REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 582 OF 2012

PRAVINCHANDRA

JAMNADAS KAKAD…………………………....PLAINTIFF/RESPONDENT

VERSUS

LUCAS OLUOCH MUMIA……………………DEFENDANT/APPLICANT

RULING

Before this court for determination is the Defendant's Notice of motion dated 15th February 2013 brought under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order to rule 11 of the Civil Procedure Rules 2010.

The application is predicated on the grounds on the face of the Notice of Motion and supported by the Affidavits of Lucas Oluoch Mumia, the defendant herein, and Cliff Ombeta, sworn on 15th February 2013.

Principally, the application seeks orders for setting aside the Exparte Interlocutory judgment entered against the applicant defendant herein on 7th February 2013 and an order granting him leave to file his defence out of time.

Basically the Notice of motion is predicated on the grounds that:-

a. The Defendant was not personally served with the summons to enter appearance,
b. The Defendant had, although, without instructions entered appearance through the firm of Ombeta and Associates.
c. M/s Ombeta & Associates is a firm representing the applicant in an ongoing Criminal case at Milimani Law Courts and are therefore not agents for the applicant to receive summons.
d. The Memorandum of Appearance dated 8th January 2013 as entered by the firm of Ombeta and Co. Associates was bare of instructions.
e. The defendant is prejudiced by the very entry of judgment and stands to suffer irreparably.
f. No prejudice shall be suffered by the Respondent if the orders sought are granted.

In his supporting affidavit and the affidavit of Cliff Ombeta Advocate the applicant/Defendant Lucas Oluoch Mumia deposes that his advocate in a criminal case No. 1774/2011 Mr. Cliff Ombeta was approached by a person who wished to serve the Defendant some documents and the advocate advised that person to take the said documents to his office situated at Lonrho House. That the said firm was to

open on 14th January 2013 the document were served on Mr. Tom Okemwa the firm's associate who consequently filed and served Memorandum of Appearance on the said 8th January 2013 but unfortunately he did not hand over the instructions to his boss Mr. Cliff Ombeta.

It is then claimed that the said Tom Okemwa advocate left the firm of Cliff Ombeta & Associates without filing defence and it was not until 31st January 2013 when the defendant in the course of making a follow up with his advocate as to the progress of his criminal case that he also inquired of the service effected on this office that he discovered that the service concerned a civil case herein, and that admittedly, the advocates had filed and served a Memo of appearance without instructions from his client the defendant herein, in the above named criminal case.

That the said advocates were then tasked to draft and file defence. But that the said defence was filed in a wrong court inadvertently (Children's court Division as shown by the Defence marked LMO-1. Consequently, a withdrawal notice was filed as shown by annexture LMO-2.

The defendant deposes that he had not given the advocate any instructions to represent him in the civil suit or to file any pleadings on his behalf.

In detesting that he was served with any summons to enter appearance, the applicant maintains that he was approached by somebody who intended to serve him with some documents not summons to enter appearance and that it was in the presence of his advocate Mr. Cliff Ombeta who advised the said person to take the said documents to the advocates office but that notwithstanding, Mr. Ombeta did not have his express permission to enter an appearance on his behalf as he had only been instructed to represent the defendant in criminal case no. 1774 of 2011.

According to the defendant, the advocate Mr. Ombeta did not qualify to be his agent under Order 5 Rule 1 of the Civil Procedure Act which provides that service upon the defendant shall be in person or through an agent if he has one.

The defendant blames the firm of Ombeta & Associates for acting without instructions which occasioned confusion including filing defence in the Children's court on 1/2/13, which was a mistake of an advocate that should not be visited on him. He further deposes that the intended defence raises triable issues and that the issue for determination is for payment of colossal sums of money which he is unable to pay as he does not owe the plaintiff any monies. He urges the court not to condemn him unheard. Finally, the defendant deposes that the plaintiff does not stand to suffer any prejudice in the event that the judgment entered exparte against him is set aside.

Mr. Cliff Ombeta advocate also swore an affidavit supporting the defendant's depositions maintaining that he specializes in criminal law practice and that there was a mix up when his associate, Tom Okemwa who received the documents left the firm. He deposes that due to his firm's mistakes, the defendant should not be penalized for failure to file defence in the time stipulated by law.

The application by the defendant is vigorously opposed by the plaintiff who swore and filed a replying affidavit on 1st April 2013 contending that the said application is incompetent. That there was an unequivocal admission that service of STEA was effected on Ombeta & Associates Advocates who in turn entered an appearance on his behalf, after the defendant himself advised the process server to effect service upon the advocate's firm.

Further, that the affidavit of Bashi Mumbaha the process server was clear that after he got the defendant's telephone contacts no. 0722 580373, he called him through his own cell phone and he informed him that he had documents, to be served upon the defendant. That on 8/1/2013 the process server was called by Mr. Cliff Ombeta advocate on telephone no. 0735213825 telling him that he was waiting for the process server at Milimani Law Courts and that he was with the defendant and that when the process server went

to meet them, he accompanied them to Ombeta's office where he served the court process where it was accepted by the signature affixed thereto. The plaintiff maintains that if that were not the case, then the law firm of Ombeta & Associates had no business filing a Memorandum of Appearance within the statutory stipulated period and serving the same upon the plaintiff's advocates.

It is also contended by the plaintiff that even assuming that the defence was filed in the Children's court by inadvertence then it matters not as it was in any event filed out of the statutory period.

The plaintiff maintains that the defendant has come to court with unclear hands as he has not even offered security in view of the colossal sums of money claimed hence he is not entitled to unconditional leave to defend the suit after admitting that he was served with summons to enter appearance.

It is further averred by the plaintiff that the allegation that a holding defence was filed in a different (Children's) court does not make sense as the two courts were far apart and that even through, the purported holding defence and draft defence are a mere sham containing mere denials. He maintained that the money owed was not in respect of any breach of contract but monies had and received and that any denial of the claim by the defendant was insincerity of the highest order.

The plaintiff annexed copies of personal cheques and bank statements to demonstrate his entitlement to the sums claimed. He also annexed what he described as fraudulent instruments delivered to him by the defendant that enticed the plaintiff to forward to him the debt sum which borders on outright criminality.

The plaintiff blamed the advocate Mr Ombeta for abdicating his duty by failing to file proper documents in court. He urged the court not exercise any discretion in favour of the Defendant who had not done equity and whose application was meant to frustrate the plaintiff from enjoying the fruits of his judgment as he was the author of his own misfortune and was guilty of inequitable delay. The plaintiff urges the court to dismiss the defendant's application with costs.

The parties agreed to dispose of the application by way of written submissions with the defendant / applicant filing his on 9/6/2014 and the plaintiff/ Respondent filing his on 25th June 2014. The defendant filed a rejoinder on 9th July 2014.

The defendant's submissions mirrored on the 2 supporting affidavits filed and the grounds upon which the application was premised, while relying on several authorities to support his averments. On the other hand, the plaintiff's written submissions too mirrored the depositions in the replying affidavit supported by decided cases.

The gist of the defendant's submissions is that there was no personal service and that the service affected on Ombeta & Associates was erroneous as the said law firm did not have the defendant's instructions to receive service of summons on his behalf as they were not his agents empowered to receive such summons on his behalf.

Further, that it is trite law that an exparte judgment would be set aside where there has been no proper service and where a defence raises triable issues, with the overriding fact being that of doing justice to the parties. He cited what he calls a notorious Ugandan case of **Uganda Commercial Bank Vs Mukoome Agencies (1982) HCB 22** where it was held that where fraud is alleged, the party alleging it must be given opportunity to prove it. And that a substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit. That he has denied all the particulars of fraudulent misrepresentation pleaded by his draft defence and that the triable issues include:-

a. Whether there was an existing contract between the plaintiff and defendant.
b. Whether the defendant conceived any idea enabling him to source funds from the plaintiff for use in business activities to which fund the defendant was to repay the plaintiff as alleged.
c. Whether the defendant made any representation to the plaintiff that CBK owed him Kshs. 210,000,000.
d. Whether out of the said alleged representation by the defendant to the plaintiff, the defendant owes

the plaintiff a colossal sum of Kshs. 206,926,300.

The defendant relied on the cases of **Atlas Copco Customer Finance Ltd Vs Polarize Enterprises Ltd (2014) eKLR; Joseph Gitau Vs Joreth Limited and Another (2013) eKLR, Chemwolo & Another Vs Kubende (1986) KLR 492; Maina Vs Kariuki (1984) KLR 407** asserting that the common threads in those cases was that if there was a triable issue in a defence, it was in the interest of justice that a defendant be given an opportunity to file his defence.

The defendant further submitted that a condition of payment into court ought not to be imposed where a reasonable ground of defence is set up. He maintained, relying on **Maina Vs Muriuki (Supra**) that the discretion to set aside exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error.

He further maintained that the default in filing defence late was occasioned by procedural errors committed by Mr. Ombeta & Associates and that this court is enjoined by Article 159 (2) of the constitution to deliver substantive justice and not give undue regard to procedural technicalities. The defendants contended that in the case of **Patel Vs EA Cargo Handling Services Ltd (1974) EA 75,**

> ***"There are no limits or restrictions on the judge' discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits oR by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."***

The defendant urged the court to do justice to the parties by allowing the application and letting the suit go to trial on merits.

The plaintiff on the other hand submitted through his advocate and own law firm PJ Kakad & Co Advocates in opposition by framing 5 issues for determination by the court:

1. Whether the service as effected on the Defendant is proper.
2. Whether the defendant's previous advocates acted without authority.
3. Whether the judgment entered is proper and regular in law.
4. Whether the defendant's defence raises any triable issue capable of adjudication at a full trial.
5. Whether the defendant is as a consequence thereof entitled to the orders he is seeking.

On **Issue No. 1,** the plaintiff contends that the process server's affidavit of service speaks confirming that it was the defendant who advised the process server to effect service upon the firm of Ombeta & Associates whom he identified as his advocates and that the defendant even accompanied the said advocates to his office together with the process server.

He maintained that personal service is not always mandatory under Order 5 Rule 8 (1) of the Civil Procedure Rules which provides that

> "**Wherever it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient".**

Further, that as the defendant has by his own affidavit sworn on 15th January 2013 admitted service, judgment as entered is regular and the same should not be disturbed.

On **Issue No. 2** the plaintiff contends that the allegations that the advocate served had no authority to receive process does not add up as the said advocate did file a Memorandum of appearance and defence though in a wrong court and out of time.

Therefore, the plaintiff should not be made to shoulder the consequences of negligence of the defendant's

advocate. The plaintiff's advocate relied on **Water Painters International Vs Benjamin Ko'goo T/A Group of Women in Agriculture Kochieng (Gwako) Ministries (2014) eKLR** where Ogola J held

> "***In the words of Justice Ringera in Omwoyo Vs African Highlands & Produce Co. Ltd (2002 J)KLR, time has come for the legal Practioners to shoulder the consequences of their negligent acts of omissions like other professionals do in their fields of endeavour. The plaintiff should not be made to shoulder the consequences of negligence or the defendant's advocates. This is a proper case where the Defendant's remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment."***
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> The plaintiff's advocate added that if the said advocates had no instructions from the client then there would be no need for them to file a Memorandum of Appearance, citing Wanyuri Kihoro & 2 Others Vs British Airways Travel Insurance & Another (2012) eKLR where Mwera J held:-
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>> "***But as far as the Civil Procedure Rules are concerned an advocate can only enter appearance for the whole proceedings. Perhaps he can file a notice that his instructions are limited to this or that aspect only."***

Counsel for the plaintiff maintains that there is no provision in law for a "**holding defence".**

On **Issue No. 3,** the plaintiff's advocate avers that the judgment entered is proper and regular in law hence the same should not be interfered with.

On **Issue No. 4,** the plaintiff scoffs at the defendant's assertion that he has a defence to the claim raising triable issues. He maintains that even if the said defence was filed in time, it would be amenable to striking out as it discloses no reasonable cause of action at all, averring that limitation statute cannot be pleaded where it is not stated when the cause of action arose and that in this case the cause of action only arose when the money became due and payable to the plaintiff and that the plaintiff's replying affidavit remains unchallenged.

The plaintiff cited the case of **Charles Mwalia Vs the Kenya Bureau of Standards** HCC 1058/200 by Ringera J to the effect that failure to provide a reasonable defence by the defendant ……the need to set aside the lawful judgment present herein. Further, that he who seeks equity must come with clean hands. That the defendant is quiet on the fact that he received money from the plaintiff and failed to repay the same. He also drew this court's attention to the case of **Thayu Kamau Mukigi Vs Francis Kibaru *Karanja (2013) eKLR*** *where the court stated:-*

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

Counsel maintains that there is no valid defence which is a pre-requisite for setting aside judgment.

On the last issue, the plaintiff urges this court to find that since judgment was entered regularly and the principles for conditions for setting aside judgment regularly entered have not been fulfilled by the defendant, he should not be allowed to benefit from his own mistakes.

Further, that under order 10 Rule 11, this court can only make such order on "just terms" but that in this case the defendant is not fair and honest, only attempting to forestall the inevitable in paying a debt that has lawfully accrued.

He also argues that the advocates on record have no locus stands in the matter as no leave was granted for change of representation hence the Notice of change of advocates and submissions filed are invalid rendering the application hopeless and offensive to order 9 Rule 9 of the Civil Procedure Rules which

enact:-

> *"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court."*

The plaintiff urged the court to dismiss the defendant's application with costs. In a rejoinder (further submissions) filed on 9/7/2014, the defendant maintains that he was not served with STEA as Mr. Ombeta was not his agent. Further, that there are a myriad of triable and bona fide issues which can only be thrashed out at a full hearing of the suit on merit. He lists 14 such issues among them, that the plaint did not disclose how the said debt accrued, that the total amount claimed is inconsistent with the amounts in the annextures which only totals Kshs. 7,270,000, that the alleged third parties who also received the claimed money on behalf of the plaintiff are not disclosed, that letters of enticement annexed are doubtful and show impropriety on the part of the author- Governor of Central Bank Andrew Mulei, that cheques were issued to PJ Kakad & Co yet the suit is filed in the name of Pravinchandra Jamnads Kakad.

Further, that under Order 10 rule 11 of the Civil procedure Rules this court has the discretion to order for thrown away costs and not security for costs.

On the issue of locus it was submitted that the application dated 15th February 2013, second prayer thereof sought leave to come on record in the place of Mr. Ombeta & Co Associates and that there is a valid notice of change filed and dated 17/2/2014. That Article 159 (2) (d) of the constitution of Kenya provides that justice shall be administered without undue regard to procedural technicalities especially in weighing the interest of justice. That the court can also grant leave to amend the notice of motion if it finds that the current advocates are improperly on record, to avoid an injustice to the defendant. That the defendant has a constitutional right to be represented and therefore he should not be hindered in his quest to set aside the exparte judgment.

Finally, that this court should lean towards a policy of deciding cases on merit rather than encouraging exparte judgments based on procedural technicalities and that the plaintiff can adequately be compensated by an award of costs.

<u>Analysis and Determination</u>

I have carefully considered the defendant's application, his supporting grounds and affidavits; the plaintiff's replying affidavits as well as both parties elaborate written submissions supported by relevant precedents and statutory in support of their respective rival positions.

The plaintiff Pravinchandra Jamnadas Kakad is an advocate of the High Court of Kenya. By a plaint dated and filed in court on 7/12/2012, he claims from the defendant Lucas Mumia Oluoch a sum of Kshs. 206,926,300 together with interest at court rates, costs of the suit and any other relief this court may deem fit to grant.

The plaint alleges that in the year 2004, the Defendant conceived the idea of sourcing for funds from the plaintiff to be utilized to his business activities and that the defendant alleged that he was owed substantial sums by Central Bank of Kenya which allegation turned out to be untrue and a fraud.

It is further alleged that in order to induce the plaintiff to advance Kshs. 210,000,000 to the defendant, the latter made statements and representations to the plaintiff to the effect that

a. CBK owed him Kshs. 210,000,000
b. He would obtain the requisite Banker's cheques from CBK to replace the said sums to be forwarded to the Defendant by the plaintiff.
c. It is a businessman and a civil servant with unimpeachable credentials with the Kenyan Civil Service.

It is contended that later, it turned out that Central Bank of Kenya did not owe the defendant any sums of money that the Bankers cheques forward to the plaintiff by the defendant were fraudulent replicas and not genuine; and that the defendant was not a businessman with unimpeachable credentials with the Kenyan Civil Service as alleged.

The plaintiff, therefore, upon discovery of the defendant's fraudulent actions filed suit for recovery of Kshs. 206,926,300 being loss of investment that would have been earned had the money been invested in another income generating activity or even in an interest earning account.

He also claimed that his health status took a nose dive as a result of the defendant's fraudulent intention and deceitful acts.

The suit was filed by the plaintiff's law firm of PJ, Kakad & Co Advocates.

The record shows that on 8/1/2013 the firm of Ombeta & Associates received and stamped on the summons to enter appearance issued on 10th December 2012. There is also a process server's affidavit of service sworn on 10th January 2013 by Bashir Mumbaha deposing that on 7/1/2013 he received STEA from PJ Kakad & Co who also gave him a telephone no. 0722580373 belonging to the defendant.

That at about 4.20 pm the process server called the said number but nobody picked. That at 4.22 pm the defendant returned the call and enquired on why he was being called and the process server explained the purpose and the defendant promised to call back. Further, it is contended that on 8/1/2013 at 10.17 am, the process server received a call from Mr. Cliff Ombeta Advocate on phone no. 0735213825 to the effect that he was waiting for the process server at Milimani Law Courts and that he was with the defendant.

That the process server proceeded to Milimani Law Courts and met the defendant with his advocate Mr.Ombeta. That he tendered to the defendant STEA and plaint but Mr. Ombeta informed the process server to accompany them to his office at Lonrho House and which he did and Mr. Ombeta acknowledged service of STEA by signing and stamping on the principal copy which was returned to court.

The process server is said to have been informed by the defendant whom he knew that he (the defendants) was aware of the matter.

By a Memorandum of appearance dated 8th January 2013 and filed in court on 9th January 2013, the firm of Ombeta & Associates filed a Memorandum of Appearance on behalf of the defendant.

On 28/1/2013 the plaintiff filed a request for judgment in default of defence and the said judgment was endorsed on the 7th February 2013 by the Deputy Registrar. By a notice of motion dated 15th February 2013, the defendant through the Law firm of Omwoyo, Momanyi Gichuki & Co Advocates filed the application subject of this ruling seeking for leave to come on record in the place of Ombeta & Co Advocates, setting aside of exparte judgment and leave to file defence out of time, as expected, the plaintiff opposed the application.

From the above exposition, I find several issues for determination in this application namely:-

1. Whether service of Summons to Enter Appearance was effected upon the defendant
2. Whether the firm of Omwoyo, Momanyi & Gichuki & Co Advocates were properly on record and therefore whether the application dated 15/2/2013 is competent before the court- whether consent without endorsement is valid before court.
3. Whether the firm of Anyango & Githogori Advocates are properly on record, having taken over the conduct of the application from Omwoyo, Momanyi & Gichuki & Co Advocates by way of notice of change, and argued the application, before the former could regularize their coming on record
4. Whether the defendant is entitled to the prayers sought in the application.

From my careful evaluation and analysis of the record, I have no doubt in my mind that the defendant/ applicant was served with summons to enter appearance as evidenced by the endorsement on the Summons to Enter Appearance by the firm of Ombeta & Associates. Albeit the said advocate alleges that he only represented the defendant in the criminal case, the said Ombeta advocates never denied the process server's deposition that he called the process server or that he met the process server while he was with his client at Milimani Law Courts, and or that he instructed the process server to accompany him to his Lonrho House office where the Summons to Enter Appearance were received on behalf of the defendant.

More importantly, albeit the said Ombeta advocate alleges that he had no instructions to represent the defendant in the Civil suit herein, he does not explain why he promptly filed the Memorandum of Appearance and served it upon the plaintiff, and why he did not inform the defendant that he was not filing any defence in the matter for want of instructions. Although the defendant deposes that the firm of Ombeta & Associates "purportedly" received summons to enter appearance on his behalf, I find that deposition unfounded as he does not deny that he was present when the process server met Ombeta Advocate at Milimani Law Courts. The defendant casually, at paragraph 5 of his Supporting affidavit deposes that:-

> "**That on 8th day of January, I was approached by a person who wished to serve me on some documents and my advocate Mr. Ombeta advised him to take them to his office situated at Lonrho House".**

The defendant does not disclose what documents they were and whether he read and understood their content or whether Mr. Ombeta read them before instructing the process server to sent them to his office. He however admits that the advocates firm filed Memorandum of appearance the following day and had them served on the plaintiff's advocates. It emerges that indeed, if Mr. Ombeta who was with the defendant sent the process server to take the documents to his office, nothing prevented the defendant from stopping the advocate from entering an appearance or even filing defence on his behalf since he was already representing him in the criminal case.

This court finds both the advocate and the defendant were very evasive in their depositions. Thus, the defendant and Mr. Ombeta advocate could not have instructed the process server to take "**documents"** to Mr. Ombeta's office without knowing what documents they were. Furthermore, at paragraph 12 & 13 of the defendant's affidavit, it is clear that Mr. Ombeta inquired from his associate whether a defence had been filed and upon learning in the negative, "**he tasked another associate to prepare a defence which was filed and served on the next day, the 1st February 2013".** It is clear that Mr. Ombeta inquired from his associate whether a defence had been filed and upon learning in the negative, "**he tasked another associate to prepare a defence which was filed and served on the next day, the 1st February 2013".** It is then deposed by the defendant at paragraph 14 that unfortunately the said defence was filed in the wrong court Children's court. Mr Ombeta does not state when his associate left the office and why, if from the onset he had no instructions to represent the defendant he was later instructing another associate to prepare the defence to the claim, upon realization that the defence had not been filed.

At that point in time, there is no indication that Mr. Ombeta had no instructions to represent the defendant in this matter and if there was any such lack of instructions then the defendant had no business inquiring from Mr. Ombeta of the service that was done in the office. In addition, Mr. Ombeta had no business inquiring from his associate whether a defence had been filed in the matter if at all he had no instructions from the defendant to enter appearance and or file defence.

It is unacceptable that an advocate of Mr. Ombeta's standing in the roll of advocates, and in this country and one of the top notch and renowned lawyers can expect this court to believe him that he simply told a process server to take some documents belonging to the defendant to his office, without knowing what documents they were. It is also not persuasive for the defendant to allege that he did not know what documents they were.

Further, at paragraph 18, the defendant deposes that the advocate- Ombeta & Associates filed a holding

defence awaiting full instructions from the defendant. I am convinced that the defendant did instruct Ombeta advocate to represent him in this matter and that is the reason why a Memorandum of appearance was swiftly drawn on 8/1/2013 and filed and served on 9/1/2013 but they forgot all about filing of the defence perhaps, as deposed by the defendant, awaiting for "**full instructions"** from him, which term "**full instructions"** is heavily loaded. It is possible that the defendant did not pay Mr. Ombeta for legal representation in the matter, but that is only part of the instructions. I find Mr. Ombeta's firm accepted instructions from the defendant and that is why they entered an appearance on his behalf and even filed a "**holding defence"** in the wrong court.

This court even finds it hard to believe Mr. Ombeta that his firm filed a holding defence in a wrong court for reasons that what appears to be the stamp of the Nairobi Children's court for 1st February 2013 is simply imposed. There is no official court receipt to show the filing in that court. Further, it has not been shown that the person who went to file the defence was new in filing of court processes and therefore did not know in which court the defence ought to have been filed, or that the Children's court registry clerks were so ignorant and in a hurry that they could receive documents which did not belong to their court without confirming whether or not they had such a file in their custody.

I also observe that Mr Ombeta does not deny signing the defence in question dated 1st February 2013. If he had no instructions from the defendant at that stage he had no business signing the defence, assuming his associate Mr. Tom Okemwa who hurriedly drew the Memorandum of appearance did so without instructions of the defendant. I find both the defendant and Mr. Ombeta's assertion incapable of belief and I dismiss them as conjured and intended to win favour from this court through the backdoor.

I believe the plaintiff that indeed the defendant has not come to court with clean hands, in as much as he has a right to be represented by an advocate of his own choice. I find that the conduct of the Defendant and Mr. Ombeta at the time of service of STEA depicted principal / agent relationship and therefore the process server could not have been expected to effect another service. Furthermore, there is no prejudice caused to the defendant by virtue of that service on Mr. Ombeta's office, with Mr. Ombeta's own instructions to the process server, following the defendant's own admission that indeed the process server met him and Mr. Ombeta when the latter instructed the said process server to take the "**documents"** to Mr. Ombeta's office.

In my view, the issue of professional negligence is neither here nor there, as the defendant has not, in his depositions accused his then advocates, Mr. Ombeta of any professional negligence. What I hear him saying is that he did not instruct Mr. Ombeta's firm to enter appearance on his behalf or even to file a defence in the matter. If that is the case, then where does professional negligence arise? In my view, the defendant is the author of his own misfortune. He had the opportunity to enter an appearance which he did, but did not bother to file defence in time and is now using "**lack of instructions"** to Mr. Ombeta for the delay in filing a defence and or filing it in a wrong court out of time without leave of the court. That is argument is too cheap to be brought by any sensible legal mind. On the plaintiff within 14 days from the date of filing. In this case, even if this court was to believe the defendant's assertion that the defence was filed but in a wrong court, the said "holding defence was purportedly filed on 1st February 2013**,** long after the 14 days allowed by order 7 rule 1 of the Civil Procedure Rule hence, leave of court was mandatorily necessary.

It follows therefore that indeed the exparte judgment entered on 7th February 2013 was regular and the subsequent judgment entered on 2nd April 2013 was superfluous.

Having found that the defendant did instruct Mr. Ombeta to enter an appearance and even file a defence in the matter, whether such defence is described as holding or otherwise, the other issue is whether, therefore, the Exparte judgment as entered on 7th February 2013 was regular and proper.

In my view, the defendant having been served with summons to enter appearance on 8th January 2013 through Ombeta & Associates, he was expected to enter appearance within 15 days thus by 23rd January 2013 and followed by a defence within 14 days from date of filing of appearance in the suit and serve it.

In law, and practice, even a regular judgment can be set aside on conditions, and that is an issue which this court can at most, consider.

But before coming to that point, I must first address an equally important issue no 2 of whether the firm of Omwoyo, Momanyi & Gichuki & Co Advocates was properly on record and therefore whether the application dated 15/2/2013 for setting aside exparte judgment is competently filed and before the court.

The applicable law that settles this issue is the provision of order 9 Rule 9 of the Civil Procedure Rules which provides that:-

> "**When there is change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-**
>
> a. **Upon an application with notice to all parties; or**
> b. **Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be".**

Under Order 9 rule 10, **"An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first."**

In this case, there is no doubt that the firm of Ombeta & Associates entered an appearance in record time of one day after service of summons to enter appearance. They even attempted to file a defence out of time without seeking leave of court and after judgment had been entered against the defendant. No doubt that is the law firm that was correctly on record as a the time this application for setting aside exparte judgment was being filed by Omwoyo, Momanyi Gichuki & Co Advocates on 18th February 2013.

I note that on 18/2/2013 the said Law firm of Ombeta & Associates Advocates and Omwoyo, Momanyi Gichuki & Co Advocates signed a consent dated 15th February 2013 permitting he latter advocate to take over the matter from Ombeta & Associates on behalf of the Defendant. I have, however not seen any order of the court acknowledging the said consent.

Under order rule 10 of the Civil Procedure Rule, an application to change advocate after judgment may be combined with other prayers provided that prayer is determined first. Both order 9 rule 9 and rule 10 emphasis that there must be an order of the court whether the incoming or outgoing advocates are consenting or whether the incoming advocate files an application to come on record.

The issue as to whether or not Omwoyo, Momanyi, Gichuki advocates were properly on record at the time of filing of the application subject of this ruling, therefore, does not arise as they did seek in prayer 2 of the application, leave to come on record. They however, did not move the court to have that prayer determined first before pursuing the other prayers of setting aside the exparte judgment. However, my appreciation of order 9 rule 9 is that once consent between the advocates is filed, it is upon the court to make an order in terms of the consent, which was not done in this case.

Since Order 9 rule 9 was intended to protect the interests of an advocate who had represented a party until after judgment, from letting go the brief without a possible guarantee of his or her legal fees being paid, I see no prejudice in endorsing the consent dated 15/2/2013 as an order of the court.

Furthermore, the firm of Ombeta & Co Advocates are supportive of the application herein for setting aside of the exparte judgment and are not opposed to the firm of Omwoyo, Momanyi, Gichuki & Co Advocates coming on record for the defendant in their place.

That being the case, I find that to hold that Omwoyo, Momanyi, Gichuki & Co Advocates are improperly before the court and therefore the application dated 15th February 2013 is incompetent would not only be unfair, but also unjust and an engagement in procedural technicalities at the altar of substantive justice, which Article 159 (2) (d) of the constitution and Section 1A and 1B of the Civil Procedure Act abhors.

I therefore adopt the consent dated 15th February 2013 between Ombeta & Associates and Omwoyo, Momanyi & Gichuki Advocates as an order of the court allowing the latter advocates to come on record in place of the former advocates, which order also disposes of prayer No. 2 of the Notice of motion dated 15th February, 2013.

Having so ordered above, I find that the firm of Anyango Githogori & Co Advocates are properly on record for the defendant by their notice of change of advocates dated 17th February 2014, and were competent to file the written submissions dated 9th June 2014 on 9th June 2014.

I now turn to the issue of whether the service of summons to enter appearance were effected on the defendant. I reiterate the answer, from my analysis to be in the affirmative and dismiss the defendant's counsel's vehement submissions that the process server did not make any efforts to serve the defendant.

The defendant himself does not deny service of the said summons to enter appearance upon him through Mr. Ombeta Advocate. Neither does he deny being called on mobile no. 0722580373 and or calling the process server and promising to call the process server. Mr. Ombeta too does not deny calling the process server using mobile phone no 0735213825, and neither does he deny being the subscriber to the said mobile telephone and asking the process server to meet him at Milimani Law courts where he was to be found in the company of his client the defendant, in the Criminal case, and the process server introducing himself and tendering the Summons to Enter Appearance and plaint to him.

Neither Mr. Ombeta advocate nor his client the defendant herein denied proceeding with the process server to Mr. Ombeta's office at Lonrho House on 8/1/2013. In addition, the defendant does not deny that he informed the process server that he was aware of the matter. The process server was categorical that he effected service on Mr. Cliff Ombeta advocate who accepted service by signing and rubber stamping on the principal copy returned. What Mr. Ombeta did was to fail to challenge that aspect of affidavit evidence by simply stating in his affidavit of 15/2/2013 that he was *"approached by a person who wished to serve my client some documents and I advised him to take them to my office situated at Lonrho House."* At the same time, Mr. Ombeta admits in his paragraph 2 that he was initially the Defendant/ applicant's advocate in this matter, forgetting that he had simply referred to some documents and recalls that his associate Mr. Tom Okemwa received the said summons and entered a Memorandum of appearance and filed the same without his instructions.

The said Mr. Ombeta also materially contradicts his own client at paragraph 9 when he swears that he received a phone call from the Defendant/applicant inquiring about his criminal case and in the passing made an inquiry about the service made to the office. At paragraph 10 of the defendant's supporting affidavit, he asserts that on 31st January 2013 in the course of checking (not telephoning) on his advocate in the criminal case no. 1774/2011 he did ask in passing of the service that was done in his office and upon inquiry from his office (not former associate) he learnt that what was served upon him (not his former associate) was a civil process. With those kind of material contradictions this court must discredit both the advocate and his client the defendant as being untruthful witnesses who cannot be relied on and or be believed even for one moment in this case in their bid to overturn a lawfully obtained judgment of the court.

I am satisfied beyond any shadow of doubt that the argument against service of Summons to Enter Appearance upon the defendant through Mr. Ombeta Advocate which service was followed by the filing of Memorandum of appearance is for academic purposes. Even an allegation that the STEA was filed without the client's instructions is laughable, in the wake of admission by Ombeta that it is his associate who filed Memorandum of appearance without he (Ombeta's) instructions, but not that he (Ombeta) did not have instructions from his client to enter an appearance, while maintaining that he even went ahead to file a holding defence in a wrong court after learning of the filing of Memorandum of appearance without instructions. I accept the holding in **Wanyiri Kihoro & 2 Others Vs British Airways Travel Insurance & Another (2012) eKLR** while Mwera J held that "**But as far as the Civil Procedure Rules are concerned an advocate can only enter appearance for the whole proceeding. Perhaps he can file a notice of appointment and urge the court to note that his instructions are limited to this or that**

aspect only".

And in my view, if Mr. Ombeta only had partial instructions from his client th defendant herein, he did not state to what extent, and what full instructions he was waiting for after "filing of a holding defence in a wrong court."

As stated earlier, it follows that the exparte judgment entered against the defendant in this case is proper in law.

The defendant has stated that even if the judgment entered was proper, it should be disturbed as his defence raises triable issues capable of adjudication at a full trial. On the other hand, the plaintiff maintains that the purported defence raises no triable issues or at all and that even if he is given leave to have the said defence be on record, it is amerable to being struck out for disclosing no reasonable cause of action for reasons that the plaintiff cannot plead limitation of Actions without stating when the cause of action arose, which, in his view, was when the money became payable to the plaintiff, and the fact that issues raised in the plaintiff's replying affidavit remain unchallenged, which failure to provide a reasonable defence, according to Ringera J in HCC 1058/2000- **Charles Mahta Vs the Kenya Bus Service,** vitiates the need to set aside the lawful judgment; and in **Thayu Kamau Mukingi Vs Francis Kibaru Karanja (2013) eKLR** citing with approval **Tree Shade Motor Ltd Vs D.T. Dobie Co Ltd CA 38/1998** that even when exparte judgment was lawfully entered, the court should look at the draft defence to see if it contains valid or reasonable defence, which is non-existent in this case.

The defendant on the other hand vigorously contends that where fraud is alleged, the party alleging fraud must be given an opportunity to prove it, and that a substantive allegation of fraud raised a triable issue entitling the defendant leave to defend the suit, relying on the Ugandan case of **UCB Vs Mukoome Agencies (1982) HCB22.**

The power to set aside exparte judgment is a discretionary one as was held in the case of **Patel Vs EA Cargo Handling Services Ltd (1974) EZ 75** that:-

> "***There are no limits or restrictions on a judge's discretion except that if he does vary the judgment he does so on terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules…."***

In **Maina Vs Muriuki (1984) KLR 407,** it was held that the discretion to set aside exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. The court further held that where the common thread was that there were triable issues in a defence; it was in the interest of justice that a defendant be given an opportunity to defend the suit.

I have carefully examined the plaintiff's claim against the defendant which, quite precisely, is anchored on fraud and or fraudulent misrepresentation.

There are extremely serious claims of fraud against the defendant involving colossal sums of money allegedly paid by the plaintiff to the defendant for a purpose that is not very clear from the pleadings on record and it appears that the name of Central Bank of Kenya and its former top manager are also cited in the transaction. The nature of the business activities for which such sums of money in hundreds of millions was sourced from the plaintiff by the defendant is not disclosed in the plaint dated 7th December 2012. That, in my view, invites probing and questions as to why the plaintiff did not report the defendant fraudster to the police for investigations into possible criminal offences abound.

I have examined the annexed documents to the replying affidavit which include personal cheque drawer in favour of the defendant by the plaintiff's law from PJ Kakad & Co. I have no doubt that the plaintiff being an advocate practices in a firm name (business) name and there is no defect in issuing cheques in his firm's name in favour of a third party. But I am concerned that despite evidence of payments of those cheques in favour of the Defendant drawn on Fidelity Bank, City Branch as confirmed by the said Bank

all during the month of May, 2005 and December 2006, there is nothing on record to show for what purpose the said cheques were being issued.

Furthermore, there is, prima facie, no evidence that the cheques Numbers 017049, 017041, 017049, 019055 and 019057 as purportedly issued by Central Bank of Kenya in favour of the plaintiff were banked and or dishonored in the period 17/1/2006 and 18/7/2006. Neither is there any document of denial or verification from CBK that their Bankers cheque were fraudulent replicas and not genuine.

Those are some of the questions that emerge, which, in my view, subject to explanations, raise serious triable issues in this case and which persuade me that despite the regular judgment on record, the matter herein ought to be heard interpartes to enable the defendant exercise the right to be heard in defence.

Iam therefore persuaded by the case of **Uganda Commercial Bank v Mukoome Agencies(supra)** that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit.

I do not find that this application is in any way intended to delay or obstruct the course of justice. The defendant, upon discovery of entry of judgment did timeously apply to set it aside and it has now taken 2 years to have this application determined. As at the time of the application, there was no delay by the defendant. If judgment had been set aside then, or application heard expeditiously, I am sure this matter would by now be fully determined. The delay was occasioned partly by the insufficiency of judges due to election petitions in 2013 and partly, the record shows that the parties' advocates sought adjournments from time to time. I therefore see no reason why this matter cannot be heard on merit in view of the many triable issues raised.

In the end, I set aside the exparte judgment entered against the defendant on terms and grant the defendant leave to file an appearance and defence within 14 days from the date hereof in default, judgment to revert unless such period is enlarged by the court on application.

As the default judgment was regular and proper, I award costs of this application to the plaintiff/Respondent. I also award the plaintiff thrown away costs of Kshs. 50,000 for the inconvenience caused to him following the delay. The thrown away costs to be paid within 14 days from the date of this ruling and in default, execution to issue for recovery.

Dated, signed and delivered at Nairobi this 13th day of July 2015.

R.E. ABURILI

JUDGE