

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
HCCOMM NO. 518 OF 2015

PEMBE FLOUR MILLS LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

WILSON NDUNGU KAMOMOE.....1ST DEFENDANT/APPLICANT

MOHAMMED NASIR KHALIFA.....2ND DEFENDANT

JOSEPHAT OKEO KEGENGO.....3RD DEFENDANT

BENJAMIN MAILU.....4TH DEFENDANT

DAVID MAINGI KOGI.....5TH DEFENDANT

RULING

1. This Ruling is in respect to two applications. The 1st application is the 1st defendant's Notice of Motion dated 27th March 2024 filed pursuant to the provisions of Order 22 Rule 22, Order 10 Rule 11 & Order 50 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A & 3A of the Civil Procedure Act and all other enabling provisions of the law. The 1st defendant prays for orders for setting aside, discharging, or varying in their entirety the *ex parte* Judgment and the consequential *ex parte* Orders issued herein *ex debito justitiae*, and for the Court to thereafter issue directions on the filing of a statement of defence. He also prays for an order that the Process Server, Chrisphine Olengo, who allegedly effected service leading to the entry of the Judgment, be summoned for cross-examination on the affidavits of service sworn in this matter, particularly, the affidavit supporting the request for interlocutory judgment.

2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Wilson Ndungu Kamomoe, the 1st defendant herein. Mr. Kamomoe averred that the Judgment entered against him arose from false service of pleadings and hearing notices. That upon perusing the Judgment, he became aggrieved and dissatisfied and consequently instructed the law firm of Mungai Kivuti & Co. Advocates to challenge the entire process.
3. He deposed that he was never served with any Court process and that the matter proceeded *ex parte* on the basis of a questionable and falsified affidavit of service. He maintained that he was denied the right to be heard throughout the proceedings culminating in the Judgment, in violation of his fundamental right to a fair hearing. He stated that the right to be heard and to participate in judicial proceedings is a core principle of litigation. Mr. Kamomoe asserted that he has a good and arguable case for setting aside the *ex parte* Judgment herein, as demonstrated by the draft defence annexed to his affidavit.
4. In opposition to the application dated 27th March 2024, the plaintiff filed a replying affidavit sworn on 16th April 2024 by Mr. Arafa Omar, the plaintiff's Legal Officer. Mr. Omar contended that the 1st defendant is not entitled to the Court's discretion due to material non-disclosure and inconsistent, misleading averments. He averred that the 1st defendant has shifted positions across multiple applications regarding non-service and representation, despite earlier admissions of legal representation and knowledge of the suit, and has falsely claimed ignorance of the proceedings notwithstanding an affidavit of service evidencing service on 17th February 2016, during the pendency of a related criminal case. Mr. Omar further averred that the pleadings and supporting documents in the civil suit were produced as exhibits in the criminal

proceedings, demonstrating that the 1st defendant and his Advocates were aware, or ought to have been aware of the existence of this suit.

5. Mr. Omar asserted that the reliefs being sought herein, are discretionary and unavailable to an indolent litigant who failed to enter appearance or defend the suit despite such knowledge. He maintained that the 1st defendant has not approached the Court with clean hands, having engaged in material non-disclosure, misrepresentation, and lack of candour, which disentitle him to any equitable reliefs. He stated that the draft defence annexed to his affidavit comprises general denials, raises no triable issues, and is merely intended to delay execution of the decree. Mr. Omar averred that all the defendants in this suit, including the 1st defendant, were convicted in a related criminal case, thereby undermining any claim of a plausible defence. He further averred that the 1st defendant has filed multiple applications, seeking similar reliefs over the same subject matter, some of which were never served or disclosed in the instant application, amounting to forum shopping and an abuse of the Court process.
6. The 2nd application is the 1st defendant's Notice of Motion dated 19th June 2024, pursuant to the provisions of Sections 1A, 1B, 3A & 94 of the Civil Procedure Act, Order 17, Order 22 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, Articles 47, 50 & 159 of the Constitution of Kenya, 2010, wherein the 1st defendant prays for the setting aside and nullification of all execution proceedings commenced by the plaintiff and the interested party, or any other persons acting on their behalf, including the warrants of attachment of movable property dated 25th January 2024, the proclamation notices dated 12th February 2024, and the notice to sell immovable property dated 25th March 2024, on

grounds that the said execution processes are unlawful in substance, and that the said procedures were instituted pursuant to an invalid and incompetent decree.

7. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Wilson Ndungu Kamomoe, the 1st defendant herein. Mr. Kamomoe averred that this suit was instituted by the plaintiff in September 2015, seeking a substantial monetary judgment. He stated that he has since learned that a default Judgment was allegedly entered against him, upon which the plaintiff has commenced execution proceedings, prompting him to file an application to set it aside. He contended that the execution by the plaintiff is unlawful as it is founded on an invalid decree, given that the entire suit had previously been dismissed for want of prosecution in May 2021, with that dismissal later upheld by the Court in October 2022.
8. He averred that despite the dismissal of the suit, the interested party has escalated execution by issuing a notice to sell his immovable property without following due process as provided for under the Civil Procedure Rules, 2010, and without obtaining the requisite warrants of attachment. Mr. Kamomoe contended that upon dismissal of the suit, there was no valid or competent decree capable of being issued or executed, rendering all ensuing execution processes fatally defective and unlawful. The foregoing notwithstanding, he deposed that even if the decree was valid, which he denies, the plaintiff commenced execution in violation of Section 94 of the Civil Procedure Act, as costs had not been assessed and taxed prior to execution.
9. In opposition to the application dated 19th June 2024, the plaintiff filed Grounds of Opposition dated 23rd September 2024, raising the following issues-

- i) That the instant application is a blatant attempt by the 1st defendant at forum shopping with an aim to obtain favourable stay orders before another Judge in the Commercial and Tax Division. The Honorable Court must resist the 1st defendant's attempt at sowing discord with an application dated 27th March 2024 seeking similar orders already on record and having been given directions by Hon. Lady Justice Njoki Mwangi, the 1st defendant proceeded to file the instant application and managed to finally obtain stay Orders before Hon. Visram J;
- ii) That the applicant has developed a habit of filing multiple applications, seeking identical orders, and subsequently withdrawing the applications when stay orders are not granted. This pattern of litigation is vexatious, amounts to forum shopping, and constitutes a clear abuse of Court process;
- iii) That the instant application is made on grounds of glaring material non-disclosure and misrepresentations which disentitle the 1st defendant from benefitting from the orders sought;
- iv) That the orders sought by the 1st defendant are discretionary in nature and cannot issue to a litigant who conceals material facts pertinent to the application. In filing the instant application, the 1st defendant did not disclose the fact that he had sought similar orders in another application dated 27th March 2024;
- v) That the 1st defendant owed a duty to this Court to disclose all material facts whether they were in his favour or not. The 1st defendant has deliberately avoided disclosing the directions issued by this Court in the application dated 14th February 2024;

- vi) That the applicant's repeated withdrawal and refiling of applications as will be demonstrated by the Court record, demonstrates a lack of good faith and an intention to frustrate the legal process;
- vii) That in any event, if the 1st defendant had any further grounds to adduce in favour of his application dated 27th March 2024, he would have sought leave to do a further affidavit instead of bombarding the Court and the plaintiff with another application seeking similar orders;
- viii) That allowing the applicant to continue filing multiple applications over the same matter undermines judicial economy, the finality of decisions, and the efficient administration of justice. The Court must discourage parties from engaging in such dilatory tactics;
- ix) That the plaintiff stands to suffer great prejudice if the interim orders sought are granted, as the continued filing of duplicative applications has caused unnecessary delay and legal costs, obstructing the plaintiff from enjoying the fruits of its judgment; and
- x) That the application is frivolous, vexatious, a waste of precious judicial time and should be dismissed with costs to the plaintiff.

10. The plaintiff also filed a replying affidavit sworn on 12th November 2024 by Mr. Arafa Omar, the plaintiff's Legal Officer. Mr. Omar averred that on 30th October 2023, the Court entered Judgment in favour of the plaintiff against the 1st, 2nd & 3rd defendants for the decretal sum, costs, and interest at commercial rates, while the suit against the 4th & 5th defendants was dismissed for want of prosecution, resulting in a valid decree. That subsequently, the plaintiff lawfully

applied for, and obtained warrants of attachment in favour of Reizen Auctioneers, pursuant to which proclamation notices were served on the 1st defendant, followed by a forty-five day redemption notice in respect of the identified immovable property. He stated that the execution process was subsequently interrupted by claims from a third-party bank asserting a security interest over the property, and later by the filing of the instant application, through which the 1st defendant obtained stay orders.

11. Mr. Omar asserted that the 1st defendant has a history of filing multiple applications on the same subject matter with the intention of frustrating execution. He averred that Section 94 of the Civil Procedure Act grants the Court discretion to authorize execution prior to taxation where circumstances so warrant, and that in this case execution proceeded with the Court's knowledge, authority, and in compliance with the law. He maintained that the decree holder is entitled to enjoy the fruits of its Judgment without undue delay, and that the 1st defendant's interpretation of Section 94 is rigid, misleading, and intended solely to obstruct lawful execution. Mr. Omar further averred that the notice to sell the immovable property was issued only after valid warrants had been obtained and in strict compliance with the provisions of Order 22 of the Civil Procedure Rules, 2010, and that even if any procedural defects were alleged, none occasioned prejudice to the 1st defendant, who was at all times aware of the execution process.
12. The application herein was canvassed by way of written submissions which were highlighted on 25th September 2025. In respect to the application dated 27th March 2024, the 1st defendant's submissions were filed by the law firm of Bryan Khaemba, Kamau Kamau & Company Advocates on 5th August 2024,

whereas the plaintiff's submissions were filed on 14th November 2024 by the law firm of Sagana, Biriq & Muganda Advocates LLP.

13. In respect to the application dated 19th June 2024, the 1st defendant's submissions were filed on 5th February 2025 by the law firm of Bryan Khaemba, Kamau Kamau & Company Advocates, while the plaintiff's submissions were filed on 11th March 2025 by the law firm of Sagana, Biriq & Muganda Advocates LLP

Application dated 27th March 2024.

14. Mr. Bulowa, learned Counsel for the 1st defendant submitted that the right to a fair hearing under Article 50 of the Constitution, together with the rules of natural justice, requires that sufficient notice be given before any adverse *ex parte* steps are taken. He contended that although the 1st defendant had an Advocate who entered appearance under protest, neither the 1st defendant nor his Advocates were served with subsequent Court processes, including mention notices and the request for *ex parte* Judgment. On that basis, the 1st defendant sought leave to cross-examine the Process Server whose affidavits of service formed the basis of the *ex parte* judgment. Counsel relied on the cases of **David Koome Matugi v APA Insurance Limited** [2021] KEHC 4942 (KLR), and submitted that where service is disputed, the presumption arising from an affidavit of service is rebuttable and it is desirable, in the interest of justice, for the Process Server to be cross-examined.
15. Mr. Bulowa stated that this Court's power to set aside default judgments under Order 10 Rule 11 of the Civil Procedure Rules, 2010, is wide and unfettered, subject only to the requirement that it be exercised judiciously. He cited the

cases of **Shah v Mbogo & another** [1967] EA 116 and **Mbugua v Sigimo Enterprises Limited & another** [2023] KEELC 22453, and further stated that the primary concern of the Court is to do justice and to avoid hardship arising from procedural lapses, particularly, where a matter has not been determined on its merits. He asserted that even where service is found to have been regular, the Court retains discretion to set aside a default judgment in the interest of justice.

16. He argued that justice is better served by allowing parties to ventilate their disputes fully rather than determining matters on procedural technicalities, and that any prejudice to the plaintiff can adequately be compensated by costs. He maintained that the annexed draft defence raises triable issues, especially given that the plaintiff's claim is founded on allegations of fraud.
17. On the issue of conditions for setting aside the *ex parte* Judgment, Mr. Bulowa referred to the cases of **B.N Kotecha & Sons Limited v Naushad Trading Company Limited** [2022] KEHC 741 (KLR) and **Patrick L Otieno Oyoo t/a Otieno Oyoo & Company Advocates v Africa Merchant Assurance Company Limited & another; Diamond Trust Bank Kenya Limited (Garnishee/Applicant)** [2021] KEHC 13471 (KLR), and contended that imposing onerous terms such as deposit of the decretal sum would unjustly fetter the Court's discretion and hinder access to justice, as existence of a defence raising triable issues ought to be sufficient to warrant the setting aside the *ex parte* Judgement.
18. Mr. Otieno, learned Counsel for the plaintiff submitted that the jurisdiction to set aside or vary a judgment is discretionary and must be exercised judiciously, guided by the principles set out by the Court of Appeal in **Shanzu Investments Ltd v Commissioner of Lands** [1993] KECA 36 (KLR). Counsel argued that the 1st defendant is guilty of material non-disclosure and misrepresentation of

facts, which disentitles him to any equitable reliefs. He further submitted that the 1st defendant's explanation for non-participation in the suit have been inconsistent and contradictory across several applications, ranging from admission that his Advocates were handling the matter, to later assertions that he was never served and had no representation. Mr. Otieno contended that the 1st defendant falsely claims to have only become aware of the suit upon execution, despite the existence of a duly sworn affidavit of service dated 17th February 2016, evidencing proper service.

19. Counsel stated that the request to cross-examine the Process Server is a dilatory tactic intended to delay execution of a valid Judgment. Relying on the provisions of Order 5 Rule 16 of the Civil Procedure Rules, 2010, and the Court of Appeal case of **Shadrack Arap Baiywo v Bodi Bach** [1987] KECA 69 (KLR), Counsel argued that an affidavit of service constitutes *prima facie* evidence of proper service unless convincingly rebutted. He asserted that the 1st defendant failed to point out any factual inaccuracies in the affidavit of service, and that he has not laid a credible basis to warrant cross-examination of the Process Server. In addition to the foregoing, Mr. Otieno stated that the application to set aside the *ex parte* Judgment has been brought eight (8) years after the said Judgment was entered in 2016, without any reasonable explanation.
20. Citing the cases of **Shah v Mbogo** (supra) and **Mureithi Charles & another v Jacob Atina Nyagesuka** [2022] KEHC 1805 (KLR), Counsel submitted that discretion to set aside judgments is intended to avert injustice arising from accident or excusable mistake, not to aid indolent litigants or those intent on delaying justice. Mr. Otieno referred to the case of **Langer v Mutambu & another** [2023] KEHC 25372 (KLR), and contended that the draft defence

annexed to the 1st defendant's affidavit, raises no *bona fide* triable issues, consisting merely of blanket denials and generalities.

21. He stated that the 1st defendant failed to disclose that he and the other defendants were convicted in Criminal Case No. 556 of 2014 on 4th September 2023 on multiple counts arising from the same factual matrix, thereby undermining the credibility of the proposed defence. Given that the standard of proof in criminal cases is higher than in civil cases, learned Counsel argued that it is highly unlikely that the 1st defendant's bare denials would succeed even if the judgment were set aside.

Application dated 19th June 2024.

22. Mr. Bulowa, learned Counsel for the 1st defendant submitted that the execution proceedings commenced by the plaintiff were unlawful, irregular, and procedurally flawed. He further submitted that although the plaintiff initially obtained warrants of attachment and sale of the 1st defendant's movable property dated 25th January 2024, without changing the mode of execution or complying with the mandatory requirements of Order 22 Rules 9 & 48 of the Civil Procedure Rules, 2010, the plaintiff through the interested party, purported to attach the 1st defendant's immovable property, namely Nakuru/Block 23/49, by issuing a 45-day notice to sell.
23. Counsel argued that no formal application was made for attachment of immovable property, no particulars or description of the property were provided as required by law, and no prohibitory order was issued, registered, or affixed on the 1st defendant's property. He asserted that the attachment of the immovable property was outrightly unlawful and *void ab initio*. To buttress these submissions, Mr. Bulowa relied on the case of **UAP Insurance Company**

Limited v Alfred Mdeizi t/a Pave Auctioneers & another [2023] KEHC 22683 (KLR). He also referred to the case of **Wayaffe v Toner Holdings Limited & another; Stanbic Bank Kenya Limited (Garnishee); Aristocrats Concrete Limited (Proposed Interested Party)** [2024] KEELC 5920 (KLR), and submitted that the execution was premature and unlawful for want of compliance with Section 94 of the Civil Procedure Act, as costs had not been taxed and no leave of the Court had been obtained to execute prior to taxation.

24. Mr. Bulowa asserted that the decree holder concedes that costs were never taxed and that no leave was sought, rendering the execution proceedings illegal. He challenged the very existence of a valid decree capable of execution, submitting that the entire suit was dismissed for want of prosecution by Mativo J., on 26th May 2021, and that an application to set aside that dismissal was also dismissed by Chepkwony J., on 28th October 2022. Counsel argued that the decree issued on 3rd October 2023 was irregular and founded on a non-existent suit. In the end, Counsel contended that the execution process was unlawful, premature, and unsupported by a valid decree, and urged the Court, in the interest of justice, to set aside the impugned execution proceedings *ex debito justitiae* and allow the application dated 19th June 2024, as prayed.
25. Mr. Otieno, learned Counsel for the plaintiff maintained that the execution process was lawful, regular, and in strict compliance with the Civil Procedure Act and Rules. He contended that the Court duly issued warrants of execution on 25th January 2024, following which Reizen Auctioneers lawfully issued a proclamation and a 45-day redemption notice in accordance with the provisions of Order 22 of the Civil Procedure Rules, 2010. Counsel cited the case of **Machira t/a Machira & Co Advocates v East African Standard**

[2002] KEHC 1167 (KLR), and argued that the 1st defendant was properly notified of the execution steps taken and cannot feign ignorance or allege unfairness, as execution is the natural and lawful consequence of failure to satisfy a valid Judgment.

26. Counsel referred to the case of **Gulf Fabricators v County Government of Siaya** [2020] KEHC 5952 (KLR), and argued that the contention that costs must be taxed before execution is misconceived. He stated that Section 94 of the Civil Procedure Act expressly permits execution before taxation of costs with the Court's permission, a provision intended to prevent hardship to decree holders, particularly where substantial decretal sums are involved. He maintained that in the circumstances of this case, delaying execution pending taxation would unfairly prejudice the decree holder. He asserted that the Court's discretion under Section 94 was properly exercised.
27. Mr. Otieno submitted that the 1st defendant's application is a deliberate attempt to frustrate and delay execution, thereby denying the plaintiff the fruits of its Judgment. He relied on the Court of Appeal case of **Nyutu Agrovet Limited v Airtel Network Kenya Limited** [2016] KECA 444 (KLR), and stated that the 1st defendant's conduct undermines the principle of finality of judgments, which is essential to the integrity of the judicial process.

ANALYSIS AND DETERMINATION.

28. Upon consideration of the applications herein, and the affidavits filed in support thereof, as well as the replying affidavits by the plaintiff and its grounds of opposition, together the written submissions filed by Counsel for the parties, the issues that arise for determination are –

- i) Whether the 1st defendant has established a case to warrant the setting aside of the *ex parte* Judgment and the consequent decree and if the 1st defendant should be granted an order for leave to file a defence to this suit; and**
- ii) Whether the execution proceedings commenced by the plaintiff and the interested party against the 1st defendant should be nullified and/or set aside.**

Whether the 1st defendant has established a case to warrant the setting aside of the *ex parte* Judgment and the consequent decree and if the 1st defendant should be granted an order for leave to file a defence to this suit.

29. This Court's jurisdiction to set aside an *ex parte* judgment where the defendant fails to enter appearance or file a defence is provided for under the Provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010, which states that -

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.

30. In the case **Abdalla Mohamed & another v Mbaraka Shoka** [1990] KECA 49 (KLR), the Court of Appeal set out the tenets a Court should consider when dealing with applications to set aside an interlocutory judgment to include -

- i) Whether there is a regular judgment;***
- ii) Whether there is a defence on merit;***
- iii) Whether there is a reasonable explanation for any delay;***
- iv) Whether there would be any prejudice.***

31. The issue of regular judgments was addressed in the case **Mwala v Kenya Bureau of Standards EA LR [2001] 1 EA 148**, where the Court stated as follows -

...to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debit. Justiciae for a court should never countenance an irregular judgment on its record.

32. The plaintiff's case is that on 30th October 2023, Mativo J., (as he then was), issued Orders in this suit whereby he entered Judgment for the plaintiff as against the 1st, 2nd & 3rd defendants for Kshs.218,665,038.00 and costs of the suit, and dismissed the suit against the 4th & 5th defendants for want of prosecution. It is this order that is the subject of the warrants of attachment of movable property in execution of decree for money issued to Reizen Auctioneers.
33. The 1st defendant in urging this Court to set aside the *ex parte* Judgment entered against him, averred that the said Judgment arose from false depositions of service of pleadings and hearing notices. He asserted that he was never served

with any Court process and that the matter proceeded *ex parte* on the basis of a questionable and falsified affidavit of service.

34. The above notwithstanding, the 1st defendant contended that the *ex parte* Judgment was invalid, since the entire suit had previously been dismissed for want of prosecution in May 2021, and that dismissal was later upheld by the Court in October 2022.
35. On perusal of the Court record, on 8th June 2016, Judgment was entered as prayed in the plaintiff's plaint as against the 1st, 2nd & 3rd defendants having been duly served, but having failed to enter appearance or file a defence. Similarly, on 20th June 2016, Judgment was entered as prayed in the plaintiff's plaint as against the 4th & 5th defendants having been duly served, but having failed to enter appearance or file a defence.
36. Subsequently, the 4th & 5th defendants filed an application dated 7th May 2018 seeking *inter alia*, orders to set aside the Judgment in default of defence and the decree entered against them, which application was allowed in a Ruling delivered by Honourable Lady Justice Maureen A. Odero. The suit against the 4th & 5th defendants was however later dismissed by Mativo J., (as he then was) on 26th May 2021 for want of prosecution. The plaintiff's attempt to have the suit reinstated vide an application dated 23rd May 2022 was unsuccessful, as the application was dismissed by Chepkwony J., on 28th October 2022
37. It therefore follows that the suit against the 1st, 2nd & 3rd defendants was not capable of being dismissed as *ex parte* Judgment had already been entered against them on 8th June 2016, which Judgment has to date never been varied and/or set aside by a Court of competent jurisdiction. From the record, it is evident that the *ex parte* Judgment entered against the 1st, 2nd & 3rd defendants

on 8th June 2016 was premised on an affidavit of service sworn on 17th February 2016, by Chrispine Olengo, a licensed Process Server.

38. The 1st defendant claims that neither he nor his Advocates have ever been served with the pleadings and/or any other process in this matter, making the affidavit of service used to obtain the *ex parte* Judgment questionable and falsified. He contended that the *ex parte* Judgment is irregular. On perusal of the contents of the said affidavit of service, it is manifest that the Process Server averred that he received Summons to enter appearance, plaint and verifying affidavit dated 2nd November 2015. He then proceeded to Milimani Law Courts at around 9:30 am., where the defendants were attending trial of **Criminal Case No. 556 of 2015 – Republic v Wilson Ndungu Kamomoe & 4 others**, before Hon. Gandani in Court No. 3.
39. Mr. Olengo, the Process Server, explained that on arrival, he sat and waited for the matter to be called out so that he could identify the defendants herein, and thereafter he walked outside and waited for their matter to proceed after the defendants had requested for time allocation to enable their Advocates attend Court. He then approached the defendants, introduced himself, explained the purpose of his visit and served them with Summons to enter appearance, the plaint and verifying affidavit. Mr. Olengo asserted that all the defendants accepted service and acknowledged receipt of the same by signing at the back of the Summons to enter appearance except for the 1st defendant who accepted service, but refused to sign, stating that he would pass the documents to his lawyer for further action.
40. This Court notes that although the 1st defendant claims that the affidavit of service by Chrispine Olengo was falsified, he does not deny having been at Milimani Law Courts on 17th February 2016, attending trial for **Criminal Case**

No. 556 of 2015 - Republic v Wilson Ndungu Kamomoe & 4 others, before Hon. Gandani in Court No. 3, and that he was the 1st accused person in that case. I am therefore not satisfied that the 1st defendant has made out a case to warrant cross-examination of Chrispine Olengo on the contents of his affidavit of service sworn on 17th February 2016, that led to the entry of default Judgment against the 1st, 2nd & 3rd defendants on 8th June 2016.

41. In light of the foregoing, this Court is satisfied that there was proper service of Summons to enter appearance, the plaint and verifying affidavit in this matter upon the 1st defendant. As such, the default Judgment entered against the 1st defendant on 8th June 2016, was regular and valid.
42. Having found that the default Judgment entered by the Court on 8th June 2016 is regular, lawful and enforceable, I now have to determine whether it will be in the interest of justice to set it aside and allow the 1st defendant to file his defence. In so doing, I have to consider whether the 1st defendant's defence raises triable issues or if it is only meant to frustrate the plaintiff, a position addressed by the Court in the case of **Patel v East Africa Cargo Handling Services Ltd** [1974] EA 75, which held as hereunder -

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

43. As to whether the 1st defendant's draft defence raises triable issues that warrant this Court's consideration on merits, I am not persuaded that that is the case. To the contrary, a perusal of the said draft defence reveals that it consists primarily of general denials, raising no *bona fide* triable issues. It is also noteworthy that the 1st defendant along with his co-accused persons were convicted in **Criminal Case No. 556 of 2014**, on matters arising from the same factual matrix, further undermining the credibility of the proposed defence. While the right to a fair hearing under Article 50 of the Constitution and principles of natural justice are fundamental, these rights cannot be invoked to shield inordinate delay or indolence.
44. In addition, it is not disputed that the 1st defendant's application to set aside the impugned *ex parte* Judgment was lodged approximately eight (8) years after the said Judgment was entered. Upon consideration of the application, the supporting affidavit, and the submissions made on behalf of the 1st defendant, no explanation whatsoever has been offered to account for the inordinate delay in seeking to set aside the *ex parte* Judgment. In the absence of any justification for such prolonged delay, it is my finding that the said application was filed unreasonably late and does not merit the exercise of my discretionary powers in favour of the 1st defendant.
45. In the circumstances, the 1st defendant has not established sufficient grounds to warrant the setting aside of the *ex parte* Judgment and/or to be granted an order for leave to file a defence to this suit.

Whether the execution proceedings commenced by the plaintiff and the interested party against the 1st defendant should be nullified and/or set aside.

46. The plaintiff's case is that on 30th October 2023, Mativo J., (as he then was), issued orders in this suit whereby he entered Judgment for the plaintiff as against the 1st, 2nd & 3rd defendants for Kshs.218,665,038.00 and costs of the suit, and dismissed the suit against the 4th & 5th defendants for want of prosecution. It is this order that is the subject of the warrants of attachment of movable property in execution of decree for money, which warrants were issued to Reizen Auctioneers. The 1st defendant on the other hand contended that the *ex parte* Judgment was invalid since the entire suit had previously been dismissed for want of prosecution in May 2021, a dismissal later upheld by the Court in October 2022.
47. The Court record shows that the *ex parte* Judgment was entered against the 1st, 2nd & 3rd defendants on 8th June 2016, whereas the suit against the 4th & 5th defendants was dismissed on 26th May 2021. The plaintiff's attempt to reinstate it vide an application dated 23rd May 2022 was dismissed in a Ruling delivered on 28th October 2022. On perusal of the Court record and the Case Tracking System, I have neither seen nor come across orders issued by Mativo J., (as he then was), on 30th October 2023, where he entered Judgment for the plaintiff as against the 1st, 2nd & 3rd defendants for Kshs.218,665,038.00 and costs of the suit, and dismissed the suit against the 4th & 5th defendants for want of prosecution.
48. In view of the fact that the impugned execution proceedings are based on a Judgment that was allegedly entered by Mativo J., (as he then was), on 30th October 2023 and not the *ex parte* Judgment entered against the 1st, 2nd & 3rd defendants on 8th June 2016, I am satisfied that the execution proceedings commenced by the plaintiff and the interested party against the 1st defendant

should be set aside for being based on an irregular, invalid and incompetent decree.

49. The upshot is that the application dated 27th March 2024 is not merited and the application dated 19th June 2024 is merited. I therefore make the following orders—

- i) The 1st defendant's application dated 27th March 2024 is hereby dismissed with costs to the plaintiff;**
- ii) The application dated 19th June 2024 is hereby allowed. The execution proceedings commenced by the plaintiff and the interested party, or any other persons acting on their behalf, including the warrants of attachment of movable property dated 25th January 2024, the proclamation notices dated 12th February 2024, and the notice to sell immovable property dated 25th March 2024 are hereby set aside; and**
- iii) Costs of the application dated 19th June 2024 are hereby granted to the 1st defendant.**

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 6th day of March 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Bryan Khaemba for the 1st defendant/applicant

Ms Kwamboka h/b for Mr. Otieno for the plaintiff/respondent

No appearance for the 2nd & 3rd defendants

No appearance for the 4th & 5th defendants (The case against them was dismissed on 26th May 2021 for want of prosecution.)

Ms B. Wokabi – Court Assistant.

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