**Henkel Polymer Company Limited t/a Henkel Chemicals E.A v Personal Care Industries Limited (Environment & Land Case 52 of 2023) [2024] KEELC 3394 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3394 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE 52 OF 2023**

**LL NAIKUNI, J**

**APRIL 22, 2024**

**BETWEEN**

**HENKEL POLYMER COMPANY LIMITED T/A HENKEL CHEMICALS E.A ..... PLAINTIFF**

**AND**

**PERSONAL CARE INDUSTRIES LIMITED ..... DEFENDANT**

**RULING**

## I. Introduction

1. The Defendant/ Applicant herein, trading in then names and style as Personal Care Industries Limited moved this Honorable Court for the hearing and determination of the Notice of Motion application dated 17th January, 2024. It was brought under a Certificate of urgency and the dint of the provisions of Sections 1A,1B and 3A of the *Civil Procedure Act*, Cap. 21 and under the Inherent Powers of this Honourable Court.

2. Upon service of the Notice of Motion application, by way of opposing it, the Plaintiff responded to the said Application through a Replying Affidavit dated 11th February, 2024.

## II. The Defendant/Applicant's case

3. The Defendant/Applicant sought out for the following orders:

    a. Spent.

    b. That the Order of this Honourable Court made on 1st November 2023 directing the Defendant to deposit the outstanding rental arrears on the suit premises with the Plaintiffs Advocates on or before 19th February 2024 be set aside ex debitio justitae.

    c. That the costs of this application be awarded to the Defendant..

4. The application by the Defendant/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 14th Paragraphed Supporting Affidavit of Mohsin Kanji, a director of the Defendant sworn and dated 17th January, 2024. The Defendant/Applicant averred that:

    a. He was a Director of the Defendant and hence duly authorized to swear this Affidavit on its behalf.

    b. He annexed in the affidavit in a bundle and mark as Exhibit 'MK - 1', being true Photostat copies of the typed proceedings supplied to the Defendant/Applicant's previous Advocates, Messrs. A.A. Said & Co. Advocates.

    c. From this he saw that on 1st November 2023, when the parties' Advocates appeared before this Honourable Court, an order was made, inter alia, directing the Defendant/Applicant to deposit the outstanding rental arrears on the suit premises on or before 19th February 2024.

    d. On 12th July 2023, when parties appeared before this Honourable Court, the Court had found that there had been no proper proof of service on record and it ordered that the application be served by the Plaintiff/Respondent on the Defendant/Applicant for hearing on 5th October 2023.

    e. This Order of the Court was not complied with and no proper or other service was effected on the Defendant/Applicant. He was further informed by Mr. A.A. Said of Messrs. A. A. Said & Co., Advocates, the Defendant/Applicant's previous Advocates and verily believe that no service was effected upon his firm either as directed by the Court on the 12th July 2023.

    f. On 25th October 2023, this matter was not listed for hearing and he received a notification by SMS from the Judiciary that the matter would be listed for mention on 15th February 2024.

    g. Thereafter, in later October 2023, they realized that matter had actually been listed for 1st November 2023. Given that they only realized about the matter being listed only in the preceding week, it was not possible to file a response to the application which had not been and, to date, has not in any event been served upon the Defendant/Applicant as earlier ordered by the Court on the 12th July 2023. In the ordinary course of events, the Plaintiff/Respondent was first obliged to discharge its obligations under the directions given before the Defendant/Applicant's obligation to file a Response arose.

    h. In the circumstances, in law, no substantive orders could be made against the Defendant/Applicant on the 1st November 2023 particularly that there was no prayer for payment of the alleged outstanding rental whether to the Plaintiff/Respondent or in Court.

    i. In any event, a stated above, in the Plaintiff/Respondent's application before the Court, there was no prayer for payment of or securing the Plaintiff/Respondent for any alleged accrued rental either and this was only a substantive prayer in the Plaint. It was incongruous of the Plaintiffs Advocate to orally apply that the said sum be paid without a trial on merit given the Defendant/Applicant had already filed its Defence on liability in the matter.

    j. The Plaintiff/Respondent's Advocates recognized that they were not entitled to the relief being sought in their application at an interlocutory stage from their own submissions made on the 1st November 2023 and it was mischievous and a misconception for them to seek an order for payment of the alleged outstanding arrears when there was Defence on record on liability.

k. By making the Orders as it did on 1st November 2023, this Honourable Court was misled into condemning the Defendant/Applicant unheard thereby compromising its constitutional right to a fair trial as well as its right to natural justice and placing an onerous burden on the Defendant/Applicant as a condition to defend itself.

l. It was only fair and just, in the circumstances that the said Order for deposit of alleged accrued rental be set aside and the Defendant/Applicant's right to be heard and to a fair trial not be impeded. The Defendant/Applicant denied that the Plaintiff/Respondent was entitled to claim the sum of Kenya Shillings Twenty Five Million Seven Sixty Thousand Eight Ninety Three Hundred and Ninety Cents (Kshs. 25,760,893.90/=) or any other sum whether as alleged or at all.

m. The Defendant/Applicant therefore prayed that this Honourable Court set aside the Order for deposit made on the 1st November 2023.

**III. The Response by the Plaintiff/Respondent.**

5. While opposing the Application dated 17th January, 2024, the Plaintiff/Respondent filed a 24 paragraphed Replying Affidavit sworn on 11th February, 2024 by RUth Martha Henkel, a director/ shareholder to the Plaintiff/Respondent Company with five (5) annextures marked as 'RMH - 1 to 5'. She averred that:-

a. The application was incompetent and ought to be summarily dismissed as it was not premised or grounded on any law and yet it purported to seek for an order of setting aside orders of the court made on the 1st November, 2023.

b. In the circumstances, and as advised there was no competent application before this court worthy of being determined by this Honorable Court.

c. In response to the contents of Paragraphs 3 to 8 of the Supporting Affidavit, it was not true as alleged that with the pleadings and the hearing date of the application coming up on 1st November, 2023.

d. The Defendant/Applicant's then Advocates A.A Said & Co. Advocates with the hearing notice dated 23rd October, 2023 through their office email info@aasaldadvocates.co.ke on the 23rd October,2023 at 1:14 pm.(She attached in the affidavit and mark it as "RMH – 1").

e. Her advocate filed an affidavit of service dated 23rd October, 2023 which was filed on the same day via court email.(She attached in the affidavit a copy of the affidavit of service together with the email to the court dated 23rd October, 2023 as "RMH – 2").

f. On 23rd October,2023 at 12:26 pm his advocate on record received an email from ELC Mombasa Court at elcmombasa01@gmail.com informing his advocate that the Notice of Motion dated 6th April, 2023 would be heard on the 1st November, 2023 before Hon Justice L.L Naikuni ELC Court No. 3. The email was copied to info@aasaidadvocates.co.ke who were the advocates for the Defendants/Applicants at the time. (She attached a copy of the said email and mark it as "RMH – 3").

g. On the 1st November, 2023 this matter was called, there was an advocate present representing the Defendant/Applicant one Mr. Ogondo Advocate who was holding brief for Mr. Said for the Defendant/Applicant. (Annexed in the affidavit and marked as "RMH – 4" was a

copy of the court order dated 3rd November, 2023 evidencing the presence of counsel for the Defendant/Applicant).

h. It was therefore not true as alleged in Paragraph 6 that the Defendant/Applicant's Advocate was not served with the pleadings and hearing notice.

i. She believed that had her advocate not served the Defendant/Applicant's Advocate as alleged, then Mr. Ogondo Advocate would not have appeared in court on the material day on behalf of the Defendant/Applicant.

j. In response to paragraph 9 of the Supporting Affidavit, it was not true as alleged that no sustentative orders could not have been made as there was no prayer for payment of the alleged outstanding rental due to them.

k. In further response, she wished to draw the Court's attention and indeed the Defendant/Applicant's attention application dated 6th April, 2023 where in prayer 4 of the Motion she asked for:-

> " That this Honourable Court directs and issues an order for the Defendant to pay accrued rent arrears to the Plaintiff"

l. In light of the above, she believed that the Honourable Court was rightly moved and the court granted the orders as that was discretionary of the court to so grant.

m. In response to paragraph 10 of the Supporting Affidavit no defence had been filed in these proceedings as is alleged and therefore the averments that a defence on liability had been filed.

n. Mr. Ogondo Advocate never objected to the prayer for payment of accrued rental income as he only remarked that if that had not been paid, then it ought to be paid.

o. To confuse this Honorable Court the Defendant/Applicant had attached an alleged court proceedings which had not been certified by this Honorable Court as the true happenings of what transpired on the material day.

p. The attached proceedings could not be the true reflection of what transpired on 1st November, 2023 as it records that Mr. Osiemo Advocate represented both the Plaintiff/Respondent and the Defendant/Applicant yet the true records were as the one attached in exhibit "RMH – 5" being a signed court order with the correct names of the advocates who attended the hearing on the material day.

q. The totality of the Defendant/Applicant's Application was that it was riddled with outright lies, misinformation and inaccurate records of the court's proceedings.

r. In the circumstances she prayed that this application be dismissed with costs as in an abuse of the Court process.

s. Further no statement of defence had been filed herewith despite service of pleading and yet the Defendant/Applicant was asking the Court to grant them equitable rights of setting aside the orders made on 1st November, 2023.

t. The affidavit was in opposition of the Defendant's application and urged the Honourable Court to dismiss the application with costs.

**IV. Submissions**

6. On 23rd January, 2024 in the presence of both parties in Court, the Honourable Court directed that the Notice of Motion application dated 17th January, 2024 be canvassed by way of written submission. Pursuant to that the Honourable Court having confirmed complied reserved the date of the ruling on 15th February, 2024.

**A. The Written Submissions by the Defendant/Applicant**

7. The Defendant through the Law firm of Messrs. A. B. Patel & Patel LLP Advocates filed their written submissions dated 19th March, 2024. Mr. Sanjiv Khagram Advocate commenced his submissions by stating that the Defendant/Applicant filed its Notice of Motion Application under Certificate of Urgency and its Supporting Affidavit sworn by Mohsin Kanjiboth dated 17th January 2024 seeking "inter alia" orders that the Order made on 1st November 2023 directing the Defendant/Applicant to deposit the outstanding rental arrears with the Plaintiff/Respondent and/or its Advocates on the suit premises be set aside ex debitio justitate. The Plaintiff/Respondent filed its Replying affidavit dated 13th February 2024 feebly opposing the Application.

8. On the background, the Learned Counsel submitted that the Defendant/Applicant filed this Application seeking to set aside the orders made by this Honourable Court to deposit alleged outstanding rental arrears on grounds that:

    a. the Defendant/Applicant was never accorded an opportunity to be heard. The application was never served on the Defendant/Applicant by the Plaintiff/Respondent, nor had they been served with the Application to date.

    b. no such prayer was made in the Application by the Plaintiff to warrant the order which was issued

    c. the issue of outstanding rental arrears was a substantive issue which can be determined after trial and upon preponderance of evidence adduced.

9. According to the Learned Counsel, there were two (2) main issues for the determination by the Honourable Court. These were as follows: Firstly, on whether the application was properly before the court. The Learned Counsel submitted that the Defendant/Applicant had rightly invoked the inherent powers of the seeking to set aside the orders that were issued by this Honourable Court without it being given an opportunity to be heard which contravenes the provisions of Articles 50 and 159 of *the Constitution* of Kenya, 2010. The argument presented by the Plaintiff/Respondent in opposition to the said application that the application was incompetent having not been premised or grounded on any provision of the law was a fallacy.

10. According to the Learned Counsel, in determining whether this Honourable Court has inherent jurisdiction to set aside its own orders, the Court of Appeal in the case of "Provincial Insurance Company E.A. Ltd – Versus - Mordekai Mwanza Nandwa C.A. 179/95"(attached hereto and marked 'A') quoted with approval the case of "Craig – Versus - Kanseen(1943)" held:

> " Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that an appeal from the order is

not necessary. I say nothing on the question whether an appeal from the order, assuming that the appeal is made in proper time, would not be competent."

11. To buttress on this point, the Learned Counsel cited Justice Ouko (as he then was) "In the Matter of the Estate of George M'mbokoki Meru HSC 357 of 2004" (marked 'B')on determining what inherent jurisdiction is stated:

> " It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."

12. Similarly, the Learned Counsel relied on the case of "Kenya Bus Service Limited and Others -Versus - Attorney General and The Minister for Transport and Others NRB Hc Misc. 413 of 2005" (marked as 'C') where the Court held that:-

> " Where there is no specific provision to set aside, the courts power or jurisdiction would spring from inherent powers of the court. Whereas ordinary jurisdiction stems from Acts of Parliament or statutes, the inherent powers stem from the character and the nature of the court itself-it is regarded as sufficiently empowered to do justice in all situations."

13. The Learned Counsel averred that it was also trite, as affirmed by the Supreme Court, that Justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of Justice were met as was set out in the case of:- "Deynes Muriiti & 4 Others – Versus - Law Society of Kenya & Another [2016] eKLR" - Marked 'D'. The Supreme Court further endorsed the holding in the case of:- "Mwenesi – Versus -Shirkely Luckhurst & Another, Civil Application No. NAI 17 of 2000" to the effect that a Court of Justice has no jurisdiction to do injustice and where injustice on a Party to a judicial proceeding was apparent, a stay was irresistible.

14. He asserted that the Supreme Court further stated that the Court of Appeal needs to be mindful, in the exercise of its discretion, to ensure that the Orders it granted did not have the effect of predetermining the substantive case pending. In the instant case, the Defendant/Applicant humbly contended that the Orders made on 1st November 2023 had the effect of substantially determining the pending suit and were not only highly unjust but also contravene the law. Therefore, it was the Defendant/Applicant's humble submission that the Application was properly before Court, Equally, the Court was properly seized with jurisdiction to hear and to determine this Application on merit.

15. Secondly, on whether the order issued on 1st November, 2023 ought to be set aside. The Learned Counsel asserted that it was trite law that a party should never be condemned unheard. It was against the rules and principles of natural justice and violation of a person's constitutional right to deny someone a fair hearing. To support this legal position, the Counsel cited the case of:- "Republic – Versus - Vice Chancellor Jomo Kenyata University and Technology [2008] eKLR",(marked as 'D') where the Court observed that:

> " The rules of natural justice dictate that a party should not be condemned unheard. Where the principles of natural justice have been breached, the Court will readily grant an order of certiorari to quash any such decision arrived at in disregard of such principles."

16. He further relied on the of:- “Essanji & Another – Versus - Solanki [1968]EA 218” where the Court observed that:

> “ The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”

17. It was for this reason that the Learned Counsel made the following submissions in support of the Defendant/Applicant's application that seeking to persuade this Honourable Court to set aside its orders issued on 1st November 2023 to allow and/or give the Defendant/Applicant an opportunity to present its case against that of the Plaintiff. It was trite law that that the purpose of service of any court process, was to let the other party involved in the litigation to know that there was a dispute before the Court and that way he has a right to take action he may deem right to defend his rights or take any position he deems necessary as it is fundamental requirement in keeping with the principles of rules of natural justice and the practice of the rules of law. Ideally, the object of all service of court process was purely to give notice to the party on whom it was made. This was to create awareness and the ability to resist that which had been sought against him. The Plaintiff/Respondent's alleged to have served the Defendant/Applicant's advocates by email the Application as per the directions of the court issued on numerous occasions. This argument was supported by the Affidavits of service filed by the Respondent at annexure “RMH - 2(a)” of the Plaintiff/Respondent's Replying Affidavit. According to the Learned Counsel that there had not been shown any proof of service of the Application to the Defendant/Applicant or the Defendant/Applicant’s advocates by the Plaintiff/Respondent for the following obvious reason:

a. Under the strict provisions of Order 5 Rule 22B of the Rules (new)whereas the Plaintiff/ Respondent is entitled to serve any court process upon the Defendant/Applicant at his last confirmed and used E-mail address, the Plaintiff/Respondent MUST show that it sent the court process to the Defendant/Applicant's E-mail address and that he received a delivery receipt confirming that the email had been received.

b. Under the provisions of Order 5 Rule 22B of the Rules, which the Plaintiff/Respondent (as could be observed at Paragraph 4 of the Affidavit of Service sworn by Nelson W. Osiemo) had relied on to serve the Hearing Notice dated 23rd October 2023, the process (in this case the Hearing Notice) could only be deemed to have been successfully served when the Plaintiff/ Respondent received and produced in court a read receipt and/or a delivery receipt.

c. The Court in the case of “Sifuna & Sifuna Advocates – Versus - Patrick Simiyu Khaemba [2021] eKLR (marked as "E") whilst deciphering the law on service of documents in this electronic dispensation of justice era and in particular in matters of service of documents, observed that the law has gradually moved from personal service to electronic service. The Honourable Court made the following plausible observations in its holding, that:

> “ In regard to service of documents, the burden bearer is the one who asserts that he effected service. It is not the other way round. That is why the Rule 22B (4) of the Civil Procedure Rules provides that the officer of the Court who effected service should file an Affidavit of Service accompanied with an attachment of "the Electronic Mail Service delivery receipt confirming service."(emphasis added)”
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> The at Paragraph 18 of its holding further stated that:

> "In terms of Sub - rule 2, it is not enough for one to send documents to the last known email address of a party. The Sub - rule provides that the Sender must receive "a delivery receipt" as a confirmation that service has been effected. In my view, the Sub rule was meant to cure the mischief of parties sending documents to emails of others, keeping quiet about it and taking advantage of others 'lack of knowledge of the activity in their email."
>
> "Therefore, the drafters of Sub-rule 4 of Order 5 Rule 22B decided in their wisdom to include the requirement that "a delivery receipt" has to be filed with the Affidavit of Service by the authorized process server. I reiterate that a sent email is not the same as a delivery receipt. The Sub-rule 4 abovementioned provides that a sent email must be accompanied by evidence that the email was duly received. The Respondent did not attach the delivery receipt herein. It therefore leaves doubt as to whether or not the Applicant actually received the email that was sent on 28/9/2021 to his email at 11.46 am. Perhaps, the Respondent should have gone ahead to immediately bring to the notice of the Applicant though other means that an email had been sent to his address and it required attention. That would have supplemented the service effected to confirm receipt of the email. In Commission for Human Rights and Justice – Versus - Jacob Kimutai Torutt & 5 Others [2021] eKLR, the process server attached an Electronic Mail Service delivery receipts of the email sent but did not attach "receipts for delivery of service via WhatsApp". The Court stated at the end of considering whether or not service was proper, "As such, this court is not satisfied that service was properly effected upon the 1st Respondent..."

18. The Learned Counsel posited that its application be allowed for want of non-service of the Hearing Notice as submitted above and proceed to set aside the proceedings of 1st November 2023 ex debitio justitae. As explained in the Defendant/Applicant's affidavit in support of its application, given the failure on none-service by the Plaintiff/Respondent upon the Defendant/Applicant, the Defendant/Applicant could not have possibly filed a response to an application which had not been served upon it and neither could it have known that the matter was scheduled to come up for hearing on 1st November 2023. In the circumstances, the court was misled into issuing substantive orders against the Defendant as it did - see Exhibit 'MK - 1' of the Supporting Affidavit.

19. Prior to this attendance, the Court would note that on 12th July 2023, when the matter came up, this Honourable Court found that there had been no proper proof of service on record and proceeded to direct the Plaintiff/Respondent to serve the application for hearing on 5th October 2023. Again, these directions were not complied with. On 5th October 2023 the matter was not listed for hearing and the Defendant only came know the position of the matter through an SMS notification from the Judiciary that the matter would be listed for mention sometime in February 2024 only to learn later on that the matter had actually been listed for mention on 1st November 2023 for mention. It was trite law that no substantive orders could be made against a litigant on a mention that date, it being only a mention date. They relied on the decision in the case of "Republic – Versus - Disciplinary Tribunal of The Law Society Of Kenya & 2 Others Ex - Parte John Wacira Wambugu [2015] eKLR" (attached and marked "F"). Consequently, the Plaintiff/Respondent misdirected the Court in engaging on substantive issues in the absence of the Defendant/Applicant. He submitted that such an action was mischievous and a misconception for the Plaintiff/Respondent to seek an order for payment of the alleged outstanding arrears when there was Defence on record on liability. Which Defence this Honourable Court on 15th February 2024 confirmed to the parties that it was available and properly filed online.

20. The Learned Counsel asserted that by making the Orders of 1st November 2023, this Honourable Court was misled into condemning the Defendant/Applicant unheard thereby compromising its

constitutional right to a fair trial as well as its right to natural justice and placing an onerous burden on the Defendant/Applicant as a condition to defend itself. Therefore, it was only fair and just, in the circumstances that the said Order for deposit of alleged accrued rental be set aside and the Defendant/Applicant's right to be heard and to a fair trial not be impeded. It is the Defendant/Applicant's strong belief that the Plaintiff/Respondent was not entitled to claim the sum of Kenya Shillings Twenty Five Million Seven Sixty Thousand Eight Ninety Three Hundred and Ninety Cents (Kshs. 25, 760, 893.90/=) or any other sum whether as alleged or at all.

21. Also, it was clear from the proceedings and Application that the Plaintiff/Respondent never in its Application sought to have any amount be deposited by the Defendant/Applicant. This prayer was applied orally by the Plaintiff/Respondent's advocate with an intention to steal a march on the Defendant/Applicant. According to the Learned Counsel, the Plaintiff/Respondent is bound by its own pleadings and the court can only grant orders to that which was pleaded. Granting orders otherwise in this regard was tantamount to the principles of fair hearing and natural justice. In the case of "Raila Amolo Odinga & Another – Versus - IEBC & 2 Others [2017] eKLR" (marked as "G"), the Supreme Court of Kenya quoted with approval the excerpt from the decision of the Supreme Court of India in the case of:- "Arikala Narasa Reddy – Versus - Venkata Ram Redd Reddgari & Another 2012[2014]2 S.C.R" where the Court stated:

> " In an absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party.
>
> Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings..."

22. The Learned Counsel affirmed that the alleged outstanding arrears was the substratum of the suit before this Honourable court and a substantive issue which ought to be determined after parties were heard. The Plaintiff/Applicant in its Plaint sought for payment of the rental arrears. How then could this issue be determined at an interim stage when it was not sought for? Justice must not only be done but must be seen to be done. In saying so, the Learned Counsel referred Court to the case of:- "Wachira Karani – Versus – Bildad Wachira [2016] eKLR", the exists to serve substantive justice for all parties to a dispute before it. Both deserve justice and their legitimate expectation was that they would each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This was the fundamental principle of natural justice. Additionally, he cited the Court of Appeal in the case of "D. Chandulal K. Vora & Co. Ltd. – Versus - Kenya Revenue Authority [2017] eKLR" as cited in the case of "Pkiech Chesimaya – Versus - Limakorwai Achipa [2020] eKLR ["H"]" this Court stated as follows:

> " The main consideration for courts is do (sic) justice to the parties in the suit. The discretion to dismiss a suit or strike out an appeal or pleadings generally should be exercised sparingly judicially and only in deserving cases which cannot be mitigated. The practice nowadays is to elevate substantial justice to the parties over and above the strictures of rules of procedure, which have been stated to be mere hand maidens of justice....In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159(2) (d) of *the Constitution* makes it

abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether.

The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."

23. Finally, and in any event, the Learned Counsel submitted that this Honourable Court had no jurisdiction to make the Order it did on 1st November 2023 as this had the effect of granting the Plaintiff summary Judgement for a sum of Kenya Shillings the sum of Kenya Shillings Twenty Five Million Seven Sixty Thousand Eight Ninety Three Hundred and Ninety Cents (Kshs. 25, 760, 893.90/=) and directing that this be paid over to the Plaintiff/Respondent through its Advocates as a pre-condition to defending this suit. The Defendant/Applicant filed its Defence herein dated 24th July 2023. On the same day denying the said claim. On the 1st November 2023, this Honourable Court was misled that no defence or opposition had been filed to the claim for arrears of the sum of Kenya Shillings Twenty Five Million Seven Sixty Thousand Eight Ninety Three Hundred and Ninety Cents (Kshs. 25, 760, 893.90/=) when, in fact, there was one on record. Under the provisions of Order 36 Rule 1, Summary Judgement can only be granted where a Defendant has appeared but not filed a Defence.

24. The Counsel stated that in "Baldev Ray Aggrawal & 2 Others – Versus – Kamal Kishore Aggrawal [1988] eKLR", the Court of Appeal set aside Judgement entered summarily by the High Court where the High Court had not looked at the Defence on record. Additionally, in the case of:- "Stephen Kipkebut - Versus -Mathew Wambugu [2002]eKLR" - [marked ['T'], Waki J as he then was held the case not fit for Summary trial having perused the Defence filed and having found that '... there is a joinder of issues which can only be resolved in a trial where the evidence is tested in Cross examination....In the case of:- "Kingsway Tyres & Another - Versus - Alison Retreading Co. Limited & 3 Others [2003] eKLR" [marked 'K'] in which Ibrahim J, as he then was held that:

> " even when the Summary procedure is properly invoked, the Defendant has a right to show by way of Affidavit or even oral evidence that he should have leave to defend the suit".

25. It was clear from the foregoing that no suit ought to be summarily be dealt with unless it appears the Defence was plainly and obviously hopeless and discloses no plausible Defence. In this case, this Honourable court was misled into believing that no Defence had been filed. Neither was there any prayer before the Court in the Plaintiffs application 6th April 2023 for payment of the sum of the sum of Kenya Shillings Twenty Five Million Seven Sixty Thousand Eight Ninety Three Hundred and Ninety Cents (Kshs. 25, 760, 893.90/=). Instead, the application was for eviction and repossession only and this Honourable Court, with tremendous respect, had no jurisdiction to grant relief that has not been prayed for. The point is that this honorable Court had no jurisdiction to make a Summary Order in the manner it did on 1st November 2023 but even if it did, it can only do so after considering the Defence and whether it discloses a triable issue.

26. The Learned Counsel concluded that as was evident from the proceedings of the 7th June 2023, this Court had already recognized that given the nature of prayers sought, they could not be grateful 'Ex - Parte'. The Learned Counsel urged the Honourable Court to set aside the order granted and provide a level playing field for parties to justly litigate their matter for a just determination of the suit.

B. The Written Submissions by the Plaintiff/Respondent

27. The Learned Counsel for the Plaintiff/Respondent the Law firm of Messrs. Osiemo Wanyonyi & Company Advocates while opposing the application dated 17th January, 2024 by the Defendant/ Applicant filed their written submissions dated 26th march, 2024. Mr. Osiemo Advocate commenced his submissions by stating that when parties appeared before the Honourable Court on the 15th February, 2024 for the hearing of the Defendant's application dated 17th January, 2024, the court directed that the application be disposed of by way of written submissions.

28. He stated that the Plaintiff/Respondent would be relying on the filed Replying affidavit sworn by Ms. Ruth Martha Henkel, the Director/shareholder to the Respondent. As was highlighted therein, parties entered into a lease agreement for a term of six (6) years at an agreed rent of Kenya Shillings Two Hundred and Eighty Thousand (Kshs. 280,000/=) plus VAT per month, to be revised at a compound rate of 5% every two years throughout the lease period on the 1st October 2020. It was provided for in Clause 2:2 of the agreement, that any Rehabilitation of the Demised property was capped at a pecuniary value of a sum of Kenya Shillings Eight Million (Kshs. 8,000,000/=) exclusive of VAT, and subject to any such repairs being undertaken by contractors mutually identified by both parties.

29. The Defendant/Applicant in defence to the claim, now alleged that it had undertaken repairs of the premises, to the tune of a sum of Kenya Shillings Fifteen Million Fifty Thousand (Kshs. 15,050,000/ =) contrary to the express and mutually agreed sum of Kenya Shillings Eight Million (Kshs. 8,000, 000/= mark and was now claiming in its defence that it be allowed to fully set off the sums from the monthly rent payable until recovered in full. The Counsel held that being fully aware that at this stage, the Court was not required not to look at the merit of the claim before the court as parties would have time to ventilate those issues at trial, but he submitted that this background information was crucial in determining this application and having in mind generally the character of the Defendant/Applicant. The Counsel averred that this was the reason the Defendant/Applicant was resisting to pay rent due to the Plaintiff/Applicant from the time it was given vacant possession of the suit property in April, 2021. Further, it was the reason it had filed the present application seeking to set aside this Court's orders to deposit the funds. On 1st November, 2023 when the Plaintiff's Application dated 6th April 2023, came up for hearing before Court, the Plaintiff/Respondent was represented by Mr. Osiemo Advocate while the Defendant was represented by a Mr. Ogondo Advocate. During the session, Mr. Ogondo Advocate was not heard saying that they had not been served with the Application coming up for hearing as was alleged in the submissions by the applicant. In fact, the current Counsel for the Defendant/Applicant were not on record at the material day and so they could not be heard saying the Defendant was never served with that Application. The Defendant was duly represented in the proceedings and never carried such instructions from the Defendant.

30. The Learned Counsel contended that The records of this court would show that Mr. Ogondo Advocate conceded to the Application on rental arrears after which the court promptly issued directions on the deposit of the same. If the Defendant never properly instructed its counsel to concede as was the case, the proper recourse was to take out disciplinary action against the said Counsel and to file an application for setting aside of the orders on grounds of want of instructions and not the present application seeking the setting aside on grounds of service.

31. The fact that the Defendant's counsel appeared in court on the material day of the hearing of the Application discharged the Plaintiff's burden of duty of service. Therefore, for this application to be solely hinged on the grounds of service in light of the above submissions, the Application ought to be dismissed forthwith.

32. The Learned Counsel submitted that they would be relying on the following two (2) issues for the Court's determination. These were:-

Firstly, whether the Defendant/Applicant had met the threshold for setting aside orders issued by the court in the presence of both parties' counsels. He noted that this application had been brought under the provision of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21. On the face of it, it sought the setting aside of the Orders of the court made on the 1st November, 2023 without the Applicant citing the correct procedural law in moving the court to set aside orders.

33. He averred that the law on setting aside orders was not novel and its discretionary. However, he submitted that the applicant in such motions ought to convince the court that it deserved the orders. He relied at case law on this subject from the Privy Council to show that a court must consider the reasons given for such an application to be merited. Lord Diplock of the Privy Council on an appeal in the case of:- "Grafton Isaacs – Versus - Robertson (1985)1 AC 97 had the following to say on the issue of setting aside orders ex debito justitiae:-

> " There is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex-debito justitiae in the exercise of inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with the proceedings to set aside orders for irregularity and give to the judge a discretion as to this order he will make. The judges that have made distinction between the two types of order have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex-debito justitiae the right to have it set aside, save that specificallyit includes orders that have been obtained in breach of rules of natural justice."

34. As was in the case of "Moses Omolo Atieno & Another- Versus - John Njong Osingo [2015] eKLR Okong'o J. while considering an application to set aside an order for alleged non-service held:-

> " Where a party demonstrates that he was not served with an application that was heard by the court in his absence or that no notice was given to him of the date when the application was to be heard, on an application to set aside an order made ex - parte in such application, the court has no discretion in the matter. Such order is irregular and the aggrieved party is entitled to have it set aside ex debito justitiae.

35. Moreover, Learned Judge Lenaola in dismissing a similar application in the case of: "Benjo Travellers Limited & Co. & Another – Versus - Mary Wangai Mutuku [2008] eKLR" quoted thesentiments of the court in the case of "Maina – Versus - Mugiria (1983)e KLR 78 at 79, where it was stated as follows:-

(a) "Firstly, there are no limits or restrictions on the judge's discretion (to set aside) except that it should be based on such terms as may be just because the main concern of the courts is to do justice to the parties.

(6) Secondly, this discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error ,but is not designed to assist the person who has so deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

(c) ...

(d) ...

(e) A discretionary power should be exercised judicially and in a selective and discriminatory power, not arbitrarily and idiosyncratically.

36. Following the above, it was plainly evident that the Defendant/ Applicant had not satisfied any of the conditions warranting this court to have mercy on him and set aside the orders of court issued on 1st November, 2024 nor had the Defendant/Applicant given a sufficient ground for the court to grant the orders sought in the application.

37. Instead, the Defendant/Applicant was asking this court to strike a balance between competing rights and interest of the parties within the confines of the law, but failed to see that their actions were on the daily, causing substantial loss and harm to the Plaintiffs/Respondents herein. He submitted that the application for setting aside must surely fail since litigation could not be conducted in the manner in which the Defendant/Applicant had set out to do.

38. Secondly, whether the Defendant/Applicant had been condemned unheard and its constitutional right to fair trial violated. The Learned Counsel averred that the Defendant/Applicant's right to a fair trial had not been violated in any manner, and even as the Defendant/Applicant had confirmed to the court that there was an advocate on record for them, when the court was issuing out directions and therefore, they were represented.

39. Specifically, he drew Court's attention to response to Paragraphs 17 to 21 of the Defendant/ Applicants' submissions and reference to their Replying Affidavit. It was clear that the then Defendant/Applicant's advocates, Messrs. A.A Said & Co. Advocates were served with the hearing notice dated 23rd October, 2023, and an affidavit of service was duly filed on the same day via court email. Moreover, the email from ELC Mombasa Court at elcmombasa01@gmail.com informing parties that the Notice of Motion dated 6th April,2023 would be heard on the 1st November, 2023 before Hon Justice L.L Naikuni of ELC Court 3, was copied to info@aasaidadvocates.co.ke who were the advocates for the Defendants at the time. In that case, the Learned Counsel wondered, if at all the Defendant/Applicant was as clueless as alleged, why exactly they were in court for on the day the matter was mentioned.

40. Furthermore, they even had their representative, one Mr. Ogondo Advocate who held brief for Mr. Said Advocate for the Defendant/Applicant. Indeed, on that date – 1st November, 2023, Mr. Ogando Advocate admitted to the rental arrears thus prompting the court to make the order it rightly made. Accordingly, Mr. Ogondo Advocate never objected to the prayer for payment of accrued rental income as he only remarked that if that had not been paid, then it ought to be paid. Thus, it was on this ground that, the Learned Counsel disagreed with the Defendant/Applicant's averments that the Court issued out the orders from a misled place.

41. The court in its wisdom and in pursuit of fairness and just determination of suits, could make any such orders as it deemed just: and that was simply what the court did by directing the rental arears be deposited with the court, pending the hearing and determination of both the Plaintiff/Respondent's application and suit filed before the court.

42. To further support this position, the Learned Counsel drew the court's attention to Prayer 4 of the application where the Plaintiff/Respondent herein asked for:-

> "THAT this Honourable Court directs and issues an order for the Defendant to pay accrued rent arrears to the Plaintiff"

43. The Learned Counsel held that the allegations that the Defendant/Applicant was condemned unheard was misplaced. To him, this was all but a statement meant to tag on emotions of empathy and lack footing. He asserted that the rules and principles of natural justice demanded that all parties to a suit were accorded equal opportunity as to representation; which the applicant had enjoyed its right to

representation throughout this suit as it had had its advocates on record in court, every time the court had been sitting, to attend to the matter in question; Therefore, the Defendant/Applicant had been heard, and given an equal opportunity to respond by the court. It was the statement made by the Plaintiff/Applicant's advocate on record, by admitting the accrued rental arrears that prompted the court to issue out the directions as it did, as was in the case of "Grace Chemutai Koech – Versus - Franices Kiplangat Chebiror & 2 others [2018]eKLR, where it was held that:-

> " a Court should take whichever course appears to carry the lower risk of injustice if it turns out to have been wrong.

44. He submitted that just because the court had issued directions that a party opines was not favorable to it, never equated to the said directions being unjust or unconstitutional; and The power of a court to Review or set aside its own orders, Rulings or Judgments was a strict application and should therefore be applied only in cases that the applicant had proven they are deserving of such discretion, as per the standards set out in the law.

45. There were no compelling reasons to warrant the orders prayed for in the application. It was their submissions that the remaining duty of the court was to find the application to be devoid of any merit and dismiss the application. In conclusion, the Learned Counsel submitted that the Defendant/ Applicant had failed to meet the legal threshold required, for this Honorable Court to be persuaded to grant the orders as sought in its application. The directions as issued by the court were well within the bounds of law and the Defendant/applicant had failed to show how, the said directions contravene the law. C. The Supplementary Written Submissions by the Defendant/ Applicant

46. The Defendant/Applicant through the Law firm of Messrs. A. B. Patel & Patel LLP Advocates, with the leave of Court, filed their written submissions dated 28th March, 2024. Mr. Khagram Advocate, commenced his submissions from the filed Supplementary submissions in response to the Plaintiff's submissions filed herein and served on the Defendant on 26th March 2024. In determining this matter, this Honourable Court has to take into account two pertinent issues:

    a. whether this Honourable Court had jurisdiction to issue the orders it made on 1st November 2023 directing payment of a sum of the sum of Kenya Shillings Twenty Five Million Seven Sixty Thousand Eight Ninety Three Hundred and Ninety Cents (Kshs. 25, 760, 893.90/=); and

    b. whether this Honourable Court has any jurisdiction to commit an injustice.

47. In regard to both these questions, the Defendant/Applicant drew this Honourable Court's attention to the following decisions:

    i. "Deynes Muriithi & 4 Others (Supra) -Authority 'N'- in which the Supreme court reiterated and approved the decisions of the Court of Appeal in the "Equity Bank Limited – Versus - Westlink Mbo Limited" decision to the effect that:

        > " To my mind, the answer to the above question must be in the affirmative Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests competing rights and interests of different parties within the confines of law, to ensure the ends of justice are met....

    ii. "M. Mwenesi – Versus - Shirley Luckhurst (Supra) this Court held that a Court of Justice had no jurisdiction to do injustice ...'.

iii. "Den – Versus – PNN [2015] eKLR" Authority 'O'-in which, the Court of Appeal reiterated that without jurisdiction a Court of law has no business proceeding further and that a Court has no power to make an Order, unless by Consent, which is outside the pleadings nor grant relief no sought by a party;

iv. "National Bank of Kenya Limited – Versus – Leonard Gethol Kamweti [2019] eKLR", were the Court of Appeal held:

> " ...jurisdiction of a Court to entertain any matter either exists or its does not. Likewise, it can neither be acquiesced nor granted by consent of the parties. This much was appreciated by this Court in Jamal Salim -v- Yusuf Abdulahi Abdi & Another [2018] eKLR which stated as follows:

'It follows that even where a party initially admits to jurisdiction ....The same does not clothe a Court with jurisdiction it did not have to begin with...;"

v. "National Social Security Fund Board or Trustees – Versus -Kenya Tea Growers Association & 14 Others [2023]KECA 80[KLR]" -Authority 'Q'-where the Court of Appeal held:

> " 5. .. Jurisdiction, a mantra in adjudication connected the authority or power of a Court to determine a dispute....Where a Court was trained of the jurisdiction to entertain a matter, the proceedings, flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, would be marooned in the intractable web of nullity.
>
> 17. if proceedings were conducted by a Court without jurisdiction, they were a nullity. Any award or judgement and or orders arising from such proceedings were also a nullity.....;and

vi. "Odoyo Osodo – Versus - Rael Obara Ojuok & 4 Others [2017] eKLR"-Authority 'R' - where this Honourable Court held and reiterated that:-

> '..... If a Court has no jurisdiction to do something, it cannot do so in what is said to be the interest of justice. The interest of justice are forever best served by upholding the law and not bending it to suit the individual circumstances of cases before the Court....'.

48. According to the Learned Counsel, the above cases, save the last [which was persuasive] were binding on this Honourable Court. On 1st November 2023, there was no prayer seeking relief before this Honourable Court that the sum of the sum of Kenya Shillings Twenty Five Million Seven Sixty Thousand Eight Ninety Three Hundred and Ninety Cents (Kshs. 25, 760, 893.90/=) being alleged rent arrears be paid over to the Plaintiff/Respondent through its Advocates and the grant of any order in such terms simply meant that such prayer contained in the Plaint was granted summarily and without jurisdiction. All proceedings and the order this Honourable court was misled into making were a nullity.

49. In conclusion, the Learned Counsel submitted that setting aside of orders made without jurisdiction and which was a nullity was not a question of discretion. Instead, it was rather one where the person was entitled to have the same set aside ex debitio justitae. The authorities cited by the Plaintiff/Respondent

never assisted the Plaintiff/Respondent given the circumstances of this case especially so that under the provision of Orders 36 Rule 1, where Defence had been filed, no summary Orders could be made.

**V. Analysis and Determination**

50. I have carefully read and considered the pleadings herein being the application dated 17th January, 2024 by the Defendant/Applicant, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statures.

51. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-:

    a. Whether the Notice of Motion application dated 17th January, 2024 by the Defendant/Applicant herein has any merit whatsoever.

    b. Whether the parties herein were entitled to the orders sought.

    c. Who meets the costs of the Notice of Motion application dated 17th January, 2024?

**ISSUE No. a) Whether the Notice of Motion application dated 17th January, 2024 by the Defendant/Applicant herein has any merit whatsoever.**

52. Under this Sub – heading, the main substratum in this matter is whether this Honourable Court may consider setting aside of its own orders. Specifically, the Court has been called to set aside its orders made on 1st November, 2023 on the grounds already averred hereto by the Defendant/Applicant herein. Certainly, the application has been vehemently opposed accordingly.

53. Legally speaking, Courts on the subject matter of setting aside its own decisions are guided by several provisions of *the Constitution* of Kenya, 2010 and statures. The provisions of Article 159 (2)(d) of *the Constitution* and Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap. 21, Sections 3 and 13 of the Environment & land Court Act, No. 19 of 2011 deal on the discretionary powers of administering of justice, judicial authority, Overriding Objectives and Jurisdiction of this Court which may included the aspects of setting aside the decision of Court. Ideally, the focus is on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases. Ideally, parties are entitled to the orders of setting orders aside. Both the provisions of Orders 10 Rule 11 and 12 Rule 7 of the Civil Procedure Rules, 2010 empowers Court to set aside its decision being a Judgement having been delivered either in default or for non attendance of parties. Likewise, the provision of Order 40 Rule 7 and 45 of the Civil Procedure Rules, 2010 pertains to review of Court orders and setting aside of an injunctive Orders pursuant to an application by any party dissatisfied with such orders whatsoever.

54. In the instant case, the Defendant/Applicant moved this Court seeking to have it set aside its orders delivered on 1st November, 2023 as clearly enumerated herein "ex debitio justitae', which simply means "a debt of justice". Accordingly, and for avoidance of any doubts, the main cause of action delves from a proceedings in this Honourable Court. Precisely, on 1st November, 2023, the Honourable Court issued the following orders verbatim:-

> " This matter coming up for mention on 1st November, 2023 before Hon. Justice LL. Naikuni and in the presence of Learned Counsel's Mr. Osiemo for the Plaintiff and Mr. Ogondo Advocate holding for Mr. Said for the Defendant. IT IS HEREBY ORDERED:-
>
> a. That the Defendant granted 14 days leave to file and serve Replies to the Notice of motion application dated 6th April, 2023;

b. That the Plaintiff granted 7 days leave to file and serve further Affidavit to the new issues raised.

c. That the matter to be mentioned on 19th February, 2024 for "Inter - Parte" hearing and further direction and Ruling date taken.

d. That the Defendant directed to deposit the outstanding rental arrears on the suit premises with the Advocate for the Plaintiff on or before 19th February, 2024 as the same is not disputed" (Emphasis is Mine).

55. From the effects of the afore said order, the Defendant/Applicant became extremely aggrieved and thus instituted the impugned application seeking the stated orders thereof. In a nutshell, from the filed application, the Defendant/Applicant raises three (3) fundamental grounds. These are namely:-

Firstly, the Applicant has held that the Plaintiff/Respondent mislead the Honourable Court on the issue of service of pleadings as they were never served as required. In so doing, the Defendant/Applicant was denied the opportunity and right of fair hearing and hence a breach to the principles of natural justice as founded in the provisions Articles 10 and 159 of *the Constitution* of Kenya, 2010. Besides, the decision appeared to have taken place during a mention date of the matter.

Secondly, the order by this Court for the deposit of the rent was never anchored on any the prayer made by the Plaintiff/Applicant from their pleadings. Hence it was all intended to steal the match. To the Defendant/Applicant, the issue of arrears was a substantive one and which would require fair adjudication and determination by this Court through preponderance of evidence to be adduced during a full trial and not summary Judgement as it happened. Under the provisions of Order 36 Rule 1, Summary Judgement can only be granted where a Defendant has appeared but not filed a Defence.

Thirdly, that this Honourable Court had no jurisdiction to make the Order it did on 1st November 2023 as this had the effect of granting the Plaintiff/Respondent summary Judgement for a sum of Kenya Shillings the sum of Kenya Shillings Twenty Five Million Seven Sixty Thousand Eight Ninety Three Hundred and Ninety Cents (Kshs. 25, 760, 893.90/=) and directing that this be paid over to the Plaintiff/Respondent through its Advocates as a pre-condition to defending this suit. The Defendant/Applicant filed its Defence herein dated 24th July 2023. On the same day denying the said claim. In so doing, there would be nothing else left for adjudication in this matter yet the Defendant had filed a Defence which raised triable issues on the alleged claim herein.

56. Juxtapose, the Plaintiff/Respondent has endeavored to make a joinder to all these issues herein. Before setting side any orders of the Court, the court must establish that the party seeking to set aside the same was in Court. The Court as ever holds that facts are always stubborn and where possible have to be recounted even if its done on umpteenth times. In all fairness, the Honourable Court will be dealing with these grounds separately. To begin with, with regard to service. According to the Plaintiff/Respondent, on 23rd October, 2023 at 12:26 pm his advocate on record received an email from ELC Mombasa Court at elcmombasa01@gmail.com informing his advocate that the Notice of Motion application dated 6th April, 2023 would be heard on the 1st November, 2023 before Hon Justice L.L Naikuni ELC Number 3. The email was copied to info@aasaidadvocates.co.ke who were the advocates for the Defendants at the time. (She attached a copy of the said email and mark it as "RMH – 3"). From the records, the Honourable Court has managed to establish that on the 1st November, 2023 when this matter was called out, there was an advocate present representing the Defendant/Applicant one Mr. Ogondo Advocate. This fact has not been controverted by the Defendant/Applicant at all. Mr. Ogando Advocate was holding a brief for Mr. Said from the Law firm of Messrs. A.A Said & Co. Advocates, who were then the Advocates for the Defendant/Applicant (Annexed in the affidavit

and marked as 'RMH – 4" was a copy of the court order dated 3rd November, 2023 evidencing the presence of the Learned Counsel for the Defendant/Applicant). Therefore, graphically, I take note that on 1st November, 2023 there was representation for the Defendant/Applicant in Court. Mr. Ogondo Advocate opined to the court that:-

> "Given the nature of the Application, the orders sought are final/ mandatory orders. We can be granted 21 days and the status quo to be to be maintained. On the rent accrued be considered upon consultation."

57. For Mr. Ogando to have been in Court was a result of the proper service of the hearing notice of the application dated 6th April, 2023 by the Plaintiff/Respondent. As submitted by the Learned Counsel for the Plaintiff/Respondent, should Mr. Ogando Advocate have acted without the instructions of Mr. Saad Advocate or it was an act of professional misconduct by the said, then the only remedy left was to have lodged a formal Complaint at the Advocates Disciplinary Committee or moved Court under the provisions of the Section 56 of the *Advocates Act* which holds as follows:-

Savings of disciplinary powers of Court – Nothing in this Act shall supercede, lessen or interfere with the powers vested in the Chief Justice or any of the Judges of the Court to deal with misconduct or offences by an Advocate, or any person entitled to act as such, committed during or in the course of, or relating to, proceedings before the Chief Justice or any Judge"

58. None of these two actions were taken by the Defendant/Applicant. Instead, they opted to filing a notice of change of Advocates. In the given circumstances, the best option left is to assumably conclude that Mr. Ogando Advocate acted on the proper instructions the then Advocates for the Defendant/Applicant them having been properly served and being fully aware of the hearing date of the application.

59. On the issue of the order to make the rent deposit and the fact that it was never pleaded. Clearly, amongst all other orders afore stated, the one that has raised the temperatures and leading to the Court being moved is that the last one on for the deposit of the alleged outstanding rental arrears on the suit property with the Advocate for the Plaintiff/Respondent on or before 19th February, 2024 as the same was not in dispute. The Defendant/Applicant has further argued that the orders sought and hence granted amounted to a substantive one leaving nothing else to be adjudicated upon. Furthermore, the orders would deny the Defendant/Applicant an opportunity to be heard contrary to the principles of natural Justice. On this issue, the Learned Counsel for the Plaintiff/Respondent drew the court's attention to Prayer 4 of the application wh

> "THAT this Honourable Court directs and issues an order for the Defendant to pay accrued rent arrears to the Plaintiff" This was an indication, though not set Court from the filed Plaint, but there was such a prayer sought from the pleadings.

60. Principally, this Honourable Court has unfettered powers as founded under the provision of Sections 1, 1A, 3 and 3A of the *Civil Procedure Act*, 2010; Sections 3 and 13 of the *Environment and Land Court Act*, No. 19 of 2011; Sections 101 of the *land Registration Act*. No. 3 of 2012 and Section 150 of the *land Act*, No. 6 of 2012. Further, the provision of Order 51 Rule 1 of the Civil Procedure Rules, 2010 is about the form of the application while the provision of Sections 1, 1A, 3 and 3A of the *Civil Procedure Act*, Cap. 21 are all about the inherent powers of the Court to make such order as to meet the ends of justice or prevent the abuse of its process. The phrase "all other enabling provisions of the law" is meaningless in so far as there is no enabling provision of law which is cited to clarify what it refers to.

The provision of Order 45 Rule1 of the Civil Procedure Rules, 2010 which regulates the review and setting aside of court orders provides as follows:-

1(1) Any person considering himself aggrieved

(a)By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b)By a decree or order from which no appeal is hereby allowed,

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desire to obtain a review of the decree or order, may apply for a review of Judgment to the court which passed the decree or made the order without unreasonable delay.

61. Based on the surrounding facts and inferences in this matter, this being a land matter it is imperative that this Court weighs in the balancing and competing interest of all parties. Clearly, the relationship between the Plaintiff/Respondent and the Defendant/Applicant herein emerges from a Leasehold Agreement terms and conditions stipulated thereof. There appear a dispute has emerged from the issue of payment of rent and what is being termed as auxiliary expenses incurred by the parties herein. For the honourable Court to reach a fair conclusion there would be need for a full trial based on the principles of natural Justice and fair hearing under the provision of Articles 25 ( c ), 47 and 50 of *the Constitution* of Kenya, 2010. Thus, the application by the Defendant/Applicant should be allowed to succeed.

**ISSUE No. b). Whether the parties herein were entitled to the orders sought.**

62. The issues under this Sub – heading are nor now 'fait compli" and straight forward from the conclusion already arrived at above. I reiterate that the Law provides for the setting aside of "Ex – Parte" orders. In this case, it has been well established that the Defendant/Applicant was well represented in Court by Mr. Ogondo Advocate. Thus, the orders were not issued ex parte and in other senses, the orders issued were not final as they were admitted by the said advocate. Additionally, it is not factual that the Defendant/ Applicant was not present when the orders were issued.

63. Nonetheless, taking the nature and scope of this matter involving a Lease Agreement terms and conditions stipulated herein, the inherent powers of the Court, the Overriding Objectives and the need to sustain the principles of natural justice, the Court has felt it reasonable to grant all parties an opportunity to be heard during the full trial before the final adjudication of the matter.

64. Based on the foregoing, I find that the Defendant/Applicant has succeeded in uncertain terms, to show why this Court should set aside its order made on 1st November, 2023 and hereby allows the application for being meritorious.

QUOTE

**Issue No. c). Who meets the costs of the Notice of Motion application dated 17th January, 2024**

65. The issue of costs is at the discretion of the Court. However, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* Cap. 21. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See "Hussein Janmohamed & Sons – Versus - Twentsche Overseas Trading Co. Limited [1967] EA 28".

66. The court finds no good reason why the successful party should not be awarded costs of the action. Accordingly, in the instant case, the Plaintiff/Respondent shall have the costs of the Notice of Motion application dated 17th January, 2024.

**VI. Conclusion and Disposal**

67. The upshot of the foregoing is that after conducting such an intensive and elaborate analysis to the framed issued, the court is satisfied that the Notice of Motion application dated 17th January, 2024 by the Defendant/Applicant herein is well established. For avoidance of any doubts, I proceed to specifically order:-

    a. That the Notice of Motion application dated 17th January, 2024 be and is found to be meritorious and hence allowed.

    b. That the orders of this Honourable Court issued in Court on 1st November, 2023 and served upon the Defendant through an order issued on 3rd November, 2023 be and are hereby set aside, *ex – debito justitiae*.

    C. That for expediency sake, the matter to be fixed for hearing on 31st July, 2024. There be a mention on 1st July, 2024 for purposes of conducting a Pre – Trial conference under Order 11 of the Civil Procedure Rules, 2010.

    d. That each party to bear their own costs.

IT IS SO ORDERED ACCORDINGLY.

**RULING DELIEVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 22ND DAY OF APRIL 2024.**

.....

**HON. JUSTICE L.L NAIKUNI**

**ENVIRONMENT AND LAND COURT AT**

**MOMBASA**

Ruling delivered in the presence of:-

a. M/s. Fridaus Mbula – the Court Assistant.

b. M/s. Main holding for. Mr. Osiemo Advocate for the Plaintiff/Respondent.

c. M/s. Essajee Advocate holding brief for Mr. Sanjiv Khagram Advocate for the Defendant/Applicant.