Sang (Suing as personal representative of the Estate of the Late Esther Taprandich Sang) v Koskei (Environment & Land Case 61 of 2012) [2023] KEELC 18368 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18368 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 61 OF 2012

MC OUNDO, J

JUNE 15, 2023

BETWEEN

NANCY CHEBII SANG (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE ESTHER TAPRANDICH SANG) .... RESPONDENT

AND

EZEKIEL KIPSIELE KOSKEI .... APPLICANT

RULING

1. Before me for determination is an application dated the 17th of January 2023 filed by the Applicant/ Defendant herein and brought pursuant to the provisions of Order 12 Rule7, Order 22 Rule 22(1), Order 51 Rule 1 of the Civil Procedure Rules, Sections 3A of the *Civil Procedure Act* and all enabling provisions of the law where the Applicant seeks that the default judgment entered against him and all consequential orders be set aside and there be stay of execution of the said judgment pending the hearing and determination of the application and in the meantime, the parties do maintain status quo.

2. The said application, which was disposed of by way of written submissions was supported by the grounds thereto and the supporting affidavit of Ezekiel Kipsiele, the Applicant herein, dated the 17th January 2023 to the effect that although he was represented by Counsel, there had not been service of the hearing notice upon him and further that his Counsel had closed his firm in 2019 without informing him. That it was only fair to allow him to exercise his fundamental right be heard as enshrined under Article 50(1) of *the Constitution* and on merit since he had a good defense. He sought that the ex- parte default judgment herein be set aside so that he could be accorded an opportunity to be heard.

3. The Applicant framed his issues for determination as follows;

    i. Whether the default judgment entered against the Applicant be set aside.

    ii. Whether stay of execution should be granted.

iii. Who should bear the cost of the suit?

4. On the first issue for determination, the Applicant relied on the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules to submit that he had met the conditions therein and that he would suffer substantial loss if the application was not granted as he had been in occupation of the suit land since the year 1952 wherein he had made massive developments and therefore he stood to lose his homestead and thereby be rendered homeless.

5. That the delay in filing the application was excusable as at no point had he ever been served personally because the Respondent had served Counsel who was not on record and who had no instructions to act for him. That he had only been served personally in the month of July 2022 wherein he had filed the current application to set aside the default judgment. That he was willing to provide security when needed should the application be allowed.

6. On the second issue for determination, the Applicant relied on the principles set in the decision in Patel vs. East Africa Cargo Handling Services Limited [1974] E.A to submit that he had never been served with any hearing or mention notice. He had a valid defense with the counterclaim for adverse possession having resided on the suit land since the 1950s. That he wished to have his counterclaim heard on merit.

7. That the affidavit of service by the process server by the name Paul Kiplimo Kogo was from the law firm of M/S Kipkemoi & Co Advocates which was not the firm that had filed his Memorandum of Appearance and there had never been any change of Advocates, which was a clear indication that the said law firm had no instructions from him.

8. That courts had discretionary powers to set aside an ex-parte judgment with the sole aim to have justice prevail so as to avoid injustice or hardship resulting from an accident, inadvertence and excusable mistake or error. Reliance was placed on the decision in Rayat Trading Company Limited vs. Bank of Baroda & Tetezi House Limited [2018] eKLR amongst many other authorities.

9. He went on to submit that the court should consider whether he had demonstrated a sufficient cause warranting the setting aside of the ex-parte decision or proceedings as was held in the case of Wachira Karani vs Bildad Wachira [2016] eKLR.

10. That the improper service by the Respondent herein led to massive miscarriage of justice as the Respondent took advantage of an application dated the 7th December 2020 seeking to strike out his defence for reason that it raised no triable issues and which application had been allowed. The Applicant urged the court to exercise its discretion so that the matter could be heard on merit for justice to be meted.

11. The application was opposed by the Respondent's Replying Affidavit dated the 15th February 2023 for reasons that the Applicant had always had two Counsel on record for him and that Counsel Mutai had still remained on record for him even after closure of his office in 2019 wherein at no point had Counsel indicated to court that he had ceased acting for the Applicant and had no instructions therein. That Counsel had always been served with the hearing and mention notices and the Applicant had not denied having received the same from his Counsel.

12. That the matter had been confirmed ready for hearing on 31st May 2018 but did not proceed severally due to the absence of the Applicant. On 13th March 2019, parties had indicated their wish to settle the matter out of court wherein the matter had been mentioned severally to confirm settlement without success.

13. That the Applicant had not approached the court with clean hands and his application was tainted with non-disclosure of facts in his knowledge. The judgment delivered on 11th November 2021 was a regular judgment which had a Memorandum and a Defence on record and therefore it could not be set aside. That the Applicant had not preferred a plausible and reasonable explanation for not prosecuting his matter despite having been served.

14. That the provisions of Order 22 Rule 6 of the Civil Procedure Rules were clear and the Applicant was just bent at frustrating the Respondent from enjoying the fruits of the lawful judgment. That setting aside of the judgment would greatly prejudice her, the case having stayed for over 10 years in court.

15. That further, the Applicant had not met the threshold as set out under Order 42 of the Civil Procedure Rules for stay of execution as he had not shown the substantial loss he would suffer if the stay was not granted and neither had he provided security which was a mandatory requirement.

16. That she had been denied enjoyment, use and quiet possession of the suit land which was currently occupied by the Applicant and setting aside of the judgment would be tantamount to allowing the Applicant to benefit from an illegality having illegally encroached on the said parcel of land. That the Applicant was vexing her and delaying the enjoyment of the fruits of her judgment, the application was fatally defective, frivolous, vexatious and an abuse of the court process.

17. The Respondent framed their issues for determination as follows;

    i. Whether the Applicant is entitled to orders of stay of execution

    ii. Whether the court should set aside the judgment dated 11th November 2021.

18. On the first issue for determination, the Respondent relied on the provisions of Order 42 Rule 6(1) & (2) of the Civil Procedure Rules and on the decision in ANM vs VN [2021] eKLR to submit that the principal of the law was that the successful litigant in possession of a valid court judgment was entitled to the fruits of the judgment unless there existed exceptional circumstances to deny him or her that right, which exceptional circumstances the Applicant had not highlighted and hence was not deserving of the stay.

19. The Respondent further submitted that pursuant to the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules, and the holding in the case of Florence Hare Mkaha vs. Pwani Tawakal Mini Coach & Another [2014] eKLR amongst other authorities, the Applicant had not proved nor provided evidence in support of the claim that he would suffer substantial loss if stay of execution was not granted. That she being the successful litigant was entitled to enjoy the fruits of the successful litigation without restriction. The Applicant had no proprietary interest in the subject matter and therefore should not be accorded the legal protection. That substantial loss did not mean the normal and ordinary loss which every judgment debtor was subjected to when he loses a case but ought to have been in addition to the ordinary loss, something which the Applicant had not established and therefore by this very reason, it was enough to warrant the dismissal of his application as he was in unlawful possession of the suit land.

20. The Respondent further submitted that judgment had been delivered on 11th November 2021, wherein the current application had been filed on 17th of January 2023, about 16 months later where no plausible explanation had been proffered by the Applicant for the delay and therefore he was undeserving of the orders.

21. Further, the Applicant had not provided any security or indicated in any way that he would abide by what the court would impose in terms of security which was in contravention of the provisions of Order 42 rule 6 (1) & (2) of the Civil Procedure Rules which terms were mandatory.

22. As to whether the court should set aside the judgment of 11th November 2021, the Respondent submitted that on the 31st May 2018, the matter herein had been certified ready for hearing but did not proceed severally due to the Defendant's absence. The matter had equally been listed for mention on a number of occasions wherein the Plaintiff filed an application dated 7th December 2020 seeking to strike out the Defendant's pleadings on grounds that they did not raise any triable issue to be determined by the court. The application was allowed. The Plaintiff then proceeded to prove her case through formal proof hearing and judgment was subsequently delivered on the 11th November 2021 wherein eviction orders against the Defendant were issued. That the Applicant had not offered sufficient justification for the court to use its discretion to set aside its judgment. Reliance was placed on the provisions of Article 159 of *the Constitution*, Sections 1B and 3A of the *Civil Procedure Act*, Sections 18 and 19 of the Environment and Land Court, to submit that the court had a duty to provide prompt justice to the parties.

23. That in setting aside a judgment, the court is called upon to examine whether the judgment was entered regularly or irregularly and whether, in the case of a regularly entered judgment, there were justifiable reasons for the Court to exercise its jurisdiction. Reliance was placed on the decision by the Court of Appeal in the case of James Kanyiita Nderitu & Another 2016 eKLR. That in the instant case, the judgment was a regular one as summons had been properly served wherein the Applicant/Defendant had entered appearance and filed his defence and counterclaim but despite service of hearing and mention notices, he had refused, ignored and/or neglected to defend the matter.

24. That having established that the judgment herein was a regular one, the next consideration was whether there are justifiable reasons for the court to exercise its jurisdiction in favour of the Defendant wherein the first issue to determine was whether the Applicant had good reason for failure to appear.

25. On this issue, the Respondent submitted that the Applicant had been duly represented by an Advocate who had proceeded with the matter until the firm closed its shop purportedly in the year 2019. That it was worth noting that Advocate Mutai trading as Chelule and Company Advocates had been on record for the Applicant both before the purported closure and after the closure as the court record bears the same position. The said Advocate therefore had always had instructions to appear and act for the Applicant. That he only ceased acting for the Applicant on the 17th January 2023, post judgment, when leave was granted to the firm of Langat Godwin Advocates to act for the Applicant upon an application dated 4th November 2022.

26. That the Applicant had not approached the court with clean hands as his application was tainted with non-disclosure of facts in his knowledge and he was in pursuit of adulterating the pure streams of justice with his monkey tactics of misleading the court. That there were no plausible reasons proffered by the Applicant as to why he had failed to continue defending this suit despite him being fully aware of this matter. That setting aside of judgment could only be based on valid reasons and was not designed for parties who were after obstructing and delaying the cause of justice as it would tantamount to abuse of the court process and a wastage of judicial time.

27. As to whether the defense raised triable issues, this issue had been dealt with when the Respondent filed an application dated 7th December 2020 seeking the striking out of the Defendant's pleadings on grounds that they did not raise any triable issue to be determined by the court and which application had been allowed. It therefore depicted clearly that the defense raised no trouble issues to be determined by the court and the defence cannot therefore be resuscitated.

28. As to whether the orders were warranted in light of the prejudice to be occasioned to the Respondent, reliance was placed on the case of James Kanyiita Nderitu (supra) to submit that the Applicant

deliberately and without any excusable mistake avoided participating in the hearing and this court should not assist him as he is in a pursuit to delay the course of justice. That setting aside of the judgment would greatly prejudice the Respondent who had been waiting for the finalization of the case for over 13 years since 2012. That lack to defend a matter was not reason enough to set aside the judgment.

29. That on the issue of the statutory 10 days' notice of entry of judgment as alleged by the Applicant, reliance placed on the provisions of Order 22 Rule 6 of the Civil Procedure Rules to submit that the same did not apply in the instant case as there had been filed a Memorandum of Appearance and a Defence by the Applicant. That his application was therefore frivolous, vexatious and an abuse of the court process and the same ought to be dismissed and/or struck out with costs.

Determination

30. Having considered the Application herein to set aside the ex-parte judgment, and stay the execution of the same herein and having considered the response thereto opposing the same as well as the subsequent written submissions for and against allowing the said application, I find the issues arising for my determination as follows.

    i. Whether there has been raised sufficient ground to set aside the judgment and if so;

    ii. Whether there should be stay of execution of the impugned judgment

    iii. Who should bear the cost.

31. The law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide as follows;

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

32. Setting aside a judgment is a matter of the discretion of the court, as was held in the case of Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR where the court citing relevant cases on the issue held inter alia:-

    > "The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). 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 vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."

33. The Court of Appeal for Eastern Africa in the case of Mbogo v Shah [1968] EA 93, held that for the court to set aside a judgment, the court must be satisfied about one of the 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.

34. I have considered the reasons as presented by the Applicant in his quest to set aside the judgment delivered on the 11th November 2021 to wit that although he was represented by Counsel, there had not been service of the hearing or mention notice upon him and further that his Counsel had closed his firm in 2019 without informing him. That further there had been service effected on Counsel who was not on record or the Applicant and who also had no instructions to act for him. That he had only been served personally in the month of July 2022 wherein he had filed the current application to set aside the judgment. That he had a good defense and counterclaim having lived on the suit land since 1952, and therefore it was only fair to allow him to exercise his fundamental right to be heard on merit as enshrined under Article 50(1) of *the Constitution*.

35. On the issue as to whether there should be stay of execution of the impugned judgment, the Applicant had supported this prayer by submitting that should stay of execution not issue, he would suffer substantial loss as he had been in occupation of the suit land since the year 1952 and had made massive developments thereto. That the delay in filing the application was due to lack of service upon him. He also submitted that he was willing to provide security for due performance as ordered by the court.

36. The Respondent opposed the Applicant's application for reasons that the Applicant had always been represented by two Counsel and that Advocate Mutai had remained on record for him even after closure of his office in 2019 wherein at no point had Counsel indicated to court that he had ceased acting for the Applicant and/or had no instructions therein. That Counsel had always been served with the hearing and mention notices and the Applicant had not denied having received the same from his Counsel. That he had been denied enjoyment, use and quiet possession of the suit land which was currently occupied by the Applicant and setting aside of the judgment would be tantamount to allowing the Applicant to benefit from an illegality having illegally encroached on the said parcel of land. That further, the Applicant had not approached the court with clean hands and his application was tainted with non-disclosure of facts in his knowledge.

37. On the application for stay of execution, it was the Respondent's submission that the Applicant had not met the threshold set out under Order 42 of the Civil Procedure Rules to be granted the stay as he has not shown the kind of substantial loss he would suffer if the stay was not granted and neither had he provided security which was a mandatory requirement.

38. In the case of Shah vs Mbogo & Another (1967) EA 116 it had been held that;

> " The discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".

39. Since the Applicant's argument for seeking to set aside the ex-parte judgment was based on the reason that there was no service and further that he was not represented, I have taken the liberty to peruse through the court record to satisfy myself as to the genuineness of his argument so as to satisfy myself as to whether the ex-parte judgment was as a result of an accident, inadvertence, excusable mistake an error or otherwise and whether the Applicant had established a sufficient cause to have the same set aside.

40. It is on record that the suit herein had been filed by the original Plaintiff vide a Plaint dated the 24th July 2012 wherein the Applicant had filed his Memorandum of Appearance, Statement of defence and Counterclaim on the 22nd August 2012 through the firm of M/S Chelule & Company Advocates.

41. By consent, the matter was fixed for pretrial for the 23rd May 2013 wherein the Applicant had filed his list of witnesses and statements on the 25th July 2013. On the 28th June 2013 the record is clear that Mr. Kogo of M/S Chelule & Company Advocates for the Applicant was present in the registry to take dates for pre-trial wherein on the 8th November 2013, in the absence of the Applicant's representative, the Respondent took a date for mention for directions for the 16th January 2014 on which day both parties were represented and the matter was slated for a further mention for the 10th March 2014.

42. On 10th March 2014 the record is clear that Mr. Mutai advocate had appeared for the Defendant/ Applicant wherein the matter was to be mentioned before the Land and Environment Court wherein on the 14th of April 2014, there was no appearance for the Applicant and the matter was slated for a further mention for the 26th May 2014 on which day Mr. Mutai Joshua Advocate was present for the Applicant where he had informed the court that parties had complied with the provisions of Order 11 of the Civil Procedure Rules and had sought for a hearing date.The matter was then re-scheduled for pretrial at 2:30 in the afternoon, wherein again the record is clear that the Applicant was represented by Counsel and directions were taken that the matter be mentioned in the registry to take a mention date for pre-trial.

43. On 12th September 2014, the matter was mentioned in the registry in the absence of the Applicant's Counsel and had been fixed for mention for the 30th October 2014 wherein both parties were absent and the same had been taken out. On the 24th April 2015 the matter was mentioned again in the absence of the Applicant's Counsel and deferred for the 22nd July 2015 for pre-trial on which day the Applicant's Counsel was absent and the matter was mistakenly marked as abated after the court had been informed that the original Plaintiff had passed away on 13th May 2013, instead of 13th May 2015. (although the court had noted the correct date)

44. The matter stayed dormant for some time after which the Respondent had filed an application dated the 3rd October 2016 seeking to have the original Plaintiff substituted by her legal administrator. From the court's record, on the 9th February 2017, 7th March 2017, 27th March 2017, and 7th June 2017 there had been no appearance for the Applicant when the matter had been mentioned. However on the 25th September 2017, Mr. Koech Advocate held brief for Mr. Mutai advocate for the Applicant and another date for hearing of the application for substitution had been taken for the 29th November 2017. Came the said date, and Counsel for the Applicant was absent but the application had been allowed and the matter scheduled for the 15th February 2018 for directions on which date Counsel for the Applicant was present and the matter was reschedule for mention for the 5th April 2018 on which day both Counsel for the parties were present and the deceased Plaintiff had been substituted with the present Plaintiff and the matter scheduled for mention for the 31st May 2018 to fix a hearing date.

45. On the said date, Counsel for the Applicant was absent but the matter was fixed for hearing for the 3rd October 2018 but on which day, the matter had been mentioned in the registry in the absence of Counsel for the Applicant and had been given another hearing date for the 4th December 2018. The matter did not take off on that date but had been mentioned in the registry again in the absence of Counsel for the Applicant wherein it had been given another date for the 13th March 2019, and on which day Mr. Rono Advocate held brief for Mr. Mutai for the Applicant and submitted that they were ready to proceed with the hearing. The file had been placed aside up 11:40 am when Mr. Mutai Advocate was now present and both Counsel, by consent agreed to have the matter settled out of court.

46. A date for the 28th May 2019 had been taken for mention to confirm the position of the settlement, on which day Mr. Gideon Mutai Advocate held brief for Mr. Mutai J Advocate for the Applicant and sought for more time. The matter was rescheduled for mention for the 11th July 2019 on which day

Miss. Cheruiyot Counsel appeared for the Applicant wherein she had informed the court that their firm had not been in contact with the Applicant and therefore they intended to file an application to cease acting. The matter was then scheduled for mention for the 28th October 2019 on which day a representative of the Applicant's Counsel's firm appeared in the registry and took a further mention date for the 5th December 2019 on which day Mr. Mutai Advocate informed the court that the Applicant had not been in touch with him and he sought for more time. The matter was reschedule for mention for the 18th February 2020.

47. Came the 18th February 2020 and Mr. Sang Advocate who was holding brief for Mr. Mutai J Advocate for Applicant informed the court that negotiations had failed and the court directed for dates to be taken in the registry. In the meantime the Respondent then filed an application dated 7th December 2020 seeking to strike out the Defendant's defence for reason that it raised no triable issues. Since there had been service of the Hearing notice and the application upon Mr. Mutai J Counsel for the Applicant, who had acknowledged receipt but had not responded to the application nor appeared in court, the said application had been allowed unopposed on the 3rd March 2021 and judgment entered against the Defendant/Applicant.

48. The matter was then scheduled for formal proof hearing for the 4th May 2021. The court did not sit on that day but on the 16th July 2021 a hearing date for the 27th September 2021 was taken in the registry and a hearing notice served upon Mr. Mutai Jushua Advocate for the Applicant who acknowledged receipt on 26th July 2021 but failed to turn up for hearing. The matter then proceeded for formal proof hearing in the absence of both the Applicant and his Counsel and the impugned judgment had subsequently been delivered on the 11th November 2021.

49. From the chronology of events herein above stated, it cannot be said that the Applicant had no notice of the proceedings in court, the hearing notices and mention notices or that he had been unrepresented because it is clear that from when the matter had been instituted up to the time the impugned judgment had been delivered, he had Counel Mr. Mutai on record for him.

50. The Supreme Court of India in the case of Parimal vs Veena 2011 3 SCC 545 attempted to describe what sufficient cause constituted when it 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."

51. I have asked myself whether the failure to defend the suit constituted sufficient cause or whether it was meant to deliberately delay the cause of justice and I find that the turn of events as submitted by the Applicant was inadequately explained and did not constitute sufficient cause to warrant exercise of the court's discretion.

52. The test to be applied was whether the Applicant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the Applicant 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, the Applicant did not demonstrate sufficient cause why he never defended his case despite indulgence by the court.

53. From the record, it comes out clearly that despite parties having complied with the provisions of Order 11 of the Civil Procedure Rules, the Applicant's conduct was indicative that he was not willing to participate in the suit to the effect that his defence was also struck out unopposed because it raised no triable issues. No appeal was filed. The question that now arises is what kind of defence he no seeks to adduce?

54. The Court of Appeal in the case of Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others [2014] eKLR expressed itself as follows:-

> " we agree with the noble principles which goes further to establish that the court's discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

55. In the present suit, I find that the Applicant deliberately failed to prosecute their case and thereby refusing to avail himself to the court process. It does not ague well with the court that a litigant who has knowledge that a matter is pending before court decides to take a backseat and relax and after the judge/ Magistrte has taken his/her time to burn the midnight oil and crack their brain to write their decision and thereafter deliver the same, that the said litigant suddenly wakes up from slumber and seeks to set aside the said decision dragging everyone along with him/her back to square one. This creates wastage of valuable judicial time and builds a backlog and as a result, genuine litigants waiting in the queue that never moves develop anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice. This matter had been confirmed ready for hearing on 31st May 2018 but did not proceed severally due to the absence of the Applicant and despite there having been notices served upon him through his Counsel.

56. Suits do not belong to the Counsel or the court but to parties who should show interest by following proceedings in court and not laying back and waiting for miracles to happen. I find that the Application is an afterthought, a waste of judicial time and an abuse of the court process and is intended to vex the Respondent/Plaintiff and put him to expense. The Respondent/Plaintiff is being gravely prejudiced by the Applicant/Defendant and therefor there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice. The court is not powerless to grant relief, when the ends of justice and equity so demand, to this effect, I find that the Application dated 17th of January 2023 and filed 13 months later without an explanation for the delay, has no merit and the same is dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 15TH DAY OF JUNE 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE