Kayongo v Embakasi Ranching Co Ltd; Munira & 2 others (Aggrieved Party) (Environment & Land Case 1125 of 2016) [2023] KEELC 18439 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18439 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1125 OF 2016

JO MBOYA, J

JUNE 21, 2023

BETWEEN

MONICA ATIENO KAYONGO ..... PLAINTIFF

AND

EMBAKASI RANCHING CO LTD ..... DEFENDANT

AND

EGLAH WANGARI MUNIRA ..... AGGRIEVED PARTY

MARY WAIRIMU MWAI ..... AGGRIEVED PARTY

EVANSON KAMAU MWAI ..... AGGRIEVED PARTY

RULING

INTRODUCTION AND BACKGROUND

1. Vide Notice of Motion Application dated the 20th April 2023; the Defendant/Applicant herein has approached the Honorable court seeking for the following Reliefs;

    i. .....(Spent).

    ii. That the Firm of M/s Macharia Gakuo & Co., Advocates be granted Leave to come on record for the Defendant/Applicant.

    iii. That pending the hearing and determination of this Application, there be a stay of execution of the Judgment and Decree and all consequential orders arising from the Ex-parte Judgment entered against the Defendant/Applicant on the 9th day of September 2021.

    iv. That this Honorable court be pleased to review and set aside the ex-parte Judgment delivered on 9th September 2021 as against the Defendant/Applicant.

v. That this Honorable court be pleased to set aside the ex-parte Decree issued as against the Defendant/Applicant on the 15th October 2021.

vi. That this Honorable court grants any further Orders its may deem fit and just to grant in the circumstances.

vii. That costs of this Application be provided for.

2. The instant Application is anchored on the grounds alluded at the foot of the Application thereon. Furthermore, the Application is supported by the affidavit of one Jack Kamau Wachira, sworn on the 20th April 2023; and in respect of which the Deponent has annexed 5 documents, inter-alia, copies of Certificates of official search.

3. Upon being served with the instant Application, the Plaintiff/Respondent filed a lengthy and elaborate Replying affidavit, totaling 42 paragraphs; and in respect of which the Plaintiff/Respondent has disputed the claims/allegations contained at the foot of the instant Application.

4. Be that as it may, the instant Application came up for hearing on the 6th June 2023, when the advocates for the respective Parties agreed to canvass and ventilate the Application by way of oral submissions. Consequently and in the premises, the Parties indeed tendered their oral submissions.

Submissions By The Parties

A.Defendant's/applicant's Submissions:

5. Learned counsel for the Applicant adopted and reiterated the grounds contained at the foot of the instant Application and further relied upon the contents of the Supporting affidavit sworn on the 20th April 2023.

6. Further and in addition, Learned counsel for the Applicant thereafter intimated to the Honourable court that same would wish to highlight and canvass four (4) salient issues for consideration and ultimate determination by the court.

7. Firstly, Learned counsel has submitted that the Defendant/Applicant herein was neither served with summons to enter appearance nor Plaint, pertaining to and in respect of the subject matter. In this regard, Learned counsel added that without having been served, either as required under the law or at all, the Applicant herein could not have been expected to file any Statement of Defense.

8. Secondly, Learned counsel for the Applicant has submitted that the Applicant herein was hitherto the proprietor and owner of want constitutes the suit property, prior to allocation and/or alienation to the beneficiaries, who were members of the Defendant/Applicant.

9. Furthermore, Learned counsel has submitted that insofar as the Applicant was hitherto the proprietor of the suit properties; then the Applicant herein is conversant with the rightful allottee and/ or beneficiaries.

10. On the other hand, Learned Counsel further submitted that the Applicant herein would therefore be in better place/ position to tender and adduce before the Honourable court critical evidence to allow the court to reach and arrive at a fair and just decision in respect of the instant matter.

11. Thirdly, Learned counsel has submitted that the Plaintiff/Respondent herein was never the allottee of the suit properties. Consequently and in this regard, Learned counsel has contended that the instant suit was mischievously filed by the Plaintiff/Respondent with a view to defrauding the rightful allottee of the suit properties.

12. Fourthly, Learned counsel for the Respondent has submitted that the instant Application has been brought timeously and with due promptitude and that it would be in the interests of Justice that same be allowed.

13. Premised on the foregoing submissions, Learned counsel for the Applicant has therefore implored the Honourable court to find a hold that the Applicant has placed before the court credible evidence and explanation to warrant the setting aside of the impugned Judgment and the consequential Decree.

B.Respondent's Submissions:

14. Learned counsel for the Respondent adopted and relied on the contents of the Replying affidavit sworn on the 30th May 2023; and in respect of which Learned counsel invited the Honourable court to take cognizance of the various annexures attached thereto.

15. Other than the foregoing, Learned counsel for the Respondent raised, highlighted and canvassed four issues for consideration by the Honourable court.

16. First and foremost, Learned counsel for the Respondent submitted that the Defendant/Applicant herein was duly served with the summons to enter appearance and the Plaint and that upon being served, the Defendant/Applicant instructed, retained and engaged an advocate to participate in the instant proceedings and to defend her rights/interests.

17. In addition, Learned counsel has submitted that pursuant to and arising from the instructions from the Defendant/Applicant, the firm of M/s Ngata Kamau & Co., Advocates proceeded to and indeed filed a Notice of Appointment of advocate and thereafter participated in the subject proceedings, for and on behalf of the Defendant/Applicant herein.

18. In any event, Learned counsel has contended that the named advocates would not have participated in the instant proceedings without the instructions from the Defendant/Applicant or her authorized agents.

19. As a result of the foregoing, Learned counsel for the Respondent has thus submitted that the contention that the Defendant/Applicant was never served with the summons to enter appearance and Plaint, is therefore erroneous, mistaken and otherwise calculated to defeat the Due process of the court.

20. Secondly, Learned counsel for the Respondent has submitted that even if the instant Judgment was a default Judgment, it was incumbent upon the Defendant/Applicant to place before the Honourable court sufficient and credible material to warrant exercise of Judicial discretion to and in favor of the Applicant.

21. Nevertheless, Learned counsel has added that the Applicant herein has neither placed any credible/plausible reason, as to why same was unable or incapable of filing a Statement of Defense, either within the set timeline or at all.

22. Thirdly, Learned counsel for the Respondent has submitted that the discretion of the Honourable Court to set aside a default Judgment, if at all, is a discretionary remedy and hence same can only be exercised in favor of a Party, who has exhibited honesty, candour and due diligence, whilst approaching the seat of justice.

23. However, in respect of the instant matter, Learned counsel for the Respondent has submitted that the Defendant/Applicant has not approached the seat of justice with clean hands and hence same ought not to partake of and/or benefit from Equitable discretion of the Honourable court.

24. Lastly, Learned counsel for the Respondent has submitted that the Judgment sought to be set aside was rendered on the 19th September 2021 and thereafter, the Defendant/Applicant herein was duly served with a copy of the Judgment of the court. In this regard, Learned counsel has invited the Honourable court to take cognizance of paragraphs 17 of the Replying affidavit.

25. Other than the foregoing, Learned counsel for the Respondent has also submitted that subsequently the Respondent procured and obtained the Decree of the court and that thereafter the decree which was issued on the 15th October 2021; was served upon the Defendant/Applicant. For good measure, Learned Counsel has invited the court to take cognizance of the Contents of paragraph 18 of the Replying affidavit.

26. Additionally, Learned counsel for the Respondent has also submitted that other than the Judgment and Decree, which were duly served upon the Applicant; the Applicant was also served with an Application seeking execution of the Judgment.

27. Notwithstanding the foregoing, Learned counsel for the Respondent has submitted that the Applicant herein remained non-committal and dis-interested in taking out and/or putting in place any relevant steps aimed at vindicating her interests, if at all.

28. In the premises, Learned counsel for the Respondent has submitted that the Applicant herein has hitherto displayed a conduct or behavior which reeks of apathy, lethargy and want of diligence.

29. In any event, Learned counsel has contended that the current Application by and on behalf of the Applicant has been mounted and/or filed with unreasonable and inordinate delay, which delay has neither been accounted for nor explained.

30. Consequently and in the premises, Learned counsel for the Respondent has therefore invited the Honourable court to invoke and apply the Doctrine of Latches and thereafter to dismiss the Application beforehand for being an abuse of the Due process of the court.

Issues For Determination

31. Having reviewed the Notice of Motion Application dated the 20th April 2023; and the response thereto; and upon considering the oral submissions ventilated on behalf of the respective Parties, the following issues do arise and are thus worthy of determination;

    i. Whether the instant Application has been filed by an Advocate/Law firm with the requisite Locus Standi or otherwise.

    ii. Whether the Supporting Affidavit to the Application meets/satisfies the Legal threshold in terms of Order 9 Rule 2(c) of The Civil Procedure Rules, 2010, and if not; whether the Application is competent.

    iii. Whether the Applicant herein is deserving of the Equitable Discretion of the Honourable court or otherwise.

    iv. Whether the Application before Honourable court has been made and mounted without unreasonable delay and in any event, whether the Doctrine of Latches is applicable.

Analysis And Determination

Issue Number 1. Whether The Instant Application Has Been Filed By An Advocate/law Firm With The Requisite Locus Standi Or Otherwise.

32. Though the Learned counsel for the Defendant/Applicant has submitted that the Applicant was neither served with the summons to enter appearance nor Plaint; however it is instructive to note and recall that the same advocate has also pointed out at the foot of ground one (1) of the Application; that the Defendant/Applicant herein indeed engaged and retained a firm of advocate to defend her rights in respect of the instant matter.

33. Furthermore, Learned counsel for the Applicant has ventured forward and stated that the previous advocate, who was hitherto retained and engaged by the Applicant herein indeed failed to file the requisite statement of defense on behalf of the Defendant/Applicant.

34. Other than the foregoing, there is also the aspect where the current advocates, namely, M/s Macharia Gakuo & Co., Advocates, are seeking Leave to come on record for the Defendant/Applicant.

35. It has been necessary to reproduce and highlight the features contained in the preceding paragraphs, because the current Advocate for the Applicant acknowledges and confirms that indeed the Applicant herein was hitherto represented by a firm of advocate during the proceedings in respect of the instant matter.

36. Being aware and knowledgeable of the fact that the Applicant was hitherto represented by a previous firm of advocates, it was therefore incumbent upon the current advocates to seek for and obtain Leave of the court to come on record for and on behalf of the erstwhile advocates.

37. In any event, it is not lost on this court that the current advocates have included in the body of the instant Application a prayer which state as hereunder;

> " That the firm of M/s Macharia Gakuo & Co., Advocates be granted leave to come on record for the Defendant/Applicant."

38. Having been aware that there was a previous advocate who was hitherto on record for and on behalf of the Applicant, it was instructive that the current advocates do serve the instant Application upon the outgoing advocates, as well as the adverse Parties.

39. Nevertheless, it is also important to point out and underscore that the instant Application was never meant to nor was same served upon the erstwhile advocates, who were hitherto on record for the Defendant/Applicant.

40. Clearly and in this respect, the current advocate on record, cannot be deemed to be lawfully and legally on record, insofar as same did not comply with and/or adhere to the prescription alluded to under Order 9 Rule 9 of the Civil Procedure Rules, 2010.

41. Secondly and assuming that non-service of the instant Application upon the outgoing advocates, was not fatal; it is also important to point out that the current advocate did not even indicate who was the previous advocate on record and in whose place same was seeking Leave to come on record for. For good measure, the Leave could not have been granted in vacuum.

42. Thirdly and most importantly, there is no gainsaying that where an advocate mounts and/or files an omnibus Application seeking various reliefs, inter-alia, Leave to come on record in place of a previous counsel; it behooves the concerned advocate to impress upon the court to hear and dispose of the limb

of the Application for Leave to come on record at the onset and prior to ventilating the substantive reliefs sought at the foot of the Application under reference.

43. Nevertheless and despite the clear terms of Order 9 Rule 9 of the Civil Procedure Rules, 2010; Learned counsel for the Applicant herein neither procured nor obtained the requisite Leave from the onset. Furthermore, it is instructive to point out that the aspect seeking leave to come on record, in place of an unknown law firm, is still pending and is part of the reliefs being agitated herein.

44. Consequently and in this regard, the question that does arise is whether the current advocate and for whom no leave has since been granted up to and including the time of rendition of the ruling can be deemed to be lawfully on record for the Applicant or at all.

45. Humbly and to my mind, it was incumbent upon Learned counsel to exercise due diligence and to be proactive from the onset, so as to procure the requisite Leave before venturing to ventilate/canvass the remainder/substantive issues.

46. Lastly, it is also worth pointing out that even where Leave to come on record has been granted by the Honourable court in accordance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010; it is still incumbent upon the incoming advocate to thereafter proceed and file the requisite Notice of change of advocate in accordance with Order 9 Rule 5 of the Civil Procedure Rules, 2010.

47. Notably, the firm of M/s Macharia Gakuo & Co Advocates, who have mounted the current Application have not up to and including the delivery of the ruling, filed and served the requisite Notice of change, or at all.

48. In my humble view, it behooves Learned counsel for the Applicant to appreciate and comprehend the import and tenor of the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 and thereafter to read same along side the provisions of Order 9 Rule 5 and 6 of the Civil Procedure Rules, 2010, respectively.

49. Sadly, the foregoing provisions of the law, which in my humble view are peremptory and mandatory in nature, were never complied with and/or adhered to, whatsoever.

50. At any rate, it is also not lost on this court that the Learned counsel for the Applicant did not even endeavor to account for the failure and/or default to abide by the stipulated provisions of the law. Consequently, the presumption that does arise is one of intentional and deliberate disregard of the Rules of procedure.

51. Perhaps and at this juncture, it is important to recall, restate and reiterate the established and hackneyed position that the Rules of procedure were never made in vain or for cosmetics purposes. For good measure, same were made to be complied with, unless some plausible reason(s), can be availed for non-compliance.

52. Further and in addition, I beg to point out that the rules of procedure and in particular the provisions of Order 9 Rules 5, 6 and 9 of the Civil Procedure Rules, were meant to avert mischief which was hitherto evident in various proceedings; particularly after entry and rendition of Judgment.

53. Arising from the foregoing, the breach and/or violation of the named provisions of the Civil Procedure Rules, cannot in my humble view be white washed and/or sanctioned by a court of law. In any event, time is ripe for advocates and legal counsel in general to come to terms with the pronouncement of

the Court of Appeal in the case of Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 others [2013] eKLR, where the court held thus;

> " A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 as follows;
>
> > "In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

54. Having made the foregoing observations, I come to the conclusion that the instant Application, which has been mounted in breach of and without due regard to the named provisions of the law, has indeed been mounted by a stranger without the requisite Locus standi or otherwise.

Issue Number 2. Whether The Supporting Affidavit To The Application Meets/satisfies The Legal Threshold In Terms Of Order 9 Rule 2(c) Of The Civil Procedure Rules, 2010, And If Not; Whether The Application Is Competent.

55. Other than the fact that the current advocate neither sought for nor procured the requisite Leave at the onset, there is yet another critical aspect touching on the competence of the supporting affidavit that has been annexed/attached to the instant Application.

56. For good measure, the instant Application is supported by the affidavit of one Jack Kamau Wachira, who has described himself as hereunder;

> " That I am an adult male of sound mind and a licensed surveyor registered with the surveyors board of Kenya and an employee of the Defendant/Applicant and hence competent to swear this affidavit"

57. From the preamble of the supporting affidavit, two things do arise and merits discussion by the court.

58. Firstly, there is no gainsaying that the deponent is neither a director, company secretary nor principal officer of the Defendant/Applicant herein. For good measure, it is common knowledge that only a director, company secretary or principal officer of a corporation can act and/or swear an affidavit of behalf of the corporation, albeit under the authority of the said Corporation.

59. Secondly, it is also worthy to point out that it is not within the mandate of any other employee, whether messenger, gardener or secretary, let alone surveyor, to swear any affidavit on behalf of a Corporation.

60. Nevertheless, where the affidavit on behalf of a Corporation is sworn, like in the instant case by an Employee (whose proper portfolio is not indicated), it is incumbent upon the deponent to state that same has the requisite authority of the company.

61. Unfortunately, in respect of the deponent of the instant affidavit, there is no averment that same has indeed be authorized by the Defendant/Applicant to swear and/or make the impugned supporting affidavit.

62. To be able to appreciate and understand the law as pertaining to who is authorized and mandated to, inter-alia, swear an affidavit on behalf of a Corporation, it is instructive to take cognizance of the provisions of Order 9 Rule 2 of the Civil Procedure Rules, 2010.

63. For ease of reference, the provisions of Order 9 Rule 2 (supra) states as hereunder;

> 2.Recognized agents [Order 9, rule 2.]
>
> The recognized agents of parties by whom such appearances, applications and acts may be made or done are—
>
> (a) subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;
>
> (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts;
>
> (c) in respect of a corporation, an officer of the corporation duly authorized under the corporate seal.

64. Insofar as the deponent of the affidavit is neither a director, company secretary or principal officer of the Defendant; and insofar as the deponent has not alluded to any authority to make/swear the supporting affidavit, I come to the conclusion that the impugned supporting affidavit does not meet the threshold of the law.

65. Consequently, I hold the view that the supporting affidavit which has been annexed to the impugned Application is invalid and hence incapable of anchoring the Application or otherwise. In this regard, the Application is therefore premised on an invalid supporting affidavit.

Issue Number 3. Whether The Applicant Herein Is Deserving Of The Equitable Discretion Of The Honourable Court Or Otherwise.

66. To start with, the instant Application seeks to set aside and/or review the Judgment of the Honorable court rendered on the 9th September 2021, on account that same was entered without the participation and involvement of the Defendant/Applicant.

67. Further and in addition, the Defendant/Applicant is also seeking that upon the setting aside of the impugned Judgment, same be granted liberty to file and serve a statement of defense to the claim by the Plaintiff/Respondent.

68. Clearly, it is important to point out that the kind of Application that has been placed before the Honourable court, is one that seeks exercise of discretion by the court.

69. To the extent that the instant Application is one that seeks exercise of Judicial discretion, then it was incumbent upon the Applicant herein to place before the Honourable court cogent, credible and plausible evidence/explanation to account for the default/lapse leading into the failure to timeously act or at all.

70. Furthermore, it would also have been incumbent upon the Applicant to move and/or approach the Honourable court with due diligence, honesty and in any event, without unreasonable delay.

71. Having taken into account the foregoing parameters, it is now appropriate to revert back to this matter and to consider whether the Defendant/Applicant has been candid and honest with the court in pursuit of the current Application.

72. Firstly, the Defendant/Applicant has impressed upon the Honourable court to find and hold that same was never served with the summons to enter appearance and Plaint, in respect of the instant matter.

73. However, despite the averments by and/or on behalf of the Defendant/Applicant, there is abundant and credible evidence that indeed the Defendant was duly served with the summons to enter appearance and Plaint in respect of the instant matter. For good measure, the Plaintiff/Respondent exhibited a copy of the summons to enter appearance that was duly served and received by the Defendant/Applicant.

74. Additionally, the Defendant/Applicant herein thereafter instructed, retained and engaged the firm of Ngata Kamau And Company Advocates to represent same in the instant matter. In this regard, the firm of Ngata Kamau indeed designated an advocate who appeared before Lady Justice K Bor, on the 28th November 2018 and thereafter on the 22nd January 2020 and 24th January 2021, respectively.

75. On the other hand, it is also worth noting that the Defendant's advocate who appeared before the court on the 20th April 2021; proceeded to and extensively addressed the court as follows;

> " The case is not ready for hearing. We have not filed our witness statement and documents. We are seeking instructions from our client. We seek a month to file our documents. It has been difficult to get instructions. We seek a month".

76. Arising from the foregoing address, the Honorable court proceeded and made an order which was couched in the following terms;

> " The Defendant is to file and serve its documents within seven (7) days of today; failing which the suit will proceed without it calling any evidence and the suit will proceed as undefended. Hearing of the suit on the 7th June 2021".

77. Moreover, on the 7th June 2021 the Defendant herein was duly represented by an advocate, namely, Mr. Brian Kimeto who thereafter participated in the hearing and in particular undertook extensive cross examination of the Plaintiff. In any event, the named advocate thereafter proceeded to and closed the Defendant's case.

78. From the foregoing elaboration, it is difficult to comprehend the contention by the Defendant/Applicant herein that same were not served with summons to enter appearance and the Plaint.

79. Furthermore, it is worth recalling that the Applicant has not discounted and/or deconstructed the fact that her own counsel participated in the entire proceedings before the Honourable court.

80. Secondly, it is also important to point out that the Applicant herein, was granted opportunity to file her requisite pleadings and documents by the court. However, the various indulgence that were granted by the Honourable court were neither taken nor appropriated.

81. Surely, the Defendant/Applicant herein cannot be heard to contend that same was denied and/or deprived of a right to be heard or at all.

82. To the contrary, the Defendant/Applicant was afforded extreme latitude and altitude, but for reasons known to her, same chose not to appropriate the opportunity to defend herself.

83. To my mind, the law and in particular, the Right to fair hearing does not state that a party must be heard, irrespective of whether same wants to be heard or otherwise. Instructively, what the law underscores and highlight is that a Party must be afforded a reasonable opportunity and facility to be heard.

84. Nevertheless, as to whether or not the party afforded the opportunity and facility to be heard, appropriates the rights to be heard or not, is a different issue. In any event, it is not lost on this Honourable court that a Party cannot be compelled to testify and/or file pleadings, if same is dis-interested.

85. Nevertheless, it is my position that the Defendant/Applicant herein was granted the requisite opportunity and facility to participate in the proceedings and same participated in the proceedings to the best to her ability. Consequently, the Defendant/Applicant must stand or fall with the quality of representation that were made before the court.

86. Finally, it is critical to point out that he who seeks equity must approach the court with clean hands and not otherwise. However, in respect of the instant matter, it is worthy to note that the Applicant has chosen to be dishonest with the court and hence the conduct of the Applicant is devoid of candour.

87. In view of the foregoing, it is my humble opinion that a Party who approaches the Honourable court but fails to make full and frank disclosures, or who better still, conceals material information; must not benefit from Equitable discretion.

88. As pertains to the requirement that he who seeks Equity must approach the seat of Justice with clean hands, honesty and candour, it is instructive to adopt and reiterate the succinct explication of the law by the Honorable Court of Appeal in the case of Mohamed Shally Sese (Shah Sese) versus Fulson Company Ltd & another [2006] eKLR, where the court held thus;

> " It is apparent that the applicant has not been candid with this court. The orders the applicant seeks are discretionary in nature and equitable. Equity calls to those seeking its aid to come before it with clean hands and also do equity. In John Njue Nyaga v Nicholas Njiru Nyaga & Another (2013) eKLR, the Court of Appeal sitting at Nyeri observed as follows:
>
> "It is our considered view that one who comes to equity must come with clean hands and equity frowns upon secrecy and underhand dealings." The applicant has not done so and is underserving of the orders he seeks."

89. Invariably, I must decline to reward and/or dignify the Applicant herein with exercise of discretion, when same has been less than candid. For good measure, the grant of the orders sought would be tantamount to sanctioning lethargy, apathy and a deliberate intention to defeat the Due process of the law.

Issue Number 4. Whether The Application Before Honourable Court Has Been Made And Mounted Without Unreasonable Delay And In Any Event, Whether The Doctrine Of Latches Is Applicable.

90. It is important to recall that other than service of the summons to enter appearance and Plaint upon the Defendant, the Defendant herein was also served with, inter-alia, a copy of the Judgment, a copy of the resultant decree and an Application for execution of the Judgment, respectively.

91. In particular, it is imperative to note that a copy of the Judgment was duly served upon the Defendant on the 2nd October 2021, whereas the Application for execution of the Judgment was served on the 8th

October 2022. In this regard, there is no gainsaying that the Applicant herein was knowledgeable of the fact that the instant matter had been heard and concluded.

92. Consequently and assuming that the Defendant/Applicant was not knowledgeable of the instant proceedings (which is not the case), then the Applicant ought to have taken adequate steps and measures to act upon being served with the Judgment.

93. However, it is not lost on the Honourable court that the Applicant herein did not take any steps and remained indolent for more than three years, before waking up to file the instant Application.

94. Furthermore, even though the Applicant has taken three years or thereabout to file the instant Application, same has neither endeavored to nor supplied any explanation for the delay, which evidently is inordinate.

95. Yet again, one is left wondering why the Defendant/Applicant did not exercise due diligence in mounting and/or filing the instant Application. In this respect and in the absence of any explanation, the court is left to second guess the diligence on the part of the Defendant/Applicant.

96. Nevertheless and without belaboring the point, I beg to state and underscore that the amount of delay that is evident and apparent at the foot of the instant Application does not warrant the intervention of the court or at all.

97. To buttress the foregoing observation, it is imperative to take cognizance of the holding of the Court of Appeal in the case of Tana and Athi Rivers Development Authority versus Jeremiah Kimigho Mwakio & 3 others [2015] eKLR, where the court held thus;

> "It appears that the appellant fell short of this expectation. It bears repeating that no explanation was ever given as to why the particulars to the defence failed to be filed. Yet it is common ground that the appellant was aware of the order to that effect. While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi v Kariuki [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."

98. In my humble view, the situation obtaining in respect of the instant matter replicates and corresponds with what the Honorable Court of Appeal, dealt with in the decision (supra). Consequently, I am obliged to adopt and do hereby adopt the apt words employed therein.

Final Disposition

99. In my humble view, it would be a dis-service to the Rule of law and the general administration of Justice for any party, the Defendant/Applicant not excepted, to misuse the due process of the court, whilst concealing pertinent and material facts.

100. Furthermore, it is incumbent upon courts of law to guard against litigants who seek to propagate dishonest claims before the court merely to obstruct, delay and/ or defeat the Due process of the court. In any event, where a court of law discerns evident concealment of material facts, then the court must decline to exercise equitable discretion.

101. Premised on the foregoing, I come to the conclusion that the Application dated the 20th April 2023; is not only premature and misconceived; but same is also devoid of merits.

102. In a nutshell, the Application be and is hereby Dismissed with costs to the Plaintiff/Respondent.

103. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21TH DAY OF JUNE, 2023.

OGUTTU MBOYA

JUDGE