Estate of Kamei Chombir Psetilat v Kala & 3 others (Environment & Land Case 16 of 2018) [2023] KEELC 16951 (KLR) (19 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16951 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 16 OF 2018

FO NYAGAKA, J

APRIL 19, 2023

BETWEEN

ESTATE OF KAMEI CHOMBIR PSETILAT ..... PLAINTIFF

AND

REUBEN KALA ..... 1ST DEFENDANT

JACKSON KARIWO ..... 2ND DEFENDANT

KOMOLINYANG NGARIA ..... 3RD DEFENDANT

JENIFER CHEYECH ..... 4TH DEFENDANT

RULING

1. By a Notice of Motion dated September 5, 2022 the 1st and 4th Defendants moved this Court for a number of prayers. The Application was brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 12 Rules 7 and Order 22 Rule 6 and Order 51 Rule 1 and 4 of the *Civil Procedure Rules, 2010.* They sought the following reliefs:-

   (1) ...spent

   (2) ...spent

   (3) That this honourable Court be pleased to set aside its ex parte proceedings herein, the judgement delivered on May 26, 2022, the subsequent decree issued on February 26, 2022 and all consequential orders and/or proceedings and the applicants be allowed to participate in this matter for the same to be determined on merit.

   (4) Thatthis Honourable Court be pleased to set down the suit for hearing and the matter be determined on merit.

   (5) That costs of this Application be provided for.

2. The Application was based on a number of grounds. In summary they were that the matter proceeded in the absence of both the parties and their learned counsel and judgement was subsequently delivered and a decree extracted. The decree holder was in the process of executing the decree, having filed and served the Bill of Cost due for taxation on September 13, 2022. The failure to attend Court on May 4, 2022 when the suit came up for hearing was not adverted to but it was because the defendants were unaware of the hearing date as the hearing notice was not served on them. The Applicants were never served with the application by their previous advocates to cease acting in order to enable them take action hence they always believed the matter proceeded well under their previous advocates.

3. The 1st and 4th Defendants learned of the judgment when they were served with the taxation notice on or about August 22, 2022 and upon perusing the Court file they found that the judgment had been delivered against them. The Applicants had a good defence which raised triable issues. The 1st and 4th Defendants were in possession of the suit land as of right, having lawfully purchased it hence they should, under Article 50 of the *Constitution*, be given opportunity to be heard. The Defendants were never served with a Notice of Entry of Judgment in terms of Order 22 Rule 6 of the *Civil Procedure Rules*. The right to be heard is fundamental under the *Constitution of Kenya*. It would be in the interest of justice to set aside the judgment and allow the Defendants to participate in the matter. The Defendants will suffer great prejudice if the orders sought are not granted while the same will not prejudice the Plaintiff. The Application had been brought without undue delay.

4. The Application was supported by the Affidavit of one Reuben Kala, the first Defendant. In the Affidavit sworn on September 6, 2022, he repeated but in deposition form most of the contents of the grounds in support of the Application. Thus, I will not repeat the similar contents in this summary of the Affidavit. But he deponed that he was an adult of sound mind and annexed to the Affidavit and marked as RK1 a copy of his national Identity Card. He annexed and marked as RK2 a copy of the letter of authority from the 4th Defendant for him to swear an Affidavit in that behalf. He also annexed and marked as JK 3, 4 and 5 the copies of the judgment, Decree and Bill of Costs. After that he annexed as JK6 copies of two Affidavits sworn by one George Mumali on March 19, 2023 and 4/05/2023. On them he deponed that both he and the 4th Defendant had never been served with any mention notice dated February 25, 2022 and hearing notice dated April 20, 2022. He then deponed that he worked as a clerk in Sigor in the office of the Assistant County Commissioner hence there was no way he could have been at his shop at Makutano on 7/03/2022 and April 20, 2022 at 9.30 am. He did not work in a Supermarket called Californian and that on February 25, 2022 he was at his work place in Sigor. He repeated the deposition that he was a clerk working the Assistant County Commissioner's office in Sigor and he could not be at his shop on the alleged dates and time since he was at work.

5. He then deponed that the process server did not give the name of the business premises purportedly owned by the 4th Defendant in which he served the documents as deponed in paragraph 3 of the Affidavits of Service. That on the material dates the 4th Defendant was in Uganda where she carries on business, having gone there between March 2022 and June 2022 hence she was not in Makutano on the respective dates of service.

6. The 1st Defendant then trained his argument against the process server but in favour of the 2nd and 3rd Defendant. He deponed that the process server did not specify where in Chepareria he found the two defendants, Chepareria being a vast area. He then deponed that the process server ought to have informed the Court with specificity whether the 2nd and 3rd Defendants stayed in the market centre or in the village.

7. In support of the deposition that they were never served with an application by their previous advocates to cease acting, he annexed and marked as JK7 and 8 the Application and Affidavit of Service thereof.

Regarding the Affidavit of Service which was sworn on 26/05/2021, he challenged its truthfulness on account of three reasons. The first one was that the Advocate had earlier, on November 18, 2019, sworn that he had lost touch with them yet on May 26, 2022 he swore that he (learned counsel) reached him on May 26, 2021 through his phone number 0708xxxxxx. Second, that in the Affidavit of Service the former Advocate swore that he served him yet nowhere did he indicate that the 1st Defendant received service on behalf of the rest of the Defendants. Third, there was no evidence of correspondence between his previous advocate and them that was annexed to the Application to cease acting.

8. With the above he deponed that the previous advocates were allowed to cease acting on their behalf without their knowledge. He deponed further that they always believed that the former advocates were acting in their behalf. He repeated that they had a good Defence and annexed a copy of the same and marked it as RK 9. He annexed as JK 10 and 11 copies of agreements of purchase of the land and photographs to show the developments on the land.

9. He deponed that Order 12 Rule 7 of the *Civil Procedure Rules* allowed the granting of the orders sought on such terms as the Court deemed just. He prayed for the orders to be granted.

10. The Application was opposed strongly through an Affidavit sworn by one Chepochechendo Chombir Atodongor on November 12, 2022. The Replying Affidavit was in respect of the instant Application and the one dated September 20, 2022. She deponed that a suit belonged to the parties and they were under an obligation to follow up with their advocates for updates on its litigation. She deponed further that the law firm previously on record had ceased acting, with leave of court, for the applicants on the grounds that they failed to get in touch with them to record witness statements and furnish them with compliance documents. It was inconceivable that prior to May 27, 2021 up to the time of filing the instant application, the applicants never bothered to get in touch with their advocates and know the status of their case. That the case delayed so much for failure to comply with the provisions of Order 11 of the *Civil Procedure Rules* because of the conduct of the Defendants.

11. The Respondents stated that the Applicants admitted that the same process server who had served previously the hearing notices was the same one who had now served the Notice of Taxation whose service they now did not dispute. She annexed as CAA1 a copy of an Affidavit of Service by the said George Mumali.

12. The 1st Respondent swore that it was the 1st Defendant who ran the Supermarket known as California Supermarket. She annexed and marked as CAA2 a copy of a receipt of sale of goods from the said business, which was issued by the said Supermarket when she bought goods from it, evidencing that the email address thereon bore the names of the Applicant. She deponed that the process server had clearly stated that he effected service on the Applicant in the said Supermarket but the Applicant refused acknowledge receipt on the hearing notice. Further, she deponed that the process server knew well all the four Defendants, having previously served them.

13. The Respondent deponed further that the 4th Defendant did not deny that she conducted a cereals business in a shop situate along Makutano-Kacheliba road. She then stated that the 2nd and 3rd Defendants admitted having been served with the taxation but declined to sign and their place of service was in Siyoi village where they were served earlier. Her deposition was that the Applicants were out to delay the finalization of this suit and prejudice the Plaintiffs. She repeated that the deceased never sold land to the applicants nor could the administrators of the estate of the deceased do so before letters of administration were confirmed. She repeated that the law did not require service of a notice of entry of judgment on the applicants. She prayed for the dismissal of the Application.

14. The 2nd and 3rd Respondents filed an application dated, 20/09/2022 whose substantive prayer was similar as the one sought by the 1st and 4th Defendants. The Application was brought under Sections 3 and 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the Civil Procedure Rules. In it they sought the prayers:

    1. ...spent

    2. That the judgment entered on May 26, 2022 against the 2nd and 3rd Defendants and any other consequential orders herein be set aside.

    3. That the costs of this application be in the cause.

15. The Application was based on ten (10) grounds and supported by the Affidavits of Jackson Kariwo and Komolinyang Ngaria which were sworn on September 20, 2022. The grounds upon which the Application was brought were that the applicants had hired the services of Ms. Chebii Cherop Advocates in defending their suit. The said advocates never informed them of their hearing date of this matter hence they were not aware of it and did not participate in the hearing. The two Defendants had instructed the law firm currently on record and the said firm established that judgment had been delivered in this matter. That no notice of entry of judgment had been given to the Applicants. The Defendants entered appearance and filed defence. That their Defence raised triable issues. Lastly, failure of the Defendants to attend Court to defend the suit was not deliberate. That it was in the interest of justice that the orders sought be granted.

16. On his part, in support of the Application one Jackson Kariwo swore the affidavit referred to above. He repeated most of the contents in the grounds of the Application. He annexed and marked as JK-1 a copy of the joint Defence they filed on April 17, 2021. He also annexed a copy of the Application by the firm previously representing them, and the Affidavit of service showing that he was served with the Application.

17. He deponed that "we were not aware" of the hearing date of the main suit and "we did not participate at the hearing" and learned of the same upon being served with a notice of taxation. When they were served with the notice they instructed the firm of R. E. Nyamu & Co Advocates to peruse the Court file and it noticed the judgment had been entered against them. A notice of entry of judgment was not served on them and they knew all along that the former law firm was acting for them. He then deponed that the purported service of the hearing notice by George Mumali was defective. He annexed and marked as JK 5 and 6 the Affidavits of Service by the said George Mumali. He prayed for the application to be allowed.

18. The 3rd Defendant too swore his Replying Affidavit on the same date. Other than not annexing the copies of documents that the co-applicant, on Jackson Kariwo, did when swearing his Affidavit in support, the Affidavit was similar to that of his Applicant. Therefore, I will not repeat the contents of the depositions of the 3rd Applicant herein but will rely on them fully in my determination of the matter before me.

19. After being served with the Replying Affidavit sworn by Chepochechendo Atodongor, the 2nd Defendant filed a Supplementary Affidavit on January 24, 2023. He swore it on January 20, 2023. In it he deponed that the former Advocates informed them to wait and that he would inform them of the progress of the suit and they believed him. They did not know that he had applied to cease acting for them. He deponed that failure to attend court was occasioned by their former advocates. He the deponed that the Affidavit of Service about service on them was false because he was not with the 3rd Defendant on June 13, 2022. He then castigated the earlier service as stated in the Affidavit sworn on

May 4, 2022 since it could not be true that he and the 3rd Defendant were always together when service could be effected. He denied the service of the hearing notice dated July 4, 2022 and noted that there were no proceedings of that dates. He then deponed that about the Application by Chebii Cherop & Co. Advocates to cease acting for them, it did not demonstrate the efforts learned counsel made to communicate with them. He deponed further that they did not refuse to give instructions to the former Advocates and blamed him for the failure to attend Court.

20. The Applicant annexed and marked as JK-1(a) a copy of a school attendance register of June 13, 2022 to show that he was in school throughout that day. He deponed that he was not at the 3rd Defendant's home on June 13, 2022 as alleged by the process server. He annexed and marked as JK-1(b) a copy of a pay slip to show that he was a teacher at Tilak Primary School. He deponed that the Affidavit of Service was false. He prayed for the granting of the Application dated September 20, 2022.

Submissions

21. The Applications were disposed of by way of written submissions. The 2nd and 3rd Defendants filed theirs dated January 24, 2023 on January 26, 2023. The 1st and 4th Defendants filed theirs dated February 20, 2023 the same date while the Plaintiff filed hers dated the February 20, 2023 the same date. In the Plaintiff's submissions, for the Application dated September 20, 2022, they argued that they did not attend court for reason that they were unaware that the suit was due for hearing on the material date. Their contention was that the failure was not deliberate as their then Advocates on record did not inform them of the hearing. Rather that he had informed them earlier that they wait and he would inform them of the progress only for him to apply to cease acting. They said that the Advocate's promising words are the ones that made them not to attend but wait. They then submitted further that the said former advocates did not demonstrate that they tried to communicate with them in vain. They stated that they were interested in the case. They relied on the case of Capt. Philip Ongom v Catherine Nyero Owola, Civil Appeal No 14 of 2001. In it the court stated that it would not consider the failure of an advocate who is served to comply with the notice as the client's mistake since they did not know the content of the notice. To attribute that to a client without caution would lead to abuse of the system of law that permits representation of clients by advocates. The court then concluded that a client should not bear the consequences of the advocate's fault.

22. The Applicants summed it that they were not aware of the Court processes and only relied on their advocates' advice. They attacked the truthfulness of the Affidavit of service which was annexed to the Replying Affidavit to show that they were served. They stated that they could not be together on June 13, 2022 since the 2nd Defendant was a teacher and at school the whole day and not at the 3rd Defendant's home. They stated that their defence raised triable issues and that any prejudice occasioned to the Plaintiff by the orders sought if granted would be compensated by costs.

23. The 1st and 4th Defendants submitted by first summarizing the contents of the Applicant dated September 5, 2022. They then relied on the case of *Patel v E.A. Cargo Handling Services Ltd* [1974] EA, 75 which cited the House of Lords in *Evans v Bartlam* [1937] AC 437; [1937] 2 All ER 647 at p 651. In the authority, their Lordships were of the view that the main issue for the court to consider is whether any useful purpose would be served the judgment and in that it should see if there was no possible defence to the action, and secondly how it came about that the defendant became bound by a judgment regularly entered against him.

24. They then stated that indeed judgment was regularly entered against them. But they did not deliberately fail to attend Court on the date the suit came up for hearing on May 4, 2022 but because they were unaware of that fact. They then laid seven (7) grounds of discounting the fact that they were served, as sworn by the Affidavit of Service of one George Mumali. These were relevant to summarize

and consider herein. One, they were not served with the Mention Notice dated February 25, 2022 or hearing notice dated April 20, 2022. Second, the 1st Applicant worked in Sigor in the office of the Assistant Deputy County Commissioner hence could not have been at his shop on March 7, 2022 or on April 20, 2022. Third, he did not work in a Supermarket known as Californian because he was a civil servant. Fourth, he was in the office in Sigor on the material dates of the alleged service. Fifth, the Process Server did not give the name of the business premises purportedly owned by the 4th Defendant whereas he served her on May 19, 2022. Sixth, from March, 2022 to June 2022 the 4th Defendant was in Uganda where she carries out farming business hence could not be at Makutano on March 7, 2022 and April 20, 2022. Seventh, and which surprisingly showed that all the defendants were working together, the 1st and 4th Defendants argued that the process server did not specify where he found the 2nd and 3rd Defendants in Chepareria which is a vast area.

25. Then the 1st and 4th Defendants turned their submissions on the argument that they were never served with the Application to cease acting. This Court has considered the points raised therein although their relevance to the instant application is minimal if any. They also argued on the point that they were not served with a Notice of Entry of Judgment as required by Order 22 Rule 6 of the *Civil Procedure Rules*. This Court having found that the judgment herein was regular made a further finding that the Rule was irrelevant hence it further finds no relevance of the submission and authority (of *Patel supra*) whose excerpt is cited in support thereof.

26. Lastly, they submitted that they had a good defence on the record and with high chances of success and raised triable issues hence should not be locked out. Again, they stated that they were on the suit land since they lawfully purchased the same and that they brought the instant application without undue delay.

27. On her part the Plaintiff submitted that the Applicants had stated in their Affidavits that they were waiting for communication from their then advocate who ceased acting for them without their knowledge. She summarized the arguments in the applications and the Replying Affidavit. She countered the contention that it was the Applicants' case and not the advocate's and they had an obligation to follow up about the case to know what the position was. He reiterated that the Applicants' 'former' advocates applied to cease acting for them because they did not give him further instructions.

28. On the blame on the advocate, the Respondent relied on the case of Johnson Nyamoko Abuga v Otiso Ondicho [2021] eKLR which relied on the Court of Appeal one of *Rajesh Rungani v Fisty Investment Ltd & another* (2005) eKLR. In it the Court stated that it was not enough to blame the advocate for failure to inform as if there is no duty on the client to purse the matter. It is not an excuse for a client to rely on a lawyer's inaction. They also relied on the case of *Nahesh Kumar Aggarawal v Silas Kiptui Kipchila & 2 others* which cited the one of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR which was to the effect that it was not open for a client to blame an advocate on record for all manner of transgressions but that parties have a duty to show interest int their matters.

29. The Respondent then submitted that the manner in which the Applicants received the taxation notice was the same as they did of the hearing notice by not signing upon service. She then submitted that the Applicants were given opportunity to defend their case but they failed to utilize it hence could not blame parties and their advocates. She was of the view that the application was designed to delay the finalization of the suit. Lastly, they submitted, relying on the case of *Daniel Musau Mbithi v Rael Kavili Munyao & another; Timothy Ngila Nzuki & 6 Others (Parties)* eKLR, that the law was not that a party must be heard in every litigation but that a party is given reasonable opportunity of being heard and once the opportunity is not used the only other one available is for the party to say why he did not

use the opportunity. She then submitted that the parties had made the application as an afterthought, and prayed they be dismissed.

Issues, Analysis and Determination

30. I have considered the Applications, the law on both, being case law and statutory, and the submissions by all the parties. I have also given due consideration of the principles on setting aside a regular judgment. I have two issues for me to decide in the instant applications. These are, whether the applications are merited and what orders to give in terms of costs thereon.

31. As I begin with the determination of the first issue, which is on the merits of the applications, it is important to first consider the authorities the parties relied on in their submissions and make a finding as to their relevance or distinction. The 3rd and 4th Applicants relied on the case of *Capt Philip Ongom v Catherine Nyero Owola*, Civil Appeal No 14 of 2001. In it the consideration was whether the mistake by way of failure of the party's advocate to act on a hearing notice would be attributed to the client. The Court was of the view that it would not wholesomely be so but the Court has to be extremely cautious to do so or else it would breed abuse of the procedure of representation of a party. That holding is contrasted with the instant situation. In the present case, the fact and the record is that the Applicant's Advocates ceased acting for them before the hearing notice was served. Actually, the contention is that the hearing notice was served on the parties but they did not attend Court.

32. The above distinction goes also for the cases of J*ohnson Nyamoko Abuga v Otiso Ondicho* [2021] eKLR and *Nahesh Kumar Aggarawal v Silas Kiptui Kipchila & 2 Others* which were cited by the Respondent. In both, the court considered whether or not a party who is represented by counsel can blame the advocate for his mistakes and go away with it. The Court found it not so. But in the instant case, although the applicants purported to blame the 'former' advocates on record, the advocates were no longer on record when service was done. Thus, failure to attend court, though attributed to the said advocates was not actually their advocates'. As for the case of *Daniel Musau Mbithi v Rael Kavili Munyao & Another; Timothy Ngila Nzuki & 6 Others (Parties)* eKLR the ratio decidendi is applicable herein.

33. Having distinguished the cases cited, the starting point in the instant application is to determine whether the judgment impugned by the Application before me is a regular or irregular one. The reason is that there are parameters to be considered or principles to be applied in considering whether or not to set aside either of the judgments. Where the Court finds that the judgment was irregular, it will have no much choice than to set it aside ex debito justitiae, meaning as a matter of right, in order to give the party against whom it was entered a chance to be heard. That is what the rules of natural justice require: a party should not be condemned unheard.

34. About the right to be heard as the rules of natural justice dictate, the Supreme Court of India stated, in *Sangram Singh v Election Tribunal, Koteh*, AIR 1955 SC 664, at 711, as follows:

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

35. This Court cannot overemphasize the point about the principles of setting aside the two types of judgment than was ably put by the Court of Appeal in the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. The Court stated in it as follows:-

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 judgment 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 the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other....
>
> 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 justitiae, 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."

36. Therefore, from the above definitions and principles, this Court sets to start the determination herein by making a finding on either of the two. From the record, it is clear that the Applicants, in the two applications under consideration herein were served with summons to enter appearance. This is because, although there is no Affidavit of Service to that effect, soon after the filing of the suit and extraction of the summons to enter appearance, all the four Defendants, now applicants, entered an appearance dated February 28, 2018 on March 13, 2018 through their immediate 'former' lawyers. They filed a Joint Defence dated April 16, 2018 on April 17, 2018. Upon serving the same, the Plaintiff filed a Reply to Defence dated June 20, 2028 the same date.

37. After the pleadings closed, the matter was set down for hearing on November 28, 2019 when it did not proceed. It was then fixed for hearing on March 30, 2020 when again it did not go on. Another date of May 13, 2021 was taken. On the latter date, the Advocate then appearing for the Defendants indicated to Court that he has filed an application dated November 18, 2019 which was fixed for hearing on May 27, 2019. The application was for the 'former' Advocates to cease acting for the Defendants. The Application was allowed on the date it came up for hearing.

38. After the Advocates for the Defendants ceased acting for them the Plaintiff was directed to serve the defendants in person for the hearing of the main suit which was then fixed for July 22, 2021. While the record is silent as to when the Defendants purported to instruct one Mr. Bisonga Advocate to represent

them following the withdrawal of the 'former' Advocates, the record of 22/07/2021 shows that it was indicated by the Plaintiff's Advocates that Mr. Bisonga had not come on record then as he intimated (possibly earlier). For that reason, the suit was adjourned to 03/11/2021 when it did not again proceed. The record shows that on November 26, 2021 the Plaint was Amended and served on the Defendants. This was indicated to Court on 17/1/2022 and the suit was fixed for mention on February 21, 2022 and further on March 21, 2022 to confirm that service had been effected. It was then fixed for hearing on 4/05/2022 when the Plaintiff was heard in absence of the Defendants, service having been confirmed through an Affidavit of Service duly filed on April 30, 2022. Judgment was delivered on May 26, 2022, and it is the one sought to be set aside.

39. As noted above, the first application was brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 12 Rules 7 and Order 22 Rule 6 and Order 51 Rule 1 and 4 of the *Civil Procedure Rules, 2010*, while the second one was brought under Sections 3 and 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the Civil Procedure Rules To begin with, the relevance of the provisions cited is important to underscore. Section 1A of the *Civil Procedure Rules* is on the objective of the Court which is basically to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. Section 1B is on the duty of the Court which is to determine all disputes in a just, efficient, timely manner which includes the use of technology to achieve it. Section 3 is on the unlimited power granted to the Court by the Act, where there is absence of any specific provision to the contrary by any other law for the time being in force. Section 3A is on the inherent power of the Court to make any order necessary for the ends of justice or to avoid abuse of its process. Order 51 Rule 1 of the *Civil Procedure Rules* is on the form of all formal Application to be filed in Court, which should be by Notice of Motion and to be heard in open Court unless specifically directed otherwise by the Court. Order 22 Rule 6 is on execution of a decree of the Court or by a Court to which a decree has been sent to. The Rule has a proviso thereto that where a judgment is entered against a party in default of Appearance or Defence, execution should not issue unless a notice of entry of the judgment is given for not less than ten (10) days to the judgment debtor/s.

40. This Court has analyzed all the above provisions to show that although cited, they are not directly relevant to the Applications herein. Each have their specific realm of application and if they are not in relation to the alleged events that led to the judgment sought to be set aside herein. Therefore, such argument as by the Applicants that the Plaintiff ought to have complied with Order 22 Rule 6 of the Civil Procedure Rules before execution would be done was a misinterpretation of the law. The judgment herein was not entered against the Defendants in default of appearance or defence as the record bears it. The judgment was entered against them for reason of failure to attend the hearing fixed by Court. Any application to set aside such judgment is governed by Order 12 Rule 7 of the *Civil Procedure Rules*.

41. Order 12 Rule 7 of the *Civil Procedure Rules* provide as follows:

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

42. The Rule is clear that the power of a court to set aside its judgment is discretionary and wide. Once the Court decides to apply the discretion favourably to an applicant it has power to set terms or conditions as may be deemed to it to meet the ends of justice. The intent and purpose of the discretion is important to bear in mind.

43. Regarding the extent of the discretionary power under the Rule and its limits, courts have pronounced themselves. In *John Mukuha Mburu v Charles Mwenga Mburu* (2019) eKLR cited with approval the

case of Shah vs Mbogo (1979) EA 116. It was held that the discretion of the Court in setting aside a judgment is very wide. Specifically, the Court stated thus:

> "……this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

44. Earlier, in Patel v E.A. Cargo Handling Services Limited (1974) E.A. 75, cited with approval in the case of *Stephen Wanyee Roki vs K-Rep Bank Limited & 2 others* (2018) eKLR the Court held as follows:

> "There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

45. In the case of *Esther Wamaitha Njihia & 2 Others v Safaricom Limited* [2014] eKLR, the learned Judge, citing the case of *Stephen Ndichu v Monty's Wines and Spirits Ltd* [2006] eKLR, held as follows:

> "The principles governing the exercise of judicial discretion to set aside ex-parte Judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See Patel v E.A. Cargo Handling Services Ltd [1974] E.A 75). The discretion is intended 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 cause of justice (See Shah v Mbogo [1969] E.A 116). The nature of the action should be considered, the Defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration v Gasyali [1968] E. Way. 300). It also goes without saying that the reason for failure to attend should be considered."

46. Also, Justice Mativo (as he then was), in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR cited the case Ongom v Owota where it was held that for an order of setting aside of an ex-parte judgment to issue, the court must be satisfied with two things namely:

(a) either that the Defendant was not properly served with summons; or

(b) that the Defendant failed to appear in court at the hearing due to sufficient cause.

47. About the service of summons on the Applicants herein, this Court has found that it is neither here nor there since the Defendants entered appearance and filed defence. The next limb of the holding in the Karani case (supra), that is to say, sufficient cause, is what this Court considers relevant. It is the only reason that can come close to what Order 12 Rule 7 contemplates for, apart from giving the Court discretion to impose terms as he deems just on setting aside, it does not give the basis for which the judge or judicial officer may set aside a judgment or order made pursuant to failure to attend a hearing.

48. Sufficient cause was defined by the Supreme Court of India in the case of *Parimal vs Veena* which also was cited in the case of *Wachira Karani v Bildad Wachira* (2016) eKLR. In the case, the Court observed that:-

> "Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"
>
> The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

49. Therefore, sufficient cause had to be shown by the applicants in order for the applications to be meritorious, and three requirements are attendant thereto for consideration. First, whether the applications were brought without undue delay. In this regard since the applicants contend that they were unaware of the hearing and the judgment of this Court, for the sake of determining only the issue whether indeed they were diligent in moving the Court, this Court has to examine the period between the alleged service of the Bill of Costs and when the Applications were served and find whether there was or was not delay, and if there was any delay, whether it was satisfactorily explained. From the record, a Plaintiff's Bill of Costs was filed on June 16, 2022 and a date for it fixed on June 21, 2022 for July 19, 2022. An affidavit of service sworn by one George Mumali on July 19, 2022, and marked as annexture CCA1 to the Affidavit sworn by the Respondent on November 12, 2021, shows at paragraph 2 and 3 that service of the same was effected on June 13, 2022. The Bill of Costs was not taxed on July 19, 2022. But on that date, it was fixed for September 13, 2022. From then on, nothing is shown to have taken place until the first of the instant Applications was filed on September 8, 2022 and the second on September 20, 2022.

50. The question this Court asks itself and which can only be answered from the record and documents filed by the parties is, since the Applicants were unaware of the hearing date of the suit, and the same having proceeded in their absence, and they having been waiting for their advocates previously on record to inform them of the progress of the suit, and since the taxation of the Bill of Costs herein was fixed for hearing for the first time, and purportedly (though contested) served but the hearing did not take place, and another date was fixed but not served, how come the Applicants knew of the existence

of the judgment herein and instructed their current advocates on various dates to apply to set aside the judgment? What prompted the 2nd and 3rd Defendant to suddenly and almost contemporaneously with the 1st and 4th Defendants start moving the Court for the orders sought in the instant applications?

51. When this Court carefully read through the supporting Affidavit of Jackson Kariwo, sworn on September 20, 2022 to the Application dated the same date, it does not at all explain what prompted him to instruct Ms. Nyamu and Co. Advocates to peruse the Court file and establish that judgment had been entered against him. Again, the said Jackson Kariwo denies vehemently the service of the Bill of Costs on him on June 13, 2022 and even another one of 4/07/2022. He denies the existence of proceedings of the latter date. And when the two dates he refers to are carefully analyzed against both the record and affidavit in question, they do not support the deposition the said Mr. Kariwo alludes to. First, the process server does not state that he served him on June 13, 2022 but on July 8, 2022. Second, he does not depone to any proceedings of July 4, 2022. Thus, the 2nd Defendant's depositions and contention are irrelevant.

52. That aside, similarly, the supporting Affidavit of Komolinyang Ngaria sworn the same date does not explain that fact. All that both deponents swear to is that they knew all along that the firm of Ms. Chebii & Co. Advocates represented them, and all of a sudden, so to say, from the blues, they instruct a new law first which discovers, about two months after the Bill of Costs which is to be taxed a week before they file their application, that there is judgment against them and a bill of costs about to be taxed. That is too coincidental for parties who wish to convince the court that they were unaware of the existence of the judgment yet they do not explain what prompted them to start being active in the matter all of a sudden! That means also that the two applicants failed to explain the delay from the date of the judgment and even of when the Bill of Costs was served on them for taxation to the date of filing of their instant application.

53. This Court now turns to the depositions of the 1st and 4th Defendants to find our how they got to know of the existence of the judgment and iF there is an explanation as to the delay, if any in bringing their instant application. Using the same parameters as for that used to assess the explanation on the part of the 2nd and 3rd Defendants, as above, the Applicants herein filed their application on September 6, 2022. They too alleged that they were unaware of the hearing date and even that their advocate previously on record had filed an application to cease acting for them. The Affidavit of Ben Kala, sworn on September 6, 2022 alludes at paragraph 13 that he became aware of the existence of the judgment around August 22, 2022 when he was served with a notice of taxation of the matter herein and when he perused the Court file the same date he found so. There is no Affidavit of Service by any process server to confirm that indeed service was effected on 22nd of August of thereabouts. The only one in existence is the one of 8/07/2022 as sworn by George Mumali on July 19, 2022, which he has not denied. Thus, this Court finds it difficult to agree to the Applicant on that later service and finds that service was effected on July 8, 2022. Even granted that service was effected on September 22, 2022, the delay of fifteen days to bring the instant application is neither ordinate nor explained.

54. On the score above I would find the applications before me not merited. However, in addition to that, the reasons given for the failure to attend Court on the date of hearing need to be considered. The parties spent considerable time to argue that they were unaware of the hearing date for reason that their advocates previously on record advised them to sit pretty and wait for information about the progress of the case. For that reason, they never acted until, one set of the parties, being the 2nd and 3rd suddenly decided to instruct the lawyers currently on record only for them to find a judgment having been entered against them and they brought the instant application. The other set of the parties, being the 1st and 4th Defendants, also sat and waited for their Advocates to inform them of the progress of their matter until they were served with a Bill of Costs for taxation and they were cajoled into action.

55. At this point I emphasize here that the determining issue on this point is the explanation given about the failure to attend Court on 04/05/2022. The issues of service or non-service of hearing dates, mention dates or even the application by the law firm previously on record to cease acting for the Applicants is neither here nor there regarding the application to set aside the judgment herein. They are only ancillary to the main issue. For instance, about the fact that the application dated November 18, 2019 was either served or not, the Court satisfied itself as to the service thereof and granted the order that the law firm of Ms. Chebii Cherop & Co. Advocates does cease to act for the Applicants and it was so. That was on May 27, 2021. From then on, the Applicants were to be served for the hearing. It is not convincing on the part of the Defendants to claim that they were unaware that Ms. Chebii Cherop & Co. Advocates had applied to cease acting and had actually not gone off record when as early as July 22, 2021, soon after the Court had ordered the said law firm to cease acting, the Defendants are said to have instructed one Mr. Bisonga to come on record for them but it never materialized. Even then, once the Court order the firm previously on record to cease acting, the record was that the said law firm ceased to act and the Defendants were on their own.

56. The above being the position, the issue the applicants needed to address was whether or not they were served for the hearing of May 4, 2022. Regarding that service, one George Mumali swore an Affidavit of Service which was filed in Court. He detailed how on April 21, 2022 he received a hearing notice dated April 20, 2022 and proceeded the same date to Makutano market where he effected service on the 1st Defendant at his premises known as California Supermarket at 9.30 am. On the same date he went to the 4th Defendant's business premises along Makutano-Kacheliba where she sells cereals and effected service on her about 10.47 am. From there he went to Siyoi village where the 2nd and 3rd Defendant reside and about 2.17 pm he met both at the 2nd Defendant's home and effected service on them. On 4/05/2021, the Court was satisfied as to this service and directed the suit to proceed in absence of the Defendants.

57. Peradventure that the Court was misled as to the service, the explanation given by the Defendants for non-attendance, hence about non-service needs to be considered. The 2nd and 3rd Defendants argued that they were not served with the hearing notice. They stated that the advocates previously on record did not inform of the hearing date. As I have found above, the hearing notice was not served on the advocates previously on record. Thus, they were under no obligation to inform the Defendants of the hearing notice which they did not know of. Jackson Kariwo blew hot and cold in his argument. At one time he said that the advocates previously on record did not inform him of the hearing date. Later he deponed at paragraph 13 of his Affidavit that he was not served with the hearing notice and that the Affidavits of Service by George Mumali, being annextures JK 5 and 6 were defective.

58. In the Court's humble view, it is either the 2nd Defendant had an advocate on record who should have informed him of the hearing date hence was the one served or he was supposed to have been served personally. In any event when I have carefully analyzed the annextures he refers to, JK 5 refers to service in respect of a mention notice dated March 25, 2022. Save that it shows that service of the mention was effected on the 2nd Defendant, it does not relate to the hearing of May 4, 2022. Regarding annexture JK 6 which is on the service for 4/05/2022, this Court was satisfied before proceeding with the hearing that the service was proper in terms of Order 5 of the *Civil Procedure Rules, 2010*. Regarding the argument that the service was defective and the Affidavit of service was false, the Applicant submitted that on June 13, 2022 both he and the 3rd Defendant were not together in order for the service to have been effected on them since he is a teacher in Tilak Primary School. At the same time, the 2nd Defendant swore a Supplementary Affidavit on January 20, 2023 and filed it on July 24, 2023. In it, at paragraphs 7 and 13, 14 and 15, he deponed that he is a teacher in Tilak Primary School and that on June 13, 2022 he was in School, the place of work, all day, could not have been at the 3rd Defendant's home.

He annexed a school attendance register as JK 1(a) and a pay slip as JK 1(b) to evidence that he was a teacher in the school and that he was in school all day.

59. However, this Court notes that neither of the affidavits of service indicates that service was effected on June 13, 2022. The Affidavit of Service in issue refers to service which was effected on 21/04/2022 for the hearing of 04/05/202 and of 8/07/2022 for the taxation of the Bill of Costs on July 19, 2022 respectively. There is no evidence from the 2nd Defendant that he was in school on the material dates. In any event, this Court compared the signatures on the annexture marked as JK 1(a) purporting to be of the 2nd Defendant herein and noted a great unexplained difference between them and those of the Supporting Affidavit and even the Supplementary Affidavit that he swore. Thus, even if the dates referred to could have been material this Court doubts whether it could have been convinced that the person who signed the attendance of June 13, 2022 was the same as the 2nd Defendants.

60. As for the service on the 3rd Defendant, he only denied service. This Court had found earlier that the said applicant was duly served. Further the Court had found that the process server had been serving him previously and knew well where he could trace him and how to identify him subsequent to the first service. This on the part of the application dated September 20, 2022 I find that there was no merit on the ground that the Applicants were not served with the hearing notice.

61. In regard to the merits of the argument of non-service of the hearing notice on the part of the 1st and 4th Defendants, first, the 4th Defendant gave written authority to plead to the 1st Defendant. This doubts as to whether that is lawful at that stage. Order 4 Rule 1(3) of the *Civil Procedure Rules* provides for the written authority to be filed at the time of filing the Plaintiff: it should accompany the Verifying affidavit. I think and hold that in relation to several defendants, the same, if any, should accompany the initial pleadings, being the Defence. Be that as it may this Court will treat that as a curable anomaly under Article 159(2)(d) of the *Constitution* and for this matter finds it in order in terms of the *Civil Procedure Rules*.

62. The 1st Defendant deponed that he is a civil servant working in Sigor in the Assistant Deputy-Commissioner's Office. Basing his argument on that fact he trained his argument on two limbs, that he could thus not have been at his business premises, and that he was on duty on the occasions he was allegedly served. He alleged that on the material date, he was not at his business premises. Specifically, he too deponed, as the 2nd and 3rd Defendants about the fact that he and the 4th Defendant were not served with the mention notice dated February 25, 2022. While that is a telling coincidence in regard to the flow of thought of all the Defendants, in the sense that it together with the other several coincidences show that they all discussed and put their minds together on how to approach the setting aside of the judgment herein, which is not an issue though, the mention notice and the date it invited the parties to Court is not relevant in the instant application. Thus, the Court confines itself to the relevant date, which is the hearing of 4/05/2022 and the related Affidavit of Service being the one dated May 4, 2022 and what the applicants had to say about the alleged service.

63. Furthermore, about the telling coincidences, the Court was not impressed at all by the interchanging of the serialization of the annextures to the Affidavits of the 1st Defendant, Reuben Kala, wherein in relation to the content and depositions in the respective paragraphs, namely, 1, 2, 3, 4, 6, 8, 9, 14 and 15, Annextures 1 and 2 were marked as RK 1 and RK2 but for Annextures 3 to 8 they were JK 3 - JK8 only to turn to RK 9 and then revert to JK 10 and JK 11. But the annexed documents were all marked RK 1 - 11. Thus, in terms on Section 9 of the *Oaths and Statutory Declarations Act*, Chapter 15 of the Laws of Kenya which provides that Exhibits to an Affidavit be marked sequentially and serially, the depositions in paragraphs 3, 4, 6, 8 and 15 were not factually supported because they did not have annextures KJ 3-8 and JK 10 and 11 which they referred to. Instead to them were annexed strange

documents which could be referred to as annextures to the Affidavit. I find that the serialization of the 'strange' documents referred to above followed the exact pattern or marking of serialization, being JK-1, 2, 3 etc of the Annextures to the Affidavits of Jackson Kariwo sworn on September 20, 2022 and January 20, 2023 which were drawn through the law firm of R. E. Nyamu & Co. Advocates, and that was a curious coincidence. It cost the Applicants in the Application dated 6/09/2022 a lot of factual information hence totally weakening their contentions.

64. The deponent swore that he was not in his shop on 24/04/2022 at 9.30 am but in Sigor, at his work place. He stated that he does not work in a Supermarket called Californian. In response to that the Respondent restated on oath that the Applicant ran a Supermarket that goes by that name, California Supermarket. To prove it she attached to her Affidavit a copy of a receipt of Kshs.410/= for the purchase of items which she marked as CCA 2 and stated that it was issued to her on September 16, 2022. The Applicant did not in any way refute on oath that the said California Mini Supermarket belonged to or was owned by him.

65. Further, then the Court scrutinized the receipt issued on the said date at 9.41 am, it confirmed that indeed it bore an email reubenkiyapyap@gmail.com which the Respondent stated on oath it was of the 1st Defendant, and the 1st Defendant did not refute it on oath. Furthermore, it bore the mobile number 0708xxxxxx which the 1st Defendant himself deponed to as his vide the supporting Affidavit he swore on 6/09/2022 at paragraph 9(a) when he contended that it was a lie that the previous Advocate, by name Mr. Chebii, had lost contacts with him yet he regarding the application to cease acting for them Mr. Chebii reached him through his mobile number given.

66. From the above, what this Court finds from the deposition of the 1st Applicant regarding the fact that he was not at his work place on the alleged date of service is a pure lie concocted to make the Court buy into non-service of the hearing notice. When the lie was confronted with the truth about the details of the ownership of the Mini Supermarket known as California, the 1st Defendant's mouth must have remained agape hence he was speechless and had nothing to respond with thereto. Moreover, the fact that the 1st Defendant was a civil servant who ran a business by the name as found above does not mean that he could not on any one occasion as those service was effected, be at his place of business. It was incumbent upon his to avail documentary evidence that indeed he was on duty at the Sigor office and not at his place of business at California Mini Supermarket on the material date so as to contradict the fact of service upon him at the said Supermarket. This was particularly vital given that the Respondent had gone to the extent of disproving the 1st Defendant that he did not run a business of a Supermarket by that name.

67. In any event, the 1st Defendant was served with the notice of taxation and accepted service, to which he deponed positively, but did not sign the returned copy. This Court infers that the 1st Defendant's acceptance of service of the hearing notice served on April 21, 2022 but failure to sign on the returned copy is not evidence of non-service. And given that the 1st Defendant admitted to service of the notice of taxation which the process server swore to the fact of acceptance in a similar manner as the way the hearing notice was received, this Court infers a trend of accepting service in similar nature by the 1st Defendant. In any event, Order 5 Rule 13 of the *Civil Procedure Rules* provides for the Court to be satisfied in the event of failure to acknowledge receipt, that service was effected if facts demonstrate that. The Applicant's submissions by the Applicant did not show how the above issues could have come to be so as to convince the Court that the Applicant was not properly served.

68. About the contention that the 4th Defendant was not served, the 1st Applicant swore that she was not served with the mention notice dated February 25, 2022. This Court has already found that the relevant service in relation to the instant application was the one allegedly April 21, 2022. On it, the

1st Defendant swore at paragraphs 6 (g) of the supporting Affidavit that she was in Uganda where she carried out farming business between March 2022 and June 2022 hence not at her place of business in Makutano on April 20, 2022 at 9.30 am. He said nothing more about the service or supported his deposition by way of factual information. This Court finds first that there was no service alleged to have been effected on April 20, 2022. Instead service was effected on April 21, 2022. Again, the Applicant swore that of his own knowledge he knew that the Applicant was out of the Country between March, 2022 and June, 2022. He did not present any evidence for instance in the form of travel receipts to and from Uganda to show that indeed of the 4th Defendant was out of the Country, when she travelled to that country and when she returned. Also, he did not attach visa or travel documents to show that the said Defendant ever visited Uganda. The Court cannot rely on mere words penned down that a party traveled, leave alone out of the country, which trip and stay requires visa issuance. I still hold as I did that service of the hearing notice on the party was proper and she failed to attend Court willingly. There is no merit in the contention of non-service of the hearing notice. I further find that the submissions of the 4th Applicant regarding non-service regurgitated the depositions which this Court has now found to be unmeritorious.

69. The other issue on the merit of the applications, is whether there is a Defence on merit or which is merited. I have looked at the Defence filed by the Applicants. They aver that they were owners of the portions of the land they occupy by virtue of having bought them from shares of the beneficiaries of the Estate of the deceased Kamei Chombir Psetilat. At paragraph 5 of the Defence they named some of the beneficiaries who sold the portions to them. These were one Lokitare Tukoo and Chemurkong Atodongor. At paragraph 8 the 2nd Defendant claimed to be a lawful owner of a portion of the parcel by virtue of his wife Lucy Cherotich having bought it from, and as part of the share of Chemurkong Tukoo, one of the beneficiaries of the estate of the late Kamei Psetilat. At paragraphs 11-13 of the Defence the Defendants allege that by virtue of their alleged purchase of the portions of land they occupied, they had now become beneficiaries of the estate of the deceased and were not trespassers but that the Plaintiff had only brought succession squabbles into this Court by way of this suit.

70. As I understand the Defence to be, it is that they claim ownership of the portions they occupy and have put up structures on them by virtue of having bought them variously or through other persons such as the 2nd Defendant through one Lucy Cherutich. They claim that they are therefore not trespassers on the suit land. If this is the defence which they claim to be a merited one, I am afraid it is not and can never be a merited defence by virtue of Section 45(1) of the *Law of Succession Act*, Chapter 160 of the Laws of Kenya.

71. Section 45(1) of the Act provides that,

> " Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person."

72. The Applicants have not raised a defence that they were or are permitted by the Act or any other written law, or grant of representation issued under the Act to buy, enter, take possession of or construct on or in any way dispose of the property of the estate of the deceased. All their activities that led to the things they did on the land are contrary to the provision and amount to intermeddling of the estate of a deceased person. That is not a good defence. Thus, in terms of the holding in *Patel v E.A. Cargo Handling Services Ltd* [1974] EA, 75, the setting aside of the judgment herein will not serve a good purpose. It shall only serve to delay justice and cause backlog of cases.

73. Lastly, on whether or not the applicants will be prejudiced by not granting the orders sought, it is this Court's view that they will not. They began on an illegality of intermeddling with the estate of the deceased Kamei Psetilat. Instead it is the estate of the deceased that is prejudiced by their presence and actions on the suit land. If they feel prejudiced, by having expended money and built structures on the suit land, which this Court can only sympathize with but cannot do anything about it, they would do well to go back to the administrators of the estate and renegotiate with them to exercise mercy and permit them to stay on the land and have the portions transferred to them. But that will purely depend on negotiations outside of this suit.

74. The upshot is that the applications dated September 6, 2022 and September 20, 2022 lack merit. They are hereby dismissed with costs to the Respondents. The orders of stay of execution issued herein pending the hearing and determination of the applications are hereby lifted.

75. Order accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 19TH DAY OF APRIL, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE