EACC v Njuguna & another (Environment & Land Case 184 of 2010) [2023] KEELC 21059 (KLR) (16 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21059 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 184 OF 2010

LL NAIKUNI, J

OCTOBER 16, 2023

BETWEEN

EACC ..... PLAINTIFF

AND

GILBERT MWANGI NJUGUNA ..... 1ST DEFENDANT

WILSON GACHAJA ..... 2ND DEFENDANT

RULING

I. Introduction

1. The 1st Defendant/ Applicant herein, Gilbert Mwangi Njuguna moved this Honorable Court for the hearing and determination of a Notice of Motion application dated 19th April, 2023. It was brought under a Certificate of urgency and the dint of the provisions of Sections 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B, 3, 3A, 63 (e) of the *Civil Procedure Act*, Cap. 21 and Articles 50 & 159 (2)(d) of *the Constitution* of Kenya, 2010.

2. Upon service, the Plaintiff/Respondent herein while opposing the said application, did file responses in form of a Replying affidavit dated 27th April, 2023 accordingly. I shall be dealing with it much later on.

II. The 1st Defendant/ Applicant's case

3. The 1st Defendant/Applicant sought for the following orders:-

    a. Spent.

    b. The Honourable Court be pleased to arrest the Judgment slated to be delivered on Notice pending the inter parties hearing of this Application.

c. The Honourable Court be pleased to re-open this case for the hearing of the 1st Defendant's case who never participated in the initial hearing.

d. Costs of this Application be provided for..

4. The application by the 1st Defendant/Applicant herein was premised on the grounds, testimonial facts and averments made out under the 32 Paragraphed Supporting Affidavit of Gilbert Mwangi Njuguna sworn and dated 19th April, 2023. He averred that:

a. The Applicant is the 1st Defendant in this case having been sued by the Ethnics & Anti Corruption Commission (hereinafter referred to as "The EACC") and as such had a right to be heard.

b. Thiscase (Main Suit) was heard and was pending the delivery of Judgment to be on notice.

c. He was utterly surprised that the case was heard in his absence yet he was one of the parties and a key witness who had invested tremendous time and resources in the case and had been eagerly waiting for the hearing date so that he adduces his evidence.

d. The allegations that had been levelled against the Applicant were grave in nature and as such it was only important that court afforded him an opportunity to defend himself.

e. The case was a land matter which was complex in nature and as such it was only fair that the Applicant and his witnesses were accorded an opportunity to be heard before the Court retired to deliver Judgment on the matter.

f. The Applicant was a man of high reputation, being a former Judicial Officer who served in the capacity of a Magistrate for quite some time.

g. The Applicant was highly apprehensive that the suit having been heard in his absence, the court might proceed in error having not had an opportunity to hear his case.

h. It was the Applicant's case that his Constitutional right to a fair hearing was about to be trampled over thus infringing on the parameters of natural justice, conscience and fair trial.

i. The delay that caused the long dragging of this matter was occasioned by the Plaintiff/Respondent which never prosecuted this matter for more than twelve (12) years for not good reasons.

j. The case was initially struck out by the Court on its own motion but thereafter reinstated on Application by the Plaintiff/Respondent.

k. Since then, the Plaintiff/Respondent had continued giving flimsy grounds why it could not prosecute its case.

l. The cause of this delay was that the Plaintiff/Respondent could not provide the Applicant with its list of witnesses and witness statements. To date the Applicant has only received two (2) witness Statements from the Plaintiff/Respondent.

m. The gist of all the adjournment was the failure of the Plaintiff/Respondent to comply with numerous Court Orders requiring that it provide the Applicant with its witnesses' Statement. The Court's record could confirm this position.

n. Court issued conservatory orders preventing the Plaintiff/Respondent from dealing adversely with the suit property until the instant case is heard and determined.

o. As a result of the conservative orders issued in the year 2010, the suit premises had been deteriorating due to lack of repairs yet the Applicant continued to pay annual rates and other charges required by County Government and National Government. The Applicant had done all this yet he receives no income from the property since the year 2010.

p. The Conservative Orders had never been lifted but trespassers had taken over the property and had caused constructions upon it despite the current injunctive orders. The Applicant was under the impression that, the Court had ordered a joint report between the Plaintiff and his (the Applicant's)Advocates regarding this issue.

q. The Applicant had travelled from Nairobi to Mombasa on 12th June, 2022, following information received from Messrs. Lumatete Muchai & Co Advocates, who were then acting on his behalf, that the matter had been slated for hearing on 13th June, 2022 and 14th June, 2022, which was correct.

r. Unfortunately, the Plaintiff's Advocates were not present in court for the hearing slated for 13th June,2022 The Applicant's Advocate, Mr. Evans Fiki and his key witness, (the Applicant herein) were forced to check on the Plaintiff's Advocates physically in their offices whereof they failed to get the Counsel in the office. The witness (the Applicant) was forced to return to Nairobi leaving his Advocates to address the problem.

s. While in the Plaintiff's Office they jointly discussed the issue with a Senior Administrator of the office.

t. Since the filing of this suit, the Applicant had made numerous trips from Nairobi to Mombasa for purposes of attending the hearing of this matter which was always frustrated by the Plaintiff. The Applicant incurred huge expenses on accommodation, meals, and transport in the process.

u. As a result of the frustrations regarding the hearing of this matter, the Applicant wrote a Confidential Letter to Her Ladyship, the Chief Justice Martha Koome outlining the history and the genesis of this matter and urging that the matter be heard on priority basis.

v. Despite an order by the Chief Justice emeritus, His Lordship, Justice David Maraga that all cases which had gone unprosecuted for more than seven, (7) years be dismissed, this case, though well above the seven(7) years was never dismissed.

w. The Applicant would not have written the Chief Justice the said confidential letter if he was not desirous of having the matter heard.

x. The Applicant, a former judicial officer resided on the suit premises from the years 1987 to 1998 when he served as a Magistrate at Mombasa Law Courts.

y. The Applicant therefore pleaded with the Honourable Court to arrest the Judgment and re - open the case so that he presents his case before the court could safely retire to make a determination on the matter.

z. Justice to this suit demanded that the orders sought herein be granted as prayed for.

aa. The right to fair hearing under the provision of Articles 50, 25 and 24 of *the Constitution* of Kenya,2010 was a non - derogable right. It was in tandem with justice to allow this Application in order to afford the Applicant the right to be heard on merit

ab. The Respondents would suffer no prejudice if this Application was allowed as prayed.

ac. The ends of justice and the overriding objective of this court tilted onwards the grant of the orders sought.

ad. This Honourable Court was vested with jurisdiction under the law and further under its own overriding objective to grant the orders sought.

III. The response by the Plaintiff/Respondent

5. On 30th May, 2023, the Plaintiff/Respondent herein filed a detailed 50 Paragraphed Replying Affidavit sworn by Songole B. Asingwa, an Advocate of the High of Kenya practicing as such at the EACC herein and dated on 27th April, 2023. The replies was in opposition of the application. It was together with ten (10) annextures marked as "SBA 1 to 10" annexed thereof. She stated as follows: -

a. The Law firm of Messrs. Khaminwa and Khaminwa Advocates which had purportedly filed the application was a stranger to this matter as it had never been on record representing any parties in this matter. The said application was therefore irregular and invalid as the said Law firm was not lawfully on record.

b. According to the Counsel, the provision of Order 9 Rule 7 provided for a party to appoint an Advocate to represent them and the same must be done via a notice of appointment of Advocates.

c. Pursuant to the above Order, the 1st Defendant/Applicant appointed the Law firm of Messrs. Kamau Kuria & Kiraitu Advocates to represent it and subsequently changed its legal representation to the Law firm of Messrs. Lumatete Muchai & Company Advocates (Annexed in the Affidavit are Notice of Appointment and the Notice of Change of Advocates marked "SBA - 1). All the while the said Law firm of Messrs. Lumatete Muchai & Company Advocates had always appeared in court to represent the 1st Defendant/Applicant. Service of hearing and mention notices had always been effected by the 1st Plaintiff/Respondent on the said firm.

d. On 21st October, 2010 the suit was to be heard however the same was removed from the cause list. The Plaintiff/Respondent was present in court but the 1st Defendant/Applicant was not. On 11th November, 2015 the suit was dismissed for non-appearance of the Plaintiff/Respondent.

e. On 17th December, 2015 the Plaintiff/Respondent via notice of motion dated 14th December, 2015 made an application seeking to reinstated the suit. The suit was reinstated and parties were directed to proceed for Pretrial directions. Pursuant to the Courts directive, the Plaintiff/Respondent had been taking several mention dates and served a mention notices on the 1st Defendant/ Applicant (Annexed in the affidavit were mention notice and affidavit of service marked as "SBA – 2").

f. On 17th May, 2017 the matter came for notice to show cause why the suit shouldn't be dismissed for want of prosecution wherein the 1st Defendant/ Applicant informed the Honorable Court that they intended to compromise the suit. The Honorable court directed the matter to be mentioned on 19th July, 2017 to confirm if the Plaintiff/Respondent had filed an application to compromise the suit. The 1st Defendant/ Applicant was ably represented by his Advocates.

g. On 19th July, 2017 the matter was mentioned and the Plaintiff/Respondent sought for more time to file its application. The 1st Defendant/ Applicant was present in court and he opposed the application. On 2nd May, 2018 the matter came up for pre-trial directions and Court gave

further pre-trial direction on compliance. Even then, the 1st Defendant/Applicant was present in court.

h. On 23rd May, 2018, the Plaintiff/Respondent filed an application seeking to compromise the suit pursuant to the provisions of Order 25 Rule 5(1)(2), of the Civil Procedure Rules, 2010 which application was opposed by the 1st Defendant/ Applicant (annexed in the application is the Applicant's Replying Affidavit marked as "SBA – 3").

i. On 10th July, 2018 the suit came up for directions wherein the court directed that the application by the Plaintiff/ Respondent to be heard on 30th July, 2018. The 1st Defendant/ Applicant/'s Advocates were present in court when directions were given. On 30th July, 2018 the matter came up in court wherein the 1st Defendant/Applicant was fully represented. The Plaintiff/Respondent application was argued on the same day and court noted it would issue its ruling on 31st September, 2018. The Court noted its ruling was not ready and the same was delivered on 17th December, 2018.

j. On 3rd June, 2019, the Plaintiff/Respondent suit was dismissed for non-attendance but the same was reinstated on 12th March, 2020 by the Honorable Court after the Plaintiff/ Respondent and 1st Defendant/ Applicant had presented their arguments same (Annexed in the affidavit is a hearing notice and affidavit of service marked as "SBA – 4").

k. Subsequently, on 6th July, 2020 Court gave pretrial direction on hearing wherein the Applicant/1st Defendant was present. The matter was then scheduled for hearing on 17th June, 2021. Despite the 1st Defendant/ Applicant being present in court, the Plaintiff/Respondent took it upon itself to serve a hearing notice on the 1st Defendant/Applicant on the above date.

l. On 17th June, 2021 when the matter came up for hearing the 1st Defendant/Applicant informed Court that their client was a party to another suit that was touching the same subject matter which had been filed at the Chief Magistrate's Court Mombasa as Civil Suit Number E14 of 2021. Pursuant to the above information which was brought to the attention of the Honorable Court by the 1st Defendant/Applicant, the Court directed that the other parties be enjoined to this suit and matter be mentioned for further directions on 11th October, 2021. Unfortunately, the matter was not mentioned as there was an extension of the Huduma day Holiday and hence court never sat.

m. The Plaintiff/Respondent took and served a mention date for the matter. The mention notice was dated 16th February, 2022. It was served upon all the parties including the 1st Defendant/ Applicant. The matter was mentioned and the 1st Defendant/Applicant was present wherein court directed that the matter be heard on two diverse days - 13th and 14th June, 2022.

n. On 5th April, 2022, the Plaintiff/Respondent filed an application to amend its Plaint in a bid to comply with the court's direction to enjoining the other parties from Chief Magistrates Court, Civil Suit Number E14 of 2021. The application on amendment of the Plaint by the Plaintiff/ Respondent was heard and Court directed that the matter be mentioned on 14th May, 2022. That the 1st Defendant/Applicant's Advocates were present on the very day and were given 14 days to amend their Defence. On 14th May, 2022when the matter came up for mention the 1st Defendant/Applicant was absent. The Court issued a hearing date for 18th October, 2022. On 13th June, 2022 the matter came up and both the 1st Defendant/ Applicant and the Plaintiff/ Respondent were present in court. The Plaintiff/Respondent told Court that the

suit had issued a date for hearing for 18th October, 2022. Upon confirmation of that position, the hearing date was affirmed by Court.

o. On Plaintiff/Respondent served all parties including the 1st Defendant/Applicant with a hearing notice for 18th October, 2022. However, when the matter came up for hearing, unfortunately, Court could not reach it and the same was therefore adjourned to 16th November, 2022. The 1st Defendant/ Applicant was absent despite being served with the hearing notice and being present in court when the matter was confirmed for hearing.

p. The Plaintiff/ Respondent served all parties, including the 1st Defendant/Applicant with a hearing notice for 16th November, 2022. The Plaintiff/ Respondent and 2nd Defendant/ Respondent were present in court and the matter proceeded for hearing. The 1st Defendant/ Applicant was again not present during the hearing. Both the Plaintiff/Respondent and 2nd Defendant/ Respondent closed their case and directed to file their submissions which they did.

q. On 16th February, 2023 the matter came up for mention to confirm if parties had filed their submissions. It was on this day that the Law firm of Messrs. Khaminwa and Khaminwa Advocates appeared in Court for the first time and purported to be representing the 1st Defendant/Applicant herein.

r. From the foregoing, it was clear that the 1st Defendant/ Applicant had always been aware and participated in the suit and could not therefore at this juncture purport to have not known the matter was coming up for hearing. The Plaintiff/Respondent served upon the 1st Defendant/ Applicant with the list of witnesses and list of documents and two witnesses because the other witnesses were to produce a valuation report and letter from the documents from Ministry of Housing which had already been supplied to the 1st Defendant/ Applicant.

s. If the 1st Defendant/ Applicant had an issue with the witness statement supplied then he should have written or even raised an objection over the same in court or with the Plaintiff/ Respondent. The 1st Defendant/Applicant was not being honest to this Honorable Court by purporting there had been adjournments on ground of the Plaintiff/Respondent failure to comply with court orders.

t. In fact it was the Defendant/ Applicant who had never served the Plaintiff/Respondent with any list of documents, list of documents or witness statement and could not therefore purport that they were keen on prosecuting the matter by shifting blame to the Plaintiff/ Respondent.The 1st Defendant/Applicant/'s application was an afterthought as the real objective was to have the case re-opened so that they could fill in the gaps in their case which had been exposed.

u. Fromthe foregoing, it was clear that the 1st Defendant/ Applicant was well aware of the matter and the onus of ensuring that he appeared in court to prosecute the matter was on him and not the Plaintiff/ Respondent. The 1st Defendant/ Applicant/'s herein were at all material times of the hearing of the suit fully represented and accorded the opportunity to be heard through their appointed Advocates. If indeed the 1st Defendant/Applicant was in Court as he purported to have been on 13th June, 2022, then nothing barred him from addressing the Court. It was not his responsibility to seek to find the Plaintiff/ Respondent's Counsel to appear in Court. His Counsel (Mr. Faki) should have proceeded with the matter.

v. The 1st Defendant/Applicant's application was a technical gimmick and a theatrical maneuver intended to defeat the ends of justice which technicality is abhorred by Article 159(2) (d) of

the Constitution of Kenya, 2010. The 1st Defendant/ Applicant's application should not be allowed as it's filed with the intention of defeating justice and it's in the public interest that the same should not be allowed.

w. The Application herein if allowed, would prejudice, hinder and risk the recovery of the subject suit parcel of land which is public property. The 1st Defendant/Applicant's had not laid any basis or met the threshold to enable the court to exercise its discretion to allow the reopening of the case in their favour and that the application is a clear example of abuse of the due process of the court.

x. The 1st Defendant/ Applicant's application was unmeritorious, frivolous, vexatious and an abuse of court process whose objective it to waste of Court's precious judicial time hence should be dismissed with costs to the Plaintiff/Respondent.

IV. Submissions

6. On 30th May, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 19th April, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that, I have noted that only the Plaintiff/Respondent herein. For unclear reason, by the time I was peening down this Ruling, the 1st Defendant/Applicants had not yet filed their submission despite of the stringent timeframe set out by Court. Hence the Court will proceed on merit. On 11th July, 2023 a ruling date was reserved on Notice by Court accordingly.

A. The Written Submissions by the Plaintiff/Applicant

7. The Plaintiff/ Respondent through the office of the EACC filed their written submissions dated 18th July, 2023. M/s. Songole Advocate commenced her submission by setting out the factual background of the matter. She stated that on 19th April, 2023 the 1st Defendant/Applicant filed an application seeking that the case be re-opened. She stated that indeed, the matter had already proceeded for full trial and apart from the 1st Defendant/Applicant, the Plaintiff/Respondent, the 2nd, 3rd, 4th & 5th Defendants herein closed their case and were awaiting delivery of Judgement. Thus, the 1st Defendant/Applicant sought to have the anticipated and/or expected Judgement be stopped from being delivered on various grounds amongst them that the 1st Defendant/Applicant was not given an opportunity to defend the suit as he was never notified when the matter was coming up for hearing.

8. The Plaintiff/Respondent (hereinafter referred to as the Commission) has identified issues arising from the Application filed by the 1st Defendant/Applicant and would address the Court on the following four (4) issues for its determination.

9. Firstly, on whether the Law firm of Messrs. Khaminwa and Khaminwa was properly on record. The Learned Counsel submitted that the 1st Defendant/Applicant had stated that they were never properly served and came to learn of the suit way after it had been heard and was pending delivery of Judgement. They had further asserted that the Plaintiff/ Respondent never effected proper service upon his Advocates. On these allegations, the Learned Counsel averred that the 1st Defendant/Applicant was not truthful as his Advocates were properly served at all times of the hearing of the matter as had been demonstrated by the Plaintiff/Respondent in its Replying Affidavit.

10. The 1st Defendant/Applicant purported that he changed his Advocates. Indeed, in his further replying Affidavit, he attached a Notice of Change of Advocates filed in court on 19th September, 2022. The said Notice of change only bore the official stamp of the court. The Plaintiff/ Respondent was and has

never (to date) been served with the said notice of change of Advocates. The provision of Order 9 Rule 5 of the Civil Procedure Rules,2010 which provides that:-

> " A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to Rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

11. The Learned Counsel further submitted that the import of the failure of service was clearly indicated in the above Order. The 1st Defendant/Applicant never effected service of the said notice to any parties more so on the Plaintiff/Respondent. No evidence of service had been produced. Unless and until a notice of change of Advocate was filed and duly served an Advocate on record for a party remained the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.

12. To support her point, the Learned Counsel referred to Judge J.G Kemei in "Stephen Mwangi Kimote – Versus - Murata Sacco Society [2018] eKLR" stated thus:-

> " Article 50 (2)(b) of *the Constitution* protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties. I have noted that the Applicant did not comply with order 9 Rule 5 as well".

13. Additionally, the Learned Counsel stated that this position was also echoed by Justice W.Korir in "Simon Barasa Obiero – Versus - Jackson Onyango Obiero [2016] eKLR" where he stated:-

> " Any change of advocate should comply with the rules. Chaos would reign if parties can change advocates at will without notifying the Court and the other parties".

14. Therefore, in view of the above, the Learned Counsel asserted that the Law firm of Messrs. Khaminwa and Khaminwa Advocates were improperly on record. The Plaintiff/Respondent continued to serve the Law firm of Messrs. Lumatete Muchai & Company Advocates who still appeared in court even when the date for hearing was confirmed by court. The court record would bear witness to this fact.

15. Secondly, on whether the 1st Defendant/Applicant was offered an opportunity to defend themselves. The Learned Counsel submitted that *the Constitution* of Kenya 2010 at the provision of Article 50 makes the right to a fair hearing one of the rights and fundamental freedom secured by *the constitution*. It states Article 50(1) provides:

> " Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, amounting independent and impartial tribunal or body".

16. The Court has a constitutional mandate to ensure that a trial will be fair. The Plaintiff/Respondent had demonstrated in its Replying affidavit how the 1st Defendant/Applicant were well aware of the matter but chose not to appear in court and could not therefore turn around and state otherwise. The provision of Order 12 Rule 2 was clear on procedure for hearing a matter where only the Plaintiff has

attended court.The 1st Defendant/Applicant was very active to have this matter dismissed for want of prosecution but not so eager to prosecute its case once it came up for hearing. The onus of ensuring that he appeared in court to for hearing was on him and not the Plaintiff/Respondent.

17. To buttress her point, she referred Court to Justice Dr. Iur Fred Nyagaka in the case of "Moses Kimaiyo Kipsang – Versus - Geoffrey Kiprotich Kirui & 2 others [2022] eKLR" where the Judge held:-

> " Having found that the Defendants were properly served, this court is of the view that it must consider whether the Defendants were accorded a chance for fair hearing. The record speaks for itself. Defendants' counsel appeared on two occasions only but failed to attend the other court sessions. Again, even when the matter was fixed for hearing and Learned Counsel failed to attend Court, there is no explanation not attend Court in absence of the counsel. There is no law or practice that is to also automatically fail to attend Court. This does not show good faith and seriousness on the part of the defendants themselves, especially when they did not file a defence. He has stated that his mistake should not be visited on the client. This court notes that the case is of the client and not his advocate. The totality of the facts and circumstances is that the court is of the opinion that the Defendants were accorded a chance to be heard but they chose not to. Order 12 Rule 2 is clear on what the Court should do in the circumstances such as were on 20/05/2021 and the Court cannot be faulted".

18. Thus, the Learned Counsel opined that the 1st Defendant/Applicant could not therefore describe himself as a party who was denied a chance to be heard. On the contrary, throughout the matter the Plaintiff/Respondent took further steps of serving a hearing notice on the 1st Defendant/Applicant despite him being present in court when the hearing date was being issued. The court record would bear witness to this fact.

19. Thirdly, on whether the case should be re-opened and Judgement arrested. The Learned Counsel submitted that the 1st Defendant /Applicant had not established sufficient cause to warrant the orders they were seeking as they were indolent and were really attempting to now shift the blame to the Plaintiff/Respondent. The Court held in the case of "Samuel Kiti Lewa – Versus - Housing Finance Company Limited & another {2015} eKLR" that

> " the Court's discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought."

20. In the case of "Union Insurance Co. of Kenya Limited – Versus - Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998" the Court of Appeal held that:-

> " Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the Applicant was denied the right to defend itself. The Applicant were notified on every step the Respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the Applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard andonce that

opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."

21. The Learned Counsel held that the 1st Defendant/Applicant had just woken up into filing the application just because the Honorable Court was about to pronounce its Judgement yet it all along knew of the existence of the suit and even knew of the hearing date. The 1st Defendant/Applicant had not given a reasonable cause as to why he never attended court as service was always effected on his Advocates. The Powers to arrest a Judgement was discretionary. The discretion was intended to be exercised to avoid injustice and not designed to assist a person who had deliberately chosen to delay and obstruct course of Justice just like 1st Defendant/Applicant was doing.

22. To support her submission on this issue, the Learned Counsel cited Justice G.V Odunga in "Wambua Maithya – Versus - Pharmacy and Poisons Board; Pharmaceutical Society of Kenya & 2 others (Interested parties) eKLR" where the Court noted that:-

> " Accordingly, it is my view that in appropriate cases, the Court is entitled to arrest the delivery of a decision in order to do justice if circumstances warrant it. However, that is a jurisdiction which cannot be exercised in a properly exercised after a lot of circumspection and soul searching by the judge. In this respect, Sir. Udo Udoma, CJ in Musa Misango – Versus - Eria Musigire and Others Kampala HCCS No. 30 of 1966 [1966]EA 390, expressed himself as follows:
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> > " Now it is unquestionable that, both under the inherent power of the court, and also under a specific rule to that effect under the *Judicature Act*, the court has a of an excuse, so that to permit the action to go through its ordinary stages up to process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think that they will be successful in the end lies a wide region, and the courts have properly considered this power of arresting an action and excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the Defendant challenged the validity of the plaintiff's claims as a matter of law. It is evident that ougr judicial system would never permit a plaintiff to be "driven from the Judgement seat" in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad." [Emphasis added].

21. Therefore, whereas the powers to arrest the decision may be invoked, it is a power which ought to be invoked very sparingly and in exceptional circumstances and not to assist a person who is intent upon abusing the process of the Court.

23. The Learned Counsel argued that the 1st Defendant/Applicants application shouldn't be allowed as it's filed with the intention of defeating justice and it's in the public interest that the same should not be allowed. Allowing the same would violate the provisions of Article 159 of *the Constitution* and Sections 1A and 1B *Civil Procedure Act*, Cap 21.It would also cause prejudice by hindering and risking the recovery of the subject suit parcel of land which was public property that should be in use by Government officers.

24. In conclusion, the Learned Counsel submitted that the 1st Defendant/Applicant application was unmeritorious, frivolous, vexatious and an abuse of court process whose objective it to waste court's precious judicial time hence should be dismissed with costs to the Plaintiff/Respondent.

V. Analysis & Determination.

25. I have carefully read and considered the pleadings herein, being a Notice of Motion application dated 19th April, 2023 by the 1st Defendant/Applicant herein, the responses, written submissions and myriad of authorities cited by the Plaintiff/Respondent, the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

26. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has framed three (3) salient issues for its determination. These are:-

    a. Whether the law firm of Messrs. Khaminwa and Khaminwa are properly on record?

    b. Whether the case should be re - openedand give the 1st Defendant an opportunity to be heard?

    c. Who will bear the Costs of Notice of Motion application 19th April, 2023.

ISSUE No. a). Whether the Law firm of Messrs. Khaminwa and Khaminwa are properly on record

27. Under this Sub heading the main issue for the Courts consideration is one on legal representation. The provision of Order 9 Rule 1 of the Civil Procedure Rules, 2010 which provides:-

> " 9 (1) Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf: Provided that—
>
> (a) any such appearance shall, if the court so directs, be made by the party in person; and
>
> (b) where the party by whom the application, appearance or act is required or authorized to be made or done is the Attorney-General or an officer authorized by law to make or to do such application, appearance or act for and on behalf of the Government, the Attorney-General or such officer, as the case may be, may by writing under his hand depute an officer in the public service to make or to do any such application, appearance or act."

28. From the reading of the provision of Order 9 Rule 1 of the Civil Procedure Rules, 2010 and my understanding of the said provision, there is nothing that requires a formal Notice of Appointment of an Advocate.

29. The order that requires a Notice of appointment of an Advocate is required to expressly state so: For example under the provision of Order 9 Rule 7 of the Civil Procedure Rules, 2010. It is provides:-

> " Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications."

30. The above order is clear that it is only in a situation where a party after suing or defending a suit in person, appoints an Advocate to act in the case or matter on his behalf, he/she shall give notice of

appointment of an advocate or notice of change of an advocate as the case may be. This is because there are situations in which Notice of Appointment of an Advocate is not necessary or required such as where an Advocate files a plaint for the Plaintiff; Petition; Originating Summons; or filing memorandum of appearance and defence. From the records, I have established that no notice of appointment of the law firm of Messrs. Khaminwa and Khaminwa Advocates on record therefore this Honourable Court. Thus, whilst in concurrence with the position taken by the Learned Counsel for the Plaintiff/Respondent, I strongly discern that the esteemed Law firm - Messrs. Khaminwa and Khaminwa Advocates are not properly on record for the 1st Defendant/Applicant from the onset of this suit.

31. Be that as it may, I will still proceed to examine the merits of the prayers sought by the 1st Defendant/Applicant in the application dated 19th April, 2023.

ISSUE No. b). Whether the case should be re-opened and give the 1st Defendant an opportunity to be heard

32. The issue under this sub heading pertains the orders sought from the application before Court seeking for re - opening of a party's case and adducing of additional or further evidence. Both sides agree and I accept, that whether or not to allow a party to re-open its case and to adduce additional evidence is a matter of the Court's discretion.

33. On this point, I am guided by the case of "Raindrops Ltd – Versus - County Government of Kilifi (2020) eKLR", the Court observed that both the Civil Procedure Rules, 2010 and the *Evidence Act*, Cap. 80 do not have clear and express provisions on how a court should exercise the jurisdiction to re-open a case. Although the closest one would think of was for the Court to invoke the provisions for re – calling of witnesses for purposes of cross – examination. These are founded under the provision of Section 146 (4) of the *Evidence Act*, Cap. 80 states:-

> " The Court may In all cases *permit a witness to be recalled either for further examination – in – chief or for further cross – examination, and it does so, the parties have the right of further cross examination and re – examination respectively".

34. To me this only allows the court to permit the recall of a witness for further cross-examination or cross-examination as the case may be. Additionally, the Provision of Order 18 rule 10 of the Civil Procedure Rules, 2010 holds:-

> " 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"

This too grants the court powers to recall any witness who has already been examined and put such questions to him as it thinks fit. Paradoxically, the application by the 1st Defendant/Applicant never sought for any such reliefs nor invoked any of these provisions of the law. On the contrary, my quick reading of the application spells out that the reliefs sought by the 1st Defendant/Applicant were very specific to wit:-

> " i. The Honourable Court be pleased to arrest the Judgment slated to be delivered on Notice pending the inter parties hearing of this Application; and .

ii. The Honourable Court be pleased to re - open this case for the hearing of the 1st Defendant's case who never participated in the initial hearing.

35. *The Constitution* of Kenya 2010 at Article 50 makes the right to a fair hearing one of the rights and fundamental freedom secured by *the constitution*. It states:

> Article 50(1) provides
>
> Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, amounting independent and impartial tribunal or body.

36. The decision therefore whether to re-open a case is purely left to the discretion of the court. Judicial discretion as has been severally stated is a powerful tool that must be exercised with a lot of caution. It must be used judiciously to advance the cause of justice and not whimsically.

37. The "Raindrops Ltd case" made reference to and quoted with approval the Canadian Encyclopedia Digest Evidence (V) 12, (a), which summarized the approach a Court should adopt in assessing a party's conduct as a relevant factor in the following terms:-

> " Where a party wishes to adduce evidence at a late stage that does not fall within the definition of rebuttal testimony, it must seek to re-open its case. The jurisprudence has not always been consistent in establishing what is required for the granting of leave to adduce new evidence and the matter is complicated by the fact that attempts to re-open can occur after the parties have closed their case, but before Judgment has been entered, and after Judgment has been entered while some Judges have advocated an unfettered approach to the trial Judges discretion whereby re-opening is permissible anytime it is in the interest of justice to do so, the more common method of proceeding is to focus on two criteria.
>
> (1) Whether the evidence; if it had been properly tendered would probably have altered the Judgment, and
>
> (2) whether the evidence could have been discovered sooner had the party applied reasonable diligence. Re-opening the case is an extreme measure and should only be allowed sparingly and with the greatest of care. While the two criteria must both be considered, the need to have exercised reasonable diligence in discovering the evidence is not absolute. The more important the evidence would be to the outcome of the case, the stronger the argument in favour of its reception. Procedural concerns such as diligence should generally give way to the demands of substantial justice where failure to do so is likely to result in an obvious injustice. Nonetheless, re-opening is unlikely to be permitted where the evidence was discovered and not adduced originally because of a tactical decision by counsel."

38. My understanding of right to be heard in the trial of civil cases comprises, on the part of a Defendant, of a right to be notified of the existence of the case and the dates when court attendance is required, liberty to file documents in response to the Respondent's claim and entitlement to attend court and participate in the proceedings as provided for in the law guiding trial cases of this nature. The Court record shows that on 21st October, 2010 the suit was to be heard however the same was removed from the cause list. The Plaintiff/Respondent was present in court but the 1st Defendant/Applicant was not. On 11th November, 2015 the suit was dismissed for non-appearance of the 1st Plaintiff/Respondent

and reinstated on 17th December, 2015 after the Plaintiff filed a notice of motion application seeking for the orders. There are several mention notices to the 1st Defendant/Applicant on record. On 17th May, 2017 the matter came for notice to show cause why the suit shouldn't be dismissed for want of prosecution wherein the 1st Defendant/Applicant informed the Honorable Court that they intended to compromise the suit. The Honorable court directed the matter be mentioned on 19th July, 2017 to confirm if the 1st Respondent/Plaintiff had filed an application to compromise the suit. The 1st Defendant/Applicant was ably represented by its Advocates. As already stated, there is a copy of the Defence on record but it is clear that the 1st Defendant/Applicant had no desire to participate in these proceedings. When the matter came up on 2nd May, 2018 for pre-trial direction, the 1st Defendant/Applicant was present in court. the 1st Defendant/Applicant was present in court when the matter was set down for hearing on 18th October, 2022

39. Further, that the manner of exercising that discretion is set out by Odeny J in the case of:- "David Kipkosgei Kimeli – Versus - Titus Barmasai [2017] eKLR":-

> "Kasango J. in the case of Samuel Kiti Lewa – Versus - Housing Finance Co. Of Kenya Ltd & another [2015] eKLR referred to a Ugandan High Court, Commercial Division case of Simba Telecom –v- Karuhanga & Anor (2014) UGHC 98 which dealt with an application to re-open a case for purposes of submitting fresh evidence, the court referred to an Australian case Smith –versus- New South Wales [1992] HCA 36; (1992) 176 CLR 256 where it was held that:
>
> > "If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations, the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."

It should be noted that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened as was held in the abovementioned Ugandan case. It further held that even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not. I also subscribe to the above that ultimately if the court allows reopening of a case, it still has the discretion to admit the evidence adduced or introduced. The court can still reopen the case and disregard the evidence from the witnesses. What purpose would that kind of move serve as it would be an exercise in futility. That is why the court is under a duty to exercise its discretion judiciously. The court should pose the question, Is the reopening of the case likely to embarrass or prejudice the opposing party? Is it going to cause injustice? If the answer is in the affirmative then the discretion should not be exercised in the applicant's favour."

40. While considering a similar application in "Samuel Kiti Lewa – Versus - Housing Finance Co. Of Kenya Ltd & another [2015] eKLR" Kasango J. stated:

> 17. Uganda High Court, Commercial Division in the case Simba Telecom –v- Karuhanga & Anor (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of

submitting fresh evidence. That court referred to an Australian case Smith –versus- New South Wales [1992] HCA 36; (1992) 176 CLR 256 where it was held:

> " If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised."

18. The Ugandan Court in the case SIMBA TELECOM (supra) held thus:

> " I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not." .....

20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by in ordinate and unexplained delay.

41. Additionally, in the case of "Hannah Wairimu Ng'ethe vs Francis Ng'anga & Another (2016) eKLR", the court declined to allow re-opening of the case and stated that:-

> " ...the court has not been told that the petitioner has come upon or discovered some new and important evidence which after exercise of due diligence was not within his knowledge. It is noted that the petitioner has had the advantage of counsel from the inception of this case."

42. Further, in the case of:- "Odeyo Osodo – Versus - Rael Obara Ojuok & 4 Others (2017) eKLR", the Court stated that the discretion whether or not to re-open a case which the applicant had previously closed should be exercised with caution not arbitrarily whimsically and only in favour of an Applicant who has established sufficient cause.

43. Coming back to the instant application, by the time the case was finally heard on 16th November, 2022, it had been pending in court for more than ten (10) years since it was filed in 2010. The proceedings on record show that the 1st Defendant/ Applicant had been notified of the hearing on 16th November, 2022 evidenced by the hearing notice and affidavit of service attached in the Plaintiff/ Respondent's affidavit marked as SBA 9. When the matter came up on 16th November, 2022 the Plaintiff/Respondent and the 2nd Defendant were present in court and the matter proceeded for hearing. The 1st Defendant/Applicant was again not present during the hearing and the Plaintiff/ Respondent and 2nd Defendant closed their cases to file their submissions which they did. It is clear that the 1st Defendant/Applicant had always been aware and participated in the suit and cannot therefore at this juncture purport to have not known the matter was coming up for hearing.

44. Whereas it may be allowable in deserving cases to re-open a case after it has been closed, it should not and must not be allowed where it is intended to help one party to fill up gaps in evidence of his case. Re-opening a case is an extreme measure that should only be allowed sparingly and with the greatest care ("Raindrops Ltd case – supra").

45. The provision of Order 12 Rule 2 and Order 17 Rule 3 Civil Procedure Rules, 2010 allow the court to proceed to hear a matter ex parte where the Defendant had sufficient notice of the hearing date but fails to attend court. The overriding objective of the Civil Procedure Rules, 2010 as stipulated in the provision of Section 1A of the *Civil Procedure Act*, Cap. 21 is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. This objective could not have been served by delaying hearing of the suit further.

46. The 1st Defendant/Applicant cannot be described as a party who was denied a chance to be heard. He was notified of the existence of the suit. He had the liberty to file as many documents as the law allows him in response to the Plaintiff/Respondent's case and in preparation for the hearing. He was notified of the hearing date but in most of the instances he failed to seize the chance. In all fairness and given circumstances, I am not persuaded by the reasons advanced by the 1st Defendant/Applicant in support of the application. The 1st Defendant has not established sufficient cause to warrant the re-opening of this case after all parties have had their day in Court and closed their respective cases. The Application in my view is an afterthought tactically calculated to fill up gaps in evidence. It is noteworthy that the 1st Defendant/Applicant is not even seeking to recall a witness to explain an issue that may have been left hanging or produce a document that may have been inadvertently left out. He is seeking to redo the case.

47. By and large, the 1st Defendant/Applicant had an opportunity to defence himself but chose not to do so. As the Court of Appeal stated in the case of "Union Insurance Co. Ltd – Versus - Ramzan Abdul Dhanji", 'the law is that parties must be given a reasonable opportunity of being heard.' That opportunity was accorded the 1st Defendant/Applicant in this case. The upshot of all these and for the reasons set out herein, this Honourable Court declines the 1st Defendant/Applicant's prayers to re-open this case. The application must fail.

ISSUE No. c). Who will bear the Costs of Notice of Motion application 19th April, 2023.

48. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh – Versus Tarchalan Singh" eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

49. In this case, as the application by the 1st Defendant/Applicant has not been successful, Court finds that the costs of the application shall be bore by the 1st Defendant/Applicant herein.

VI. Conclusion & Disposition

50. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to the preponderance of probabilities and the balance of convenience.

51. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

a. That the Notice of Motion application dated 19th April, 2023 is found to lack merit and hence be and is hereby dismissed in its entirety.

b. That in the interest of the principle of natural Justice, Equity and Conscience, an order is made that the 1st Defendant/Applicant is at liberty to file their submissions if they deem fit to do so within the next 21 days from the date of the delivery of this Ruling.

c. That the Law firm of Messrs. Khaminwa & Khaminwa Advocates are not properly on record for the 1st Defendant and all the pleadings filed by the said law firm are expunged from record. In the meantime, the esteemed Law firm is at liberty within the next 21 days from this ruling to regularize their representation pursuant to the provision of Order 9 Rules 5 & 6 of the Civil Procedure Rules, 2010.

d. That notwithstanding the foregoing directions, the matter shall proceed on as previously scheduled for the reservation of a Judgment date in accordance with the directions pronounced by Court on 11th July, 2023.

e. That the Plaintiff/Respondent shall have the costs of the Notice of Motion application dated 19th April, 2023 for having participated in the hearing and determination of this application.

It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 16TH DAY OF OCTOBER 2023.

.....

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

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

a. M/s. Yumna, the Court Assistant.

b. M/s Songole Advocate for the Plaintiff/Respondent.

c. Dr. Khaminwa Advocate for the 1st Defendant/Applicant.

RULING: CIVIL CASE NO. 184 OF 2010 Page 9 of 9 HON. LL NAIKUINI (JUDGE)