



Kanyeki & another (The registered trustees suing on behalf of Kenya Railways Staff Retirement Benefits Scheme) v Blue Water Properties Limited & another (Environment & Land Case E002 of 2021) [2023] KEELC 16497 (KLR) (21 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16497 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E002 OF 2021
LL NAIKUNI, J
MARCH 21, 2023**

BETWEEN

JAMES KARIUKI KANYEKI 1ST PLAINTIFF

WAMUKOTA TOILI 2ND PLAINTIFF

**THE REGISTERED TRUSTEES SUING ON BEHALF OF KENYA RAILWAYS
STAFF RETIREMENT BENEFITS SCHEME**

AND

BLUE WATER PROPERTIES LIMITED DEFENDANT

AND

I & M BANK LIMITED INTENDED DEFENDANT

RULING

I. Introduction.

1. Both the Intended 2nd Defendant – “I & M Bank Limited” and the 1st Defendant – “Blue Water Properties Limited” moved this Honorable Court for its determination through two (2) Notice of Motion applications brought under a Certificate of Urgency dated the 24th June, 2022 and 22nd July, 2022 respectively in that sequential order. For good stead, the Honorable Court has decide to deal with these two sets of pleadings simultaneously as set out herein below.

II. The Intended 2nd Defendants’ case

2. As stated above, the application by the Intended 2nd Defendant herein is the one dated 24th June, 2022. The application is brought under the provision of Articles 10, 40, 50 and 159 of *the Constitution* of Kenya 2010, Sections 26, 30 and 56 of the *Land Registration Act*, No. 3 of 2012, Sections 3 and



18 of the *Environment and Land Court Act*, No. 19 of 2011, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Cap. 21 and Orders 1 Rule 3, Order 21 Rule 6 and Order 51 Rule 3 of the Civil Procedure Rules 2010. The Intended 2nd Defendant sought for the following orders:

- a. Spent;
 - b. Spent;
 - c. Pending the hearing and determination of this application inter - partes, there be a stay of execution of the Judgment dated 15th December 2021 and the Plaintiffs, his servants or agents and the Land Registrar, Mombasa be restrained from interfering with the legal charges of I & M Bank Limited registered against the charged property known as Title No. Mombasa/Block / XXVI/941 Chambilo Road.
 - d. Leave be granted to I & M Bank Limited to be joined in this suit as the 2nd Defendant.
 - e. The Judgment dated 15th December 2021 be set aside unconditionally and I & M Bank Limited be granted leave to file its Defense within 14 days of the Order of the Court and the hearing start “de novo”.
 - f. Cost of the application be in the cause.
3. The Application is premised on the following ground on the face of it:
- a. The Intended 2nd Defendant (hereinafter referred to as “The Bank”) was condemned unheard and its security was in jeopardy of being set aside causing it irreparable loss exceeding a sum of Kenya Shillings Two Billion, Two Seventy Two Million, One and Seven Hundred, Seven Seventy Five Thousand and Sixty two Cents (Kshs. 2,272,107,775.62) as at 2nd July 2021.
 - b. They pleaded on the need of the right to be heard. Under the provision of Order 21, Rule 6 of the Civil Procedure Rules, 2010 where there was a prayer for a Judgment, the grant of which would result in some alteration to the Certificate of title of land registered under any written law concerning the registration of title to land, a certified copy of the title should be produced to the Court before any such Judgment was delivered. This was not taken into consideration.
 - c. They cited the case of “Kiai Mbaki & 2 others – Versus - Gichuhi Macharia & another [2005] eKLR, where the Court of Appeal stated as follows as regards the right to be heard:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.
 - d. In addition, they also referred to the case of:- ”Onyango Oloo – Versus - Attorney General [1986 - 1989] EA 456 the Court of Appeal expressed itself as follows:

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.....Denial of the right to be heard renders any decision made null and void ab initio.”



- e. They averred that a court of law could not issue orders affecting the interests of a party in his absence. To this they cited the case of:- ”Nakuru ELC No. 313 OF 2014 Ruth Wanja Mwangi – Versus -Samuel Mwaura Njuguna & 2 others [2017] eKLR where the Court held:-
- “I have perused the Complaint herein and I do not see any case pleaded by the Plaintiff against the DCIO Naivasha or against the Registrar of Persons. The Court cannot issue orders against persons who are not parties to the case before it and who have therefore not been given a hearing.”
- f. A decision disentitling a third party to property in land requires that the party to be heard. This was so held by Hon Lady Justice Wilfrida Okwany in the case of “Jackline Kemuma Orioki – Versus - Jackline Nyaboke Gichana & another [2017] eKLR wherein she stated that failure to join a third party in whose name the property was registered was fatal:
- “Turning to the issue of rectification of the register, I am in total agreement with the respondent’s submissions that this is a prayer that cannot be issued in the absence of the third party, Linet Kemunto Nyariki, in whose name the suit property is currently registered. The applicant did not enjoin the said third party to these proceedings and indeed it is a cardinal principle of natural justice that no party should be condemned unheard. Needless to say, failure to enjoin the third party to these proceedings was a fatal omission on the part of the applicant. It is therefore my finding that granting orders to delete the third party’s name from the register in respect to the suit property would be tantamount to condemning the said third party unheard.
- g. They averred that the Court had no jurisdiction to issue orders that may impliedly lead to the setting aside of the Bank’s lawfully registered legal charges.
4. The said application was premised on the basis, testimonial facts and averments founded on the face of the a 22nd Paragraphed Supporting Affidavit sworn by PERIS WAIRIMU CHEGE, sworn and dated 24th June, 2022 and annexures marked as “PWC” – 1 to 7 She deponed that:-
- a. She was employed by the Bank as a Senior Legal Manager and duly authorized and competent to swear the affidavit.
- b. There was now produced and shown to her copies of the documents from Pages 1 to 175 forming the bundle of documents in support of the exhibit marked ‘PWC’ -1’.
- c. This suit involved “inter – alia” a claim for a permanent injunction restraining the 1st Defendant herein from any manner causing further acts of vandalism and wanton destruction on the property known as Title No. Mombasa/Block / XXVI/941 [hereinafter referred to as “the Charged Property”].
- d. The said suit also sought a declaration that the Lease agreement made on 28th May 2014 between the Plaintiff and 1st Defendant be rescinded for failing to comply with the obligations under the lease.
- e. The said Charged Property was owned by the 1st Defendant who held a 43-year long term lease that commenced on 1st June 2014 and shall expire on 1st June 2063.
- f. The said long term lease was acquired by the 1st Defendant from the Plaintiffs after a competitive bid which was advertised in the local dailies known as “The Daily Nation”



Newspaper on 3rd April 2014 and extended to 11th April 2014. A copy of the Search was exhibited at page 1 of the affidavit.

- g. Pursuant to a Letter of Offer dated 15th September 2015, the Bank extended credit facilities to Atta [Kenya] Limited [hereinafter referred to as “the Borrower”].
- h. The said Borrower executed the said Letter of Offer and duly accepted all the terms and conditions contained therein as particularized hereunder. A Copy of the Letter of Offer was exhibited at Pages 2 to 15 of the affidavit.
- i. As security for the said facilities, the 1st Defendant [hereinafter referred to as “the Chargor”] and the Borrower executed a Charge dated 3rd March, 2015 over the suit property in favor of the Bank. A copy of the Charge was exhibited at Pages 16 to 55 of the affidavit.
- j. The Plaintiffs herein consented to the said property to be charged to the Bank. A copy of the said Consent was exhibited at Page 56 of the Affidavit.
- k. In May 2020, the 1st Defendant herein sued the Plaintiffs herein in the Civil Case of: “Mombasa ELC No. 50 of 2020: Blue Water Properties Limited – Versus - The Registered Trustees Kenya Railways Staff Retirement Benefits Scheme seeking “inter alia” a permanent injunction restraining the Plaintiffs from entering disposing and alienating the Plaintiff’s quiet possession of the Charged Property. A copy of the Amended Plaint as exhibited at pages 57 to 60 of the affidavit.
- l. On 12th July 2021, the Bank filed an application under Certificate of Urgency seeking to be joined in the suit as the Chargee. A copy of the said application and supporting affidavit were exhibited at Pages 61 to 69 of the affidavit.
- m. The Court directed the application to be served upon all parties and fixed the same for mention for further directions on 11th November 2021.
- n. However, on 13th July 2021, the Plaintiffs and the 1st Defendant herein filed a consent in court whereby the suit was marked as withdrawn and whereby some thrown away costs in favor of the 1st Defendant herein assessed at a sum of Kenya Shillings One Hundred Thousand (Kshs. 100, 000.00) was agreed on. A copy of the filed Consent and the Consent Order were exhibited at Pages 70 to 71 of the affidavit.
- o. In the foregoing she was very shocked to learn that there existed other suits between the Plaintiffs herein and the 1st Defendant namely:
 - “ Mombasa ELC No.E02 of 2021:James Kariuki Kanyeki & Another [Suing on behalf of the Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme J – Versus - Blue Water Properties Limited.
 - Mombasa ELC Miscellaneous Application No.E005 of 2022:James Kariuki Kanyeki & Another [Suing on behalf of the Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme] – Versus - Blue Water Properties Limited.
- p. She urgently instructed the Bank’s advocates on record to peruse the file and find out the position in the said two suits. Subsequently, the said Advocates perused the Court files in the two (2) suits and advised her that:



- i. Mombasa ELC No.E02 of 2021: James Kariuki Kanyeki & Another [Suing on behalf of the Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme] – Versus - Blue Water Properties Limited was filed by the Plaintiffs herein.
 - ii. In the long run, the Plaintiffs herein obtained Judgment on 15th December 2021 from the said suit after a formal proof hearing.
 - iii. The Plaintiffs herein then filed a Civil Suit “Mombasa ELC Miscellaneous Application No.E005 of 2022: James Kariuki Kanyeki & Another [Suing on behalf of the Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme – Versus - Blue Water Properties Limited”.
- q. From the said suit, the Plaintiffs sought an order for the Land Registrar, Mombasa to cancel entry No. 1 with regard to the charged property known as Title No. Mombasa/ Block / XXVI/941 Chambilo Road which entry had granted a Certificate of Lease to the 1st Defendant.
- r. On 16th May 2022, the Court granted the said order sought by the Plaintiffs and cancelled the said entry. A copy of the Order was exhibited at Page 72 of the affidavit. She depend that the Bank would suffer grave prejudice if the orders herein were not granted for the following reasons:
- i. 1st Defendant never disputed the fact that the Bank advanced it a loan which was still outstanding.
 - ii. The said debt now stood at Kenya Shillings Two Billion, Two Seventy Two Million, One and Seven Hundred, Seven Seventy Five Thousand and Sixty two Cents (Kshs. 2,272,107,775.62) as at 2nd July 2021. Photostat copies of the Statements of Account were exhibited at Pages 73 to 170 of the affidavit.
 - iii. If the orders were not granted, the Bank would suffer irreparable loss as it would lose its security for the loan advanced to the 1st Defendant.
- s. In the circumstances, the Bank ought to be joined in this suit in order that its interests were protected. The Bank ought to be joined in this suit in order that the dispute between all the parties condemned in this suit may be heard and finally determined. The Bank had a serious defense as shown in the draft defense which raises serious triable issues. This draft may be modified and the Bank may consider including a counterclaim. A copy of the draft Defense was exhibited at Pages 171 to 175 of the affidavit.
- t. Save where otherwise stated, she swore this affidavit from facts with her knowledge, information and belief, sources of which have been disclosed and pray that the application be allowed as prayed.

III. The 1st Defendant's case

5. The 1st Defendant filed the Notice of Motion application dated 22nd July, 2022. It was brought under the dint of Article 40 and 159 of *the Constitution* of Kenya 2010, Sections 1A, 1B,3A and 63 (e) of the *Civil Procedure Act* and Order 10 Rule 11, Order 21 Rule 6 .Order 51 Rule 1 of the Civil Procedure Rules, 2010, Cap. 21 and Sections 6 & 7 of the *Arbitration Act* of 1995. The application sought the following:-

- a. Spent;



- b. That this Honorable Court be pleased to stay the execution of the Judgment delivered on 15th December 2021 and the Decree issued therefrom and any consequential Orders issued in execution of the said Decree on 16th May 2022 in ELC Misc. App No.E005 OF 2022 and further the Plaintiff, its servants, agents and/or the Land Registrar, Mombasa be restrained from interfering, rescinding or cancelling the registration of the Lease Agreement dated 28th May 2014 registered over Title No. Mombasa / Block/ XXVI/941 situated along Chambilo Road in Mombasa pending the hearing and determination of the application inter - partes.
 - c. That this Honorable Court be pleased to restrain the Plaintiff, its servants and agents from evicting, taking possession and/or interfering with the Defendant's quiet and peaceful possession of the Suit Property Title No. Mombasa/Block / XXVI/941 situate along Chambilo Road pending the hearing and determination of this application inter - partes.
 - d. That this Honorable Court be pleased to stay the execution of the Judgment delivered on 15th December 2021 and the Decree issued therefrom and any consequential Orders issued in execution of the said Decree on 16th May 2022 in ELC Misc App No.E005 OF 2022 and further the Plaintiff, its servants, agents and/or the Land Registrar, Mombasa be restrained from interfering, rescinding or cancelling the registration of the Lease Agreement dated 28th May 2014 registered over Title No. Mombasa /Block/XXVI/941 situate along Chambilo Road in Mombasa pending the hearing and determination of the Suit and/or arbitration.
 - e. That this Honorable Court be pleased to restrain the Plaintiff, its servants and agents from evicting, taking possession and/or interfering with the Defendant's quiet and peaceful possession and enjoyment of the Suit Property Title No. Mombasa/Block / XXVI/941 situate along Chambilo Road pending the hearing and determination of the Suit and/or arbitration.
 - f. That this Honorable Court be pleased to set aside unconditionally the Judgment entered on 15th December 2021 and the Decree issued therefrom against the Defendant, and all consequential orders made and any consequential Orders issued in execution of the said Decree and in particular the order made on 16th May 2022 in ELC Misc App No. E005 OF 2022 and to direct the Land Registrar Mombasa to re-register the Lease Agreement dated 28th May 2014 over Title Number Mombasa /Block/XXVI/941.
 - g. That upon grant of prayers 5 & 6 hereinabove the Honorable Court do find that it has no jurisdiction to hear the substantive Suit herein and consequently stay the proceedings herein pursuant to the provisions of Section 6 of the *Arbitration Act* and refer the dispute herein to Arbitration in accordance with the arbitration agreement embedded in Clause 19 (9) and (10) of the Lease Agreement dated 28th May 2014.
 - h. That in the alternative and without prejudice to prayer 7 above this Honorable Court be pleased to grant the Defendant unconditional leave to file its Defence and the draft Defence annexed hereto be deemed as properly filed and served.
 - i. That the costs of this application be provided for.
6. The Application is premised on the following ground on the face of it:
- a. The Judgement entered against the Defendant on 15th December 2021 had the net effect of rescinding a 50 years Lease Agreement made between the Plaintiff and the Defendant and offered as Security with the consent in writing of the Plaintiffs to the Bank to secure advances to the Defendant.



- b. The mandatory 21 days' notice of Intention to terminate the Lease was never issued to the Defendant as stipulated under the Lease Agreement.
 - c. The Defendant was not served with the Summons to enter Appearance and the pleadings either in person or by any other permitted mode of service and learnt of this Suit on or about 12th June 2022 when the Plaintiff posted security guards at the Suit Property. The said Judgment was un - procedural and irregular and should be set aside 'ex debito justitiae'.
 - d. The Defendant's director was not served with the pleadings and Summons via the mobile numbers referenced in the Affidavits of service while the Postal address to wit, P.O. Box number 1xxxx-00400 Nairobi, through which the said pleadings were purportedly served did not and never belonged to the Defendant.
 - e. Despite being aware of the Bank's interest in the Suit Property having consented to creation of a security over the Suit Property the Plaintiffs deliberately failed to enjoin the Bank in the proceedings before the Court.
 - f. In any event the Court had no Jurisdiction to hear and determine the Suit in light of the express provisions of Clause 19 (9) and (10) of the Lease Agreement dated 28th May 2014 made between the parties which expressly stipulated that any dispute relating to or arising from the Agreement or termination thereof would:
 - i. First be resolved within 15 days by way of consultation between the parties in good faith upon issuance of a written notice by one party to the other; and
 - ii. If the dispute was not resolved within 15 days by consultation, the same should be referred to a single arbitrator to be agreed upon by the parties and in default to be appointed by the Chairman of the Chartered Institute of Arbitrators, Kenyan Chapter.
 - g. In the unlikely event that the Court found that it had jurisdiction in the matter the Defendant should in the alternative and without prejudice to the foregoing, plead that if had a plausible defence which raises triable issues and deserves to be heard on merit.
 - h. In view of the foregoing, it was evident that the Plaintiffs' claim together with the proceedings leading up to entry of Judgment against the Defendant were anchored on gross non - disclosure of material facts well calculated to steal a match against the Defendant and to deny it the right to be heard in the appropriate forum in accordance with the contractual bargain.
7. Emphatically, the application was based on the premise, testimonial facts and the averments made out under the 49 Paragraphed Supporting Affidavit sworn by Diamond Hasham Lalji , dated 27th July, 2022 and the fifteen (15) annexures marked as "DHL – 1 to 15". He deponed that:-
- a. He was a Director of the Defendant Company fully conversant with the facts of this matter hence competent to make this affidavit with authority of the Defendant and on its behalf.
 - b. In the first instance, this Honorable Court lacked the Jurisdiction to hear and determine this Suit and to grant the reliefs sought in light of the express provisions of Clause 19 (9) and (10) of the Lease Agreement dated 28th May 2014 which provided for the procedure for dispute resolution as follows:-
 - i. CLAUSE 19 (9)-Any dispute, controversy or claim arising out of or relating to this agreement or termination hereof (including without prejudice to the generality of



the foregoing, whether in its interpretation, application or implementation/,shall be resolved by way of consultation held in good faith between the parties. such consultation shall begin immediately one party has delivered to the other written request of such consultation. If within fifteen (15) Business Days following the date on which such notice is given the dispute cannot be resolved, the dispute, controversy or claim shall be submitted to arbitration accordance with Clause 19 (10) below.

- ii. Clause 19 (10) - should any dispute arise between any of the parties concerning this agreement or a termination hereof (including, without prejudice to the generality of the foregoing, whether in its interpretation, application or implementation) and the consultation process referred to in Clause 19 (9) shall not have resolved such dispute, the dispute shall upon application by any party, be referred for arbitration to a person acceptable to all such relevant parties, or if such parties cannot agree on the appointment of such person within a period of thirty (30) days from the date of such application, then the dispute shall be referred to arbitration by a single arbitrator to be appointed by the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch upon written request of either party. The Appointment of the Arbitrator shall be final and binding on the parties. The arbitration shall take place in Nairobi, Republic of Kenya and the language of the arbitration shall be English. The decision of the arbitrator shall be final and binding on the parties and may be made an order of a court of competent jurisdiction.
- c. Notwithstanding the foregoing, a party was entitled to seek preliminary injunctive relief or interim or conservatory measures from a Kenyan Court of competent jurisdiction pending the final decision or award of the arbitrator.” Annexed herewith and marked “DHL - 1” was a copy of the Lease Agreement and the Certificate of Lease.
- d. On or about 12th June, 2022 the security guard employed by the Defendant on the suit Property was shown a Court order issued on 16th May 2022 ELC Mbsa APP No. E05 of 2022 by a security guard instructed and/or sent by the Plaintiff to the Suit Property and advised that the Plaintiff intended to take over possession of the Property from the Defendant and post its security personnel thereat. Annexed herewith and marked as “DHL - 2” was a copy of the Order.
- e. The attempted take - over was promptly brought to the attention of the Defendant and who duly instructed their Advocates on record to peruse the Court file in the above matter and which matter disclosed the existence of the instant Suit and the Judgment delivered on 15th December 2021 and from which Judgment the Plaintiffs’ sought the order issued in the aforementioned Misc. App No. E005 OF 2022.
- f. Granted that the Defendant had offered the Suit Property as collateral to the Bank, they duly notified the Bank of the imminent threat to the security as required under the Charge Instrument issued in favour of the Bank.
- g. The Bank thereafter filed an application dated 24th June 2022 and which came up for hearing on 14th July 2022 and wherein they instructed their Advocates on record to represent them. The Defendant shall crave to refer to the Charge document filed in the said application by the Bank.
- h. Upon obtaining the pleadings, they noted that the matters filed by the Plaintiffs was commenced by a Plaint filed on 5th January 2021 and thereafter vide an Amended Plaint filed



on 19th January 2021. He referred the Court to the Plaintiffs' affidavits of service by a Paul Odhiambo Outah and filed in Court by the Plaintiffs' Advocate which averred as follows:-

- a. Affidavit of Service sworn on 21st January 2021 and filed in Court on 22nd January 2021 wherein it alleged that the Summons dated 12th January 2021 and the Plaintiff dated 5th January 2021 were personally served upon the Defendant on 13th January 2021 through his mobile numbers stated in the affidavit and to P.O. Box 1xxxx-00400 Nairobi;
- b. Affidavit of Service sworn on 21st January 2021 and filed in Court on 22nd January 2021 wherein it alleged that the Amended Plaintiff dated 19th January 2021 were personally served upon the Defendant on 20th January 2021 through his mobile number stated in the affidavit of service and to P.O. Box 1xxxx - 00400 Nairobi under cover of a letter dated 19th January 2021 addressed to the said address;
- c. Affidavit of Service sworn on 12th March 2021 and filed in Court on 15th March 2021 wherein it alleged that the Summons to Enter Appearance dated 18th February 2021 and the Amended Plaintiff and other pleadings were personally served upon the Defendant on 25th February 2021 through his mobile number stated in the affidavit and to P.O. Box 1xxxx - 00400 Nairobi under cover of a letter dated 19th February 2021 addressed to the said address. Annexed herewith and marked "DHL - 3(a to c)" were copies of the affidavits of service and the accompanying letters";
- i. Whereas the cell phone numbers mentioned were registered to him, he vehemently denied receipt of any of the pleadings and summons allegedly served through the numbers and it is succinctly discernible from the affidavits of service that neither was the process server's mobile number that allegedly sent the pleadings and documents disclosed nor was it stated whether they were sent via SMS or WhatsApp messaging services to him.
- j. Further, the above-mentioned Postal address did not belong to the Defendant. Instead, the correct Postal address for purposes of service upon the Defendant was P.O Box 66249 - 00800 Nairobi and the same was clearly captured in Schedule 2 of the duly executed Lease Agreement dated 28th May 2014 and also in the Charge Instrument consented to by the Plaintiff.
- k. To add to the confusion, he had been shown the Judgment delivered on 15th December, 2021 which made reference to an Affidavit of service dated 21st February, 2021 and filed in Court on 21st January, 2021, unless the reference to 21st February, 2021 was a genuine typographical error by the Court in the Judgment, there was no such affidavit dated 21st February, 2021 filed in the present matter and the filing of the affidavit could not predate its execution.
- l. The mode of service did not qualify as personal service as alleged in the affidavits. It beat simple logic why the Plaintiff could not serve the Defendant personally and being the lessor of the Suit Property, the Plaintiff was fully aware of the Defendant's place of business and/or the alternate address of service through the Advocates Firm stated in Schedule 2 of the Lease Agreement.
- m. There was no service of Summons and pleadings herein upon the Defendant and in the absence of service the ensuing Judgment was improper and irregularly obtained having denied the Defendant an opportunity to defend the Suit. In the absence of service, the ensuing Judgment was improper and irregularly obtained having denied the Defendant an opportunity to defend the Suit. The Lease was for a term of 50 years commencing 1st June 2014 and ending 1st June 2063. On 3rd May 2015 the Plaintiff issued a written consent allowing the Defendant to Charge



the Suit Property to the Bank to secure advances to it and which Facility the Defendant was still servicing. (The Charge Instrument was attached to the Bank's Notice of Motion dated 24th June 2022).

- n. The Lease required dutiful and diligent payment of rent to the Plaintiff and which rent the Defendant duly settled up until September 2021. The Defendant had by the said date paid up a sum of Kenya Shillings Thirty Seven Million Thirty Nine Thousand Five Ninety hundred (Kshs. 37,039,590.00) to the Plaintiff in rent where after the Plaintiff instructed the Defendant not to pay the rent. Annexed in the application and marked as "DHL – 4" was a copy of the rent statement and Plaintiff's letter dated 27th January 2022.
- o. It was indeed true that the lease required the Defendant to carry out refurbishment of the developments erected on the suit property. Vide a letter dated 17th March 2020 the Plaintiff wrote to the Defendant expressing their concern that the Suit Property had deteriorated under the Defendant's watch. Annexed in the application and marked as "DHL – 5" was a copy of the letter. Vide a letter response dated 26th March 2020 the Defendant attached proof of Architectural plans that were to be undertaken to spruce up the developments on the Suit Property. Annexed herewith and marked as "DHL – 6" was a copy of the letter. The foregoing notwithstanding, the Defendant further assured the Plaintiffs that it was engaging a different contractor and security company as some of the material and fixtures that were delivered to the site and meant to be utilized towards refurbishing the developments had been stolen and a claim lodged.
- p. The Plaintiff was also made aware that the Defendant was to refurbish and sub - let the Property to the Directorate of Criminal Investigations (DCI) staff quarters but the DCI pulled out of the deal and opted to offer housing allowance to its employees. Annexed in the application and marked as "DHL – 7" were copies of correspondences in support of the foregoing. On 23rd April 2020, the Defendant was surprised to learn that the Plaintiff had through a newspaper advertisement invited bids for sale of the three (3) of their properties including the Suit Property. Annexed in the application and marked as "DHL – 8" was a copy of the Newspaper Advertisement.
- q. The Defendant nonetheless procured the tender documents to indeed confirm the terms of sale and description of the properties. Annexed in the application and marked as "DHL – 9" was a copy of the tender documents. The Defendant was shocked to learn that the tender documents did not disclose the Defendant's interest in the Suit Property despite the Lease still being in subsistence. In addition, the Plaintiffs' had also failed to capture the Bank's interest in the Suit Property. This adverse acts by the Plaintiff prompted the Defendant to move to Court via ELC No.50 of 2020 on 5th May, 2020 to stop the Plaintiff from prejudicing its rights. Annexed in the application and marked as "DHL – 10" was a copy of the Application filed.
- r. It was later agreed by consent that the above matter would stand withdrawn. Annexed in the application and marked as "DHL – 11" was a copy of the Consent Order. Unknown to the Defendant, the Plaintiffs had also filed the present suit seeking termination of the Lease on the basis of non - performance but failed to disclose the same to the Defendant. The mandatory 21 days' notice of termination to terminate the lease was never issued by the Plaintiff to the Defendant vide the designated address of service captured in the Lease and in the circumstances these proceedings were prematurely filed. The Defendant would later discover, as explained hereinabove, that the present suit had been heard "ex – parte" and Judgment entered on 15th December 2021. They were surprised that the Plaintiff had failed to serve the Defendant with



the summons and pleadings especially in view of the fact that they were always in constant communication and it made absolutely zero sense why the Plaintiff did not just serve the Defendant personally. They also discovered that the Plaintiff had failed to enjoin the Bank as a party to the suit knowing fully well that the Bank had vested interest over the Suit Property by virtue of the aforementioned Charge.

- s. They also later discovered that the Plaintiff had filed a Miscellaneous Application no. E005 of 2022 dated 8th February 2022 seeking cancellation of the subject lease entry in the title to the Suit Property. Annexed in the application and marked as “DHL – 12” was a copy of the Application and the Order issued. The Defendant was also not served with the said Application and either in person or through him as alleged in the Affidavit of Service filed in Court in the said matter on 28th February 2022 wherein its alleged that the said pleadings were served upon himself on 11th February 2022 at his offices at Trident Insurance Company Limited and that he declined to sign. Annexed in the application and marked as “DHL – 13” was a copy of the Affidavit of service.
- t. Neither had he met the said Court Process Server nor been served with any pleadings on the material date. The said affidavit was couched in falsehoods. As a matter of protocol and practice, all documents of a legal nature intended either for the Defendant, Trident Insurance Company Limited or any other sister companies were directed by the receptionist to the Legal Department and not to him and he had enquired from the said department and advised that no such pleadings were received on the material date. Annexed in the application and marked as “DHL – 14” was the Affidavit sworn by Gertrude Yvonne Muthoni Gichuru, a Legal Officer at the said department.
- u. If indeed the Plaintiff knew where to serve the Defendant or himself as deponed at Paragraph 36 of the supporting affidavit there could be no plausible explanation for the failure to serve the Summons and the pleadings at the said offices. Pursuant to the provision of Section 7 (h) of the Land Act, No. 6 of 2012 long-term leases exceeding 21 years were “de – facto” recognized as a method of acquisition of title to land. Thus, the cancellation of the long - term lease could only be through a substantive Suit served upon all the parties and not by way of a miscellaneous application. The Lease over the Suit Property was used as security by the Defendant to obtain a facility from the Bank as indicated heretofore and cancellation of the same would not only prejudice the Bank but would also open up the Defendant to a myriad of Court cases.
- v. If the aforementioned orders were not expeditiously vacated, the Defendant herein stood to suffer insurmountable prejudice without being afforded an opportunity to be heard. In the event, it was an express term of the lease that any disputes arising therefrom were to be resolved by way of consultations to held in good faith between the parties where if within 15 days the conflict could not be resolved, the same was to be referred to Arbitration.
- w. This Honorable Court therefore lacked Jurisdiction to hear this Suit and they accordingly prayed that the Court do set aside the Judgment, issue interim orders sought and stay the proceedings pending the determination of the dispute between the parties through arbitration. In the alternative and without prejudice to the contents of Paragraphs 43 and 44 of their Supporting Affidavit and without conceding to the jurisdiction of the Court, the Defendant averred that in the unlikely event the Court found that it has jurisdiction, the Defendant had a good Defence which raises triable issues and it would be in the interest of justice for the Defendant to be given an opportunity to defend the suit. Annexed in the application and marked as “DHL – 15” is the draft Defence. The Plaintiffs’ claim together with the proceedings leading up to entry of Judgment against the Defendant were majorly anchored on gross non -



disclosure of material facts well calculated to hoodwink this Honorable Court and to prejudice the Defendant. The Defendant would suffer irreparable loss if the proceedings and Judgment were not set aside and the orders sought herein allowed as prayed. The Defendant had a strong defence which raises triable issues and it would be in the interest of justice for the Defendant to be given an opportunity to defend the suit in whichever forum as the Court may dictate.

IV. The Plaintiffs' case on the Notice of Motion application dated 24th June, 2022

8. The Plaintiff opposed the application dated 24th June, 2022 through a 20 Paragraphed Replying Affidavit sworn by JAMES KARUIKI KANYEKI dated and filed on 12th July, 2022 and six (6) annexures marked as "JKK – 1 to 6" annexed thereto. The affidavit was on behalf of the registered trustees suing on behalf of the Plaintiff – the Kenya Railways Staff Retirement Benefits Scheme under their written authority. It was made on the following grounds:-
 - a. He was the registered trustee of the Plaintiff herein, well versed with matters in issue herein and competent to swear the affidavit.
 - b. The Plaintiffs were the registered owners of the property No. Mombasa/Block/ XXVI/941, the subject matter of the suit herein.
 - c. They filed the instant suit on 5th January 2021 and the Summons, Plaint, Amended Plaint and all pleadings herein were served upon the Defendant herein who failed to enter appearance, file defence or resist our claim. The Plaintiffs and the Defendant entered into a lease agreement on 28th May 2014 wherein the Defendant took possession of the developments (residential apartments) on the property No. Mombasa/Block/ XXVI/941 with the covenant to refurbish the apartments alongside other obligations provided for under lease.
 - d. In their pleadings (refer to the contents of Paragraphs 12 and 13 of the Amended Plaint) they were seeking Injunctive Orders and a declaration that the lease of 28th May 2014 was rescinded as a consequence of material breach of terms therein. Below was a reproduced excerpt of the Orders they sought through their Plaint:-
 - i. A declaration that the lease agreement made on 28th May 2014 between the Plaintiff and the Defendant stood rescinded for failing to comply with the obligations set out under Section 66 of the Land Act, 2012.
 - ii. A permanent injunction against the Defendant by herself, her agents and/or appointed attorneys from any manner causing further acts of vandalism and wanton destruction on the property known as Mombasa/Block/ XXVI/941 Chambilo road and the building standing thereon by denying access by the defendant by herself, her agents and/or appointed attorneys into the property.
 - iii. Special damages at Kshs.86,780,760/-
 - iv. Costs of the suit.
 - e. From the Plaint and Amended Plaint filed, the Plaintiff was not seeking any relief from any third party - be it the bank nor any other. That no remedy was sought against them as they were not parties to the lease dated 28th May 2014 annexure marked as "JKK – 3" above).
 - f. Flowing from the proceedings above, the said bank could not be included in this suit as the 2nd Defendant as the Plaintiff did not hold any claim against them and no relief against them was sought vide the Plaint and Amended Plaint filed in Court.



- g. The matter herein was heard and determined through a Judgment of the Court delivered on the 15th December 2021.
- h. The lease agreement dated 28th May 2014 was now rescinded and had ceased to exist, as such, the intended 2nd Defendants claim could not arise from the lease based on reasons stated in the preceding paragraphs and further based on the fact that they did not have privity to the said lease. He attached a copy of the extracted decree and marked it as “JKK - 5 ”and reproduce contents therein as hereunder:-
- i. IT IS HEREBY ORDERED AND DECREED THAT a declaration does hereby issue that the lease agreement made on 28th May 2014 between the 1st and 2nd plaintiffs and the defendant be and is hereby rescinded for failing to comply with the obligations under the lease and the obligations set out under Section 66 of the Land Act, 2012.
 - ii. That there be and is hereby granted a permanent injunction against the defendant by herself, her agents and/or appointed attorneys from any manner causing further acts of vandalism and wanton destruction on the property known as Land registration Number Mombasa/Block XXVI/941 Chambilo Road and the building standing thereon by denying access by the Defendant by herself, her agents and or appointed attorneys into the property.
 - iii. That the 1st and 2nd Plaintiffs be awarded special damages at a sum of Kenya Shillings Eighty-Six Million, Seven Hundred eighty thousand, seven hundred sixty (Kshs. 86,780,760.00)
- i. That the costs of this suit to the 1st and 2nd Plaintiffs be borne by the Defendant.
 - j. Connected to the preceding, the draft defence annexed by the Applicant did not relate to the lease dated 28th May 2014 and more importantly, no claim was made against the Plaintiff herein arising therefrom.
 - k. The Applicants claim (if any) was against the Defendant herein and the Plaintiff should not be drawn into such matter as she did not guarantee any performance on behalf of either party.
 - l. Further, the Applicants claim did not seek any remedy to resuscitate the agreement dated 28th May 2014. Thus, their claim (if any) could be resolved outside the instant proceedings.
 - m. The Applicant herein not being a party to the rescinded lease dated 28th May 2014 could not urge for an unconditional discharge of the decree/setting aside decree herein and unconditional leave to join the matter herein yet the Defendant herein had not made a similar application to set aside the Judgment and decree of the Court.
 - n. Based on the preceding and strictly without prejudice to the contents of Paragraphs numbers 7, 8, 10, 11, 12, 13 and 14 of this Replying Affidavit, if the Honorable Court were minded to interfere with the regular Judgment delivered on 15th December, 2021 and consequent decree, then such interference should be conditional upon such terms as the Honorable Court deemed fit while protecting the proprietary interests of the Plaintiffs/Decree holder arising from the decree dated 20th January 2022.
 - o. Any interference with the decree of the Court ought to factor the losses so far borne by the Plaintiff. Thus, the Honorable Court should Order that the Applicant deposits in a joint interest earning account the special damages of Kenya Shillings Eighty Six Million, Seven



Hundred eighty thousand, seven hundred sixty (Kshs. 86, 780, 760.00) as per the decree of the Court.

- p. The subject application was a non-starter, made without bona fides or privity of contract and intended to delay the execution of the decree issued herein.

VII. The Plaintiff's Replying Affidavit to the Notice of Motion application dated 22nd July, 2022

9. The Plaintiff further opposed the application dated 22nd July, 2022 through a 40 Paragraphed Replying Affidavit sworn by JAMES KARIUKI KANYEKI on 26th August, 2022 together with eight (8) annexures marked as "JKK – 1 to 8" annexed hereto. He deposed that:
- a. The Plaintiffs was the registered owners of the property No. Mombasa/Block/XXVI/941, while the Defendant/Applicant was a lessee of the property the subject matter of the suit herein.
 - b. The Plaintiffs filed the instant suit on 5th January, 2021. They were advised by their advocate on record Mr. Malombo that the Summons to Enter Appearance, the Complaint and all the pleadings herein were served upon the Defendant herein but who failed to enter appearance, file defence or resist our claim.
 - c. The Defendant/Applicant - Blue Water Properties Limited never had a physical place of operations/office thus the summons and all documents referred in the preceding paragraph were served through the director Diamond Hasham Lalji of Mobile phone numbers 0722 xxx xxx by registered post through his Postal address 1xxxx - 00400 Nairobi. This Postal address was disclosed by the Defendant/Applicant's director through his affidavit in support of the motion dated 6th May 2020 filed in the civil suit - Mombasa ELC NO.50 OF 2020 appearing on page 118 of the application herein and reproduced as below:-

“Diamond Hasham Lalji of P.O. Box 12705-00400 NAIROBI do hereby make oath and states as follows:-
 - d. The deponent of the affidavit dated 6th May 2021 Mr. Diamond Hashim Lalji signed the affidavit before a Commissioner for Oaths where he swore and confirmed that the averments in his affidavit were true.
 - e. Service of Summons to Enter Appearance and the Complaint in this suit could not be faulted as the documents were served upon the Director of the Defendant's Company. Further in support, the documents posted to the said Director of the Company of phone number 0722 xxx xxx had never been returned unclaimed.
 - f. The matter herein was heard and determined through a Judgment of the Court delivered on the 15th December 2021. The Honorable Court was satisfied that there was proper service upon the Defendant/Applicant prior to certifying the matter ready for hearing as such the Judgment herein was regular.
 - g. As a consequence of the decree issued by the Honorable Court, the lease agreement dated 28th May 2014 was now rescinded based on proof that the Defendant/Applicant herein failed to discharge the Lessee's obligations under the provision of Section 66 of the Land Act, 2012 as well as other contractual obligations to wit:-



- i. Subject to the provisions of this agreement, the Lessee shall use all reasonable endeavors to procure that the practical Completion date will not be later than the date indicated in paragraph 4 of the second schedule. (Page 8 paragraph 4 of the lease).
- ii. The Lessee shall use all reasonable endeavors in advance of the practical completion Date to comply with such requirements as should permit the relevant planning or municipal authority to issue an occupation certificate for the apartments following the carrying out of the works relating to the apartments. (Page 8 paragraph (ix) of the lease).
- iii. Second Schedule-at paragraph 4 (page 21 of the lease document).
- iv. In the event that the Lessee is unable to complete the transaction by the date indicated in paragraph 4 of the second schedule, such date shall be extended by a period of up to and including six (6) months and the Lessee shall not be entitled to compensation or damages in respect of such delay provided that where practical completion shall become delayed beyond the six (6) months period, the Lessor shall at its sole option be entitled to either:-
 - (a)
 - (b) Rescind this agreement upon the expiry of a twenty - one (21) day notice (completion Notice) sent to the lessee in accordance with Clause 17 (3) above. (page 14 of the lease paragraph 17 (4)).
- h. From the above paragraphs, it was clear that the Lessee failed to comply with fundamental terms of the lease agreement relating to completion. As at December 2021, the Defendant/ Applicant/ Lessee was yet to comply yet it was approximately seven (7) years post execution of the lease.
- i. Similarly, notice under paragraph 17 (3) had already issued and the Defendant/Applicant had not remedied the situation.
- j. Further, the Lessee had already abandoned the lease property and the residential units erected thereon to waste and destruction. The subject property right now was desolate, uninhabitable and vandalized. Also the Defendant/Applicant had never paid rent for a period exceeding eleven (11) months now. Thus, it was clear that the Lessee had breached fundamental terms of contract and she had not discharged her obligations under lease thus no remedy claiming restitution was merited.
- k. The applicant herein left the lease property neglected and vandalized. Hence, it could not purport to seek orders to reinstate her to the lease agreement.
- l. Paragraph 2 of the affidavit of Mr. Diamond Hashim Lalji was irrelevant to these proceedings because of the following:-
 - i. The applicant failed to comply with fundamental obligations of contract such as practical completion.
 - ii. The period for practical completion under lease had never been extended.
 - iii. The Lessee was not paying any rent.
 - iv. The requisite approvals and certificates of occupation had never been sought for nor obtained.



- v. The applicant despite being served with notice to terminate did not respond thus the lease was properly terminated.
- vi. That no dispute exists capable of being resolved through an arbitrator since notice under paragraph 17 (3) had issued and consequently a suit filed herein for rescission of the lease.
- vii. No correspondence is shown inviting the respondent to agree on the choice of an arbitrator and no issues have been isolated for arbitration.
- viii. The Lessor herein will not submit to any arbitration noting that her property is vandalized in the hands of the applicant who presently does not pay any rent nor discharges any obligation under lease.
- ix. The Lessor has rightly approached the court through the amended plaint dated 19th January 2021 seeking the following orders which in any event are within the jurisdiction of this Honorable Court:-A declaration that the lease agreement made on 28th May 2014 between the plaintiff and the Defendant stands rescinded for failing to comply with the obligations set out under section 66 of the Land Act, 2012.A permanent injunction against the Defendant by herself, her agents and/or appointed attorneys from any manner causing further acts of vandalism and wanton destruction on the property known as Mombasa/Block XXVI/941.Special damages of Kshs. 86,780,760/-Costs of the suit.
- m. The contents of Paragraphs 5 and 6 of the Supporting Affidavit by the Defendan/Applicant did not involve the Lessor as the said financial facility was not procured at the best of, nor in favour of the Lessor. In further response, the matter of the charge did not involve the Lessor as a guarantor or beneficiary.
- n. In response to the contents of Paragraphs 8, 9, 10, and 13 of the Defendant/Applicant's affidavit, the Respondent reiterated the contents of Paragraphs 5, 6, 7, 8 and 9 of the Replying Affidavit.
- o. In response to the contents of Paragraph 16, the consent referred to was not issued by the Lessor, executed by trustees of the Lessor under Seal and consented to by the Sponsor of the Lessor (The Kenya Railways) thus the purported consent was of no value. Further, any such consent issued (if any) could not be a basis for breach of obligations under lease nor could it draw the Lessor to matters of charge between the Lessee and a third party.
- p. In further response to the Contents of Paragraph 16,the Lessee and the third party – the Bank - executed a charge document only binding amongst them and stipulating terms between the parties in contract. The charge document and performance thereunder did not involve the Lessor.
- q. In response to the contents made out under Paragraphs 18, 19, 20, 21 and 22 of the Supporting affidavit, the Lessor stated that the documents referred to as annexures marked as “DHL – 6”, and “DHL – 7” were of no value as completion. This was because the was strictly to have been by 31st May 2015 unless extended for a further period of six (6) months which period expired on the 1st of December 2015.
- r. In response to the contents of Paragraphs 23, 24 & 25,the steps of utilizing the property by the registered proprietor was consequent to a decree of the Court. In response to the averments



made out under the contents of Paragraphs 26, 27, 28, 29 and 30 of the Supporting Affidavit, the Respondent stated as follows:-

- i. The Lessor had not taken any facility against the title to the property No. Mombasa/Block XXVI/941 thus no contractual obligation existed between them with any bank or third party.
 - ii. That the matter of the case ELC 50 of 2020 did not affect the matter herein and the consequent Judgment.
 - iii. The Lessee was aware of this suit since its director Mr. Diamond Lalji was served with Summons to Enter Appearance and a Plaintiff.
- s. In response to the issues raised under Paragraph 33 of the Supporting Affidavit, the Lessor had no business joining any third party to the suit herein as the contracting parties were the Lessor and Lessee herein who were already parties to the matter before court. The contents of Paragraphs 34 and 35 of the Supporting Affidavit were of no value in the suit herein as they related to a different case altogether. In response to the averments made out under Paragraphs 36 and 38 of the Supporting Affidavit, the affidavit of Service by the Court Process Server was true and accurate. Indeed, todate, the deponent had not attempted to state the physical whereabouts or offices of the Defendant/Applicant company. In response to Paragraphs 36 and 38, the affidavit of Service by the Court Process Server was true and accurate, the deponent had not attempted to state the physical whereabouts or offices of the applicant company. The contents under Paragraph 37 was irrelevant to these proceedings.
- t. He averred that the contents under Paragraphs 39 and 40 were broad and general expositions of the law and Paragraph 41 was misguided, the Lessor had no legal obligation to sue third parties over a lease between the Lessor and Lessee. Under the Paragraph 43 was overtaken by events as the Lessee stopped paying rent in the months of September 2021 thus no other obligations in the lease could be consulted on or agreed. Under the Paragraph 44 comprised a broad and general exposition of the law and Paragraphs 45 and 48 of the Supporting Affidavit did not bring out a defence raising triable issues. The Court ought to find that the Judgment entered was regular.
- u. He contended that the paragraph 46 of the Supporting Affidavit was insincere and disparaging, the deponent was yet to provide the physical location of the Director's Company. Further to the above, the Lessor had expended over two million shillings in execution of the Judgment of the Court herein. Further, the Lessor had lost use of the property for eleven (11) months' rent which was Kenya Shillings Seven Million, Five Hundred fifty five thousand, five hundred eighty-six shillings and eighty-five cents (Kshs. 7, 555, 586.85). This means that any orders varying the Judgment would seriously prejudice the Lessor and subject its further loss of income and use of its property. (see paragraph I of the lease appearing at page 23 of the lease).
- v. The affidavit was in response to the application dated 22nd July, 2022 and since the subject application was a non-starter bent on delaying the execution of the decree issued. He urged the Court to dismiss the application.

V. 1st Defendant's Replying Affidavit to the application dated 24th June, 2022

10. The 1st Defendant/Respondent responded to the Notice of Motion application dated 24th June, 2022 by the Intended Defendant and response to the Replying affidavit by the Plaintiff sworn on 12th July, 2022 where the director of the 1st Respondent averred that:



- a. For the most part, the 1st Defendant did not contest the contents of the Intended 2nd Defendant's present application together with the supporting affidavit filed thereto.
- b. It was indeed true that the 1st Defendant was the de-facto registered proprietor of the suit property by virtue of a long-term lease dated 28th May 2018 and pursuant to the provision of Section 7 (h) of the *Land Act*, No. 6 of 2012.
- c. The 1st Defendant, with the Plaintiffs' consent as lessor, offered to the Intended 2nd Defendant - the Bank the aforementioned Lease as collateral to secure the advances granted by the Bank to the 1st Defendant as particularized in Paragraph 8 of the Supporting Affidavit.
- d. The 1st Defendant continued to service the facility to date.
- e. To avoid duplication of pleadings and documents, they shall crave leave to refer to the 1st Defendant's Notice of Motion to set aside the judgment.
- f. The 1st Defendant was shocked to learn that the Plaintiffs via a newspaper advertisement dated 23rd April 2020 had invited bids for sale of the 3 of their properties including the Suit Property.
- g. The 1st Defendant procured the tender documents to indeed confirm the terms of sale and description of the properties. The 1st Defendant was shocked to learn that the tender documents did not disclose the 1st Defendant's interest in the Suit Property despite the Lease still being in subsistence, and neither did it capture the Bank's interest in the Suit Property.
- h. This adverse act by the Plaintiff prompted the 1st Defendant to move to Court via ELC No. 50 of 2020 on 5th May 2020 to stop the Plaintiff from prejudicing its rights. It was later agreed by consent that the above matter would stand withdrawn and the Plaintiff would subsequently withdraw the advertised bids over the Suit Property.
- i. Unknown to the 1st Defendant, the Plaintiff then filed the present suit seeking termination of the Lease on the basis of non-performance but failed to disclose or serve the same upon the 1st Defendant.
- j. The Plaintiff despite having full knowledge of the Bank's interest in view of the aforementioned Consent to Charge and in view of the withdrawn Suit, failed to enjoin the Bank as a party to the present Suit.
- k. The Plaintiff had failed to serve the 1st Defendant with the summons to enter appearance as a consequence of which Judgment was entered on 15th December 2021. The issue of non-service was as described under the contents of Paragraphs 4, 8, 9, 10, 12 and 13 of the Supporting Affidavit filed together with the 1st Defendant's Application to set aside the Judgment.
- l. They later discovered as explained in the 1st Defendant's application that the Plaintiff had filed a Miscellaneous Application no. E005 of 2022 dated 8th February 2022 seeking cancellation of the subject lease entry in the title to the Suit Property.
- m. The 1st Defendant was not served with the aforementioned Application and the order as more particularly and clearly explained in the contents Paragraphs 35 to 38 of his Supporting Affidavit filed together with the 1st Defendant's Application.
- n. Pursuant to the provision of Section 7 (h) of the *Land Act*, No. 3 of 2012 the long-term leases exceeding 21 years were "de - facto" recognized as a method of acquisition of title to land.



- o. In view of the above, any cancellation of a long term lease is effectively cancellation of a title, cancellation of the long - term lease could only be through a substantive Suit served upon all the parties and not by way of a miscellaneous application.
- p. The Lease over the Suit Property was used as security by the 1st Defendant to obtain a facility from the Bank as indicated heretofore and cancellation of the same would not only prejudice the Bank but would also open up the 1st Defendant to a myriad of Court cases.
- q. He deposed that if the aforementioned orders were not expeditiously vacated, the 1st Defendant and the 2nd Defendant/ Applicant herein would stand to suffer insurmountable prejudice. In any event and pursuant to Clauses 19 (9) and (10) of the Lease, it was an express term of the Lease that any disputes arising therefrom were to be resolved by way of consultations to held in good faith between the parties where if within 15 days the conflict could not be resolved, the same was to be referred to Arbitration. This Court therefore lacked jurisdiction to hear the substantive suit.
- r. It was in the interest of justice therefore that the Applicant herein be enjoined as a party to the suit and the prayers sought in the present Application be granted and further that the prayers sought in the 1st Defendant's Application also be granted. For the most parts the contents of Paragraphs 1 through to 3 of the Plaintiff's Replying Affidavit were undisputed save to state that the 1st Defendant herein was at present the de facto proprietor of the suit property pursuant to a long-term Lease dated 28th May 2018 and pursuant always to the provision Section 7 (h) of the *Land Act*, No. 3 of 2012.
- s. In response to Paragraph 4 of the Plaintiff's Replying Affidavit the 1st Defendant denied service and further adopts the contents of Paragraphs 4, 8, 9, 10, 12 and 13 of the Supporting Affidavit filed together with its Application to set aside Judgement. The contents of Paragraphs 5 and 6 of the Replying Affidavit are undisputed as they were merely definitive of the crux of the present Application and the Suit in general. In response to Paragraphs 7 and 8 of the Replying Affidavit the 1st Defendant averred that:
 - i. The 1st Defendant had with the Plaintiff's consent offered the Suit Property as collateral to Bank to secure a facility granted to the 1st Defendant and which facility the 1st Defendant continued to service.
 - ii. The Bank, with the Plaintiff's consent subsequently created a Charge over the Suit Property.
 - iii. In view of the foregoing, the Plaintiff's could not be seen to deny the Bank's interest in the Suit Property as any dealings relating to the Suit Property would squarely affect the Bank's security over the same.
 - iv. Having consented to registration of the Charge, it was dishonest and bizarre that the Plaintiff's elected not to enjoin the Bank as a party to the present suit despite fully knowing about the Bank's interest thereto.
 - v. In light of the foregoing the allegation by the Plaintiff that the Bank should not be a party as unfounded in the circumstances.
- t. In response to the contents of Paragraphs 9 and 10 of the Replying Affidavit, the 1st Defendant averred and contended that the Judgment was entered on 15th December 2021 and all consequential order granted thereto were irregular on the basis of non-service of summons,



material non-disclosure and lack of jurisdiction as enunciated in its Application to set aside Judgement now duly filed in Court.

- u. In response to the issues under Paragraphs 11, 12 and 13 of the Replying Affidavit, the 1st Defendant vehemently reiterated the contents of paragraph 8 above. The contents of paragraph 14 of the Replying Affidavit had now been overtaken by events in view of the fact that the 1st Defendant, upon learning about the present suit, had now filed an Application to set aside the judgment delivered on 15th December 2021 together with all consequential orders granted thereto.
- v. In response to issues raised under Paragraphs 15 and 16 of the Replying Affidavit, the 1st Defendant averred that the amounts claimed by the Plaintiff were unsubstantiated. It was baseless, unverifiable computations. Was it verifiable rental arrears owed or was it in respect of a debt outstanding and to purport that the same be deposited in a joint interest earning account, and by the Applicant. It was a bizarre request that ought not to be given the light of the day.
- w. In response to paragraph 19 of the Replying Affidavit, the 1st Defendant averred that the present Application was properly filed and that failure to admit the Bank as a party create a very awkward situation that might ultimately expose the 1st Defendant to a myriad and multiplicity of litigation on no fault of its own. The Plaintiff had failed to sufficiently demonstrate that it stood to suffer insurmountable prejudice should this Honorable Court allow both the Applicant's and 1st Defendant's Applications.

VI. Further Affidavits

11. The 1st Defendant responded to the Plaintiff's Replying Affidavit dated 26th August, 2022 through a 34 paragraphed further affidavit where the Director averred that:-
 - i. by granting a long term lease to the Defendant the Plaintiff impliedly extended proprietary rights to the Defendant akin to leasehold ownership in light of the provisions of Section 7 (h) of the *Land Act*, No. 3 of 2012.
 - ii. The Plaintiffs had denied and continue to deny the Defendant's servants and/or agents ingress into the Suit Property and could not therefore be seen to falsely allege that the Defendant had left the Suit Property to waste and degrade.
 - iii. The Defendant held that the dispute resolution mechanism was clearly and unequivocally stipulated in Clause 19 of the Lease and which lease was prepared by the Plaintiffs and was binding on all the parties. Therefore, the Defendant strongly opined that the Plaintiffs' choice to move to Court was in bad faith and was a mischievously crafted scheme executed hurriedly to steal a match and to mislead and abuse this Honorable Court and its processes at the Defendant's prejudice. The Plaintiffs' misplaced decision to ignore the arbitration agreement in the lease amounted to an unlawful attempt to revise the Lease unilaterally without the consent of the Defendant.
 - iv. The Defendant averred that the claims as contained in the said paragraphs are rather bizarre in the circumstances and especially in view of the law and facts touching on the envisaged financial arrangement but nonetheless adopted and reiterated the contents of paragraph 16 of the Supporting Affidavit and further states:-
 - a. That by virtue of the long-term lease, the Defendant was granted proprietary rights over the property akin to leasehold ownership of the suit property;



- b. That in light of the leasehold title granted to the Defendant, the Defendant with unequivocal consent of the Plaintiffs used the said title to secure financial advances from the proposed 2nd Defendant.
 - c. That consent to charge the Suit Property was duly obtained and the same is attached to the charge instrument produced by the interested party;
 - d. That the Plaintiffs have therefore always known about the encumbrance registered against the Suit Property and their allegations are therefore rather bizarre unfortunate and unfounded.
- v. The Defendant argued that the completion date was an estimate and the same is clearly captured in the second schedule to the lease to wit: estimated completion date: 31st May 2015. It is the Defendant's position that the completion date was not cast in stone as the nature and complexity of the refurbishing works was not sufficiently known and any challenges and hurdles faced towards that end were in any event clearly communicated to the Plaintiffs and in a timely manner. The allegation that the extension was only for a maximum period of 6 months was misleading and was not captured anywhere in the Lease.
 - vi. The Defendant opined that the contents of paragraph 24 of the Replying Affidavit was embarrassing and a weak attempt at covering up the Plaintiffs malice and bad faith for reasons that there was neither a decree rescinding the Lease nor was there any Court order validating the actions by the Plaintiffs. This was further pronounced by the fact that the Plaintiffs had not availed any evidence as to existence of such a decree.
 - vii. That the Bank (the interested party herein) should squarely and legally be involved in any proceedings touching on the Suit Property by virtue of a Legal Charge registered against the suit property with the Plaintiffs knowledge and consent.
 - viii. The Defendant held that the address for service was as indicated in paragraph 2 of the Affidavit marked as annexure "DHL -19" in the Supporting Affidavit.
 - ix. The Defendant held that the Plaintiffs' failure to involve the Bank in any proceedings touching on the Suit Property despite being fully aware of the Bank's interest thereto was an act of bad faith.
 - x. The Defendant averred that the Draft Defence, to be pleaded in the alternative, revealed a ton of triable issues and to purport otherwise would be dishonest and misleading. The Defendant casts doubt as to the contents and figures as tabulated in paragraph 36 of the Replying Affidavit as no tangible evidence had been tendered to support the alleged figures. As regards the claim for unpaid rent the Defendant averred: -
 - a. That it was indeed true that the Lease required dutiful and diligent payment of rent to the Plaintiffs and which rent the Defendant duly settled up until September 2021.
 - b. That the Defendant had by the said date paid rent for a total sum of Kenya Shillings Thirty-Seven Million Thirty-Nine Thousand Five Ninety Hundred (Kshs. 37,039,590) and would have continued to dutifully pay the same but the Plaintiffs vide a letter dated 27th January 2022 instructed the Defendant not remit rent to the Plaintiff without giving any explanations or reasons for such decision (refer to annexure marked as "DHL – 4" in the supporting Affidavit).



- c. That the Plaintiffs should therefore not be allowed to approbate and reprobate in the same breath by claiming that the Defendant was in breach of its obligations yet it was the Plaintiffs that categorically declined to receive any rental payments from the Defendant.
12. The Plaintiff also responded to the 1st Defendant's affidavit sworn on 25th July, 2022 through a 13 paragraphed further affidavit dated 13th October, 2022 where he asserted that:
 - a. The replying affidavits by the Defendant failed to raise any legal or real response to the application dated 24th June 2022.
 - b. The responses were made outside the scope of the application of Order 51 rule 14 of the Civil Procedure Rules, 2010. As such, the said paragraphs could not fit in the category of a response to an application, neither did they fit as an admission of facts within the law.
 - c. The Judgment made by the Honourable Court herein was regular and could only be set aside once the applicant met the criteria for setting aside a regular Judgment. The Honorable Court was satisfied with the service of summons prior to issuing directions for hearing of the matter by way of formal proof.
 - d. Flowing from the preceding above, the Bank could not be included herein as the agenda for the instant suit was already set by the filed Plaint. The defence attached by the bank did not respond to any issues raised by the Plaintiff.
 - e. The Judgment by this Court had not been set aside and the orders under the decree vacated.
 - f. The claim by the Plaintiff was special damages which had already been proved and Judgment in default entered.
 - g. The Plaintiffs could not ably plead as no particulars were raised against them. The only issue before court was the Defendant's compliance with terms of lease. Any other issue was secondary and could not be handled by the applicants in different suits and fora.
 - h. The Replying affidavits were a non-starter, made without bona fides or legal impetus.

VI. Submissions

13. On diverse dates of 5th October, 2022 and 7th November, 2022 while all the parties were present in Court, they were directed to have the two Notices of Motion application dated 24th June, 2022 and 22nd July, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged. On and a ruling date was reserved on Notice by Court accordingly.

A. The Written Submission by the Intended 2nd Defendant

14. On 7th November, 2022 the Learned Counsels for the Intended 2nd Defendant through the Law firm of Messrs. Wamae and Allen Advocates filed their written submissions dated 3rd November, 2022. Mr. Wawire Advocate commenced by stating that before Court was their Notice of Motion application dated 24th June 2022 the orders as already stated above.
15. The Learned Counsel held that this suit involved "inter alia" a claim for a permanent injunction restraining the 1st Defendant herein from any manner causing further acts of vandalism and wanton destruction on the property known as Title No. Mombasa/Block / XXVI/941. It also sought a declaration that the lease agreement made on 28th May 2014 between the Plaintiff and 1st Defendant



be rescinded for failing to comply with the obligations under the lease. The said property was owned by the 1st Defendant who held a 43-year long term lease that commenced on 1st June 2014 and should be expiring on 1st June 2063. The said property was also charged to the Bank for a loan owed by the 1st Defendant to the Bank in the sum of Kenya Shillings Two Billion, Two Seventy Two Million, One and Seven Hundred, Seven Seventy Five Thousand and Sixty two Cents (Kshs. 2,272,107,775.62) as at 2nd July 2021. On 15th December 2021, this Honorable Court rendered a Judgment whereby the lease between the Plaintiff and the 1st Defendant was rescinded for failing to comply with the obligations under the lease as well as obligations under the provision of Section 66 of the *Land Act*. Armed with the said Judgment, the Plaintiffs filed the civil case - ELC Miscellaneous Application No. E005 of 2022:James Kariuki Kanyeki & Another - Versus - Blue Water Properties Limited” and obtained an order directing the Land Registrar, Mombasa to cancel the Certificate of Lease of the said property granted to the 1st Defendant. The said Judgment and order cancelling the Certificate of Lease were granted without affording the Bank a hearing as the Chargee of the said property.

16. The Learned Counsel submitted that the joinder of the Bank was necessary to enable this Court effectually and completely to adjudicate upon and settle all questions involved in the suit. The Bank was a necessary party in this suit to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Among the questions this Honourable Court would be dealing with upon the joinder of the Bank were as follows:
 - a. Whether the rights of the Bank as Chargee could be superseded by the rights of the lessor who has leased out the property to the lessee [Chargor] whose term was yet to expire.
 - b. Whether the lease agreement between the Plaintiffs and 1st Defendant and the obligations thereto were binding on the Bank as Chargee of the property.
17. The Learned Counsel relied upon Order 1 Rule 10 [2] of the Civil Procedure Rules, 2010 which provides as follows:-

“(2)The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
18. To buttress his point of view, the Counsel relied on the case of:- “Pravin Bowry - Versus - John Ward and Another [2015] eKLR wherein the Court of Appeal considered the principles factored in an application for joinder of parties to a suit. The Court cited with approval the Ugandan case of “Deported Asians Custodian Board – Versus - Jaffer Brothers Ltd [1999] 1 E.A.55 (SCU) .
19. The Learned Counsel also submitted that the joinder of the Bank in these proceedings would provide protection for the rights of the Bank as a Chargee which rights would otherwise be adversely affected if the Bank is excluded from the suit. The rights included the rights in the charged property as security for the loan advanced to the 1st Defendant of Kenya Shillings Two Billion, Two Seventy Two Million, One and Seven Hundred, Seven Seventy Five Thousand and Sixty two Cents (Kshs. 2,272,107,775.62). It was their submission that if the Bank was excluded from this suit and the cancellation of title was effected as per the judgment, the Bank shall lose its security together with the amount loaned to the 1st Defendant in the event of default. For the above submissions they relied on the case of “Meme – Versus - Republic [2004] eKLR where it was held that joinder of parties would be permissible in three[3] instances namely:



- i. Where the presence of the party would result in the complete settlement of all the questions involved in the proceedings;
 - ii. Where the joinder would provide protection for the rights of a party who would otherwise be adversely affected in law: and
 - iii. Where the joinder would prevent a likely course of proliferated litigation.
20. The Learned Counsel argued that the Bank should be joined because it had an interest in the said suit property as a Chargee. The rights of a Chargee under the Land Act were very elaborate. The most important rights were found under the provision of Sections 90 and 96 of the Land Act, No. 3 of 2012 where the Bank had the right to sell the suit property as security in exercise of its statutory power of sale in the event of default by the 1st Defendant. The evidence adduced by the Bank showed that the Bank held a legal Charge over the said property known as Land Reference Number Mombasa/Block / XXVI/941, which was the subject matter of this suit. In the circumstances, the Bank had a legal and equitable interest in the property. For the above submission, the Counsel relied on the case of: “Civicon Limited - Versus - Kivuwatt Limited & 2 Others [2015] eKLR where the court stated as follows:

“From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial. In the present case, it is our view that the circumstances of the case would require the participation of the appellant in the suit, owing to its direct connection to the subject matter of the suit which is in its physical custody on alleged claim for lien for unsettled bills.”

21. The Counsel also relied on the case of: “Sammy Kanyi Kareithi – Versus - Barclays Bank of Kenya & 2 others; Ross Xavier Whitley (Applicant) [2021] eKLR, wherein the Court stated as follows:

“12. There is no doubt from the material on record that the Applicant attended the public auction which the Plaintiff has impugned in this suit and put a bid for the suit property. There is also no doubt from the material on record that the Applicant was declared the successful bidder as evident from the copy of the memorandum of sale dated 17th April, 2015. It is evident that the Plaintiff has challenged the legality of the said auction and termed it fraudulent and illegal. Among the reliefs sought in the plaint dated 5th May, 2015 is a declaration that the auction of the suit property by the 2nd Defendant was null and void and an order nullifying any transfer of the suit property to the purchaser.

13. The court is satisfied on the basis of the material on record that the reliefs sought in the suit would adversely affect the Applicant if granted. The Applicant as purchaser may have acquired either a vested or contingent interest in the suit property by virtue of the public auction. If the legal relations have to be altered as a result of the suit, then it would follow that the Applicant would be a necessary party to the action.”



22. Similarly, the Learned Counsel also relied on the case of: Jackline Kemuma Orioki – Versus - Jackline Nyaboke Gichana & Another [2017] eKLR. In this case, the Court declined to grant an order to cancel the title of a property without giving the owner a hearing. The said owner had not been joined in the suit. The Court held as follows:

“ 19. Turning to the issue of rectification of the register, I am in total agreement with the respondent's submissions that this is a prayer that cannot be issued in the absence of the third party, Linet Kemunto Nyariki, in whose name the suit property is currently registered. The applicant did not enjoin the said third party to these proceedings and indeed it is a cardinal principle of natural justice that no party should be condemned unheard. Needless to say, failure to enjoin the third party to these proceedings was a fatal omission on the part of the applicant. It is therefore my finding that granting orders to delete the third party's name from the register in respect to the suit property would be tantamount to condemning the said third party unheard.”

23. On the issue of new evidence the Learned Counsel contended that the Judgment of 15th December 2021 should be reviewed and set aside because there were new evidence which had not been before the Court at the time of rendering the said Judgment. For instance, one of the new evidence was that the property whose title was cancelled by an order of this Court was charged to the Bank for the sum of Kshs 2,272,107,775.62 being a loan advanced to the 1st Defendant. The said evidence could not be adduced at the time of the hearing for the following reasons:

- a. The Bank was not aware of this suit.
- b. The Bank was only aware of Mombasa ELC No. 50 of 2020: Blue Water Properties Limited Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme which was withdrawn by consent.
- c. The 1st Defendant who is the Chargor of the suit property did not appear and participate in the proceedings.
- d. In the circumstances, the matter proceeded by way of formal proof.
- e. The Bank learnt of this suit later after withdrawal of Mombasa ELC No.50 of 2020:Blue Water Properties Limited Registered Trustees of Kenya Railways Staff Retirement Benefits Schemne where it had sought to be joined in the case as well.

The Learned Counsel held that from the foregoing, the Bank could not have brought these issues to the attention of this Honorable Court as it was not aware of existence of the suit at the time as demonstrated above. On this point, he cited case of:- ”Khalif Sheikh Adan – Versus - Attorney General [2019] eKLR where the court held as follows:

“In his affidavit in support of this application, Mr. Evans Kagoda who is the Head of Survey and Mapping Department within the Kenya Forest Service has deposed that in a letter from the Director of Physical Planning dated 8th March 2018, new evidence or matter has arisen to the effect that the purported Part Development Plan (PDP) Ref.326/98/67 which was used as the basis for the issuance of the certificate of title in favor of the Plaintiff/Respondent in this case was not approved by the relevant authorities and therefore not authentic. Where the sanctity of title is being challenged on the basis of new evidence which could not be produced during the hearing of the case, a court of law and equity will not ignore such



new evidence on grounds that it has come too late in the day. The head of Survey and Mapping Department within the Kenya Forest Services has laid a firm foundation and given explanations that the new information only came to their knowledge after the judgment and decree of this court had been issued.

I am satisfied that the information contained in the letter from the Director of Lands, Housing and Urban Development addressed to the Director, Kenya Forest Services dated 5th February 2016, is a new and important matter or evidence which was not within the knowledge of the Applicant or could not be produced with the exercise of due diligence when the judgment and decree of this Honorable Court was passed.”

24. The Learned Counsel averred that there was an error apparent on the face of the judgment as the said Judgment of 15th December 2021 as it was rendered without giving the Bank a hearing. In the circumstances, the said Judgment should be set aside and allow the Bank to come in the suit and defeat its interest. He held that it was now trite that for a Judgment to be set aside, an applicant must either show that [i] there was an error apparent in the said Judgment or [ii] there was new evidence which was not before the court when the said Judgment was being rendered. The said requirements were set out under the provision of Order 45 Rule 1[1] of the Civil Procedure Rules 2010. In their case herein, it was not disputed that the Bank was not a party to the suit at the time of rendering the Judgment. In fact, this was the reason the Bank was seeking to be joined in this suit. Had the bank been a party to the suit, the Court would have arrived at a different decision. But in this case, the matters were different since the Bank has an interest in the property as the Chargee for a loan of Kshs 2972,107,775.62 advanced to the 1st Defendant. For the above submission, the Counsel relied on the case of:- “Zablon Mokua – Versus - Solomon M. Choti & 3 others [2016] eKLR where the court held as follows:

“46. I find that the applicant has established that he was neither aware of the impugned proceeding and neither did he participate in the same and therefore he cannot be said to be deliberately seeking to delay or obstruct the course of justice by filing the instant application.

47. Having found that the applicant has satisfied this court that there was an error apparent on the face of the record and having found that adverse orders were made against the applicant in his absence without notice to him, the order that commends itself to me is the order to allow the applicant’s application dated 10th June 2016 in the following terms: The orders made in Kisii CMCC 3 of 2015 are hereby reviewed and set aside together with all other consequential orders. Each party shall bear its own costs of the application in view of the fact that the error that gave rise to the instant application was a mistake/error made by the court itself in omitting to open a High court file upon calling for the subordinate court file.”

25. In the case of:- ”Kiai Mbaki & 2 Others – Versus - Gichuhi Macharia & Another [2005] eKLR, the Court held as follows regarding an order made without giving a party an opportunity to be heard:

“No reason was given in this matter for the procedure adopted by the court in issuing interlocutory orders which, on the face of it, no party requested for nor required. The order now challenged before us was clearly made in the presence of the parties’ advocates on a date fixed for the hearing of the Petition but without giving them an opportunity to be heard. We hold that this was a serious breach of procedure amounting to a denial of justice. Consequently, the order made in such circumstances cannot be sustained and is for setting



aside. We allow the appeal, set aside the order made on 29th May 2002, and remit the matter back to the superior court for hearing of the petition in accordance with the law, before any Judge other than Ransley C.A (as he then was).The costs of the appeal shall be borne by the Respondents.”

26. Additionally, the Counsel relied on the case of: “Jackline Kemuma Orioki – Versus Jackline Nyaboke Gichana & Another [2017] eKLR. In this case, the Court declined to grant an order to cancel the title of a property without giving the owner a hearing. The said owner had not been joined in the suit. The Court held as follows:

“ 19. Turning to the issue of rectification of the register, I am in total agreement with the respondent’s submissions that this is a prayer that cannot be issued in the absence of the third party, Linet Kemunto Nyariki, in whose name the suit property is currently registered. The applicant did not enjoin the said third party to these proceedings and indeed it is a cardinal principle of natural justice that no party should be condemned unheard. Needless to say, failure to enjoin the third party to these proceedings was a fatal omission on the part of the applicant. It is therefore my finding that granting orders to delete the third party’s name from the register in respect to the suit property would be tantamount to condemning the said third party unheard.”

27. The Learned Counsel concluded that the intended 2nd Defendant’s notice of Motion dated 24th June, 2022 be allowed with costs based on the statutory provisions and cases quoted.

B. The written submissions by the Plaintiff on the application dated 24th June, 2022.

28. The 1st Plaintiff through the firm of Messrs. O. M. Robison & Company advocates filed their written submissions dated 28th November, 2022 on 29th November, 2022 where they stated that the plaintiffs are the registered owners and proprietors of that property within Mombasa County known as Mombasa/Block / XXV1/941 Chambilo Road. The property was leased to the defendant herein Blue Water Properties Ltd through a lease agreement dated 28th May 2014. The Leasee bound herself through the terms of the lease which she breached thus provoking termination of the lease and consequent Court proceedings where the Plaintiffs sought for assessment and award of damages arising from the abandonment and willful destruction of the lease property.
29. The Learned Counsel further stated that the Plaintiffs had obtained Judgment herein and had commenced execution thereof when the instant application was filed by the intended 2nd Defendant seeking orders of stay of execution of decree as well as orders to join the suit. The application was opposed; the Plaintiffs filed a Replying Affidavit dated 12th July 2022 filed in Court on even date. The Plaintiffs adopted the averments raised in their affidavit and further submitted that the intended 2nd Defendant was not a necessary party as the lease document, the subject of these proceedings did not concern them. The argument by the Plaintiffs was that the Intended 2nd Defendant never executed the lease dated 28th May 2014 and thus breach of terms of the said lease was a matter that only concerned the contracting parties and not third parties and strangers like the applicant herein.
30. The Learned Counsel submitted that the Plaintiff was to deal with the following issues:
- i. Whether the intended Co - Defendant’s application was merited.
 - ii. Whether the Co - defendant had “locus standi” in the instant matter.



- iii. Whether the remedies sought could be granted.
31. The Learned Counsel submitted that the Plaintiffs in their Replying Affidavit sworn on 12th July 2022 under the contents of Paragraphs 6 (i-iv), 7, 8 and 9 and a host of other paragraphs had opposed the instant application citing that the bank had not presented any material to show the particular interest they sought to enforce over the lease agreement dated 28th May 2014 particularly as a Co -Defendant. The Plaintiffs reproduced the contents of the said paragraphs of the affidavit by Mr. James Kariuki Kanyeki showing as follows:
6. That in our pleadings (refer to paragraphs 12 and 13 of the Amended Complaint) we are seeking Injunctive Orders and a declaration that the lease of 28th May 2014 is rescinded as a consequence of material breach of terms therein. Below is a reproduced excerpt of the Orders we sought through our Complaint:-
 - I. A declaration that the lease agreement made on 28th May 2014 between the Plaintiff and the Defendant stands rescinded for failing to comply with the obligations set out under Section 66 of the Land Act, 2012.
 - II. A permanent injunction against the Defendant by herself, her agents and/or appointed attorneys from any manner causing further acts of vandalism and wanton destruction on the property known as Mombasa/Block XXVI/941 Chambilo road and the building standing thereon by denying access by the defendant by herself, her agents and/or appointed attorneys into the property.
 - III. Special damages at Kshs. 86,780,760/-
 - IV. Costs of the suit.
 7. That from the complaint filed, the plaintiff is not seeking any relief from any third party be it I & M BANK LTD and no remedy is sought against them as they are not parties to the lease dated 28th May 2014 (JJK-3 above).
 8. That flowing from the preceding above, the said I & M BANK LTD cannot be included in this suit as the 2nd Defendant as the Plaintiff does not hold any claim against them and no relief against them is sought *vide* the Complaint filed in Court.
 9. That the matter herein is now heard and determined through a judgment of the Court delivered on the 15th December 2021. I attach a copy of the judgment and mark it "JJK-4."
 10. That the lease agreement dated 28th May 2014 is now rescinded and has ceased to exist, as such, the intended 2nd Defendant's claim cannot arise from the lease based on reasons stated in the preceding paragraphs and further based on the fact that they do not have privity to the said lease. I attach a copy of the extracted decree and mark it "JJK-5" and reproduce contents therein as hereunder:-
 - I. IT IS HEREBY ORDERED AND DECREED THAT a declaration does hereby issue that the lease agreement made on 28th May 2014 between the 1st and 2nd plaintiffs and the defendant be and is hereby rescinded for failing to comply with the obligations under the lease and the obligations set out under Section 66 of the Land Act, 2012.
 - II. That there be and is hereby granted a permanent injunction against the defendant by herself, her agents and/or appointed attorneys from any manner causing further acts of vandalism and wanton destruction on the property known as Land registration



Number Mombasa/Block XXVI/941 Chambilo Road and the building standing thereon by denying access by the Defendant by herself, her agents and or appointed attorneys into the property.

III. That the 1st and 2nd Plaintiffs be awarded special damages at a sum of Kenya Shillings Eighty-Six Million, Seven Hundred eighty thousand, seven hundred sixty (Kshs 86,780,760.00)

IV. That the costs of this suit to the 1st and 2nd Plaintiffs be borne by the Defendant.

11. THAT connected to the preceding, the draft defense annexed by the applicant does not relate to the lease dated 28th May 2014 and more importantly, no claim is made against the Plaintiff herein arising therefrom.
32. The Learned Counsel asserted that the Plaintiffs' position was that the Bank's application was incompetent and intended to convolute issues for trial while delaying the hearing and disposal of the instant matter. Against the above backdrop and further supported by the reproduced contents of the affidavit of Mr. James Kariuki Kanyeki, the Counsel submitted that the Bank's claim (if any) was not related to the lease. On the contrary, their claim related to a different instrument which ordinarily should not involve the Plaintiff. Any such claim would involve the Defendant and the Bank based on the terms and conditions stipulated in the contract. According to the Counsel, the proposed issues for consideration of the Honorable Court were as follows:-
33. Firstly, whether the intended 2nd Defendant's application was merited. On the said issue, the Learned Counsel posed whether the intended Co - Defendant fitted within the definition of "a defendant" as defined under the provision of the *Civil Procedure Act* (Cap. 21) and the Civil Procedure Rules, 2010. Secondly, could it be proved indeed that the subject matter before Court was "the Charge" as severally referred to by the Applicant in the instant proceedings? The Counsel submitted that the bank was not a Defendant as envisaged under the law simply because they did not have any claim relating to the lease of the Plot No. Mombasa/Block / XXV1/941 Chambilo Road. The Bank had no claim nor Counter Claim against the Plaintiff herein as was disclosed through the draft defense. Since the present suit concerned the original lease where the 2nd Intended Defendant was neither the Lessor nor lessee, the Bank had no interest in the suit herein. Secondly, the Defendant herein was capable of mounting their own defence. It had not been demonstrated how the Intended 2nd Defendant would come into the picture and mount a defense for the Defendant. To buttress on this point, the Counsel relied on the case of "Gladys Nduku Nthuki – Versus - Letshego Kenva Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR where Judge Odunga (as he then was) held as follows:-

“A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit would legally affect the interests of that person. and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively a person qualifies, (on an application of a Defendant) to be joined as a Co - Defendant. where



it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it. or unless the order to be made is to bind that person.”

34. The Learned Counsel submitted that the title to the suit property was not challenged and that the terms of the lease could only be challenged by a contracting party. In the present application, the applicant herein was not a contracting party within the lease document dated 28th May 2014.
35. It was the Learned Counsel’s further submission that the Intended 2nd Defendant could not be heard to shout on breach of terms thereof. In terms of the original lease, the applicant had no interest to necessitate their joinder in the instant proceedings as Co -Defendants.
36. Secondly, on whether the Intended 2nd Defendant had sufficient “locus standi” in this matter, the Learned Counsel submitted that it had already been established through the submissions and supported by the filed pleadings in Court that the subject matter before the Honorable court was the lease document dated 28th May 2014. It had also been sufficiently established that the Intended 2nd Defendant never participated and were not contracting parties to the lease agreement. In the instant suit the Plaintiff had already filed suit praying for rescission of the lease due to breach of fundamental terms therein. The applicant herein had on its part filed the instant application seeking to join the matter for purposes of protecting its interest to the property Mombasa/Block / XXV1/941 Chambilo Road through a charge with the Defendant. What the applicant intended to do is to purport to enforce a contract that arose outside the primary lease dated 28th May 2014. This would equally mean that the Co - Defendant was introducing a different cause of action in these proceedings through joinder of party.
37. In answering the above the Learned Counsel submitted that the applicant herein had no legal standing to be a Co - Defendant in this matter. He relied on the provision of Order 1 Rule 3 of the Civil Procedure Rules, 2010 which provides as follows:-
- All persons may be joined in one suit as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise.
38. The Learned Counsel submitted that it was thus manifestly clear that any relief sought by the Bank would be different from the reliefs sought by the Plaintiff through their Amended Plaint. According to the Counsel therefore, the bank lacked sufficient standing to sue in this matter or be admitted as a Co - Defendant herein.
39. Thirdly, on the issue of whether the remedies sought could be granted, the Learned Counsel submitted that the issue was answered in the negative. It was trite to note that the dispute before Court was wholly capable of being resolved without the presence of the applicant as a Co - Defendant. As submitted elsewhere above, the applicant herein only intended to convolute issues for trial and delay determination of this matter. The Plaintiffs relied on the decision of this court, differently constituted in the case of “ Macharia Kamochio & 3 Others – Versus - Commissioner of Co - operative Development& Marketing And Others [2016] eKLR. Honorable Justice Gacheru J. in the above matter found as follows:-

“that a necessary party is one whose presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit. Counsel argued that the court cannot exercise its discretion to join a party who disguises itself as an interested party. The Appellants relied on the case of Eastern Bakery – Versus - Castelino (1958) EA 461 and Hagod Jack Simonian – Versus - Johar and others (1962)1EA 336 for the



submission that an amendment should not be allowed if it causes injustice to the other side...”

40. The Learned Counsel submitted that they adopted the finding and highlighted the fact the Court in the above matter allowed the intended interested party to be enjoined in the proceedings after proving their legal stake and interest in the matter. They further relied on the Court of Appeal case of:- ”Attorney General – Versus - Kenya Bureau of Standards & Another [2018] eKLR. _In this case while faced with a similar application the Court posed the question:-

“Has the applicant satisfied us that public interest or public property is involved in this appeal that would warrant this Court to exercise its discretion to allow him to participate in these proceedings?”

The Court answered the above question as follows:-

“He has not convinced us that what he intends to advance will be helpful to the Court in the resolution of the main question in hand. As a matter of fact, and with respect, we do not think what the applicant wishes to bring into these proceedings is any different from those of the other parties already on record. He, similarly, has not demonstrated what prejudice he or indeed the country stands to suffer if his intervention is denied.”

41. The Learned Counsel stressed that the Intended Co - Defendant was not necessary in the instant proceedings as a Defendant. He held that the applicant could fit the description of an Interested Party but not a Defendant. They urged the Court to note the distinction and to make a finding that the application filed lacked merit. It was their submission that the applicant did not have nor presented any bona fide issues capable of being tried and resolved within this suit. The application should therefore be dismissed and the instant suit proceeds with execution. They shall not submit on the matter of stay of execution by the Intended 2nd Defendant taking that as at the Judgment date they were not parties to this suit.

C. The written Submissions by the Plaintiff on application dated 22nd July, 2022

42. On 29th November, 2022 the Learned Counsels for the Plaintiffs through the firm of Messrs. O.M. Robinson & Company Advocates filed submissions dated 28th November, 2022 where they submitted that the plaintiffs are the registered owners and proprietors of that property within Mombasa County known as Mombasa/Block / XXV1/941 Chambilo Road. The property was leased to the Defendant herein Blue Water Properties Ltd through a lease agreement dated 28th May 2014. The Lessee bound itself through the terms of the lease which it breached thus provoking termination of the lease and consequent Court proceedings where the Plaintiffs sought for assessment and award of damages arising from the abandonment and willful destruction of the lease property.
43. The Learned Counsel submitted that the Plaintiffs had obtained Judgment herein and commenced execution thereof when the instant application was filed by the Defendant seeking orders of stay of execution of decree as well as setting aside the Judgment and consequential orders emanating therefrom as well as referral of the matter to resolution by way of arbitration. The application is opposed; the Plaintiffs filed a Replying Affidavit dated 26th August 2022 filed in Court on even date. The Plaintiffs filed a further affidavit pursuant to leave issued by the Honorable Judge. The Plaintiffs adopted the averments raised in their affidavits and further submitted as below:-

- i. Whether the Judgment dated 15th December 2021 was regular? And if so, could it be set aside?



- ii. Whether the Court lacked jurisdiction by dint of Clause 19 of the Lease dated 28th May 2014?
 - iii. Whether the remedies sought in the instant application could be granted?
44. On the first issue, the Learned Counsel argued that the Judgment of the Court was a regular Judgment taking that despite of the Defendant having been properly served with Summons to Enter Appearance and all pleadings, it failed to enter appearance and file its defence. His contention was that the ex - parte or irregular Judgment was one where summons to enter appearance were not served upon the Defendant. On this principle of law, he relied on the case of:- “Ecobank Kenya Limited – Versus- Minolta Limited & 2 others [2018] eKLR where lady Justice Olga Sewe held as follows:-
- “A distinction is drawn between regular and irregular Judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte Judgment entered in default is regular.”
45. The Learned Counsel averred that under the contents of Paragraphs 5, 6 and 7 of their Replying Affidavit sworn on 26th August 2022 stated under oath as follows:-
- 6. That the applicant -Blue Water Properties Limited does not have a physical place of operations /office thus the summons and all documents referred in the preceding paragraph were served through the director Diamond Hasham Lalji of Mobile phone number 0722 xxx xxx by registered post through his Postal address 1xxx-00400 Nairobi.(Refer to the affidavit of service sworn on 12/3/21 by Paul Outa Odhiambo marked JKK(1)(b).
 - 7. That the Postal address 1xxxx - 00400 Nairobi is disclosed by the applicant’s director as his through the affidavit in support of the motion dated 6th May 2020 filed in Mombasa ELC NO.50 OF 2020 appearing on page 118 of the application herein and reproduced as below:-
I, Diamond Hashim Lalji of P.O. Box 12705-00400 NAIROBI do hereby make oath and states as follows:-
 - 8. That the deponent of the affidavit dated 6th May 2021 Mr. Diamond Hashim Lalji signed the affidavit before a commissioner for oaths where he swore and confirmed that the averments in his affidavit are true. (see the signature of the deponent to the affidavit dated 6/5/21 appearing at page 122 of the applicants application.
46. The Learned Counsel submitted that service of the summons had not been contested by the Defendant who didn’t denounce the Phone numbers 0722 xxx xxx and the Postal address numbers 1xxxx - 00400 Nairobi. It was their submission that the Defendant read the affidavit of the process server one PAul Odhiambo Outah and having understood the averments made under oath, He chose not to cross examine as only unfavorable responses could have been elicited. They averred that the affidavit of service had not been challenged. Thus the issue of service of summons was not contestable. They relied on the case of:- “David Koome Matugi – Versus - APA Insurance Limited [2021] eKLR where the Court held as follows:-
- “There is a presumption of service as stated in the process server’s report, and the burden lies on the parts questioning if. to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”



47. The Learned Counsel contended that they had said enough to demonstrate that the Defendant was served but failed to enter appearance and defend this suit. Therefore, it was their humble submission that the Judgment entered was regular. He further relied on the case of: "Mungai – Versus - Gachuhi & Another [2005] eKLR where Ojwang J(as he then was)held as follows:-

“A court decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be joined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity.”

48. The Learned Counsel argued that the Defendant made a conscious decision to forgo the right to enter appearance and defend the suit. Notwithstanding the Defendant’s conduct, he held that the Honorable court had discretion to set aside both regular or irregular Judgments as long as certain legal criteria were met.

49. Thirdly, on the issue of setting aside of the Judgment, the Learned Counsel opined that under the provision of Order 10 Rule 11 of the Civil Procedure Rules, 2010, the Court had unfettered discretion to set aside Judgment on such terms as it deems fit and just (see Shah – Versus - Mbogo and Another [1967] EA 116). Where Harris J stated:-

“...exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice”.

Even where the party applying had been served, like was the case herein, the Court would still have discretion to set aside ex parte orders in the interest of justice. However, the Counsel’s concern was whether in the instant case, it merited the exercise of the unfettered discretion to set aside ex parte orders herein. He relied on the legal ratio in “Shah – Versus - Mbogo (Supra). the discretion of the Court in setting aside “ex – parte” order.

50. Further, the Counsel relied on the case of:- ”Jackson Kabiri Karuru – Versus - Mary Njoki Njuguna [2022] eKLR where this court, differently constituted stated as follows:-

“The provisions of law with regards to setting aside ex parte orders are to be found under Order 12 Rule 7 of the Civil Procedure Rules provides:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

Further the provision is buttressed by Order 51 Rule 15 of the Civil Procedure Rules which provides:-

“The court may set aside an order made ex parte”

51. The Learned Counsel submitted that the Court has discretion to set aside or not to set aside an ex parte judgment. Such discretion must be exercised judiciously. In deciding whether to set aside or not, the Court is guided by the decision of the Court of Appeal in the case of: “James Kanyiita Nderitu & Another [2016] eKLR, where the Court of Appeal stated thus:-

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default Judgement, the defendant will have been duly served with summons to enter appearance or



to file defence, resulting in default Judgment. Such a Defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default Judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default Judgment, among others. See *Mbogo & Another – Versus - Shah* (1968) EA 98, *Patel – Versus - E.A. Cargo Handling Services Limited* (1975) E.A. 75, *Chemwolo & Another-vs- Kubende* (1986) KLR 492 and *CMC Holdings – Versus - Nzioka* (2004/I KLR 173. In an irregular default Judgment, on the other hand; judgment will have been entered against a Defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular; it can set aside the default Judgment on its own motion. In addition, the Court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reason why such Judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations.

52. The Learned Counsel observed that presently the Defendant had not attempted to give any explanation as to why they never entered appearance and the application herein was filed eight months after the delivery of the Judgment. Considering all the circumstances in this case and noting the conduct of the Defendant, it would be extremely prejudicial to set aside the Judgment principally because of the following two reasons:-
 - a. The Defendant never paid any rent or premiums under the lease agreement.
 - b. The Defendant was not in control of the lease premises, the premises was abandoned and in ruins. There was urgent need for intervention to stop further waste.
53. The Learned Counsel argued that that setting aside the regular Judgment herein would extremely prejudicial to the Plaintiffs. In all these, the Defendant would be the biggest beneficiary seeing that it would have a second bite at the cherry notwithstanding the dilatory conduct.
54. Fourthly, on whether the Court has jurisdiction to hear and determine it had already done. The jurisdiction of this court had not been ousted by the Clause 19 of the lease agreement as the Defendant purported. He held that once a notice of intention to rescind the lease was done and considering that there was no contestation thereon, there was nothing capable of being negotiated on or referred to arbitration. As things stood then, the matter herein was, unless it was re – opened and resolved, there was no substantive matter which was pending for referral to arbitration. In any event, and considering all circumstances, the subject matter of this suit was wholly capable of being determined by the Court.
55. The Learned Counsel was of the view that in any case, the Defendant had never initiated the process of instituting a suit before the arbitrator. Further, the following facts deponed to by Mr. James Kariuki Kanyeki under the contents of Paragraphs 14 to 18 of his Repeating Affidavit dated 26th August 2022



had not been controverted so that the Honorable Court would then refer the matter herein elsewhere for resolution. To wit:-

That similarly, Notice under paragraph 17 (3) had already issued and the applicant had not remedied the situation. I attach a copy of letter dated 17th march 2020 and notice dated 23rd November 2020 and mark it “JKK-4(a) and (b) respectively.”

That further, the Lessee had already abandoned the lease property and the residential units erected thereon to waste and destruction. The subject property right now is desolate, uninhabitable and vandalized. I attach and mark “JKK-5” recent photographs of the suit property.

That also, the applicant has never paid rent for a period exceeding eleven(11) months now. It is thus clear that the Lessee has breached fundamental terms of contract and she has not discharged her obligations under lease thus no remedy claiming restitution is merited.

That the applicant herein left the lease property neglected and vandalized thus cannot purport to seek orders to reinstate her to the lease agreement. I attach and

mark “JKK-6” a copy of the valuation report dated 11th January 2021 showing losses and damage.

That paragraph 2 of the affidavit of Mr. DIAMOND HASHIM LALJI is irrelevant to these proceedings because of the following:-

- i) The applicant failed to comply: with fundamental obligations of contract such as practical completion.
- ii) The period for practical completion under lease has never been extended.
- iii) The Lessee is not paying any rent.
- iv) The requisite approvals and certificates of occupation have never been sought for nor obtained.

(The applicant despite being served with notice to terminate did not respond thus the lease was properly terminated.)

- vi) That no dispute exists capable of being resolved through an arbitrator since notice under paragraph 17(3) had issued and consequently a suit filed herein for rescission of the lease.
- vii) That No correspondence is shown inviting the respondent to agree on the choice of an arbitrator and no issues have been isolated for arbitration.
- viii) The Lessor herein will not submit to any arbitration noting that her property is vandalized in the hands of the applicant who presently does not pay any rent nor discharges any obligation under lease.
- ix) The Lessor has rightly approached the court through the amended plaint dated 19th January 2021 seeking the following orders which in any event are within the jurisdiction of this Honourable Court:-A declaration that the lease agreement made on 28th May 2014 between the plaintiff and the Defendant stands rescinded for failing to comply with the obligations set out under section 66 of the *Land Act*, 2012. A permanent injunction against the Defendant by herself, her agents and/or appointed attorneys from any



manner causing further acts of vandalism and wanton destruction on the property known as Mombasa/Block XXVI/941 Chambilo road and the building standing thereon by denying access by the defendant by herself, her agents and/or appointed attorneys into the property. Special damages of Kshs. 86,780,760/- Costs of the suit.

56. The Learned Counsel averred that the parties herein could not purport to jump the gun and ignore consultation and proceed straight to arbitration. The parties herein were not in good terms and were incapable of engaging in any form of dispute resolution apart from submitting themselves through the Court proceedings as was already the case. Also, the Counsel observed that from the conclusion drawn by the Defendant to the effect that this Court herein lacked jurisdiction was wrong and acting in bad faith. Ordinarily, Courts were seized of jurisdiction in all matters irrespective of whether parties agreed through private treaty to oust the jurisdiction of the court. To support his point, he relied on the Court of Appeal decision of:- *Niazsons (K) Limited – Versus - China Road & Bridge Corporation Kenya* [2001] eKLR where the Court held as follows:-

“The fundamental point which is being urged on behalf of the appellant is that such an agreement as contained in clause T aforesaid ousts the jurisdiction of the court and is therefore void. The respondent’s case, in effect, principally hinges on the said clause T. Ordinarily, such an arbitration clauses simpliciter does not oust the jurisdiction of the court. But, if it purportedly attempts to do so, it would be contrary to public policy.

In the case of *Lee – Versus - The Showmen’s Guild of Great Britain* [1952] 2QB 329 Romer LJ said

“The courts jealously uphold and safeguard the prima facie privilege of every man to resort to them for determination and enforcement of his legal rights. As an example of this, it has been held that any attempt by a testator to divert from the courts the power of deciding questions of construction that may arise on his wills and vesting that power in his executors instead will fail... on the ground that they are contrary to public policy.”

Romer LJ also thought that it may well be that the same considerations of public policy would act as a fetter on attempts to oust the jurisdiction of the courts on questions of law by contractual consideration. It is discernible, therefore, as we said in the *Tononoka* case (ibid) that it is a well settled general rule recognized in the English courts that all agreements purporting to oust the jurisdiction of the courts are prohibited.

57. Further, the Learned Counsel also relied on the case of:- “*Indigo EPZ Limited – Versus - Eastern and Southern African Trade & Development Bank* [2002] eKLR” where the Court (Mbaluto J.) held as follows:-

“In any case, (there) is a well settled general rule recognized (even) in the English Courts which prohibits all agreements purporting to oust the jurisdiction of the court. (see Judgment of Lakha JA4 in the case of *Tononoka Steels Limited – Versus - The Eastern and Southern African Trade and Development Bank*(Court of Appeal Civil Appeal No 255 of 1998).

58. The Learned Counsel opined that the matter herein could have been ripe for arbitration under Clause 19 (1) of the lease agreement if the notice of intention to terminate the lease was challenged. Further, the process could have been ideal if the parties had commenced the process of agreeing on an arbitrator. The Plaintiffs were within their right to file suit for recovery of damages as a consequence of breach



and termination of the lease agreement. On this point, he cited the case of “Sukari Industries Limited – Versus - Ezra Ododi Adero [2020] eKLR where the Court held as follows:-

“ As I come to the end of this discussion I must state that Courts must generally be slow to decline jurisdiction in civil processes. A Court should do so in the clearest of instances since mostly Courts are usually the last points of call for disputants. Indeed, that is the import of Article 48 of the Constitution which provides for the right of access to justice.”

59. Finally, on whether the orders sought could be granted, the Defendant in their application raised several issues including questions as to whether the notice of termination of lease was served as well as whether the summons to enter appearance was served. These were matters outside the scope of arbitration. They were matters that invited the Court to look into the conduct of the parties and matters in issue. They further submitted principles of law applicable on orders of stay were:-

“ The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first. that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted. the success of the appeal. were it to succeed. would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”

60. The Learned Counsel held that the orders of stay of execution could not issue as the Defendant had not proved any loss. He cited the case of ”Lagoon Development Limited – Versus - Beijing Industrial Designing and Research Institute [2014] eKLR in this aspect.

61. In conclusion, the Learned Counsel strongly felt that no particular triable issues were proposed by the Defendant and further that a whole year had lapsed since the matter herein was filed and concluded. They prayed that the Court was guided by their submissions.

VII. Analysis & Determination

62. I have carefully read and put into account all the filed pleadings, pertaining to the two applications dated 24th June, 2022 and 22nd July, 2022 respectively, the myriad of authorities relied on and the relevant and appropriate provisions of the Constitution of Kenya, 2010 and enabling statutes with regard to the applications filed in this court.

63. In order to arrive at an informed, just, reasonable and fair decision, I have framed the following salient issues for determination. These are:-

- a. Whether the Notice of Motion application dated 24th June, 2022 by the intended 2nd Defendant has merit to justify the Bank being joined in this suit?
- b. Whether the Notice of Motion application dated 22nd July, 2022 by the 1st Defendant’s meets the threshold for the setting aside of the Judgment delivered on 15th December, 2021?
- c. Whether the Court has Jurisdiction to hear and determine this case in the given circumstances or should it refer this matter to arbitration in accordance with the provisions of Section 6 of the Arbitration Act of 1995.
- d. Whether the parties are entitled to the reliefs sought herein.
- e. Who will bear the Costs of these two applications.



ISSUE NO. a). Whether the Notice of Motion application dated 24th June, 2022 by the intended 2nd Defendant has merit to justify the Bank being joined in this suit?

64. Under this sub heading, the test in applications for joinder is, firstly whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation, though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. Court has to assess whether the applicant has demonstrated having sufficient interest in the subject matter of the suit or that he is a necessary party whose presence is necessary to enable the court to effectually and completely adjudicate upon all the issues in the suit?
65. The surrounding facts and inferences pertaining to this case have been graphically stated herein. Clearly, the subject matter relates to all that parcel of Land known as Land Reference Numbers Mombasa/Block / XXV1/941 Chambilo Road situated within the County of Mombasa. In the year 2014, the Plaintiff leased it to the 1st Defendant. Subsequently, the 1st Defendant took out a loan from the Intended 2nd Defendant and a charge on the property was created. The 1st Defendant has been servicing the facility. However, the 2nd Intended Defendant feels it will be prejudiced by the Judgement and the consequential Decree delivered by this Court on 15th December, 2021. It feels based on the principle of natural justice it ought to be made party to the suit.
66. The Court wishes to refer to the Court of Appeal in the case and as already cited herein by the Counsels for the 2nd Intended Defendant of “Pravin Bowry – Versus - John Ward & Another [2015] eKLR considered the applicable principles, or test in an application for joinder. The Court adopted with approval the holding by the Uganda Supreme Court in the case of Deported Asians Property Custodian Board – Versus - Jaffer Brothers Ltd [199] 1 E.A 55 (SCU) where the court stated:-

“A clear distinction is called for between joining a party who ought to have been joined as a Defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter.

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a Defendant) to be joined as a Co - Defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

67. The Court further in the Bowry case (supra) referred to the Court’s decision sitting in Mombasa in the case of “Civicon Limited – Versus - Kivuwatt Limited & 2 Others [2015] eKLR where the court while observing that exercise of discretion is called for in applications for joinder stated as follows:-

“Again the power given under the rules is discretionary which discretion must of necessity be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in



their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined.

From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 Rule 10(2) bearing in mind the unique circumstances of each case with regard to the necessity of the party, in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial.”

68. If a party seeks to be enjoined as a Defendant, there ought to be a Plaintiff or Plaintiffs who are seeking a relief from such a Defendant and/or there is a Defendant who desires the party to be enjoined as a Co - Defendant to enable them to plead their defence. In other words, the Plaintiff in the suit and/or a Defendant in the Counter - claim in the suit must have sought orders which if granted would directly affect the interest of the applicant on the party sought to be enjoined by an already existing party. The applicant must therefore demonstrate he has an interest in the subject matter of the suit and/or he stands to be affected by any orders that may be made in the suit regarding the subject matter. Alternatively, the applicant must show he is a necessary party and his presence in the suit is necessary to enable the court to effectually and completely adjudicate and settle all the issues in the suit. If the application is by an already existing party, the applicant must equally demonstrate how the person sought to be enjoined is interested in the suit and how he stands to be affected by any orders that the Court may make in the matter.
69. Applying these principles of law to the in this instant case, there is a Charge terms and conditions stipulated thereof on the suit property created by the intended 2nd Defendant as the Chargee. The 2nd Interested Party lend the Defendant such a colossal sum of finances amounting to Kshs.....Although it was being serviced, but arising from the Judgement of this Court delivered on 15th December, 2021, definitely the 2nd Intended Defendant will be adversely affected and stand to substantially loss and suffer damages whereby should they and may never be compensated at all. Undoubtedly, the Plaintiffs never joined the Bank into the matter as it held that there was no nexus between them. That is a matter of conjecture to be canvassed during the full trial. What is clear upto this stage so far, there exists a common denominator and/or thread holding the beads and thus joining the parties herein – the Plaintiffs as the registered owner, the Defendant as the Lessee/Chargor and the Intended Defendant as the Chargee respectively to the suit property. Thus, from these fundamental reasons, I am of the humble opinion that if the 2nd Intended Defendant was to proclaim the suit property to have their loan facility repaid then the Plaintiffs and the 1st Defendant would suffer substantial loss and great prejudice jointly. Hence, , I am fully satisfied and proceed to find that the 2nd Intended Defendant a necessary party to this suit. They now come in as the 2nd Defendant onwards.

Issue No. b). Whether the Notice of Motion application dated 22nd July, 2022 by the 1st Defendant’s meets the threshold for the setting aside of the Judgment delivered on 15th December, 2021?

70. It is not in dispute that the Ex parte Judgment was entered on 15th December, 2021 in favour of the Plaintiffs as against the 1st Defendant. The Court is thus vested with the requisite jurisdiction to determine the Application before it. The jurisdiction of the court to review and set aside its decisions



is wide and unfettered. In the now famous case of "Shah – Versus - Mbogo and Another [1967] EA 116 the Court of Appeal of East Africa held that:

“ This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

71. The provisions of law with regards to setting aside ex parte orders are to be found under Order 12 Rule 7 of the Civil Procedure Rules provides:-

“ Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

72. Further the provision is buttressed by Order 51 Rule 15 of the Civil Procedure Rules which provides:-

“ The Court may set aside an order made ex parte”

73. The Court has discretion to set aside or not to set aside an exparte Judgment. Such discretion must be exercised judiciously. In deciding whether to set aside or not, the Court is guided by the decision of the Court of Appeal in the case of “James Kanyiita Nderitu & Another [2016] eKLR, where the court of Appeal stated thus:

“ From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgement that is regularly entered and one which is irregularly entered. In a regular default Judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default Judgment. Such a Defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –Versus - Shah (1968) EA 98, Patel – Versus - E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another – Versus - Kubende (1986) KLR 492 and CMC Holdings – Versus - Nzioka [2004] I KLR 173.

In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be



heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

74. However, before the court can set aside its ex-parte decision or proceedings, it is trite law that Court must consider whether the applicant has any Defence which raises triable issues. In the case of “Patel – Versus - East Africa Cargo Handling Services Ltd (1974) EA 75 Duffus P. held that:

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

75. With the above in mind, the Court will proceed to make a determination on whether there is sufficient cause to set aside the ex parte judgment herein. The 1st Defendant has contended that he was never served with the summons to enter appearance and or the Plaint. To rebut these allegations, the 1st Plaintiff has annexed in his Replying affidavit, the affidavit of service showing that the 1st Defendant was indeed served through whatsappphone number 0722 xxx xxx and postal address 12705 -00400 Nairobi. The Plaintiff submitted that the issue of the service of summons had not been contested. The Court has carefully gone through the said affidavit of service and notes that the Director of the 1st Defendant was served by Paul Outa Odhiambo as evidenced by the affidavit of service sworn on 12th March, 2021. However, the said Affidavit does not indicate how the Process server was able to Identify the Defendant/ Applicant. The provision of Order 5 Rule 15 of the Civil Procedure Rules provides that:-

- (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.

76. In the absence of such identification even with the detailed affidavit of service, the Court is unable to find that there was proper service effected upon the Defendant herein. In the absence of proper service, the Court finds and holds that there is no regular Judgment on record. Assuming there was a regular Judgment on record, the Court would still be called upon to determine whether there was sufficient cause, whether the Application is brought without undue delay and whether there is a triable Defence on record. The Court has perused the draft defence attached to the Notice of Motion application dated 22nd July, 2022 and finds that the same raises triable issues as there are issues to who is the proprietor of the suit property and whether or not the lease may be rescinded before the period stipulated expires. Therefore, this Court finds and holds that the Defendants have met the threshold for setting side of the ex parte judgment delivered by this Court on 15th December, 2021.

ISSUE NO. c). Whether the Court should refer this matter to arbitration in accordance with provisions of Section 6 of the Arbitration Act of 1995?

77. The 1st Defendant urged the Court to give effect to the intentions of the parties herein expressed in their agreement. Time without numbers, this Court has held that it should never be perceived to be



- re – writing contractual instruments for parties. According to the 1st Defendant, the clear intentions of the parties was that in case of any dispute arising they would submit it for arbitration in accordance with the Clause 19 of the Lease agreement duly executed between them and the Plaintiff herein.
78. In the case of “Nyutu Agrovet Limited – Versus - Airtel Networks Limited (2015) eKLR , the Court of Appeal was emphatic that Courts should uphold the party autonomy concept’ where parties have incorporated an arbitration clause in their contract. The Court stated that where parties incorporate the arbitration clause in the contract between them, they send the message that they do not wish to be subjected to the long, tedious, expensive and sometimes inconvenient journey that commercial litigation entails.
79. Hence, it is for this fundamental reason, based on the “Doctrine of Exhaustion” - that the 1st Defendant contends that this Honorable Court lacks the jurisdiction to handle this matter at this stage as it was instituted before exhaustion of the alternative dispute resolution mechanism being arbitration as founded under the provision of Article 159 (2) (c) of *the Constitution* of Kenya, 2010 and the current Judiciary transformation policy known as Alternative Judicial System (AJS). Rightfully so, they urged the Court to lay down its tools and not to make one more step in this matter but make reference of it to Arbitration. On the contrary, the Plaintiff has a different view. The Plaintiff’s position is that this Court has the jurisdiction to hear this matter. According to the Plaintiff, an arbitration clause does not necessarily oust the jurisdiction of the Court but only prescribes arbitration as a procedure that parties intend to adopt in settling their grievances.
80. Legally speaking, a party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration. While saying so, I seek refuge from the Court’s holding in the case of “Eunice Soko Mlagui – Versus - Suresh Parmar and 4 others (2017) eKLR. The Court stated that the provision of Section 6 of the *Arbitration Act* is a specific statutory provision on stay of proceedings and referral of a dispute to arbitration where parties had entered into an agreement with an arbitration clause. The provision of law prescribes the conditions under which a Court can stay proceedings and refer a dispute to arbitration. Its intention is to regulate and facilitate the realization of the constitutional objective of promoting alternative dispute resolution. The Court stated that there was nothing in that provision that could be said to be derogating or subverting the constitutional edicts as regards alternative dispute resolution.
81. In the case of “Raila Odiga – Versus - IEBC & 3 Others”, the Supreme Court observed that Article 159 (2), (d) of *the Constitution* simply means that a Court of law should not apply undue attention to procedural requirements at the expense of substantive justice. The Article 159 was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Courts.
82. Juxtapose, the issue on whether to refer the matter for Arbitration or another dispute resolving mechanism for a change completely now that the 2nd Defendant has been joined in the suit. From the very onset, and in the given circumstances, the Court is inclined to allow the prayer made on arbitration. In so doing, the Court is informed by the facts that there exists two contractual instruments over the same denominating subject matter – the suit property but with distinct terms and conditions stipulated and parties thereof - a Lease agreement between the Plaintiff and the 1st Defendant on the one side and a Charge or loan facility contract between the 1st Defendant and the 2nd Defendant, the Bank on the other hand. These parties are not at all uniformly obligated by these contracts. For instance, if the Court was to grant the 1st Defendant its prayers then all parties will be claiming an arbitral clause



which not all parties in this suit are privy to. For that reasons, therefore, I strongly hold that this Court has Jurisdiction to hear and make the final determination over the subject matter.

ISSUE No. d). Whether the parties are entitled to the reliefs sought herein.

83. From the above elaborate analysis, the Court has already and graphically stated out the reliefs each party is entitled to in this proceedings. There has been strong justification on the need to first of all set aside the Judgement of this Court delivered on 15th December, 2021. Mainly, the issues of non service of the Summons to Enter Appearance and pleadings upon the Defendant has been demonstrated. Further, the effects of execution of the decree and consequential orders would severely prejudice both the Defendants herein who were never involved as parties in the matter. Here, the principles of fair hearing, natural justice, equity and Conscience as enshrined under the provision of Articles 25 (c), 47 and 50 (1) and (2) of *the Constitution* of Kenya, 2010 come to play.
84. From the filed draft defences, there exists triable issues which need to be adjudicated and which eventually will assist this court to arrive at an informed determination of the matter and the issues in dispute. They cannot be wished away. Additionally, the non involvement of the 2nd Defendant as a party in the matter would be putting them into great prejudice and a position likely to cause them substantial loss at a sum of Kenya Shillings Two Billion, Two Seventy Two Million, One and Seven Hundred, Seven Seventy Five Thousand and Sixty two Cents (Kshs. 2,272,107,775.62). They have a major stake in the matter being the financiers and Chargee.
85. This Court fully concurs with the Plaintiffs to the effect that based on the provision of Article 162 (2) (b) and 159 (1 & (2) of *the Constitution* of Kenya, 2010, Sections 3 and 13 of the Environment & 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. 3 of 2012 this Court is clothed with the full jurisdiction to hear and determine this matter as it did there before. The fact that Clause 19 (1) of the Lease Agreement makes provision for the matter to be referred to arbitration does not deprive the Court of the legal mandate to seize the matter whatsoever. In the given circumstances of the instant case, there exists a very peculiar situation where there are three parties – the Plaintiff, 1st and 2nd Defendants with two distinct legal contractual instruments agreements – the Lease agreement and Charge with different terms and conditions stipulated thereof. Definitely, the given scenario can not be susceptible for an arbitration process. This Court therefore, out rightly declines the request to refer to the matter for arbitration. – the right to refer the matter for arbitration does not deprive the Court Jurisdiction to hear and determine the case. There exists two distinct agreements over the same subject matter.
86. With regard to the relief sought by the Plaintiffs for the Court to cause the parties deposit the cash of a sum of Kenya Shillings Eighty Six Million Seven Eighty Thousand Seven Sixty (Kshs. 86, 780, 760) into an joint Escrow account is not sustainable. The request cannot be substantiated and not well computed. In any case the Judgement has been set aside altogether to be heard de no vo. In all fairness, and in order to comfort the Plaintiffs who were in the process of executing the Decree and other Consequential orders emanating from the Judgement of this Court delivered on 15th December, 2021, the Court has directed that the 1st Defendant give the Plaintiff thrown away costs of Kenya Shillings Two hundred and Fifty Thousand (Kshs. 250, 000.00). Arising from the potent issues involved, this is one matter that requires to be expeditious determined.

ISSUE No. e). Who will bear the Costs of the two applications.

87. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that is granted to a party at the conclusion of a legal action, process or proceedings in any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow



the events. (See the Supreme Court case of “Jasbir Rai Singh Rai Versus Tarchalon Singh” (2014) (eKLR) and Mary Wambui Munene – Versus – Ihururu Dairy Co – operative Societies Limited (2014) eKLR”). By event, it means the result of the legal action, or process or proceedings.

88. In the instant case, thought the two applications have been successful, its just fair that the costs to be in the cause taking that the matter is still to proceed on for full trail going forward.

VIII. Conclusion & Disposition

89. Ultimately, having conducted an elaborate and indepth analysis of all the framed issues of the subject matter emanating from the two filed applications, the Honorable Court is satisfied that on preponderance of probability, the Applicants have been able to some extent established their case. For avoidance of any doubts, therefore, I do proceed to order as follows: -

- a. THAT the Notice of Motion application dated 24th June, 2022 by the Intended Interested Defendant be and is hereby found to have merit and the same is allowed entirely.
- b. THAT the Notice of Motion application dated 22nd July, 2022 by the Defendant be and is allowed partially with an exception to the prayer seeking to refer dispute for Arbitration under the *Arbitration Act*, of 1995.
- c. THAT the 2nd Defendant be and is hereby joined as a party to this suit and is at liberty to file its Defence and any other accompanying document.
- d. THAT the Judgment of this Court delivered on the 15th December, 2021 is hereby set aside on the following conditions:

i.

The Plaintiff granted leave of fourteen (14) days from the date of this Ruling to amend its Plaint under Order 8 Rule 3 of the Civil Procedure Rules, 2010 and serve the Amended Plaint accordingly.

ii.

Upon service, the Defendants are granted leave of 14 days to file their Defences and/or Counter Claim, if any under Order and accompanying documents under the provision of Orders 6, 7 and 11 of the Civil Procedure Rules, 2010.

iii.

Thereafter the Plaintiffs be granted Seven (7) days leave to file Reply to Defence and/or Counter Claim thereafter.

e.

THAT for expediency sake, this matter to set down for hearing and final determination within the next One Hundred and Eighty days (180) days commencing from 28th September, 2023. There be Pre – Trial conferencing to be done within 30 days of this ruling on 16th May, 2013.

f.

THAT the 1st Defendant herein directed to pay throw away costs to the Plaintiffs for a sum of Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250, 000.00) within the next thirty (30) days of the delivery of this ruling failure to which the ex parte Judgment entered against them on 15th December, 2021 shall be reinstated and/or set in motion and orders herein without any further resource to this Court thereof.



g.

THAT the costs of the two applications to be in the cause.

IT IS SO ORDERED ACCORDINGLY.

RULING IS DATED, SIGNED and DELIVERED at Mombasa THIS 21ST DAY OF MARCH 2023.

HON. JUSTICE MR. L.L NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

Mombasa

In the presence of:-

- a. M/s. Yumna – the Court Assistant
- b. Mr. Mokaya Advocate holding brief for Mr. Malombo Advocates for the Plaintiffs.
- c. Mr. Kabaiku Advocates for the 1st Defendant.
- d. Mr. Wawire Advocates for the 2nd Defendant

