REPUBLIC OF KENYA

IN THE CHIEF'S MAGISTRATE COURT AT THIKA

MC. ELC NO. E261 OF 2021

STANELY GITHANJA GAKARU..... PLAINTIFF/RESPONDENT

-VERSUS-

LESEDI DEVELOPERS LIMITED..... DEFENDANT/APPLICANT

DEFENDANT/APPLICANT'S SUBMISSIONS

May it please the Honourable Court,

1. The Submissions herein are made on behalf of the Defendant/Applicant, with regard to its application brought by way of a Certificate of Urgency, which Application seeks the following ORDERS: -
    a) Spent.
    b) Spent
    c) That the Honourable Court be pleased to review, vary and/or stay the interlocutory judgment and all consequential orders pending hearing and determination of this application.
    d) That this Honourable Court be pleased to review, vary and/or set aside the default interlocutory judgment and all consequential orders pending hearing and determination of this application
    e) That the Honourable Court be pleased to review, vary and/or stay the interlocutory judgment and all consequential orders pending hearing and determination of this suit.
    f) That this Honourable Court be pleased to allow the Defendant/Applicant file its Defence and the draft statement of Defence annexed hereto be deemed as properly and duly filed.
    g) That the costs be provided for.
2. That the Plaintiff/Respondent responded to the said Application via its Replying Affidavit and Submissions both filed on 22nd February, 2022. From the Plaintiff/Respondent's pleadings, the Defendant/Applicant herein wishes to point out the following:
    i. That the assertions that the Plaintiff/Respondent brought to the attention of this court that the balance of Kenya Shillings One Million Nine Hundred was paid is a blatant lie orchestrated to mislead this Honorable Court.
    ii. That as a matter of fact, it is against the procedure of civil suits for the Plaintiff/Respondent to introduce new evidence before Court on the day of the hearing
    iii. If truly indeed this was the position, the main suit herein should not even be standing as it would have been overtaken by events, in actual fact, the Defendant/Applicant would be suing for malicious prosecution and costs of this suits and not the other way round.

3. That in view of the foregoing, the Defendant/Applicant proceeds to submits on its Application on the account that the Plaintiff/Respondent failed/ignored and/or omitted to bring to the attention of this Court that the Defendant/Applicant had cleared its balance with him.

Brief facts of the case

4. This Honourable Court entered a Default Judgment against the Defendant/Applicant herein on 25th August, 2021.

5. The Defendant/Applicant herein via its previous Advocate, Shabaan LLP Advocates, approached this Honourable Court via an Application filed under a Certificate of Urgency seeking a stay of interlocutory judgment herein and all consequential orders thereof.

6. It was after a personal perusal of the file by the Defendant/Applicant that it realized that the Court had on 29th September, 2021 issued a conditional stay of the interlocutory judgment as follows: Application allowed on condition that Kshs 600,000 be deposited with court within 14 days.

7. The said condition was ordered by court on the account that the outgoing advocate did not point out to Court that the Defendant/Applicant had cleared the balance of the Purchase Price of **Kenya Shillings One Million Nine Hundred Thousand (Kshs 1,900,000)**. Reference is made to annexure **GKK-1** of the Defendant/Applicant's Supporting Affidavit sworn on 29th November, 2021.

8. That be that as it may the said Order of the Court was not relayed to the Defendant/Applicant by their Advocate, Shabaan Associates LLP, therefore the conditions were not met. As a result of the foregoing, the interlocutory judgment entered on 25th August, 2021 was reinstated.

9. The above unfolding events clearly indicated that the outgoing advocates did not have the best interest of his clients, the Defendant/Applicant herein, prompting this Application.

10. Form the foregoing, it is the Defendant/Applicant's humble submissions that the issues justiciable for determination before this Honourable Court are as follows: -
    a) Whether the Interlocutory judgment and the default interlocutory entered on 25th August, 2021 should be set aside;

    b) Whether the Defendant/Applicant's draft Defence should be deemed to have been properly filed; and

    c) Who should bear the costs of this Application.

a) **Whether the Interlocutory judgment and the default interlocutory entered on 25th August, 2021 should be set aside;**

11. The Defendant/Applicant seeks to peg its humble submissions on our very able Constitution of Kenya 2010, Article 50(1), which states that:

> *"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."*

12. As per the Plaintiff/Respondent's case, the main issue at hand the payment of the balance of the Purchase price of Kshs 1,900,000, following a Sale Agreement entered into by the parties herein for sale of land.

13. The Defendant/Applicant was not made aware of the suit herein until an interlocutory judgment was entered against it 25th August,2021 prompting it to instruct the firm of Shabaan Associates LLP to represent it.

14. The Defendant/Applicant handed over all its evidence of payment of the purchase price and all other documents and correspondences relating to the sale between the parties herein.

15. The said outgoing advocates filed an application dated 10th September, 2021 to set aside the said judgment, which Application came up for hearing on 29th September, 2021. The Court in its orders gave a conditional stay of the interlocutory judgment. The condition was that the Defendant/Applicant was required to deposit a sum of Kenya Shillings Six Hundred Thousand (Kshs 600,000) with the Court.

16. Ill-advisedly, and without any explanation, the outgoing Advocate failed to inform the Defendant/Applicant herein of the said condition, therefore no amount was deposited with the court as ordered. The result of the foregoing, is that the default judgment was reinstated against the Defendant/Applicant in favor of the Plaintiff/Respondent.

17. It upon perusing the court file that the Defendant/Applicant discovered that the Court had ordered the deposit of the Kshs 600,000 based on the alleged balance of Kshs 1,900,000 which the Defendant/Applicant owed the Plaintiff/Respondent.

18. This was despite the fact that the Defendant/Applicant had provided enough evidence to prove that it had cleared its balance with the Plaintiff/Respondent through its Advocates on record. The reason as to why the outgoing advocates did not bring to the attention of the court this fact is still unknown to the Defendant/Applicant.

19. The repercussion of the outgoing advocates not acting in the best interest of the client, the Defendant/Applicant, herein led to the judgment in default being reinstated, whereas, the said suit should have been terminated at this point as there was no other pending issues between the parties herein.

20. It is unfortunate that the Plaintiff/Respondent's Advocate took advantage of the situation and now claims that he had highlighted to court that the Kshs 1,900,000 was paid to them

by the Defendant/Applicant. This would mean that the Plaintiff/Applicant herein made amendments to the Plaint, particularly on the claims at the hearing stage of the suit without seeking the leave of the court, which conduct is contract to the Civil Procedure Rules, 2010.

21. Specifically, if that was the case, the Plaintiff/Respondent's advocate violated Order 8 Rule, which provides that;

> *"(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.*"

22. Therefore, it is unlawful for the Plaintiff/Respondent advocate to cringe on the alleged fact that he had mentioned to court that the balance f Kshs 1,900,000 was paid up by the Defendant/Applicant.

23. In view of the flow of events above, it is undeniable that the Defendant/Applicant herein did not breach any term of the Agreement for sale dated 5th October, 2020 entered into by the parties. With this in mind, it would then be prejudicial to still hold the Defendant/Applicant in contempt of the court orders which led to the reinstatement of the default judgment.

24. Your honor we are guided by the case of **Lucy Bosire -vs- Kehancha Div. Land dispute Tribunal & 2 Others (supra)** Odunga J held as follows: -
"It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Keipto Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74."

25. In addition to the foregoing, the Defendant/Applicant will be condemned unheard which principle is against the rule of natural justice and as outlined in our Constitution of Kenya, 2010, Article 50(1) as above quoted.

26. That this can all be remedied considering that this Honourable Court has been granted the authority by Order 10 Rule 11 of the Civil Procedure Rules, 2010 which provides that,

> "*Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just*"

27. We rely on the case of **Joel Gichana Nyamigwa v SDA (EA) Union Limited [2017] eKLR, Kisii High Court Civil Case No. 154 of 2011**, where the court could not agree any more when it came to compromising the right of a party to be heard. It stated the following:

> *"Courts have been liberal in using their discretion granting orders to set aside ex-parte proceedings or judgments based on the cardinal rule of natural justice that states that a party should not be condemned unheard. The right to be heard before an adverse decision is made against a person is therefore a fundamental principle that permeates the entire judicial system. (See Onyango Oloo vs Attorney General [1986-1989] EA 456.*

The Supreme Court of India succinctly expressed itself on the importance of the right to be heard in **Sangram Singh vs Election Tribunal Koteh, AIR 1955 SC 664, at 711** *as follows: -*

"[T] There must be ever present to the mind, the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

28. In view of the foregoing, it is only fair and just that this Honourable Court sets aside the default judgment entered into on 25th August, 2021.

b) **Whether the Defendant/Applicant's draft Defence should be deemed to have been properly filed;**

29. If this Honourable court sets aside the default judgment dated 25th August, 2021, which we believe it will, then it would be judicious for the court to allow the Defendant/Applicant herein to defend itself in this matter by way of deeming it properly filed and on record the Defendant/Applicant's draft Statement of Defence.

30. The Defendant/Applicant's Defence in the attached draft Statement of Defence has managed to raise triable issues which this Honourable court should hear and determine the same.

31. The already severally mentioned above, the Plaint herein seeks the clearing of the balance of Kshs 1,900,000 by the Defendant/Applicant emanating from the agreement to sale entered into by the parties herein. This has since been confirmed by the Plaintiff/Respondent in its submissions and Replying Affidavit dated 4th February, 2020. In view of the foregoing, the issues remaining for determination in the Plaint are: interest for breach of contract and costs of the suit, which the Defendant/Applicant seeks to defend itself against.

32. As it can also be discerned from the Defendant/Applicant's attached intended Statement of Defence, having established that the Defendant/Applicant herein has not breached any term of the Agreement for sale, it is not mandated to pay any interest accruing from any breach. Furthermore, the Agreement for Sake entered into by the parties herein do not provide for payment of interest of breach of contract.

33. Similarly, the prayer for costs of this entire suit should not be borne by the Defendant/Applicant bearing in mind that it had not breached any term of the contract to warrant the Plaintiff/Respondent to file the suit herein, as a matter of fact, the Defendant/Applicant herein will be seeking for its costs at the earliest time possible.

34. The court in High Court at Nairobi in **Civil Case No. 47 of 2013, Multiscope Consulting Engineers Vs University of Nairobi & Another**, ruled that:

"In my view, the draft defence raises triable issues as there is vehement denial to the allegations that the 2nd defendant induced the 1st defendant to breach a contract between the plaintiff and the 1st defendant and or that the 2nd defendant in performing their statutory duty could be sued in damages for defaming the plaintiff which is a limited liability company. Those issues ought or deserve to be resolved in the context of a trial.

This court further employs the principle that a right to a hearing and therefore fair trial as enshrined in Article 50(1) of the Constitution is a fundamental human right and the cornerstone of the rule of law. It also ties up with the right to access justice under Article 48 of the Constitution. It is the duty of this court, therefore, to accord or ensure every person who has submitted themselves to its jurisdiction, an opportunity to ventilate their grievances."

35. It is therefore the Defendant/Applicant's humble submission that its draft Statement of Defence, has vehemently denied of the Plaintiff's allegations and claims and hence it is only fair and just for this Honorable Court to accord the Defendant/Applicant a chance to defend itself before it can come up with a judgment.

36. In conclusion the 2nd and 3rd Defendants/Applicants urges this Honourable Court to set aside the Judgment delivered on 26th May 2020 and admit the Defendant's Statement of Defence for justice to prevail for all the parties in this suit.

c) **Who should bear the cost of this Application**;

37. There is nothing in the present Application that would lead to the detouring of the trite Rule of law, that costs follow the event.

38. The Defendant/Applicant takes cue from the case of **Peter Muriuki Ngure v Equity Bank (K) Ltd [2018] eKLR**, where the Court ruled that:

"Be that as it may, the fixing of costs is to be governed by an overarching principle of reasonableness. In the case of; Zesta Engineering Ltd vs Cloutier (2002) O.J.No. 4495(C.A.) (QL it was stated that: "In our view the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant."

39. In view of the foregoing, we pray that costs be awarded to the Defendant/Applicant.

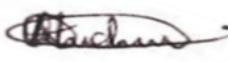
CONCLUSION

40. We as such pray that this Honourable court allows the Defendant/Applicant's prayers as sought in its application dated 29th November, 2021.

We humbly submit.

Annexed herein are the relevant authorities

DATED at **NAIROBI** this……25th ……..……of……February……2022



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REPUBLIC OF KENYA

IN THE HIGH COUR OF KENYA AT KISII

CIVIL SUIT NO. 154 OF 2011.

JOEL GICHANA NYAMIGWA..... PLAINTIFF

VERSUS

THE SDA (EA) UNION LIMITED.....DEFENDANT

RULING

1. This ruling relates to the application dated 7th February 2017 brought pursuant to **Order 17 Rule (4)** and **Order 18 Rule (9) of the Civil Procedure Rules** among other provisions of the law. In the said application the applicant seeks orders for the setting aside of the ex-parte proceedings taken on 7th June 2016 so as to afford the plaintiff/applicant an opportunity to be heard and to present his evidence in court and further that the applicant be granted an opportunity to cross-examine the defendant's witnesses who testified on 7th June 2016.

2. The application is supported by the applicant's affidavit dated 7th February 2017 wherein he avers that he was not aware of the hearing date as his newly appointed advocates had not been served with any hearing notice and that he only became aware that the case had proceeded when he received a mention notice for the purposes of fixing a judgment date.

3. It is the applicant's case that he has a good case with high chances of success and that the defendant/respondent will not suffer any prejudice if he is given an opportunity to present his case.

4. The respondent opposed the application through the replying affidavit of ALVIN ELIAMANI dated 27th February 2017 wherein he describes himself as the general manager of Africa Herald Publishing Press which is an arm of the respondent. He avers that the plaintiff has since the filing of the suit been unwilling to fix it for hearing and that all the efforts to fix the case for hearing have been at the respondent's instance. He further avers that the respondent has sought numerous adjournments every time the case has been listed for hearing culminating in the hearing date of 7th June 2016 when the plaintiff completely failed to turn up in court for the hearing despite the fact that the hearing date was taken by consent thereby leaving the respondent with no option but to proceed with the case in the applicant's absence.

5. The respondent's deponent reiterates that the respondent has waited for too long for the case to be heard so that it can canvass its counterclaim yet the plaintiff has been deploying delay tactics so that the case can become stale.

6. When the application came up for hearing, parties chose to canvass it by way of written submissions.

Analysis and determination

7. I have considered the instant application, the respondent's replying affidavit and the applicant's written submission. The main issue for determination is whether the applicant has made out a case to warrant the issuance of orders to set aside the ex-parte proceedings of 7th June 2016.

8. Order 17 Rule (4) and **Order 18 Rule (9**) on which the instant application is anchored stipulate as follows:

"[Order 17, rule 4.] Court may proceed notwithstanding either party fails to produce evidence.

4.Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."

"[Order 18, rule 9.] Power to examine witness immediately.

9. (1) Where a witness is about to leave the jurisdiction of the court, or other sufficient cause is shown to the satisfaction of the court why his evidence should be taken immediately, the court may, upon the application of any party or of the witness, at any time after institution of the suit, take the evidence of such witness in the manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be signed by the judge and shall be evidence in the suit."

9. This court is of the view that the provisions of the Civil Procedure Rules that the applicant has anchored his application are not very relevant to the circumstances of the instant case however, this court is still obliged, under the **Sections 1A, 1B, 3A** and **63 (e) of the Civil Procedure Act**, which the applicant also cited as the basis of his application, to observe the overriding objective of the Civil Procedure Act and facilitate he just, expeditious proportionate and affordable resolution of this dispute.

10. I have perused the proceedings so far taken in this case and I note that indeed, it is true that the plaintiff has been a reluctant party in this case in as far as fixing the case for hearing and actually proceedings with the case when it is listed for hearing is concerned. I note that it is true that the plaintiff/applicant has been responsible for most, if not all, the adjournments that have been sought in this case.

11. Turning to the proceedings of 7th June 2016 which is the subject of the instant application, I note that the said date was on 18th May 2016 taken by consent of the advocates for both parties. It is also noteworthy that on the hearing date of 7th June 2016, neither the plaintiff, nor the nor his advocate on record appeared in court when the case was first mentioned thereby prompting the court to place the file aside till 12.15 pm on the same day for the purposes of giving the plaintiff and his advocates a chance to turn up in court for the hearing in the event that they had been held up elsewhere.

12. Lo and behold, and to the surprise of this court, by 12.15 p.m. when the case was called up again, there was no appearance for both the plaintiff and his advocate thereby leaving the court with no option but to allow the respondent's application for the dismissal of the plaintiff's case and the hearing of the

respondent's counter claim. In effect therefore, the plaintiff's case was on 7th June 2016 dismissed for non-attendance and therefore, the appropriate order under which the application ought to have been brought is **Order 12 Rule (7) of the Civil Procedure Rules** which deals with the setting aside judgment or dismissal.

13. The plaintiff applicant alluded to the fact that he was not notified of the hearing date by his advocates on record. I note that the plaintiff was not present in court on 18th May 2016 when the hearing date for 7th June 2016 was taken and therefore, there was no way he could have known of the hearing date except through a notice sent to him by his advocates. Courts have held time and again that the mistakes of an advocate should not be visited on their clients. In the case of **Edney Adaka Ismail vs Equity Bank Ltd [2014] eKLR**, the court observed:-

"It is true that where the justice of the case mandates, mistakes of advocates, even if they are blunders, should not be visited on the clients when the situation can be remedied by costs"

14. In the case of **Lucy Bosire vs Kehancha Div Land Disputes Tribunal & 2 others**, it was held:-

"It must be recognised that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Keipto Chemwolo & Another vs Augustine Kubende [1986] KLR 492, [1989-88], KAR 1036 at 1042: [1986-1989] E.A. 74"

15. The above decisions notwithstanding, it cannot be said that parties can always obtain setting aside orders while having a free ride on their advocates mistakes when they are also under an obligation not only to attend court, but to check the position of their cases with their advocates. This position was aptly articulated by Kimaru J in the case of **Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002** when he stated:-

"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.

16. From the above finding, it is clear that parties must not only blame their advocates, but must also show the positive or tangible efforts that they made towards the prosecution of their cases. In the instant case, I find that by filing this application the moment the applicant leant that the case had proceeded in his absence, the applicant has demonstrated that he is still interested in pursuing his case to its logical conclusion which is not the conduct of an indolent plaintiff.

17. On its part, the defendant has not shown that he will suffer any prejudice that cannot be compensated by way of costs should the instant application be allowed. In any event, the case is still

pending a determination on the defendant's counter-claim and in that regard, there is at the moment, no way of telling whether or not the counter claim will be allowed.

18. Courts have been liberal in using their discretion granting orders to set aside ex-parte proceedings or judgments based on the cardinal rule of natural justice that states that a party should not be condemned unheard. The right to be heard before an adverse decision is made against a person is therefore a fundamental principle that permeats the entire judicial system. (See **Onyango Oloo vs Attorney General [1986-1989] EA 456**.

19. The Supreme Court of India succinctly expressed itself on the importance of the right to be heard in **Sangram Singh vs Election Tribunal Koteh, AIR 1955 SC 664, at 711** as follows:-

"[T] There must be ever present to the mind, the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

20. Having carefully considered this application and taking a cue from the above cited authorities, I find merit in the application dated 7th February 2017 which I hereby allow and set aside the ex-parte proceedings and orders of 7th June 2016, however the setting aside is limited only to allowing the plaintiff to present his evidence and thereafter to cross examine the defence witnesses who had already testified.

21. The respondent is granted the costs of this application and thrown away costs in respect to the proceedings of 7th June 2016.

Dated, signed and delivered in open court this 17th day of October, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

Mr. Okenye for the Applicant

Mr. Soire for Respondent

Omwoyo: court clerk

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASENO.47 OF 2013

MULTISCOPE CONSULTING

ENGINEERS ……PLAINTIFF/RESPONDENT

VERSUS

UNIVERSITY OF NAIROBI …….. 1ST DEFENDANT/APPLICANT

THE ENGINEERS BOARD

OF KENYA ……... 2ND DEFENDANT/APPLICANT

R U L I N G

By an application by way of notice of motion dated 21st March 2014 and filed in court on 25th March 2014, the applicant/2nd defendant, the Engineers Board of Kenya seeks from this court. orders for:

1. Stay of proceedings herein pending hearing and determination of this application;

2. Setting aside of interlocutory judgment entered herein and all consequential orders thereof;

3. Leave be granted to file statement of defence on such terms as the court may deem necessary;

4. Costs of the application be provided for it is premised on the grounds that;

i) The 2nd applicant/defendant was served with plaint and application on 20th February 2013.

ii) That it was never served with any summons to enter appearance

iii) **That it then instructed their advocates to represent it in the proceedings based on documents served hence, the filing of notice of appointment of advocates by Kerongo & Co Advocates on its behalf and not memorandum of appearance.**

The said application is supported by the affidavit of Patrick Nyariki Kerongo advocate who deposes

among other things, that his client was never served with summons to enter appearance requiring them to enter an appearance and that that is the reason why they only filed notice of appointment of advocates on 14th March 2013. He attached copy of instructions note from his client forwarding plaint, notice of motion application and mention notice, all received on 20th February 2013 by the 2nd defendant and after exchanging communication on the matter, he was surprised to learn from the plaintiff's advocates that the matter had now been fixed for formal proof. He contends that the affidavit of service does not indicate receipt of the said summons (stamp or otherwise on the summons to enter appearance); and that as the client is keen to have the matter defended to the fullest, it could not fail to enter appearance had it been served with summons to enter appearance.

The application was opposed by the plaintiffs through a replying affidavit sworn by Samuel Maugo the managing director of the plaintiff company on 6th May 2014. He deposes that he is aware effective service of summons to enter appearance was done as per the affidavit of service as he had the process server dropped to effect the said service upon the 2nd defendant and that is why they immediately appointed advocates to represent them in the suit as well as communication concerning referring the dispute to arbitration wherefrom the 2nd defendant curiously withdrew. He accuses the 2nd defendant of seeking to obstruct the cause of justice as they were aware of the judgment as early as 6th August 2013.

When parties appeared before **Hon. Onyancha J**, they agreed to dispose of this subject application by way of written submissions.

The applicants filed their written submissions on 21st August 2014. The same is dated 19th August 2014 whereas the plaintiff's written submissions were filed on 2nd October 2014. They are undated. The two sets of written submissions mirror the depositions in the rival affidavits and cite the relevant law applicable to applications of this nature.

In their submissions, counsel for the 2nd defendant maintains that no service of summons to enter appearance was effected upon his client and that this is demonstrated by the fact that all the documents which were served upon the 2nd defendant had the registrar's stamp on them as per exhibit "(K3)". He challenged the plaintiff to avail a copy of the summons to enter appearance that was allegedly served and received by the 2nd defendant.

He maintained that in law, time for filing of memorandum of appearance only starts running after service of summons is effected hence interlocutory judgment was irregularly entered. He pointed out that in any event, the process server does not specify which "documents were received and stamped" by the "gentleman", the 2nd defendant being a statutory body or corporation. He cited the case of **Maina – Vs – Muriuki [1984] KLR 407**, **O'Kubasu J** (as he then was) held that

"The discretion to set aside exparte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed for a party which has deliberately sought to obstruct or delay the cause of justice."

He maintained that his client had no intention of delaying or directly or indirectly obstructing the cause of justice.

He further submitted that the 2nd defendant being a corporate body, the process service must be effected on an officer known or designated to receive service on behalf of the corporation, citing the case of **Kimwele Muneeni – Vs – Carolyne Mango & 2 Others [2005] eKLR**.

He further urged the court to exercise its discretion in favour of the 2nd defendant who was not a party to

a consent referring the dispute to an arbitrator and who had a good defence to the plaintiff's claim as could be ascertained from the draft annexed to the application pointing out that the plaintiff was seeking damages for inducement of breach of contract, against the 1st defendant in another forum and doubted further whether a claim for defamation against a corporate body is sustainable in law. He cited the cases of **Maina – Vs – Muriuki [1984] KLR 40** where it was held that

"Before the exparte judgment can be set aside it must be satisfied that there is a valid defence. There was a valid defence filed in the suit and there was no suggestion that the defence was a sham";

And the case of **Patel – Vs – Cargo Handling Services** where the Court of Appeal considered the meaning of defence in the context of Order 9A Rule 10 and held that;

"In this respect, defence on the merits does not mean in my view a defence that must succeed. It means as Sherridan J put it 'triable issue'"

He maintained that from the attached correspondences exchanged between the parties, the 2nd defendant was interested in pursuing the matter/dispute herein to its logical conclusion and not obstructive or indolent as described by the plaintiff and concluded that no prejudice will be suffered by the plaintiff if interlocutory judgment entered against the 2nd defendant is set aside.

In response and opposition to the notice of motion, the plaintiff's counsel Nyakundi & Co Advocates submitted maintaining that the process server's affidavit of service is clear, that he effected summons to enter appearance together with other documents stated at paragraph 24 of his affidavit of service filed on 21st February 2013. Counsel introduces the name of Engineer Misumi as the person who must have been served with the said summons to enter appearance excusing him of dishonesty and maintaining that the *"secretary"* and the *"gentleman"* found in the office ought to have sworn affidavits to state what transpired on 20th February 2013.

He also castigated the 2nd defendant for failing to summon the process server for cross examination on his sworn affidavit, citing the case of **Amayi, Okumu Kasiaka & 2 Others – Vs – Moses Okware Opari & Another Kisumu Court of Appeal CA No. 15 of 2010** where the court so held that where service is disputed, the applicant ought to have called and cross-examined the process server.

He outlined the facts leading to the entry of interlocutory judgment and referring to the case of **Shah – Vs – Mbogo 1967 EA 116** urged the court not to exercise its discretion to set aside the said judgment as his was not a suitable case for such discretion.

Citing **Maina – Vs – Muriuki HCC 1079/80**, he urged the court to find that there is no valid defence to the claim as **Hon. Odunga J** had held in a Judicial Review matter pitting the same parties hereto that the 2nd defendant was in blatant abuse of power (**JR MISC CA 36/2013 Republic – Vs – Engineers Board of Kenya Exparte Multiscope Consulting Engineers Ltd**). He urged the court to dismiss the 2nd defendant's application with costs.

I have carefully considered the application by the 2nd defendant and the opposing submissions. In my view, the following emerge as key issues to be determined;

i) Whether there was service of summons to enter appearance upon the 2nd defendant.

ii) Whether exparte interlocutory judgement was regular.

iii) Whether the 2nd defendant is entitled to the orders sought and if so, on what premises.

Before delving into each of the above issues, it is worth noting that the application herein is brought under the provisions of Order 17 Rule 3,Order 10 Rule 11 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 5 and as of the Civil Procedure Act and any other enabling provisions of the law.

In answer to issue No. 1 above, on 22nd February 2013, the 2nd defendant wrote to its advocates Mr. P.N. Kerongo addressing them on the subject of a mention notice as follows:

"We have received a mention notice dated 15th February, 2013 from Multi Scope Consulting Engineers Ltd on the above subject.

The purpose of this letter is to request you to represent the Board on this matter. The necessary documents are enclosed for your action as necessary. Note that the mention was on 21st February, 2013.

Yours faithfully,

Eng. Gilbert M. Arasa, OGW

Registrar

Engineers Board of Kenya."

The said letter was received on 25th February 2013 by Kerongo & Co Advocates at 9.43 a.m. On 13th March 2013, the advocate filed a notice of appointment of advocates. The affidavit of Mr. Kerongo advocate annexes documents forwarded by the 2nd defendant's Registrar.

The court record shows that suit was filed on 18th February 2013 and summons to enter appearance signed and issued on 20th February 2013. On 21st February 2013, Dominic Gachuma swore an affidavit of service at paragraphs 2 and 4 as follows

"2. That on 20th day of February, 2013, I received from the firm of M/s Nyakundi & Company Advocates copies of plaint, summons to enter appearance, list of witnesses statements, list of documents, notice of motion application, supporting affidavit together with annextures dated 15th February 2013 and mention notice dated 20th February 2013 all in triplicate with instructions to effect service upon the defendants herein.

4. That on the same day, I further proceeded to Transcom House, 1st Ngong Avenue where the 2nd defendant offices are situated and upon my arrival, I found the secretary whom I introduced myself to and stated the purpose of my visit. She then directed me to a gentleman who received the aforementioned documents by stamping on the front cover of the plaint. Underlined for emphasis.

At paragraph 5 of the said affidavit, the process server deposes that

5. That I now return herewith the aforementioned documents duly served and attached hereto."

The documents attached to the affidavit of service are the plaint, mention notice and no other. Each of the two documents have endorsements with stamp of the 2nd defendant and the 1st defendant for 20th

February 2013. On 21st February 2013, the 1st defendant University of Nairobi filed notice of appointment of advocates through the firm of KTK Advocates and on 13th March 2013, the 2nd defendant's advocates' Kerongo & Co Advocates too filed notice of appointment of advocates.

With the 2nd defendant denying service of summons to enter appearance and indicating that they were only served with notice, plaint and notice of motion, and the process server insisting that he served summons to enter appearance, the question that comes to my mind is, if such summons to enter appearance were served on both defendants, why did the 1st defendant too file notice of appointment of advocates and not memorandum of appearance" Secondly, why is it that no summons to enter appearance was returned and filed in court to show service" Knowing very well that the time for entering appearance only starts to run from the time of service of summons to enter appearance and not plaint or notice of motion"

The court file shows the two original copies of summons to enter appearance retained in the court file addressed to both defendants. There is not even a semblance of filing, together with a plaint, witnesses statements or list of documents, the alleged summons to enter appearance. The plaintiff argues that where service is disputed, the 2nd defendant should have called for cross-examination of the process server.

Order 6 Rule 1 (1) of the Civil Procedure Rules provides that when a suit has been filed, a summons shall issue to the defendant ordering him to appear within the specified time.

Under Rule (3) (a) where the suit is against a corporation, the summons may be served on the secretary, director or other principal officer of the corporation or if the process server is unable to find any of the officers of the corporation mentioned herein, (i) leave it at the registered office of the corporation. From the affidavit of service filed in court, there is no evidence that the process server ever intended or sought to effect service of the summons on the secretary, director or other principal officer of the corporation. There must be good reason why the law was framed as such, to ensure that persons being served are those who understand the type of documents being served and what action would be required upon receipt of such documents. The process server focused on a "gentleman" without indicating the position of that "gentleman" and neither did he seek to know who that "gentleman" was.

In addition, it is highly doubtful that such summons to enter appearance were ever served as alleged. There is no explanation why all the documents served had receipt stamps on them except the summons to enter appearance, which is not even returned and filed back in the court file, yet the process server does not state that the "gentleman" refused to receive on the said "served" summons to enter appearance. I find no reason to suspect that the 2nd defendant "gentleman" deliberately refused to acknowledge on the summons to enter appearance, noting that upon receipt of the documents, they immediately and without any delay, forwarded them to Mr. Kerongo advocate instructing him to take necessary action on their behalf.

Under Rule 13,

"where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgment of service on the original summons;

Provided that, if the court is satisfied that the defendant or such agent or other persons has refused to so endorse, the court may declare the summons to have been duly served."

From the affidavit of service filed in court, there is no indication by the process server that he rendered summons to enter appearance on the gentleman and required him to acknowledge them by endorsing on the same and he refused. In the absence of such evidence, this court is unable to find that there was, indeed, service of summons to enter appearance on the 2nd defendant to enable them enter an appearance within a specified period of time as required by Order 6 Rule 1 of the Civil Procedure Rules.

Furthermore, Order 6 Rule 15 mandates the serving officer in swearing an affidavit of service, annex to the original summons an affidavit of service stating the time and manner in which the summons were served. No such original summons were returned. In order to expect the defendant to enter an appearance, summons to appear, must be served, as such summons specify the time frame within which an appearance should be entered (See Order 6 rule (1) of the Civil Procedure Rules.)

Under Order 7 Rule 1, a defence can only be filed after the defendant has been served with summons to appear and made such an appearance.

The record shows that interlocutory judgment was entered against the 2nd defendant on 1st August 2013 for non appearance and or filing of defence, based on the process server's affidavit of service, under Order 10 Rule 6 & 10 of the Civil Procedure Rules.

The 2nd defendant has invoked the provisions of Order 10 Rule 11 seeking setting aside of the interlocutory judgment as having been improperly entered as there was no service of summons to enter appearance, on them. Albeit it is true that Order 6 Rule 16 of the Civil Procedure Rules provides that where it is alleged that the service of summons to enter appearance was improper, the court may call the process server for cross examination, in the instant case, and taking into account all circumstances surrounding the alleged service of summons to enter appearance on the 2nd defendant and examining the affidavit of service by the process server, I find that no service of summons to enter appearance was effected upon the 2nd defendant summons to enter appearance. And cross-examination of the process server would be unnecessary as he did not return the original summons to court as required under Rule 15 (1) and even if I was wrong in my finding which is most unlikely, Order 10 Rule 11 of the Civil Procedure Rules gives this court unfettered discretion to set aside interlocutory judgment, on conditions.

This discretionary power of the court to set aside interlocutory judgment was considered in the case of **Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd – Vs – Augustine Kubende (1982-88) KAR 1036** where the Court of Appeal in adopting principles set out in the English case of **Evans – Vs – Barltam [193]AC 473] at pg 480**, **Lord Atkin** stated thus:-

"The discretion is in terms unconditional. The courts however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning, that the applicant must produce to the court evidence that he has a prima facie defence. The reason, if any, for allowing judgment and thereafter applying to set aside is one of the matters to which the court will have regard, in exercise of its discretion. The principle is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

The main principle expoused in the above passage is that the setting aside of an interlocutory judgment entered because of default in answering to a claim is governed essentially by the discretion of the court.

It is not in doubt from the record that there was no intention to have the suit herein determined in court

as shown by the consent between the plaintiff and 1st defendant, on 15th April 2013 leaving out the 2nd defendant, yet the said 1st defendant never entered appearance. Consent Order No. 3 thereof stayed the suit herein pending the hearing and determination of the arbitral proceedings and it was not until 8th May 2013 that another consent was filed, specifying that the stay was only with respect to the suit between the plaintiff and 1st defendant upon which, on12th June 2013 by a request for judgement dated 5th June 2013 the plaintiff sought judgment against the 2nd defendant for failure to file defence in time without indicating whether judgment sought to be entered was interlocutory.

The endorsement on13th June 2013 by the Deputy Registrar is clear that there was no return of service and summons annexed so she declined until a letter dated 24th July 2013 was written by the plaintiff's counsel enclosing a copy of affidavit of service (with no original summons attached) to which the Deputy Registrar again gave directions that there was a consent dated 15th April 2013 staying suit. It was again not until 31st July 2013 when the plaintiff counsel wrote to court on 26th July 2013 insisting for judgment that the Deputy Registrar endorsed that judgment as against the 2nd defendant to be entered. The endorsement for interlocutory judgment dated 1st August 2013 stated that the 2nd defendant *"… having been served with summons to enter appearance …*" yet as I have stated, during the first request for judgment the Deputy Registrar was clear in her mind that the summons were not annexed to the affidavit of service. There is no evidence that the original summons were later filed to satisfy the Deputy Registrar on that aspect of service of summons to enter appearance, upon the 2nd defendant, to enable her enter judgment. On that ground and for that reason, I find that the interlocutory judgment as entered by the Deputy Registrar on 1st August 2013 was irregular, and that settles the second issue.

On whether the 2nd defendant is entitled to set aside the said interlocutory judgment, and if so what should be the conditions to it, as I have stated, the judgment entered was irregular and must be set aside. And had the said judgment been regular, as was considered in the case of **Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd – Vs – Augustine Kubende (Supra)**, citing with approval **Evans – Vs – Bartlam (Supra)**, the applicant must produce evidence that he has a prima facie defence before the court's discretion can be invoked and exercised in his favour. Although this court has wide discretion in setting aside exparte interlocutory judgment, in the case of **Patel – Vs – East Africa Cargo Handling Services Ltd (1974) EA. 75**, it was held that a regular judgment will not normally be set aside unless the court is satisfied that there is a defence on its merits. In other words, even if I had found that the judgment as entered against the 2nd defendant on 1st August 2013 was regular, I would, in exercising my discretion to set aside a regular judgment demand that the 2nd defendant satisfies the court that it has a prima facie or arguable defence on its merits.

But a good defence or arguable defence has been held not to mean a defence which must succeed. It merely needs to satisfy the concept of a prima facie defence per **Hon. Ogola J** in **Shailesh Patel t/a Energy Co. of Africa – Vs – Kessels Engineering Works Prt Ltd & 2 Others [2014] eKLR,** where the learned Judge, despite finding that there was regular judgment entered against the defendants and despite finding the proposed defence not to appear to address the issues in the claim, nonetheless allowed the application for setting aside interlocutory judgement while acknowledging the defendant's right under Article 50 of the Constitution to a fair hearing.

Nonetheless, as was held in the case of **Mbogo & Another – Vs – Shah, EALR [1968] P. 13** that a court's discretion to set aside an exparte judgment or order for that matter is intended to avoid injustices or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

In this case, the 2nd defendant has annexed to their application a draft defence to the claim by the plaintiff. The plaintiff contends that there is no valid defence to its claim as was found in **JR Misc Civil**

App No. 36/2013.

With due respect to counsel for the plaintiff, if there was such judgment against the 2nd defendant by Hon. Justice Odunga, then I see no reason why another suit had to be filed against them. The plaintiff should simply have executed decree in that Judicial Review matter, as the Judicial Review division has the jurisdiction to award damages for any loss or damage occasioned by blatant abuse of power. I have perused that decision and the Judicial Review orders of certiorari, mandamus and prohibition sought therein. It arose from a purported review of the proposed structural designs of the proposed University of Nairobi Tower Building and the alleged intention by the 2nd defendant to take disciplinary action against the plaintiff. The observation attributed to **Hon. Justice Odunga** were, in fact made by **Hon. Justice Weldon Korir** on 14th May 2014.

In my view, the draft defence raises triable issues as there is vehement denial to the allegations that the 2nd defendant induced the 1st defendant to breach a contract between the plaintiff and the 1st defendant and or that the 2nd defendant in performing their statutory duty could be sued in damages for defaming the plaintiff which is a limited liability company. Those issues ought or deserve to be resolved in the context of a trial.

This court further employs the principle that a right to a hearing and therefore fair trial as enshrined in Article 50(1) of the Constitution is a fundamental human right and the cornerstone of the rule of law. It also ties up with the right to access justice under Article 48 of the Constitution. It is the duty of this court, therefore, to accord or ensure every person who has submitted themselves to its jurisdiction, an opportunity to ventilate their grievances.

As it was held in **Richard Ncharpi – Vs – IEBC & 2 Others [2013] eKLR**, the Court of Appeal observed

"Nowadays pendulums have swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities."

The 2nd defendant, it is noted, is a statutory body which exists to serve the interests of, not only the individual members of the Engineering profession, but also of the public, which relies on its advise in matters of the nature and subject of the dispute herein, which I find to be weighty and of great significance to the construction industry. There are allegations of the structural design of the proposed University of Nairobi Tower Building being under designed and or overdesigned, among other allegations.

The High Court vide JR 36/2013 did quash the report by the applicant herein on the grounds that the purported review was done in defiance of the rules of natural justice, by not according the respondent an opportunity to be heard and that the Peer Review Panel was biased. That being the case, the decision thereof does not bar the applicant from commencing the review process afresh, taking into account factors and lessons learnt from the quashed process. The Hon. Justice Korir was clear in his judgment that having quashed the report,

"the issuance of orders of prohibition and mandamus as proposed by the applicant will be superfluous."

And he proceeded to dismiss the prayers for orders for orders of prohibition and mandamus.

The upshot of above expositions is that:

i) The interlocutory judgment entered herein against the 2nd defendant in default of filing a memorandum of appearance and or defence and all consequential orders and actions based on the said interlocutory judgment be and are hereby set aside.

ii) There being no evidence of service of the summons to enter appearance upon the 2nd defendant applicant, and the original summons as issued on 20th February 2013 having expired, and applying the tenets of substantive justice in the administration of justice and the provisions of Article 159(2)(d) of the Constitution at the altar of procedural technicalities, in order to meet the ends of justice in an expeditious and economical manner, I hereby validate the said summons and direct that the same shall be issued and served upon the applicant within 7 days from the date of this ruling, to enable the 2nd defendant enter an appearance as required by law and file such defence within the prescribed period.

Costs of this application shall be to the successful litigant in the main suit.

Dated, signed and delivered at Nairobi this 1st Day of December, 2014.

R.E. ABURILI

JUDGE

REPUBLIC OF KENYA

IN THE HICH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 230 OF 2014

PETER MURIUKI NGURE……..PLAINTIFF

VERSUS

EQUITY BANK (K) LTD. ……....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a Plaint dated 14th August 2013 in which it is averred that the Plaintiff, on or about 11th November 2009, applied for a loan facility of Kshs 380,000 from the Defendant and charged his property title No. Kiine/Kiangai/1478 as security for the same. Subsequently, following an agreement whereby the Defendant agreed to allow him to dispose of one acre of the said portion of land at Kshs 1.2 million to repay the loan. He repaid the loan.

2. However, upon request for release of the title deed, the Defendant refused and/or neglected to return the same. As a result of which the Plaintiff filed this suit seeking for orders that;

(a) Mandatory injunction directed at the Defendant, its agents, servants and/or any other persons so authorized by it to release the Title in respect to Kiine/Kiangai/1478;

(b) Damages for breach of contract;

(c) Costs of this suit;

(d) Interest on (a) and (b) at Court rates;

(d) Any other orders as the Honourable Court may deem just and fit to grant.

3. It is noteworthy that, this suit was initially filed in the Environment and Land Court as Suit No. 996 of 2013. The parties filed their respective pleadings alongside a list and statement of witnesses and/or documents accordingly. However, subsequently on 29th May 2014, the Court was informed that the title deed had since been released to the Plaintiff and that the only issue in the matter was damages. As a result whereof, the parties agreed by consent that the matter be transferred to the Commercial & Tax Division of the High Court for further action. The matter was officially transferred to the said Division on

1st July 2014. The Court record reveals that thereafter the parties held negotiations with a view of recording a consent settlement, but unfortunately none was reached.

4. On 20th November 2015, the parties informed the Court that they had fully complied with the pre-trial directions and the matter was certified ready for hearing on 19th April 2016. For one reason or another, the matter did not proceed as the Defendant sought for time to file further witness statements and at one time the lawyer for the Plaintiff was said to be unwell.

5. On 28th September 2016, the Plaintiff was said to be unwell and the matter was adjourned, and on 5th February 2018. On that date, the Court was informed that the Plaintiff was not in a position to proceed with the case because he was unwell though present in court. The Court was then informed that the Plaintiff was not pursuing prayer (b) of the Plaint and so the only issue remaining was of costs. The Defendant had no objection to the same, whereupon the said prayer was marked as withdrawn. The parties agreed to dispose of the issue of costs through written submissions which were subsequently filed.

6. I have considered the submissions in this ruling. I find that, it is trite law that costs follow the event and are granted at the discretion of the Court. In this regard, Section 27 of the Civil Procedure Act, states as follows;

"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 of 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."(emphasis mine).

7. It is quite clear therefore that the key word in this Section is "event". As stated in the submissions by the Respondent, this word has been addressed in the Judicial hints on Civil Procedure by Justice (Rtd) Kuloba as follows;

"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite even in defeating the claim to judgment in the whole or in part".

8. The other issue that arises and is settled in law, is that the Court has unfettered discretion of to award costs, (see *Republic vs Rosemary Wairimu Munene, Exparte Applicant vs Ihururu Dairy Farmers Co-operative Society (2014) eKLR, JR Application NO. 6 of 2014 and Halsbury's Laws of England 4th Edition (Re-issue), (2010), Vol. 10.*

9. In the exercise of this discretion though the Court must always have regard to the fact that costs

awards are all about indemnification, the purpose of costs should always be to indemnify fully or partially the successful party for the expenses incurred in hiring a Counsel to defend or enforce their legal rights. (see ***Harold vs Smith 1860, 5H. & N. 381.***

10. In the case of; ***British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, 2003 SCC 71.*** the Supreme Court of Canada noted that the traditional purpose of costs awards remained indemnification and that a regular award of costs has four standard characteristics;

(i) They are an award to be made in favour of a successful or deserving litigant, paid by the looser;

(ii) Of necessity, the award must await the conclusion of the proceedings as the success or entitlement cannot be determined before that time;

(iii) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceedings;

(iv) They are not payable for the purpose of assuring participation in the proceedings

11. However, it is noteworthy that in addition to indemnity, other justifications have been introduced in law for award of costs, which includes: encouragement of settlement, the prevention of frivolous and vexatious litigation and discouragement of unnecessary steps in the proceedings.

12. Be that as it may, the fixing of costs is to be governed by an overarching principle of reasonableness. In the case of; *Zesta Engineering Ltd vs Cloutier (2002) O.J.No. 4495(C.A.)(QL* it was stated that:

"In our view the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant."

13. Finally the court will also consider inter alia; the subject matter of suit, the circumstances under which the suit was instituted and/or terminated and the general conduct of the parties.

14. In the instant case, I note that, when the Plaintiff instituted this suit, he had not been given back his title deed by the Defendant. Although I did not see among the documents any letter filed by the Plaintiff showing that the Plaintiff had written to the Defendant to be given the same and the Defendant had refused, it is clear that the title deed was released after the suit was filed.

15. I have looked at the Defence filed in response to the allegation under paragraph 9 of the Plaint that, the Defendant refused and/or neglected to give back to the Plaintiff his original title deed, the Defendant responded to the same, under paragraph 6 of the Defence as follows;

"the Defendant denies the contents of paragraph 8 and 9 of the Plaint and puts the Plaintiff to strict proof thereof"

16. It is therefore clear that the Defendant does not expressly deny that they were holding the Plaintiff's title deed. I have also looked at the statement written by Gerald Gakiri, the Credit Manager at the Defendant's Karatina Branch and note that at paragraph 10, he states as follows;

"the Plaintiff filled a security withdrawal request form on 13/2013 which request was sent to the Central Custody Unit who informed the Karatina Branch that they could not trace the title."

17. At paragraph 11 the witness further states as follows;

"the Central Custody Unit are adamant that they did not receive the said title since then all our efforts to locate and/or otherwise recover the original title deed No. Kiine/Kiangai/1478 has been in vain."

18. It is therefore clear as aforesaid that the Defendant did not release the title deed to the Plaintiff as and when it was due and necessary. That is what informed the filing of the suit herein. In that regard, the Defendant cannot deny that they are liable to indemnify the Plaintiff for any costs incurred from the date of filing of the suit, the 14th August 2013 to the date when the title deed was finally released to the Plaintiff. According to the Court record, that should have been on or before 29th May 2014.

19. In relation to the prayer seeking for general damages for breach of contract, as aforesaid, the law is settled that, costs follow the event. The Defendants instructed a lawyer to defend the suit and indeed filed a statement of Defence, witness statements and list of documents. They have been defending the matter from the date of inception up to the 5th February 2018, when the prayer relating to general damages was withdrawn.

20. The Plaintiff argues that the substantive prayer in the suit was one of release of the Title document to the Plaintiff and the issue of damages was just a corollary to the loss of the title and would not have arisen was there no loss of the title. With due respect, if that was the case, then the Plaintiff should have withdrawn the claim for damages. It was not done the time when the title was released.

21. However in view of the fact that this claim was not fully canvassed in Court, so as to determine which party would have been the successful, it is only fair and just that the Defendant be paid costs for defending the claim up to and including the date of withdrawal.

22. In conclusion therefore, I find that the Plaintiff is entitled to costs in relation to prayer (a) of the Plaint, that is, from the date of filing of the suit until the date when the title was released, and the Defendant is entitled to costs from the date of entering appearance in this matter and defending the claim under prayer (b) of the Plaint until the time it was withdrawn. No other orders are given on costs.

23. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 3rd day of May 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Ms. Nthiwa for Mr. Kabiru for the Plaintiff

Ms. Muchui for the Defendant

Lang'at…….....Court Assistant