esmail's application, he included his email to the defendants' director advising him to appoint another lawyer failure to which he would apply for leave to cease from acting. The said email was responded to by the defendants' director with the words "noted". The plaintiff averred that for the said reason, the defendants were aware of their Advocate's intention to cease from acting for them, but they did not take any steps to appoint alternative representation.

23. The plaintiff averred that the record reveals that on July 26, 2018, the Court noted that the applications dated May 14, 2018, had been served improperly and directed the defendants' Advocates to file a formal application for substituted service which would be heard on 28th September, 2018. It was stated by the plaintiff that on the said date, the defendants' Advocates had not yet filed the application for substituted service thus the matter was given a mention date for November 22, 2018, but on that day, the defendants' Advocates were absent. The plaintiff further stated that since the hearing date for the main suit had been set for December 10, 2018, it served the defendants' Advocates with a hearing notice for the said date.

24. The plaintiff averred that *vide* a letter dated 6th December, 2018 addressed to the defendants' director by Mr. Abbas Esmail and copied to the plaintiff and the 2nd defendant's Advocate, the defendants' director was advised of the application to cease from acting, the hearing date, and the likelihood of the plaintiff proceeding with the case. That the hearing did not proceed on 10th December, 2018, since the plaintiff's witness was indisposed and the hearing was rescheduled to 4th March, 2019. It was stated that on that day, the Court was not able to proceed for the same reasons and the case was rescheduled to 10th June, 2019. The plaintiff averred that neither the defendants nor their Advocates were present in Court on 10th December, 2018 and 4th March, 2019, therefore it served the defendants' Advocates with a hearing notice for 4th March, 2019 and 10th June, 2019.

25. The plaintiff's averment was that the case was eventually fixed for hearing on 7th October, 2019 and its Advocate on record served a hearing notice. That the parties appeared before the Deputy Registrar on 8th August, 2019 pursuant to a mention notice received on 31st July, 2019, and the Deputy Registrar indicated that due to the age of the matter, it should be fixed for hearing during the Court's service week. That the Counsel who was holding brief for the 1st defendant's Advocate indicated that there was a pending application for leave to cease from acting, thus the Deputy Registrar directed that the hearing date for 7th October, 2019 would be maintained.

26. The plaintiff deposed that on 7th October, 2019, Counsel for the 1st defendant who was also holding brief for the 2nd defendant's Advocates, sought to adjourn the hearing of the case due to the pending application for leave to cease from acting. The request was opposed by the plaintiff's Advocate and the Court declined to adjourn the matter and directed that the hearing would proceed as scheduled. The plaintiff averred that at this point, Counsel for the 1st defendant walked out of Court and the matter proceeded with the plaintiff testifying. It also averred that the plaintiff's case was closed and the Court delivered its judgment on 13th July, 2020. That thereafter, the plaintiff filed and served a bill of costs, together with a notice of taxation on the defendants' Advocates but they failed to participate in the taxation proceedings and the costs were duly taxed.

27. The plaintiff asserted that the defendants had not attempted to demonstrate how the orders in the decree differ from the judgment. Further, that the erroneous dating of the decree on the Court's part ought not to be a basis upon which the judgment herein should be set aside,

**If the instant application is merited.**

28. Order 12 rule 7 of the *Civil Procedure Rules, 2010* is the relevant provision under which the Court can set aside the *exparte* judgment herein. It provides as follows-

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

29. The Court in the case of *Duncan Waithaka Ndegwa v Joseph Maina Wangombe* [2013] eKLR when dealing with a similar issue held as follows-

> " The present order 12 rule 7 of the *Civil Procedure Rules 2010* under which the present application is made, is akin to order 1XB Rule 8 of the former *Civil Procedure Rules*. The principles applicable when considering an application under Order 12 Rule 7 of the *Civil Procedure Rules* were set out in the case of *Njagi Kanyunguti alias Karingi Kanyunguti & 4 others v David Njeru Njogu* No. 1818 of 1994 (UR) wherein the Court of Appeal stated at page 4 that:
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> > " In an application brought either under OIXA Rule 10 or OIXB Rule 8 of the *Civil Procedure Rules*, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially (see *Pithon Waweru Maina v Thuku Mugiria* (Civil Appeal No. 27 of 1982) (unreported). *Patel v E.A. Cargo Handling Services Ltd* 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgement being challenged, before coming to a decision whether or not to vacate the judgement.
> >
> > It is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgement in order to avoid injustice, or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

30. In this case, it is not disputed that up until the Trial Court delivered its judgment on July 13, 2020, the defendants were represented by Counsel. It is also not disputed that the defendants' former Advocates on record expressed their desire to cease from acting for the defendants and even went ahead to file applications dated May 14, 2018 seeking leave to cease from acting. On July 26, 2018 when the said applications were coming up for hearing, the Court noted that the purported service of the said applications upon the defendants was improper and directed the defendants' former Advocates on record to file a formal application for substituted service. To date, the said application has never been filed. This then leads to the inescapable conclusion that the defendants have never been served with an application for leave to cease from acting by their former Advocates on record.

31. It is worth of note that all through the proceedings, the plaintiff has been serving all the requisite notices to the defendants' former Advocates on record, which confirms that the plaintiff also acknowledged

that the defendants were represented by Counsel hence there was no need to effect service upon them in person. It is evident that Mr. Abbas Esmail vide a letter dated December 6, 2018 addressed to the 1st defendant advised the defendants that this matter was coming up for hearing on 10th December, 2018 thus the defendants should attend Court and send a representative to represent them in the matter. Looking at the face of the said letter, it only bears the stamp of the firm of Advocates on record for the plaintiff, therefore, there is way of ascertaining whether the said letter was received by the defendants and/or their director.

32. The defendants' Advocates were directed by the Trial Court to file a formal application for substituted service so as to enable them serve the defendants with the two applications seeking leave to cease from acting. The fact that the defendants' former Advocates ignored and/or declined to comply with the said directions, leaves a lot to be desired. Instead of complying with the Court's directions, they kept on receiving service and attending Court on behalf of the defendants, but when the Court directed them to proceed with the hearing of this matter as scheduled, the Advocate who appeared in Court for the defendants on that day walked out of Court and the hearing proceeded in the absence of the defendants. From the above, it cannot be confirmed if the defendants were aware of the hearing date of October 7, 2019 since this Court cannot tell if that information was communicated to them by their former Advocates on record.

33. I agree with Counsel for the defendants that the fact that the matter herein proceeded in the absence of the defendants and/or their former Advocates on record, was occasioned by the fact that the Advocate who attended Court on October 7, 2019 on behalf of the defendants, walked out of Court on that day, which was scheduled for hearing of the case, thus denying them their right to a fair hearing as enshrined in article 50 of the *Constitution of Kenya* , 2010. This Court bears in mind the fact that the defendants had not only entered appearance and filed a defence and counterclaim within the prescribed time allowed by law, but they had also been active participants all through the proceedings. For this reason, it is my finding that the defendants were interested in their case.

34. The defendants submitted that by walking out of Court on the day of the hearing, the Advocate erred and allowed the matter to proceed for hearing exparte without an opportunity for the defendants to test the veracity of the claim and to subsequently prosecute their counterclaim, which amounts to an excusable mistake visited upon them by their Advocates. In the case of *Shah v Mbogo* [1979] EA 116, the Court when dealing with a similar application stated as follows-

> " I have carefully considered in relation to the present application the principles governing the exercise of the Court's discretion to set aside a judgment obtained *exparte*. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

35. Further, in *Philip Chemowolo & another v Augustine Kubende* [1986] KLR it was stated that:

> " I think a distinguished equity Judge has said:
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> > Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, that a party should suffer the penalty of not having his case heard on merit..."

36. As explained herein above, on the day of the hearing of the main case, the defendants were represented by Counsel who was present but walked out when the Court declined to grant him an adjournment.

For this reason, I find that the mistake herein was on the part of the Counsel, and the defendants had nothing to do with it. Based on that ground, I will give an opportunity to the defendants to be heard on merits.

37. On the issue of whether the defendants' defence and counterclaim raise triable issues to warrant the setting aside of the exparte judgment, the defendants filed a defence and counterclaim disputing the debt owed to the plaintiff and asserting that the plaintiff owes them €118,731.50. It is trite that a defence on merits does not mean one that must succeed but one that brings forth triable issues. In view of the above and having perused the said pleadings, I am persuaded that the defence and counterclaim filed by the defendants raise triable issues.

38. The defendants invoked the provisions of sections 1A & 1B of the *Civil Procedure Act* in support of their application. I find it necessary to consider the overriding objective under the said provisions and also Article 159(2)(d) of the *Constitution of Kenya*, 2010. In *Hunker Trading Company Limited v Elf Oil Kenya Limited* [2010] eKLR, the Court held that Section 1A of the *Civil Procedure Act* came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. What is required of Courts under section 1B of the *Civil Procedure Act* is to facilitate-

    1. The just determination of the proceedings;
    2. The efficient disposal of the business of the Court;
    3. The efficient use of the available judicial and administrative resources;
    4. The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
    5. The use of suitable technology.

39. Article 159(2)(d) of the *Constitution of Kenya* , 2010 on the other hand provides that in exercising judicial authority, Courts and Tribunals shall administer justice without undue regard to procedural technicalities. In *Adrian Kamotho Njenga v Cabinet Secretary, Ministry of Information, Communication and Technology & 8 others* [2017] eKLR, the Court in addressing the oxygen principle held that-

> "Considering the above provisions which introduced the oxygen principle, in *Deepak Chamanlal Kamani & another v Kenya Anti-Corruption Commission* [2010] eKLR the court drew comparisons to the Wolf reforms which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules and further considered the English case of *Biguzzi v Rank Leisure PLC* [1999] 1 WLR 1926 in which Lord Woolf himself talked about the concept of overriding principle objective as follows: -
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> > "Under the {Civil Procedure Rules} the position is fundamentally different. As rule 1.1 makes clear the {rules} is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the {rules} was that often the court had to take draconian steps such as striking out the proceedings..."

In the above cited case of Kamani v Kenya Anti-Corruption Commission (supra) the court had this to say: -

> " It is, accordingly, clear to us that the amendment to section 3 of the *Appellate Jurisdiction Act*, did not, without more, come in to sweep away the well-known and established principles of law hitherto in place before the said amendment...--------This to our understanding means sections 3A and 3B of cap 9 cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this court"(Emphasis added)

In this regard, I stand guided by the above quotation from the case of Kamani v Kenya Anti-Corruption Commission (*supra*) that the amendments did not come to sweep away the well-known and established principles of law hitherto in place before the said amendment, and that the said amendments cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate conduct of cases."

40. Although litigants should not suffer due to the mistakes of their Advocates, they are duty bound to follow up on their cases so as to ensure that their Advocates attend Court and prosecute the cases without delay and within the minimal judicial resources available. The defendants herein had a role to play in the administration of justice by making a follow up of their case from their Advocates and/or the Court Registry. This Court cannot however ignore the fact that the defendants were not aware that the Advocate who attended Court on the day of the hearing of the case had walked out of Court, thereby leaving them unrepresented.

41. In addition to the above, from the defendants' averments, the plaintiff extracted a decree without involving the defendants, therefore once again, the defendants were not aware that judgment had been entered against them. It is apparent that they got to know about the exparte judgment after they were served with warrants of attachment of movable property in execution of a decree for money and warrants of sale of property in execution of a decree for money, both dated February 11, 2022.

42. I do not blame the defendants entirely for what has befell them as without a doubt, the Trial Court did direct the Advocates who were previously on record to serve the two applications in which they were seeking leave to cease from acting by way of substituted service, but the said Advocates failed to comply with the directions of the Court. I therefore hold that partly, the defendants were victims of circumstances that were brought about by their Advocates and partly, they take the blame for not following up on their case. Having earlier found that the defendants have a triable defence and counterclaim, the order that commends itself to this Court is to set aside the exparte judgment to give an opportunity to the defendants to defend their case and to prosecute their counterclaim. The said defendants shall however pay thrown away costs to the plaintiff. I therefore make the following orders-

    i. That the application dated 1st July, 2022 is hereby allowed;

    ii. That the *exparte* judgment delivered on 13th July, 2020 is hereby set aside;

    iii. That the defendants shall pay thrown away costs of Kshs.50,000/= to the plaintiff within thirty (30) days of this ruling;

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE, 2023.RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**