

delay.

4. The Claimant opposed the application vide a replying affidavit sworn on 29th November, 2024. The Claimant states that the suit herein, was filed on 27th October 2023 vide the Statement of Claim dated 26th October 2023, and the summons to Enter Appearance were extracted and served together with the Statement of Claim and its verifying documents on 30th October 2023.
5. She avers that the Respondent appointed the Counsel on record who only filed a Memorandum of Appearance dated 21st November, 2023 but failed to attend Court for the Mention on 7th February 2024. She avers further that a Mention Notice for 29th February 2024, was prepared and duly served upon the Counsel for the Respondent, and that a return of service is on record.
6. It is her case that her Counsel sought for Default Judgment and the same was allowed, and the matter scheduled for formal proof hearing 31st July 2024. The Claimant states that just days before the date for formal proof hearing, the Respondent filed the application herein under certificate of urgency, seeking to set aside the orders of the court issued on 14th March 2024, and to be granted leave to file a Reply to Statement of Claim out of time.
7. The Claimant avers that despite filing their Reply to Statement of Claim in the wrong suit on 24th April, 2024 and

being fully aware that the matter was scheduled for formal proof hearing on 31st July 2024, the Respondents continued to delay and only filed the application herein a week before the said hearing date.

8. She avers that the Respondent's conduct amounts to an abuse of the Court process and an attempt to delay the expeditious disposal of this suit.
9. This Court directed parties to file submissions on the two applications, and the submissions were received from both parties, and have been duly considered.

Analysis and Determination

10. The issue for determination is whether the Respondent/Applicant deserves the orders sought.
11. The Respondent/Applicant contends that their Advocate inadvertently lodged the Reply to Claim in a separate, but closely related case being ELRCC/E890/2023 - Tom Maina Chege VS Market Force Technologies Limited. It states further that it has a bona fide triable defense that will likely succeed if it goes to full trial.
12. I note that the Respondent has placed before court proof of having filed a reply in a similar but closely related suit from the court CTS. It is also confirmed that the Respondent has now a draft reply to the statement of claim which in my view raises triable issues.

13. In the case of ***Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede (1982-1988) KAR***, the court opined thus on setting aside of an *ex parte* judgment: -

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

14. Further in the famously cited case of ***Mbogo & Another v Shah (1968) EA 93***, the Court held as follows:-

“...the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

15. The Respondent has explained to court how the delay in filing a response to the Claimant’s claim occurred, and which in my view is sufficient to warrant the setting aside of the *ex parte* judgment. Further, it is apparent that the delay was purely the mistake of the Respondent’s counsel who filed the reply under a different matter, and as has been severally held, mistake on the part of counsel should not be visited on an innocent litigant.

16. In light of the foregoing, I am inclined to allow the Respondent's application, and which I hereby do, in the following terms:-

- a) That the ex parte directions issued on 14th March, 2024 directing that the suit herein proceeds to formal proof, be and is hereby set aside.
- b) That the Respondent be and is hereby granted leave to file a response to the claim out of time, and the same be filed within 14 days of this order.
- c) Costs shall abide the cause.

17. It is hereby so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 23RD DAY OF OCTOBER, 2025.

**C. N. BAARI
JUDGE**

Appearance:

Ms. Ruto Present for the Claimant/Respondent

N/A for the Respondent/Applicant

Ms. Esther S - C/A

