REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 698 OF 1994

JOHN MISONGA LWANGU & 122 OTHERS...PLAINTIFF

-VERSUS-

FORT PROPERTIES LIMITED..1ST DEFENDANT

MISTRY V NARAN MULJI & CO..2ND DEFENDANT

HOUSING FINANCE CO. KENYA LIMITED..3RD DEFENDANT

SAVINGS & LOAN KENYA LIMITED...4TH DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA..5TH DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 4th September, 2020 brought under the provisions of Sections 1, 1A, 1B, 3, 3A, 3B, 63(e) and 100 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 12 Rule 7, Order 1 Rule 10, Order 8 Rules 3, 5 & 8 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Articles 25, 47, 48, 50, 159 & 165 of the Constitution of Kenya, 2010 and all other enabling provisions of the law. The plaintiffs seek the following orders-

(i) That the Honourable Court be pleased to set aside *ex dibito justiciae* the entire proceedings taken and orders given herein on 15/01/2013, 6/06/2015 and 19/07/2017 and all orders and/or process consequent thereto;

(ii) That the Honourable Court be pleased to unconditionally reinstate the plaintiffs' suit herein;

(iii) That the Honourable Court be pleased to order that the names of the following individuals be expunged from the Court record and be de-listed from the proceedings, viz;

1. John Misoga Lwangu 59. Ahmed Mohamed Hamisi

2. Haggai Shijenje 60. John Mitto

3. Henry Nyangaga 61. Arthur Omolo Apiyo

4. Umari Karisa Musanzu 62. Esther Muraya

5. Agneta Atieno 63. Fredrick Andayi

6. Dennis Tamre 64. Edaki. G. Osumba

7. Milton Baraza Ojiambo 65. Zakaria Mtito

8. Wesley Kattama 66. Martin Ochola

9. Khalfani Hamisi 67. Alphonse K. Sanga

10. Peter Chege 68. Dancan Mwai

11. Ancent Mwololo 69. Francis Ouma

12. Alphonso K. Janga 70. James Onyango

13. Robert Othuoni 71. Dawson Wambua

14. Vincent Ovala 72. Majid Mohammed Ali

15. Ibrahim Kalume 73. John Obotch Oduor

16. Linus Ngayo 74. Paul J. Eminanga

17. Thadeus Kilonzo 75. James Ndeti Fundi

18. Abubakar H. Kiminda 76. Susan M. James

19. Makenga Ndiku 77. Joseph Okuta

20. J. Njumwa Mnyamwezi 78. Olindo Agoi

21. Jonathan Kimuyu 79. Maricus Abele Omollo

22. James Njoroge Kionga 80. John William Odongo

23. Augustine Mwongela 81. Kornel Ekisa

24. John Opillo Midiwo 82. Robert M. Kimaro

25. David S. Awidi 83. Vincent Mwamburi Taranya

26. Barrack O. Oduor 84. Patrick Kibe

27. Bakari Mwashambi 85. Ali Swale Bembeyu

28. Mbui Beja 86. Hamisi Mwalimu

29. Abdalla M, Abdalla 87. Shehi Mrisa

30. James Kullukah 88. Erastus Nyaranga

31. Raphael M. Mwamrizi 89. Martin Owino Nyagungu

32. Swaleh Said 90. Dominic Kaburu

33. Nyawa Ngombeko 91. Alex Nabwakwe

34. John Kamau Ngige 92. Tobias Ouma Ogokhe

35. Bob Martin Omondi 93. Daniel Oketch Okumu

36. Henry M. Kioko 94. Pascal Asiri

37. Peter Wanjohi 95. Pius Musili

38. Lawrence Wasambia 96. Cephas Njuguna

39. Albert Sombi 97. Samuel Karanja Njoroge

40. John Okumu Okoth 98. Patrick O. Tony

41. Lucas Otieno Okello 99. Charles Kiuuva Mutungi

42. Daniel Otieno Omondi 100. Mohammed Mzee Swaleh

43. Hassan Mwasambo 101. Titus Nzioka

44. Eric Muchiri Macharia 102. Robbert Kattama

45. Samuel O. Oketch 103. Mbaruku B. Mwakwaya

46. Richard N. Gacheru 104. Leonard M. Mwadena

47. Othaniel Kichoi 105. Alfred L. Amollo

48. Peter O. Oyaya 106. Michael Odongo

49. Vincent Otiende 107. Mdoe B. Mwajanga

50. Geofrey Mwikamba 108. Jefferson D. Ngala

51. Athman A. Mwangi 109. Wycliffe Amunga Nanzai

52. J ames Maina Mwangi 110. Benson Nduati Mwangi

53. Liverson M. Nyatta 111. John Omoga Oloo

54. Albert Muchemi 112. Leli K. Katta

55. Samson R. Muongi 113. Francis Opiyo Ngonga

56. Hannington Mwaivu 114. Charles Waema Mukunga

57. Dennis Ochieng Otieno 115. Samuel Walucho

58. Peter K. Osoro

(iv) And the following individuals be retained herein, to proceed with this claim as the plaintiffs, viz;

1. Habel Baya, 13th plaintiff;

2. Mishael Ogechi Obure, 32nd plaintiff;

3. Jones Magoiga, 36th plaintiff;

4. Allan Jaoko Agot, 44th plaintiff;

5. Joseph Kafisi, 55th plaintiff;

6. Ali Mbanguo Mwalui, 61st plaintiff;

7. John Maleve Mbathia, 63rd plaintiff;

8. Joshua Kiio Nzau, 75th plaintiff

(v) That the Honourable Court be pleased to grant leave to the plaintiffs to further amend the plaint as per the annexed draft further amended plaint; and

(vi) That the costs of this application be provided for.

2. The application has been brought on the grounds on the face of it and the supporting affidavit sworn on 4th September, 2020 and a supplementary affidavit sworn on 12th March, 2021 by Ali Mbanguo Mwalui, the 61st plaintiff.

3. In opposition to the application herein, the 1st and 2nd defendants on 25th November, 2020 filed a Notice of Preliminary Objection dated

20th November, 2020. On 21st January, 2021, they filed grounds of opposition dated 15th December, 2020. On the same date, they filed a replying affidavit sworn on 21st January, 2021 by Yunus Haroon Hussein, the Site Manager for the 1st and 2nd defendants herein. The 3rd defendant on 4th February, 2021 filed grounds of opposition dated 31st January, 2021 to oppose the application dated 4th September, 2020. The 4th and 5th defendants did not file responses to the said application.

4. The application was canvassed by way of written submissions. The plaintiffs' submissions and supplementary submissions were filed on 5th March, 2021 and 12th March, 2021, respectively, by the firm of Ngonze & Ngonze Advocates. The 1st and 2nd defendants' submissions were filed by the law firm of Wandai Matheka & Co. Advocates on 13th May, 2021 while the 3rd defendant's submissions were filed on 30th March, 2021 by the law firm of Archer & Wilcock Advocates.

5. Mr. Ngonze, learned Counsel for the plaintiffs submitted that a clear perusal of the record reveals that there has been a litany of errors apportionable to a number of persons previously representing the plaintiffs and that such mistakes/errors ought not be visited upon innocent litigants. To this end, he relied on the case of **Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others** [2018] eKLR, where the Court held that a mistake is a mistake and it is not less a mistake because it is an unfortunate step and it is no less pardonable because it is committed by senior Counsel, though in the case of junior Counsel, the court might feel compassionate more readily. He stated that the suit itself has never taken off for hearing and the dismissal subject hereof was not a dismissal on merit, but on procedural technicalities.

6. In his submissions, Mr. Ngonze relied on the provisions of Order 1 Rules 1, 2, 3, 4, 5, 6, 7, & 8 of the Civil Procedure Rules, 2010 in support of the application. He also relied on Order 12 Rule 7 of the said Rules which provides that where 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. He also cited the provisions of Order 18 Rule 10 of the Civil Procedure Rules, 2010 which states that the Court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force, put such questions to him as the Court thinks fit.

7. He further relied on Sections 107 and 109 of the Evidence Act Cap 80 Laws of Kenya which provide that the burden of proof as to the existence of any particular fact lies on the person who wishes the Court to believe in its existence. Mr. Ngonze also placed reliance on the case of **Kenya Anti-Corruption Commission v Michael K. Gituto** [2015] eKLR, in which the Court held that starting the case *de novo* entails recalling all the witnesses and that a trial *de novo* could mean nothing more than a new trial, thus the parties are at liberty to reframe their case and restructure it as each may deem appropriate.

8. He further submitted that the amended plaint seeks to expunge the names of the plaintiffs who had not shown interest in the case and not to introduce new facts. He argued that no party stands to suffer prejudice as this case has never been heard on merit and no injunctive orders have ever been sought.

9. Mr. Matheka, learned Counsel for the 1st and 2nd defendants submitted that the plaintiffs by seeking to set aside previous orders of the Court were attempting to have this Court sit on appeal of its own ruling without giving sufficient reasons as to why it should do so and assuming that it is even possible. He stated that the orders issued on 15th January, 2013, 6th June, 2015 and 19th July, 2013 dismissed the suit for want of prosecution, which left the plaintiffs with 2 avenues with which to challenge the said decisions, either by way of review or appeal. He relied on the case of **Nicholas Kibiwott Kaimoi & another v Consolidated Bank of Kenya Limited Nairobi** HCC No. 213 of 2018, where the Court held that litigation has to come to an end and that once a decision has been reached by a competent Court, it cannot be re-opened to be started, unless the decision reached has been set aside and if it has not been set aside, it can only be challenged on appeal. Further, that it cannot be challenged in an inferior Court, Tribunal or in the same Court except in the case of a review.

10. It was submitted by Mr. Matheka that the suit herein was dismissed on 6th June, 2015 for non-compliance with the ruling delivered on 15th January, 2013 and thereafter, the application dated 28th June, 2016 seeking orders to reinstate the suit was dismissed in accordance with the provisions of Order 12 Rule 3(1) of the Civil Procedure Rules, for non-attendance on 19th July, 2017. He relied on the provisions of Order 12 Rule 6(2) of the Civil Procedure Rules which states that where a suit has been dismissed under Rule 3, no fresh suit may be brought in respect of the same cause of action. He indicated that under Order 12 Rule 7 of the said Rules, where 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.

11. He urged this Court to take into consideration the plaintiffs' conduct since they instituted this suit, as it was clear that they were out to waste the Court's time and frustrate the 1st and 2nd defendants. He cited the case of **Murugi Nyaga v Tharaka Nithi County Government & another** Meru ELRC No. 19 of 2019, where the Court held that pendency of a case in Court when it is obvious that the plaintiff is not interested to prosecute it costs time and money to the defendants, not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time. In the said decision it was also stated that a Court should desist from allowing parties to have joy rides over their cases to the prejudice of other parties including the Courts.

12. Mr. Matheka submitted that the mistakes being complained of by the plaintiffs were mistakes of non-attendance of Court by their Advocates and that attendance is a time obligation for both the plaintiff and his Advocate. That it was the plaintiffs' duty to follow up on their matter in Court or with their Advocates on record and that there was no evidence on record to show that there were any steps which were taken by them to follow up on their matter. He stated that the Court in the case of **Elosy Murugi Nyaga v Tharaka Nithi County Government & another** [2020] eKLR, cited with approval the decision in **Edney Adaka Ismail v Equity Bank** [2014] eKLR, where it was held that it is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up the matter.

13. He argued that the prayers that were initially captured in the plaint would not be attainable as not only would it be totally unfair to reinstate the suit as the defendants' witnesses were not available to adduce evidence on issues that may be addressed against them, as witnesses who adduced evidence ceased working for the defendants many years ago. It was also stated that the plaintiffs have been living and enjoying the premises in issue ever since they were constructed.

14. As to whether the 115 plaintiffs should be expunged from the Court proceedings, Mr. Matheka submitted that the plaintiffs had not accorded the Court any substantive reason as to why the said prayer should be granted. He further submitted that amendment of the plaint at this juncture would open the defendants to a web of allegations as the amendment would add a fresh cause of action rather than address the intended prayers. He argued that the draft amended plaint had not been annexed to the application herein thus the said prayer would prejudice the 1st and 2nd defendants.

15. Ms. Mohammed, learned Counsel for the 3rd defendant relied on the provisions of Order 12 Rule 7 of the Civil Procedure Rules which provides that where a suit has been dismissed, the Court on application may set aside, or vary the judgment or order upon such terms as may be just. She cited the case of **Shah v Mbogo & another** [1967] EA 116, where the Court considered the principles governing the exercise of the Court's discretion to set aside a judgment.

16. It was submitted by Ms. Mohammed that the present application was filed more than four years from the time the suit herein was dismissed, hence the delay by the plaintiffs was inordinate and the same cannot be excused by the Court. She referred this Court to the decision in **Patel v E.A Cargo Handling Services** [1974] EA, where the Court held that there were no limits or restrictions on a Judge's discretion except that if he does vary the judgment, he does so on terms that are just. She stated that in the present case, no explanation had been offered for the inordinate delay of more than four years, thus the reinstatement of this suit would be prejudicial to the 3rd defendant as the alleged cause of action accrued over thirty years ago. She stated that since the 3rd defendant is a company, its employees leave employment from time to time. She also stated that memories fade thereby making it difficult for the said defendant to prosecute this matter.

17. Ms. Mohammed further submitted that the application herein is *res judicata* with the same issues having been raised and determined by the ruling delivered on the 19th of July, 2017. Counsel relied on the case of **Greenhalgh v Mallard** (1947) 2 All ER 255, where Somervell LJ held that *res judicata* covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the of the process of the Court to allow a new proceeding to be started in respect of them. She indicated that the application herein raises the same issues as were raised by the plaintiffs in an application dated 28th June, 2016 which was heard substantively and dismissed.

18. She submitted that pursuant to the provisions of Order 8 Rule 3 of the Civil Procedure Rules, 2010, the power of the Court to order amendment is discretionary. She stated that the issues that the plaintiff seeks to introduce in the amended plaint are not new as they seek to remove some of the plaintiffs in the matter, which prayer is not only inconsistent with the previous plaint on record but is aimed at defeating the accrued defence which is prejudicial to the 3rd defendant and will delay fair trial of the matter. She submitted that the Court should refuse to allow amendments to the plaint which *prima facie* have the effect of defeating the said defence. She relied on the case of **James Ochieng' Oduol t/a Ochieng Oduol & Co. Advocates v Richard Kuloba** [2008] eKLR, where the Court of Appeal set aside an order which had been granted to amend a plaint that disclosed no cause of action to introduce a new cause of action in reaction to a defence filed.

19. Ms. Mohammed submitted that the application for amendment of the plaint was inordinate as it had been brought more than 26 years since the suit herein was filed. That the said delay had not been sufficiently explained thus the application herein is an abuse of the court process and ought to be dismissed with costs. She relied on the case of **Kyalo v Bayusuf Brothers Ltd** [1983] KLR, where the Court of Appeal held that applications for amendment of pleadings should only be allowed if they are brought within reasonable time. She argued that no quantum of costs would be sufficient to compensate the 3rd defendant for the prejudice it would suffer in the event that the application herein is allowed.

20. In response to the submissions made by the Counsel for the defendants, Mr. Ngonze submitted that the amendment seeks to expunge some of the plaintiffs and not to change the substratum of the case. He further submitted in the present application, the plaintiffs are applying for this Court to set aside its previous orders, which is tantamount to a review. He was of the view that the doctrine of *res judicata* does not apply to applications. He stated that the present application was not similar to the one of 28th June, 2016.

ANALYSIS AND DETERMINATION.

21. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit, preliminary objection and grounds of opposition filed by the defendants and the written submissions by Counsel. The issues that arise for determination are as follows-

(i) Whether the preliminary objection dated 20th November, 2020 is merited;

(ii) Whether the entire proceedings taken and orders given herein on 15/01/2013, 6/06/2015 and 19/07/2017 should be set aside and the plaintiff's suit be reinstated;

(iii) Whether the named 115 plaintiffs should be expunged from the proceedings; and

(iv) If leave should be granted to the plaintiffs to further amend the plaint.

22. In the affidavit filed by the plaintiffs, they deposed that vide a plaint lodged herein on 14th November, 1994, they sued the defendants jointly and severally and that the defendants denied the plaintiffs' claims by filing their respective statements of defence. That on 28th November, 2008, a ruling was delivered dismissing the 1st and 2nd defendants' application dated 17th October, 2007 seeking to strike out the plaint and dismiss the suit. The plaintiffs averred that thereafter, on 23rd January, 2013 a ruling dated 15th January, 2013 was delivered which led to the suit being dismissed. That on 6th June, 2015, the suit was dismissed for non-compliance with the ruling dated 15th January, 2013 and that on 19th July, 2017, the application dated 28th June, 2016 seeking to set aside the earlier orders of dismissal was dismissed for non-attendance.

23. It was stated by the plaintiffs that the suit has never taken off for hearing and that the dismissal of the suit was not based on merit but on procedural technicalities. They averred that it would be in the interest of justice, fairness, equity, constitutionalism, principles of the rules of law and natural justice and protection of fundamental rights and freedoms enshrined in the Constitution of Kenya, 2010, for the application herein be allowed.

24. The 1st and 2nd defendants raised a preliminary objection in opposition to the application herein on the following grounds-

(i) That the application offends the provisions of Sections 13 &19 of the Environment and Land Court Act, Number 19 of 2011.

(ii) That the application offends the provisions of Order 2 Rule 15 and Order 10 Rule 11 of the Civil Procedure Rules, 2010.

(iii) That this application is vexatious, frivolous and an abuse of the Court process.

(iv) That it is in the interest of justice that the application be dismissed with costs to the defendants.

25. The 1st and 2nd defendants in their replying affidavit deposed that since the suit was instituted, the plaintiffs had not taken any steps under the Civil Procedure Rules to set down the suit for hearing as the suit has been pending since the year 1994 which is an inordinately long period of time. They averred that the last time the matter was in Court was on 19th July, 2017 when the plaintiffs' application dated 28th June, 2016 was dismissed for non-appearance and that 3 years down the line, the plaintiffs had not filed an application to either review or reinstate the suit and/or appeal against the said ruling.

26. They averred that all the 1st and 2nd defendants' employees who were directly involved in this matter had left employment and the value of the property in issue had appreciated as from the time the cause of action arose, thus the 1st and 2nd defendants' defence would be greatly prejudiced.

27. It was stated by the 1st and 2nd defendants that due to the time that had elapsed, their witnesses would not be the ones who had been directly involved in the matter hence their statements would be prejudiced. They also stated that justice ought to be done to the defendants as well. They deposed that there has to be an end to litigation which fact was not being respected by the plaintiffs. The 1st and 2nd defendants averred that the plaintiffs were asking this Court to grant them equitable remedies, yet their application shows that they had not come to Court with clean hands.

28. In the supplementary affidavit filed by the plaintiffs, they averred that it had proven extremely difficult to move as one unit (of plaintiffs), thereby resulting in unforeseen and unavoidable delays in *interlia,* securing representation particularly given that they have had limited funds to run this matter and that the Counsel now on record has had conduct of this matter on *pro bono* basis.

29. It was stated by the plaintiffs who had expressed interest to continue with this suit that the rest of the plaintiffs who were not represented by Ngonze & Ngonze Advocates had never expressed interest in concluding this long outstanding matter, despite having reached out to them earnestly several times. They stated that the delay in proceeding herein had been beyond the plaintiffs' control hence inadvertent and excusable.

Whether the preliminary objection dated 20th November, 2020 is merited.

30. It is noteworthy that none of the parties herein submitted on the preliminary objection dated 20th November, 2020. Be that as it may, since it was brought up by the 1st and 2nd defendants, this Court will consider the same. A preliminary objection is a point of law which if taken, would dispose of the suit. In the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696, Law JA., stated as follows on what constitutes a preliminary objection-

> ***"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

31. One of the points of preliminary objection raised by the 1st and 2nd respondents is that the plaintiff's application offends the provisions of Sections 13 and 19 of the Environment and Land Court Act No. 19 of 2011. Section 13 thereof provides as follows-

> ***"(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***
>
> ***(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***
>
> > ***a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***
> >
> > ***b) relating to compulsory acquisition of land;***

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(f) restitution;

(g) declaration; or

(h) costs.

32. The original plaint dated 3rd November, 1994, states that the plaintiffs purchased the suit property from the 1st defendant. That on purchase of the said property, the 1st defendant assured the plaintiffs that the houses it had developed and which had been constructed by the 2nd defendant were constructed in a competent manner and in accordance with the architectural and structural plans. That it was an express and/or implied term of the contracts between themselves that the said houses were fit for human occupation/habitation. It was alleged that later on, the plaintiffs discovered that the houses they had purchased were so structurally and architecturally defective as to render the same unsuitable for human occupation/habitation, in that there was a present and imminent danger to the health and/or safety of the occupants thereof, thus necessitating the institution of the suit herein.

33. It is evident from the above that the suit herein is one of breach of contract which is a commercial aspect falling under the law of contract for sale of what the appellants regard as structurally and architecturally defective houses. As such, the suit does not fall within the ambit of Section 13 of the Environment and Land Court Act No. 19 of 2011. Consequently, the preliminary objection fails to that extent.

34. The 2nd point of the preliminary objection raised by the 1st and 2nd defendants was that the present application offends the provisions of Order 2 Rule 15 and Order 10 Rule 11 of the Civil Procedure Rules, 2010. Order 2 Rule 15 of the said Rules states that-

"(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

35. On the other hand, Order 10 Rule 11 of the Civil Procedure Rules, 2010 provides for the setting aside of a judgment. It is evident that the application herein does not seek for the striking out of any pleadings and/or setting aside of any judgment. Prayer 3 of the application herein

seeks for the names of 115 plaintiffs to be expunged from the Court record and be de-listed from the proceedings. It is therefore not clear how the application herein offends the provisions of Order 2 Rule 15 and Order 10 Rule 11 of the Civil Procedure Rules. It is trite that he who alleges must prove. In the absence of any proof from the 1st and 2nd defendants on how the application herein offends the said provisions, this Court finds that the preliminary objection has been made without a justifiable cause.

36. The upshot is that the preliminary objection dated 20th November, 2020 lacks merit and the same is dismissed with no order as to costs.

Whether the entire proceedings taken and orders given herein on 15/01/2013, 6/06/2015 and 19/07/2017 should be set aside and the plaintiffs' suit reinstated.

37. The 3rd defendant in its grounds of opposition stated that the application herein is *res judicata* since the issues raised herein had already been determined by the Court in its ruling delivered on 19th July, 2017. The doctrine of *res judicata* is set out in the Civil Procedure Act at Section 7 as follows-

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

38. The Civil Procedure Act also gives explanations with respect to the application of the *res judicata* doctrine. Explanations 1-3 are in the following terms-

> ***"Explanation. (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***
>
> ***Explanation (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.***
>
> ***Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.''***

39. For a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the said matters were determined on merits by a Court of competent jurisdiction. Even though the issues raised herein might be similar to those raised in the application dated 28th June, 2016, the said application was dismissed on 19th July, 2017 for non-attendance, hence it was never determined on merit. This Court therefore comes to the conclusion that the application herein is not *res judicata*.

40. There is no dispute that on 15th January, 2013, the Court delivered a ruling on a preliminary objection that was filed by the 1st and 2nd defendants herein on 6th November, 2009. In the said ruling the Court held that the preliminary objection had succeeded to the extent that the suit must proceed with one Counsel, or a team of Counsel for the plaintiffs, as the suit being a single co-joint one could not proceed with disparate Counsel. The Court directed the plaintiffs to appoint a single Counsel or a team of Counsel within 45 days from the date of the said ruling.

41. The application herein has been brought pursuant to the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010 which provides as hereunder-

> ***"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."***

42. The jurisdiction of the Court to review and set aside its decisions is wide and unfettered. In **Shah v Mbogo and another** [1967] EA 116, the Court of Appeal of East Africa held that:

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

43. It is trite that the legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated sufficient cause warranting the setting aside of the *ex parte* decision or proceedings. In **Wachira Karani v Bildad Wachira** [2016] eKLR, Mativo J held that:

> ***"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 (sic) formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."***

44. In this case a ruling was delivered on 15th January, 2013 directing the plaintiffs to appoint a single Counsel or a team of Counsel within 45 days from the date of the said ruling. The plaintiffs did not comply with the said directions which led the Court on 6th May, 2015 to give

further directions to the effect that the plaintiffs should either obey or seek to set aside the said order within 14 days from 6th May, 2015, failing which, the suit herein would stand dismissed with costs to all defendants.

45. The plaintiffs still failed to obey and/or comply with the Court orders despite being given an extension on 6th May, 2015. On 22nd September, 2015, Judge P.J Otieno held that in the absence of an application before him to upset the order Judge Kasango had issued on 6th May, 2015, the order of dismissal for failure to comply had taken effect. In a bid to resuscitate the suit herein, the plaintiffs filed an application dated 28th June, 2016 which was dismissed on 19th July, 2017 for non-attendance. It is evident that none of the plaintiffs herein challenged the ruling dated 15th January, 2013 either by way of review and/or appeal.

46. The only reason given by the plaintiffs is that there have been a litany of errors apportionable to a number of persons previously representing the plaintiffs, situations in which such mistakes/errors ought not to be visited upon the innocent litigants. The said mistakes and/or errors were not disclosed to this Court for it to be able to make a determination on whether or not it should set aside the proceedings herein and reinstate the plaintiffs' suit.

47. It is also evident from the record that it is only when the matter came up before Hon. Judge P.J. Otieno on 22nd September, 2015 that the plaintiffs who were present in Court on that day informed the Court that they were not aware of the order that was made by Judge Kasango on 6th May, 2015. In this instance, the plaintiffs have not in the very least demonstrated and/or sufficiently explained to this Court why they did not comply with the orders issued on 15th January, 2013 and in the event they were not satisfied with the same, file an appeal or an application for review of the said orders.

48. Where the justice of the case demands, mistakes of Advocates even if they are blunders, should not be visited on the clients when the situation can be remedied by costs. It is however not in every case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In the case of **Savings and Loans Limited vs Susan Wanjiru Muritu** Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J expressed himself as follows-

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

49. I fully agree with the above holding. It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter. From the plaintiffs' supporting and supplementary affidavit, there is no evidence of how the plaintiffs followed up on their matter from the time the suit herein was filed to 22nd September, 2015 when the orders of dismissal took effect. There is also no explanation why the instant application was filed approximately four years after the application dated 28th June, 2016 was dismissed for non-attendance. It is thus apparent that the plaintiffs' conduct is wanting and is that of a negligent and indolent plaintiff. The plaintiffs' actions since the institution of this suit portray willful neglect, deliberately to delay the course of justice. Consequently, I hold that the plaintiffs have not demonstrated a sufficient cause to warrant this Court to exercise its discretion in their favour.

50. Further, the 1st and 2nd defendants submitted that their employees who were directly involved in this matter have left employment and since the plaintiffs' claims are based on events that occurred over a period of about 20 years, the said passage of time has no doubt blurred the memory of the witnesses. Therefore, in the event the plaintiffs' application is allowed, their defence would be greatly prejudiced. The defendants also averred that the prayers captured in the original plaint would not be attainable since the plaintiffs moved in after construction of the houses was completed.

51. The business of the Court is to do justice between the parties and not to render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. It is not disputed that the plaintiffs have been living and enjoying the premises for over 20 years ago.

52. Having found that the applicants have not demonstrated sufficient cause to warrant the setting aside of the orders made on 15th January, 2013, 6th June, 2015 and 19th July, 2017 and to reinstate the plaintiffs' suit, this Court shall not deal with issues No. 3 and 4 as in doing so, the Court will be engaging in an academic exercise.

53. Since Court orders are not given in vain, the application dated 4th September, 2020 is found to be devoid of merit and the same is dismissed with costs to the 1st, 2nd and 3rd defendants.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **MOMBASA** on this **15th d**ay of **October, 2021.** In **view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued**

by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through

Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Ms Nanjali holding brief for Mr. Ngonze for the plaintiffs

Ms Olun’ga for the 3rd defendant

Ms Wambani for the 4th defendant

N/A for the 5th defendant