



**Godoomal & another v National Environment Management Authority (NEMA) & 3 others
(Constitutional Petition 47 of 2021) [2024] KEELC 4065 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 4065 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 47 OF 2021**

**LL NAIKUNI, J
APRIL 25, 2024**

BETWEEN

CHANDAN JETHANAND GODOOMAL 1ST PETITIONER

PREM JETHANAND GIDOOMAL 2ND PETITIONER

AND

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) 1ST
RESPONDENT**

MOMBASA COUNTY GOVERNMENT 2ND RESPONDENT

KENYA URBAN ROADS AUTHORITY (KURA) 3RD RESPONDENT

**DEPUTY COUNTY COMMISSIONER MOMBASA THRO' THE
MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL
GOVERNMENT 4TH RESPONDENT**

RULING

I. Introduction

1. This Ruling regards where the Honorable Court was called upon to make determination over the Notice of Motion application dated 5th October, 2023. It was brought by the Applicant – The County Government of Mombasa, the 2nd Respondent herein under the provisions of Order 9 Rule 9 (a)& 10, Order 12 Rule 7, Order 51 Rule 1 of the *Civil Procedure Rules* 2010 & Section 3A of the *Civil Procedure Act*, Cap. 21 and all other enabling provisions of the law.
2. Upon service, and while opposing the Notice of Motion application dated 5th October, 2023, the 2nd Petitioner herein, Prem Jethanand Gidoomal responded to the same through filing Replying Affidavit dated 17th January, 2024.



II. The 2nd Respondent/Applicant's case:-

3. The 2nd Respondent/Applicant sought the following orders:-
 - a. Spent.
 - b. That this Honourable Court be pleased to grant leave to the firm of Messrs. Soni & Associates Advocates LLP to come in and act for the 2nd Respondent/Applicant herein.
 - c. That this Honourable Court be pleased to grant a stay of execution of the Judgment delivered on 26th July 2023 and Decree issued thereon and/or any further proceedings or any subsequent Orders therefrom pending the hearing and final determination of this Application.
 - d. That the Honourable Court be pleased to lift any warrants of attachment and sale that may have been issued pursuant to the extracted decree in this matter and set aside all execution proceedings pending hearing and determination of this Review Application.
 - e. That this Honourable Court be pleased to set aside its judgment entered in its entirety on 26th July, 2023 in favor of the Petitioners against the 2nd Respondent/Applicant together with any consequential Decree and Orders.
 - f. That this Honourable Court be pleased to grant the 2nd Respondent/Applicant herein leave to defend the suit.
 - g. That this Honourable Court enlarges time to allow the 2nd Respondent/Applicant file their Response to the Petition and any other supporting documents thereof.
 - h. That the 2nd Respondent/Applicant's case be re-opened and the 2nd Respondent/Applicant be allowed to call witnesses to testify and adduce evidence.
 - i. That costs of this Application be provided for.
 - j. Any other orders that the Court may deem fit and just to grant.
4. The application was based on the grounds, the testimonial facts and averments made out by the supporting affidavit sworn by Jimmy Waliula on 5th October, 2023 listed on its face. He averred that:-
 - a. Judgment in this matter was delivered on 26th July, 2023 in favor of the Petitioners as against the 2nd Respondent/Applicant for a colossal sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) to be paid jointly and severally.
 - b. Upon being served with the sermons and pleadings in this matter, the 2nd Respondent/Applicant duly instructed the law firm, which was 1st on record, Muthee Kihiko Soni & Associates Llp Advocates, to enter Appearance and defend the suit on its behalf.
 - c. The said Advocates proceeded to enter Appearance on 29th October, 2021 by filing a Memorandum of Appearance dated 27th October, 2021 but inadvertently failed to file a Response to the Petition, statements, and all/ or any supporting documents.
 - d. The said Law firm split into two firms that is, M/s. Muthee Kihiko & Associates LLP Advocates and M/s. Soni & Associates Advocates LLP, and this matter was thereafter taken over by the Law firm of M/s. Muthee Kihiko & Associates LLP Advocates on behalf of the 2nd Respondent/Applicant.



- e. The Petitioner's Advocate served upon the and Respondent/Applicant a letter dated 16th August 2023 threatening execution should the 2nd Respondent/Applicant fail to pay a total sum of Kenya Shillings Five Million (Kshs.5,000,000/=).
- f. It was only after being served with the letter threatening execution and perusing the court file that the 2nd Respondent/Applicant came to the realization that the suit was undefended as the instructed advocate never put in a response to the claim. This was in total contravention and disregard of its instructions as contained in its instruction letter to defend the claim. The Applicant was at all times under the impression that the ongoing matter was being handled by the Firm on record.
- g. The Respondent was therefore shocked that the matter herein proceeded for hearing undefended, Judgment was entered against it and execution proceedings kick-started all without its knowledge.
- h. The 2nd Respondent/Applicant had all the intentions of defending the suit and therefore engaged the services of M/s. Muthee Kihiko & Associates Advocates to defend it in accordance with the Law.
- i. The impugned Judgment herein therefore resulted from an act or omission caused by the 2nd Respondent/Applicant's Advocates on record then. It was trite law that the mistake of Counsel should not be visited upon their clients.
- j. As a consequence of the said mistake, the 2nd Respondent/ Applicant was condemned unheard and prevented from exercising its constitutional right to be heard yet it now stands to lose its assets unless this Honourable Court intervenes.
- k. Being a public body, a County government specifically, the colossal decretal sums awarded have to be borne by the taxpayers and the public in general. Consequently, public interest should also be a considered factor herein.
- l. The 2nd Respondent/Applicant had now been made aware that it is in danger of being executed against for the total sum of Kenya Shillings Ten Million (Kshs.10,000,000/=) to be paid jointly and severally between the 1st Respondent and 2nd Respondent/Applicant to the satisfaction of an alleged decretal sum and costs.
- m. The Petitioners/Respondents would not be prejudiced should the Applicant herein be allowed to defend this suit and set the record straight.
- n. It was in the interests of justice that the orders sought herein be granted.

III. The 2nd Petitioner's Response

5. The 2nd Petitioner's opposed the Notice of Motion application on 5th October, 2023 through a 9 paragraphed Replying Affidavit sworn by Prem Jethanand Gidoomal, the 2nd Petitioner herein. He deponed as follows:-
 - a. The said application was grounded on misleading averments of facts and law.
 - b. The assertion that the instructed advocate never put a response to the claim was a false assertion as a response to the Petition was filed on 16th November, 2021 opposing the Petition with the full knowledge and signature of Jimmy Waliula the deponent herein. (Annexed in the affidavit and marked as "A" was a copy of the 2nd Respondent's Replying Affidavit).



- c. The site visit was conducted by this Honorable Court on 6th October, 2022 and it was therefore incomprehensible how the 2nd Respondent could claim that they were not properly represented or heard in the proceedings before this honorable court. (Annexed in the affidavit and marked as “B” was a copy of site visit coram).
- d. That no mistake was made by the then Advocate on record and the said assertion was not only misleading but was an unwarranted stain on the professionalism of Counsel on record Daniel Kihiko who regularly attended the court proceedings on behalf of the 2nd Respondent.
- e. The said application dated 5th October, 2023 never met the requirements to warrant review of this Honorable Court’s Judgment in the slightest and should be dismissed with costs to the Petitioner.

IV. Submissions

6. On 18th January, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 5th October, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that on 5th March, 2023 all the parties obliged and a ruling date was reserved on 18th April, 2024 by the Honourable Court accordingly.

A. The Written Submissions by the 2nd Respondent/ Applicant

7. The 2nd Respondent/Applicant through the Law firm of Messrs. Soni & Associates LLP filed their written submissions dated 24th February, 2024. Mr. Makori Advocate commenced the submissions by stating that before the Honourable Court for determination is the 2nd Respondent/Applicant’s application dated 5th October 2023 seeking to review and set aside this court’s judgment entered on 26th July, 2023 in favor of the Petitioners as against the 2nd Respondent/Applicant together with any consequential Decree and Orders emanating therefrom. The application is supported by the affidavit sworn by Jimmy Waliula, the Mombasa County Attorney, on 5th October 2023. The grounds in support were that the 2nd Respondent/Applicant duly instructed the Law firm of Messrs. Muthee Kihiko Soni & Associates LLP Advocates, which was first on record, to enter Appearance and oppose the Petition on its behalf.
8. The Learned Counsel submitted that consequently, the said Law firm split into two firms, that is, M/s. Muthee Kihiko & Associates LLP Advocates and M/s. Soni & Associates Advocates LLP, and this matter was retained by the Law firm of M/s. Muthee Kihiko & Associates LLP Advocates on behalf of the 2nd Respondent/Applicant. The said Law firm proceeded to enter Appearance on 29th October, 2021 by filing a Memorandum October 2021, but inadvertently failed to file a Response in opposition to the Petition and all/or any supporting documents. On 16th August, 2023, the Petitioner’s Advocate served upon the 2nd Respondent/Applicant a letter threatening execution should the 2nd Respondent/Applicant failed to pay a total sum of Kenya Shillings Five Million (Kshs.5,000,000/=) as per the Judgment delivered on 26th July, 2023. The 2nd Respondent/Applicant was unaware of any Judgment having been passed by the court on the matter. It was only after being served with the said letter threatening execution and perusing the court file that the 2nd Respondent/Applicant came to the realization that the suit was undefended. The instructed Law firm had failed to put in a response in opposition to the Petition culminating in the 2nd Respondent/Applicant being condemned unheard. This was in total contravention and disregard of its instructions as contained in its instruction letter to the said Law firm to defend and oppose the Petition. The Judgment in question



herein therefore resulted from a mistake through an act or omission caused by the 2nd Respondent/Applicant's Advocates on record then.

9. It was trite law that the mistake of Counsel should not be visited upon their clients. Justice Nyakundi had this to say on the above in the case of:- "*Rupa Savings & Credit Cooperative Society – Versus - Violet Shidogo* [2022] eKLR";
10. The Learned Counsel argued that as a consequence of the mistake, the 2nd Respondent/Applicant was condemned unheard and prevented from exercising its constitutional right to be heard as provided for in the provision of Article 50 of the *Constitution* of Kenya, 2010. As a result of this, it now stood to suffer execution for colossal sums of money emanating from this mistake of advocate. It was on this basis that the Applicant requested this Honorable Court to exercise its discretion and intervene. The jurisdiction of this honorable court to review and set aside its decisions was wide and unfettered. The Learned Counsel referred Court to the case of: "*Shab- Versus - Mbogo and Another* [1967] EA 116" the Court of Appeal of East Africa held that:

"This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, BF 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."(emphasis added)
11. Additionally he cited the case of:- "*Patel – Versus - East Africa Cargo Handling Services Limited* (1974) EA 75" Duffus P. held that:-

"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 to 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 defense on the merits. In this respect defense on merits, does not mean in my view, a defense that must succeed, it means as Sheridan J. put it "a triable issue" that is an issue that raises a prima face defense and which should go to trial for adjudication." (emphasis mine)
12. The 2nd Respondent/Applicant was not aware that the matter herein proceeded for hearing undefended, a Judgment was entered against it and execution proceedings kick-started all without its participation. The Applicant was at all times under the impression that the ongoing matter was being handled by the Law firm on record as instructed. The 2nd Respondent/Applicant had all the intentions of defending the suit and therefore engaged the services of M/s. Muthee Kihiko & Associates Advocates to defend it in accordance with the Law. As such, failure of counsel to act as instructed was not its own doing, and they should therefore not be punished for mistakes of counsel.
13. Furthermore, it was a tenet of law that a party should not be condemned unheard more so where such an action would lead to injustice. The Rules of Natural Justice dictated that a party should not be condemned unheard and/or shut out of proceedings. The applicants only wish and desire was to be heard on merit before Judgment was rendered in the matter. Therefore, the quest to re-open the case was not meant to delay the matter but to ensure justice for both parties as envisaged under the provision of Article 159 (2) (a), (d) and (e) of the *Constitution* of Kenya, 2010. The Applicant herein filed this Application expeditiously after they were served the letter threatening execution by the Petitioner. No communication was made prior to that to enable filing of the Application herein earlier and therefore it was the Learned Counsel's submission that the Application herein was indeed filed expeditiously.



14. In conclusion, the Learned Counsel submitted that the 2nd Respondent/Applicant being a public body, a County Government specifically, was run on tax payers' money. The colossal decretal sums of Kenya Shillings Five Million (Kshs. 5,000,000/=) awarded without the 2nd Respondent/ Applicant being heard on merit, shall be borne by the taxpayers and the public in general. As a result of the above, public interest should also be considered in making a determination herein.
15. The Learned Counsel further proceeded to argue that the Petitioner/Respondent has failed to show that they shall suffer any prejudice should the 2nd Respondent/Applicant's case be reopened and the Respondent allowed to file its documents and adduce evidence on the main petition. The 2nd Respondent/Applicant's only wished to be granted a fair opportunity to be heard and adduce evidence to court before a finding was made on the same Petition. Therefore the Learned Counsel humbly submitted that it was in the interest of justice that the Applicant's application be allowed as prayed.

B. The Written Submissions of the 2nd Petitioner/ Respondent

16. The 2nd Petitioner through the Law firm of Messrs. Borona & Associates Advocates filed their written submissions dated 2nd March, 2024. Mr. Borona Advocate submitted that the 2nd Respondent herein had filed its application seeking for the setting aside of this honorable court's Judgement under the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010. This rule is applicable in cases where the court issued the Judgment or order *ex - parte*. This was the finding of the court in "PMM – Versus -JNW (2020) eKLR" where the court stated,

“The law on setting aside *ex-parte* orders is found under Order 12, Rule 7 of the Civil Procedure Rules 2010 which provides thus, where under this order Judgement has been entered or the suit has been dismissed, the court on application, may set aside or vary the judgement or order upon such terms as may be just.”

17. In the instant suit, the Judgement that was delivered on 26th July, 2023 was not entered *ex - parte*. They had demonstrated as much through the annexures filed in court alongside the affidavit of Prem Jethanand Gidoomal sworn on 17th January, 2024 in response to the current application before the Honourable Court.
18. It was the Learned Counsel's conclusion that the said application for settling aside the *ex - parte* Judgement does not in any stretch of the imagination meet the test set out in provision Order 12 Rule 7 of Civil Procedure, 2010 and the same ought to be dismissed with costs to the Petitioner herein.

V. Analysis and Determination

19. I have carefully read and considered the pleadings herein by the Interested Party, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
20. In order to arrive at an informed, Just, equitable and reasonable decision, the Honourable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the Law firm of Messrs. Soni & Associates Advocate LLP can come on record to act for the 2nd Respondent/Applicant herein?
 - b. Whether the Honourable Court should grant a stay of execution and setting aside of the Judgment delivered on 26th July 2023 and Decree issued thereon and/or any further



proceedings or any subsequent Orders therefrom pending the hearing and final determination of this Application.

- c. Whether the Honourable Court should grant the 2nd Respondent leave to defend the suit, enlarge time to allow the 2nd Respondent/Applicant file their Response to the Petition and any other supporting documents thereof.
- d. Who will bear the Costs of Notice of Motion application dated 5th October, 2023.

Issue No. a). Whether the Law firm of Messrs. Soni & Associates Advocate LLP can come on record to act for the 2nd Respondent/Applicant herein

21. Under this sub- title we shall examine whether or not the Law firm of Messrs. Soni & Associates Advocates LLP can come on record for the 2nd Respondent. Pursuant to prayer 2 of the application, the applicant seeks leave for the firm of Messrs. Soni & Associates Advocates to come on record for him. The Applicant contends that he was self-represented in the proceedings before the subordinate court. The 2nd Petitioner has not expressly opposed this aspect of the application.
22. The provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides:

“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 –

 - (a) upon an application with notice to all the 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.”
23. The foregoing rule only applies to situations where there is a change of advocate or where a party decides to act in person having previously engaged an advocate after Judgment has been passed. Undoubtedly the above provisions make it mandatory that for any change of advocates after Judgment has been entered to be effected, then there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of: “[SK Tarwadi – Versus - Veronica Mueblmann](#) [2019] eKLR” where the Judge observed as follows:

“.....In my view, the essence of the Order 9 Rule 9 of the Civil Procedure Rules was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him”
24. An Advocate’s locus gives the court jurisdiction to address the matters raised by the advocate so that without such locus the court is divested of jurisdiction to hear him/her. See the cases of:- “[Ernest Kevin Luchidio – Versus - Attorney General & 2 others](#) [2015] eKLR” and “[Paul Kiplangat Keter – Versus - John Koeh](#) [2021] eKLR” were cited.
25. It must be borne in mind that the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#), 2010 do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after Judgment has been delivered so as to avert any undercutting and or chaos. Thus, a party so wishing to change his Counsel must notify the court and other parties.



26. This court has previously pronounced itself on this subject in the case of: “*Stephen Mwangi Kimote – Versus - Murata Sacco Society* [2018] eKLR” that:-

“ 12. Article 50 (2)(b) of the *Constitution* protects the rights of an accused person to choose and be represented by an advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of advocate should comply with the rules. Chaos would reign if parties can change advocates at will without notifying the court and the other parties...”

27. The Learned Counsel for the 2nd Respondent submitted that consequently, the said firm split into two firms, that is, M/s. Muthee Kihiko & Associates LLP Advocates and M/s. Soni & Associates Advocates LLP, and this matter was retained by the Law firm of M/s. Muthee Kihiko & Associates LLP Advocates on behalf of the 2nd Respondent/Applicant. The said firm proceeded to enter Appearance on 29th October, 2021 by filing a Memorandum October 2021, but inadvertently failed to file a Response in opposition to the Petition and all/or any supporting documents. On 16th August, 2023, the Petitioner's Advocate served upon the 2nd Respondent/Applicant a letter threatening execution should the 2nd Respondent/Applicant fail to pay a total sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) as per the Judgment delivered on 26th July, 2023. The 2nd Respondent/Applicant was unaware of any judgment having been passed by the court on the matter. It was only after being served with the said letter threatening execution and perusing the court file that the 2nd Respondent/Applicant came to the realization that the suit was undefended. The instructed firm had failed to put in a response in opposition to the Petition culminating in the 2nd Respondent/Applicant being condemned unheard. This was in total contravention and disregard of its instructions as contained in its instruction letter to the said firm to defend and oppose the Petition. The judgment in question herein therefore resulted from a mistake through an act or omission caused by the 2nd Respondent/Applicant's Advocates on record then.

28. The Learned Counsel further submitted that the mistake of counsel should not be visited upon their clients. Justice Nyakundi had this to say on the above in “*Rupa Savings & Credit Cooperative Society (Supra)*”:-

“It is important the defense counsel representing a party in a litigation to appreciate the provisions of the *Constitution* and the statute law on protection and preservation of rights enshrined under Article 50, Section 1(a), 1(b) of the *Civil Procedure Act*. Defence counsel's must be independent and be able to exercise professional diligence to zealously pursue justice on behalf of his or her client. This entails putting the client's interest ahead of any personal interest, as Legal presentation is a necessary prerequisite to a right to a fair trial which is constitutionally guaranteed as a non-derogable right. I feel it is the duty of legal counsels seized of matters before courts of law to stay on the brief in order to achieve justice unless otherwise instructions has been withdrawn by the client. It is trite that mistakes of counsel should not be visited on his/her client.”

29. Therefore, under this prayer from the split of the two firms and the consent of Muthee Kihiko & Co. Advocate, I find and hold that the Applicant has made out a case for the grant of the orders to have the firm of Soni & Associates Advocates LLP.

Issue No. b). Whether the Honourable Court should grant a stay of execution and setting aside of the Judgment delivered on 26th July 2023 and Decree issued thereon and/or any



further proceedings or any subsequent Orders therefrom pending the hearing and final determination of this Application

30. Under this sub title the Applicant also seeks stay of execution of decree of the judgment delivered by this Honourable Court on 26th July 2023 and the setting aside of the Judgment delivered by this Honourable Court. The *Civil Procedure Rules*, 2010 provides strict timelines which govern the case management and ensures the expeditious disposal of matters filed in our courts. The provision of Order 7 Rule 1 of the *Civil Procedure Rules*, 2010 provides the strict timelines within which to file a statement of Defence and the various accompanying documents as outlined under Order 7 Rule 5. Further, under the provision of Order 11 Rule 2 of the *Civil Procedure Rules*, 2010 provides for the filing and service of the Pre - trial Questionnaire within 10 days after the close of pleadings and the convening of a Pre - trial conference within 30 days after the close of pleadings as stated under Order 11 Rule 3. Order 10, of the *Civil Procedure Rules*, 2010, addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. While the provision of Rule 11 empowers the court to set aside or vary a Judgment that has been entered under the provision of Order 10.
31. The provision of Order 12 Rule 7 of the *Civil Procedure Rules*, 2010 which is discretionary depending on the circumstances of the case states as follows;
- “Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just”.
32. The discretion of the court to set aside ex - parte proceedings is unfettered by virtue of Order 12 Rule 7 of the *Civil Procedure Rules*, 2010. However, it must be exercised judiciously for the interests of justice. This position was upheld in the famous case of” “*Shah – Versus - Mbogo & Another (Supra)*, the East African Court of Appeal to wit:
- “This discretion (to set aside ex parte proceedings) 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 out whether by evasion or otherwise, to obstruct or delay the course of justice.”
33. Essentially, the principles for the setting aside of an ex - parte Judgment were also considered in the case of:- “*Patel – Versus - East Africa Cargo Handling Services Ltd [Supra]*” where William Duffus, P. stated:-
- “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 judgement as is the case here the court will not usually set aside the judgement 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.”
34. Therefore, the discretion to set aside ex parte proceedings ought to be exercised for purposes of furthering justice and not to obstruct or delay justice. Hence, it behooves an applicant for such orders to demonstrate the justification for such application by showing that there is sufficient cause why they failed to attend court and that their application is made in good faith and not meant to delay the course of justice.



35. On the same point of law, I have also been compelled to cite the Indian case of “*Parimal – Versus - Veena Bharti* (2011)”, the Supreme Court of India had the following to say;
- “Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently.....”
36. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight jacked formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.
37. It is not in dispute that judgment in this matter was delivered on 26th July, 2023 in favor of the Petitioners as against the 2nd Respondent/Applicant for a colossal sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) to be paid jointly and severally. Service of the amended petition is also not disputed. The Respondents did not file a responses to the amended petition dated 10th November, 2022.
38. I have considered the Application and the submissions of the parties in total. The provision of Order 10 Rule 11 of the *Civil Procedure Rules*, 2010 provides that ex-parte interlocutory Judgment in default of appearance or defence may be set aside, it reads as follows:
- “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.”
39. One of the key factors to consider when setting aside an ex-parte judgment is whether the defendant has a defence on merit. In the case of, “*Sebei District Administration – Versus - Gasyali & others* (1968) EA 300” Sheridan J. observed that:
- “The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court.”
40. The Applicant was properly served with the amended petition and the relevant pleadings. The Petitioners on the other hand argue that the 2nd Respondent was aware of this matter and was undesirous to defend it. I have gone to the through the court record and I take note that by the affidavit of service to that effect. Notwithstanding, I take cognizance that the Respondents have a constitutional right to defend themselves. I also take this application was filed three (3) months after the ex parte judgment was entered. In this scenario it would be in the interest of justice, if the parties were heard fully on the merit of their respective claims. I however suggest that the matter should be heard expeditiously in order that justice is done as it is an old matter having been filed in 2021.
41. For these reasons, therefore, I am fully persuaded that the 3rd and 4th Prayers as per the application are found meritorious and are hereby granted accordingly.



Issue No. c). Whether the Honourable Court should grant the 2nd Respondent leave to defend the suit, enlarge time to allow the 2nd Respondent/Applicant file their Response to the Petition and any other supporting documents thereof

42. Under this sub title, the Honourable Court does not see the need not to grant this prayer as the 2nd Respondent has made its case on setting aside the Judgment of this Honourable Court. The 2nd Respondent is granted leave to defend the suit and there has been an enlargement of the period as provided for under the provision of Order 50 Rules 6 and 7 of the Civil Procedure Rules, 2010 set to filed the response to the Petition and filing of any other documents.

ISSUE No d). Who will bear the Costs of Notice of Motion application dated 5th October, 2023

43. It is now well established that the issue of Costs are at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of any legal action or proceeding of any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

44. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

45. A careful reading of the provision of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure, 18th Edition, 2011* reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

46. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure, 2nd Edition, 2005* at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

47. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each



case. In the case of:- “*Morgan Air Cargo Limited – Versus - Everest Enterprises Limited* [2014] eKLR” the court noted that:-

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

48. In this case, as this Honourable Court has opined above, the 2nd Respondent/Applicant have convinced the Court that the orders sought therefore they shall have the costs of the application.

VI. Conclusion and Disposition

49. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the orders below:-

- a. That the Notice of Motion application dated 5th October, 2023 be and is hereby found to have merit hence allowed in its entirety.
- b. That the Judgment of this Honourable Court delivered on 26th July, 2023 in favor of the Petitioners against the 2nd Respondent/Applicant together with any consequential Decree and Orders be and is hereby set aside.
- c. That an order do and hereby issues that the 2nd Respondent/Applicant to pay to the Petitioners/ Respondents a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000/-) being throw away costs jointly within 7 days of this ruling;
- d. That this Honourable Court do and is hereby pleased to grant the 2nd Respondent/Applicant herein leave to defend the suit.
- e. That this Honourable Court do and hereby grant 14 days to the 2nd Respondent/Applicant file their Response to the Petition and any other supporting documents thereof.
- f. That an order be and is hereby issued that the 2nd Respondent/Applicant’s case be re-opened and the 2nd Respondent/Applicant be allowed to call witnesses to testify and adduce evidence.
- g. That in default of compliance with order given in (b) to (g) then the order vacating the Ex - Parte Judgment and the decree entered shall automatically lapse without further reference to the to Court;
- h. That for expediency sake, and it being such an old matter, it shall be set down for hearing on 25th September, 2024 and if all facts remain constant be finalized within the next 90 days thereafter. There shall be a mention on 29th July, 2024 for purposes of conducting a case management Pre – Trial conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
- i. That the Petitioners are hereby granted corresponding leave of 14 days to respond to the pleadings of the 2nd Respondent;
- j. That costs of this Notice of Motion Application dated 5th October, 2023 are awarded to the 2nd Respondent/Applicant.



It Is So Ordered Accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT
MOMBASA THIS25THDAY OFAPRIL.....2024.**

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**HON. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus, the Court Assistant.
- b. Mr. Makori Advocate for the 2nd Respondent/Applicant.
- c. Mr. Borona Advocate for the Petitioners/Respondents.

