REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. E063 OF 2022

COSTWISE ELECTRICALS LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

ENG. EVANS C. GORO.....1ST DEFENDANT/APPLICANT

GORO CONSULTANTS LIMITED.....2ND DEFENDANT/APPLICANT

RULING

The Notice of Motion

1. **Eng. Evans C. Goro** and **Goro Consultants Limited** (hereafter the 1st and 2nd Applicants) have taken out the Notice of Motion dated 1st August 2025 (the Motion) under Sections 1A, 1B and 3A of the Civil Procedure Act (CPA); Order 10 Rule 11 and Order 51 of the Civil Procedure Rules (CPR) and Article 50 of the Constitution of Kenya, 2010, seeking to set aside the interlocutory judgment entered in the present suit on 27th November 2024 and all consequential orders, and leave to file their statement of defence and other relevant pleadings, out of time.

2. The Motion is anchored on the grounds laid out on its face and in the Supporting Affidavit sworn by the 1st Applicant in which it is deposed that **Costwise Electricals Limited** (hereafter the Respondent) instituted the present suit vide a plaint dated 14.04.2022 accompanied by an application of like date, seeking temporary injunctive orders against the Applicants, which application was ultimately dismissed by this court (**Meoli, J.)** vide a ruling delivered on 12th May 2023.
3. The 1st Applicant has averred that the Applicants were at all material times represented by the firm of **Nyiha, Mukoma & Co. Advocates** (the erstwhile advocates) in the matter, pursuant to an appointment made on 18th May 2022. That upon dismissal of the Respondent's application, the matter was fixed for directions on 22nd February 2024 but the court did not sit on that date. That nevertheless, an interlocutory judgment was later entered against the Applicants on 27th November 2024 despite the fact that the Applicant's erstwhile advocates were never served with a copy of the request for entry of judgment. That when the matter subsequently came up on 8th May 2025 and 19th May 2025 for mention and formal

proof respectively, the Applicants' erstwhile advocates were never served with the relevant notices.

4. It is the 1st Applicant's assertion that their erstwhile advocates filed an application to cease acting dated 27th May 2025 which application was allowed on 16th June 2025 following which the matter was scheduled for judgment on 7th August 2025. That the Applicants recently instructed the firm of **KWEW Advocates LLP** (the current advocates) to take over conduct of the matter on 17th July 2025 and upon their perusal of the court file, it was discovered that an interlocutory judgment had been entered, hence the current Motion.
5. The Applicants claim that they have a triable defence and that it would be in the interest and course of justice for the court to grant the orders sought in the instant Motion.

The Replying Affidavit

6. To oppose the Motion, the Respondent has sworn a replying affidavit on 16th October 2025 stating that contrary to the averments being made in the Motion, the Applicants were at all material times represented by the erstwhile advocates,

which advocates remained on record until 16th July 2025 when they formally ceased acting in the matter. That despite entering appearance in the matter on 18th May 2022 and participating in hearing of the Respondent's application dated 14th April 2022, the said advocates failed to file a statement of defence within the stipulated timelines, thereby prompting the Respondent's advocates to lodge a request for judgment on 4th December 2023. That even thereafter, the said advocates were well aware of the progress in the matter, including the hearing date for formal proof and that the Applicants therefore had ample time to put in their statement of defence but did not. That it therefore follows that the instant Motion is an afterthought and an attempt at frustrating the expeditious disposal of the matter.

Oral Arguments

7. The Motion was canvassed through oral arguments. To support the Motion, **Ms. Aguti**, learned counsel for the Applicants, reiterated the contents of the supporting affidavit to the Motion and submitted that it is not disputed that the

Applicants were represented by legal counsel in the matter at all material times until 16th June 2025 when the applicants' advocates filed an application to cease acting which was allowed by the court and that it is equally not disputed that the Applicants did not file their statement of defence in the suit.

8. Counsel argued that nevertheless, it is clear from the record that neither the Applicants nor their advocates was served with the request for judgment preceding the interlocutory judgment or the hearing notice for formal proof. She urged the court to grant the orders sought in the Motion.

9. In urging the court to dismiss the Motion, the Respondent through its advocate, **Ms. Kimanthi**, contended that the directions in the matter were issued by the court in chambers and that the advocates on record for the Applicants were in attendance and were therefore aware of the progress in the matter. She contended that the Applicants herein have failed to provide sufficient cause as to why they did not file their

statement of defence in good time and that the instant Motion fails to explain the delay of over three (3) years in complying.

10. The Respondents relied on the case of **CMC Holdings Ltd v James Mumo Nzioki [2004] KECA 143 (KLR)** on the discretionary power of the court in setting aside an *ex parte* judgment, and the case of **Gideon Mose Onchwati v Kenya Oil Co. Ltd & another [2017] KEHC 8960 (KLR)** wherein the court defined what constitutes sufficient cause.

11. On the subject of the Applicants' draft defence, it is the advocate's contention that the same does not disclose any arguable or triable issues.

12. For the foregoing reasons, coupled with the submission that there has been an inordinate delay on the part of the Applicants in defending the suit, the Respondent's advocate urged that the Motion be dismissed with costs.

13. In rejoinder, **Ms. Aguti** submitted that mistake of counsel ought not to be visited upon the client, citing the case of **Winnie Wambui Kibinge & 2 Others v Match Electricals Limited [2012] KEHC 274 (KLR)** where the said principle

was reaffirmed. Counsel maintains that the Applicants were all along willing to defend the suit and that their draft defence is arguable in nature and urged the court to exercise its discretion in favour of the Applicants.

Analysis and Determination

14. I have considered the Motion and the grounds in support thereof as well as the oral arguments and the authorities cited. The Applicable provision for setting aside interlocutory judgments is **Order 10, Rule 11** of the **CPR.** It provides thus:

> ***"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."***

15. The power of the court to grant or refuse an application to set aside or vary such judgment or any consequential decree or order, is discretionary. This discretion is unfettered, but for ends of justice to be met, the discretion must be exercised judicially. The objective of the discretion that is conferred

upon the court was spelt out in the case of **Shah v Mbogo & Another [1967] EA 116** as hereunder:

> ***"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."***

16. The principles in the above case were amplified further in **Bouchard International (Services) Ltd v M'Mwereria [1987] KLR 193**, cited with approval by the same Court in **Miarage Co Ltd v Mwichuiri Co Ltd [2016] eKLR** as follows:

> ***"The basis of approach in Kenya to the exercise of the discretion to be employed or rejected…is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justiciae. If service of notice of hearing or***

summons to enter appearance has been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial. The court in doing so is duty bound to review the whole situation and see that justice is done. The 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 course of justice…A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed. Hence the justice of the matter, the good sense of the matter, were certainly matters for the judge. It is an unconditional unfettered discretion, although it is to be used with reason, and so a regular judgment would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which

should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure…The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte… Although sufficient cause for non-appearance may not be shown, nevertheless in order that there be no injustice to the applicant the judgment would be set aside in the exercise of the court's inherent jurisdiction."

17. Flowing from the above, the first question arising for determination is whether the interlocutory judgment entered is regular.

18. As earlier mentioned, the Applicants have on the one hand vehemently denied service of the request for judgment upon their erstwhile advocates and further denied service of the hearing notice for formal proof. On the other hand, the Respondent has averred that the Applicants were at all

material times represented by a competent firm of advocates who were well aware of the progress in the suit. That even so, the Applicants failed to file their statement of defence with the stipulated timelines, thereby precipitating the request for judgment.

19. Upon my perusal of the record, I have noted that the Applicants were at all material times represented by the erstwhile advocates, who entered appearance on behalf of the Applicants vide a Notice of Appointment of Advocates dated 18th May 2022. It is apparent from the record that the erstwhile advocates participated in the proceedings to the suit, until the time of filing their application dated 27th May 2025 to cease acting in the matter for want of settlement of legal fees, which application was allowed on 16th June 2025. There is on record an affidavit of service sworn by Court Process Server Samwel Kinyua Ndege on 16th June 2025, evidencing service of the said application upon the Applicants, through the 1st Applicant.

20. It is equally not disputed that the Applicants did not file their statement of defence within the prescribed timelines or at all, thereby triggering the request for judgment by the Respondent dated 4th December 2023 which resulted in entry of an interlocutory judgment on 27th November 2024. Consequently, the matter proceeded for formal proof hearing.

21. On the issue of service of the request for judgment as claimed by the Applicants, I have not come across any legal requirement that a request for judgment must be served upon a defendant. In any event, it has already been established that the Applicants were at all material times represented by a competent firm of advocates, at all material times.

22. On the issue of service of a hearing notice for formal proof hearing, my perusal of the record shows that when the matter came up for formal proof on 19th May 2025, a representative of the erstwhile advocates was present in court and was therefore aware of the purpose of the said attendance and that upon the conclusion of the formal proof hearing, this court gave directions for filing of written submissions and

gave a mention date to confirm compliance. When the matter subsequently came up in court for mention on 16th June 2025 as scheduled, a representative of the Applicants' erstwhile advocates was equally in attendance, though the indication was that they had filed the application to cease acting in the matter and had served the same upon the Applicants.

23. From the foregoing circumstances, it is clear that the Applicants' erstwhile advocates were all along aware of the progress in the matter and were even present in court during the respective attendances, thereby dispelling the averments by the Applicants on alleged non-service of hearing notices upon their erstwhile advocates.

24. Furthermore, and in addressing the subject of the alleged inadvertence on the part of the Applicants' erstwhile advocates as purported, while the court acknowledges the existing legal principle that the mistake of an advocate should not be visited upon the client as a matter of general principle, it is worth mentioning that this principle does not apply in a

blanket sense and that each case must be judged on its own unique circumstances.

25. It is trite law that a suit ultimately belongs to the litigant and not the advocate, and thus, it is the litigant's duty to pursue or otherwise take active steps to ensure the timely prosecution of his or her claim as stated by the Court of Appeal in **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR** where it was held that:

> ***"It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."***

26. Moreover, the Court of Appeal went on to render itself as follows in the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR**:

"While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."

27. It is my considered view that no credible material was tendered in the instant case to demonstrate any attempts by the Applicants to proactively follow up on the progress of the matter with their erstwhile advocates or in instructing them to file their pleadings. I find that the Applicants cannot be

heard to entirely blame the said advocates for failing to file their pleadings. Ultimately, I find that the Applicants did not provide sufficient cause for not filing their pleadings in good time or at all.

28. In view of all the foregoing circumstances, I am satisfied that the interlocutory judgment entered on 27th November 2024 is a regular judgment.

29. I am alive to the requirement that in determining whether or not to set aside an interlocutory/default judgment, the court is required to consider whether the Applicants have a defence which raises triable issues as stated in **Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) IEA 324** reasoned thus on the subject:

> ***"Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a***

reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."

30. The circumstances of this application is that prayer 2 of the instant Notice of Motion was granted in the interim by another judge of the Civil Division. Being a judge of similar jurisdiction, I had no powers to interfere with that order but to proceed and hear the parties in this application. After careful consideration of the issues before the court and given that this court had already written the judgment and that the same was ready for delivery on 7/8/2025 before the interim order was issued on 2/8/2025, I am inclined to disallow the Notice of Motion dated 1st August 2025. In my considered view, the Applicants will not be prejudiced in any way.

31. Consequently, I hereby dismiss the Notice of Motion dated 1st August 2025. Each party shall bear own costs for this application. This court will proceed to deliver the pending judgment.

32. It is so ordered.

Dated, signed and delivered this 28th day of January 2026.

S. N. MUTUKU
JUDGE