



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 313 OF 2014

(CORAM: R.E. ABURILI – J)

AND

IN THE MATTER OF: ARTICLE 47 AND 48 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTION 13(1) OF THE LAND ACT 2012

AND

SECTION 158 OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2000

SAYANI INVESTMENTS.....EXPARTE APPLICANT

VERSUS

THE DIRECTOR OF SURVEY.....1ST RESPONDENT

THE CHIEF REGISTRAR OF TITLES.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

RULING

1. On 21/9/2016, this court delivered a judgment determining the Exparte applicant's Notice of Motion dated 22/8/2014. A year later vide a Notice of Motion dated 22/9/2017 filed on the same day, Sadhani Limited and Keibukwo Investments Ltd sought for stay of enforcement of the judgment of 21/9/2016; setting aside of the decree arising from the said judgment and to be enjoined to these proceedings. They also sought that proceeds of rent, lease, licence and or any other interest derived from the property LR No. 209/20737 (original Number 209/923, 924 and 925 be paid into a joint interest earning account of the advocates, for the Exparte applicant Sayani Investments and M/s Sadhani Ltd & Keibukwo Investments Ltd pending the hearing and determination of the application thereof and the motion dated 22/8/2014.

2. The Applicants also seek further directions and orders for purposes of meeting the ends of justice and that costs be borne by the Exparte applicant.

3. The grounds upon which the application is sought are that the Court issued writs of *Certiorari*, *Mandamus* and prohibition affecting the interests on the property without hearing the said registered proprietors of the said property.

4. Secondly, that the applicants had only discovered of the unfortunate and drastic events and that their property had been caveated and

facing deadly prejudice, without being heard.

5. That the applicants are the holders of title deed to property (*Deed Plan 356256*) yet the *Ex parte* applicants never named them as parties to the suit notwithstanding the provision of **Order 53 Rule 3(2) of the CPR, Section 4 of the FAA Act, 2015 Articles 40(1) of the Constitution and Article 47 of the Constitution.**

6. That neither were the applicants served nor were they made aware of these proceedings giving rise to the judgment of 21/9/2016 hence the decision was made in gross violation of the Rules of Natural Justice; that no person shall be condemned unheard. It was asserted that it was immaterial that the same decision would have been arrived at if the other party was heard; that the Court in exercise of judicial review jurisdiction has inherent jurisdiction to set aside judgment wrongly entered.

7. It was further claimed that the judgment of this court having been obtained in violation of the principles of natural justice, is a nullity and ought to be set aside *Ex debito justitiae* and that all executorial enterprises on it are equally a nullity for one cannot place something or nothing and expect it to stay there.

8. That as the applicants are the title holders of the suit land, it is only equitable and fair that the proceeds from the suit property for the period of the application and until the substantive notice of motion dated 22/8/2014 are held in a joint account of advocates for the parties.

9. That the pendency of the void judgment and decree of this court continues to egregiously prejudice the fundamental rights of the applicants.

10. That the applicants' legitimate expectation that the law and their right to property shall be respected have been violated hence it is in the interest of fair administration of justice and the Rule of Law that the application is allowed.

11. The application was further supported by the affidavits sworn by Peter Gathii Reuben and David Some Barno sworn separately on 22/9/2017. In the said affidavits, the deponents claim that the two companies Kelburkwo Investments Ltd and Sadhani Limited are jointly the registered proprietors of LR No. 209/20737 (original Number 209/923, 924 and 925) made from Deed Plan No. 356256 as shown by annexed Certificate of Title issued on 5/10/2016 by the Registrar of Titles.

12. That on 21/8/2017, the applicants wrote to the tenant of the property Equity Bank Ltd advising them that the applicants were proprietors of the said property and to therefore remit the rent to the applicants.

13. That it was then that the applicants received a letter dated 23/8/2017 from Messrs. Kaplan & Stratton Advocates on behalf of Sayani Investments Ltd informing the applicants that there had been a High Court case which quashed the Deed Plan No. 356256.

14. That the applicants responded to the above letter dated 29/8/2017 through Oyugi & Co. Advocates expressing surprise of the existence of court proceedings and cancellation of a Deed Plan No. 356256.

15. That the said advocates further wrote a letter dated 15/9/2017 after locating the Court file and studying the judgment, to NLC, Chief Registrar of Titles, Director of Survey advising them of the developments and indicating that they would be moving to challenge the judgment.

16. That the applicants were unaware of the existence of court proceedings leading to the judgment of 21/9/2016 and that the first time they came to learn of the existence of the court case was on or about the 23rd September 2017.

17. That as at August 2014 when these proceedings were initiated in court, the applicants had already been issued with a letter of allotment on 4th October 2013 and that a letter of allotment vests rights to a party that are justifiable and that therefore before any proceedings are taken to affect such right, then the holder of such letter of allotment is entitled to due process.

18. That the applicants followed due process in acquiring the suit property and paid all the required fees and met all the conditions of lease hence the right to own the property properly crystallized in them and that it is therefore only fair and just that the judgment be set aside and all the consequential orders/decrees be stayed in order to accord the applicants an opportunity to be heard on the initial substantive notice of motion dated 22nd August 2014.

19. The 1st and 2nd Respondents – Director of Surveys and the Chief Registrar of Titles filed their joint grounds of opposition on 17/10/2017 contending that the application as drawn is fatally defective, incompetent an abuse of the court process and ought to be dismissed with costs.

20. That this court is *Functus officio* having rendered the judgment on 21st September 2016 over a year; that Judicial Review jurisdiction is anchored on the process rather than the merits of the decisions; and that since the applicants claim ownership of the suit land, they ought to lodge their claims before the ELC for declaratory orders in respect of such ownership. It was further contended that the application is premised on the wrong provision for the law, is made in bad faith and grounded on non-disclosure of material facts, the applicant having filed Civil Appeal No. 212 of 2017 on 14/9/2017 seeking to appeal the judgment delivered by this court on 21/9/2016.

21. It was further contended that this application offends the equity maxim that equity aids the vigilant as opposed to the indolent.

22. It was further contended that stay of execution is discretionary in nature and must be sought without delay unlike the position herein where the applicant has come to court after one year after delivery of the judgment seeking review, hence the court's discretion should not be exercised in their favour.

23. That the applicants are economical with truth; in that the said alleged Certificate of Title having been issued on 6/10/2016 they only sought to collect rent on 21/8/2017 a year later.
24. That on 8/9/2017, Hon. Mativo J in JR 554/2017 issued Conservatory Orders barring the applicants from relying on Certificate of Title and demanding rent in respect of the suit property hence, Orders No(s) 5 and 6 of the Notice of Motion dated 22/9/2017 have been spent pursuant to the Conservatory Order granted by Mativo J in JR 554/2017 on 8/9/2017.
25. That the application is based on contradictory allegations which borders on mere belief, suspicion and speculations and hence incapable of any Judicial Review determination.
26. The Exparte applicant Sayani Investments Ltd filed a replying affidavit on 13/10/2017 sworn by Mr. Karim Jetha, its Director contending that it is the owner of the disputed properties having acquired it on 9/4/1965, 1st April 1968 and 31st July 1957 respectively and fully developed the properties by erecting thereon buildings known as Caxton House which has been leased to several tenants totaling 30 including a bank, law firms, insurance companies, institutions of higher learning, retailers and others.
27. That the Exparte applicant approached the court on learning that renewal of the grant / leases of the said property was being derailed by unknown persons who were trying to fraudulently obtain title to the suit properties.
28. That the Judicial Review proceedings herein were properly instituted against the Respondents who were in breach of their statutory duties as custodians of the files and documents relating to the suit properties.
29. That on 13/8/2014, this court in granting leave to apply also **ordered that such leave do operate as stay of issuance of Grants** in respect of the suit properties or a grant in respect of LR No. 209/20737 to any other person or persons other than the Exparte applicant, or dealing with the suit properties in any manner that would deprive the Exparte applicant property rights and interest in the suit properties until the hearing and determination of the Judicial Review proceedings, which orders were served on the Respondents on 15/8/2014.
30. That before the matter could be heard, the Director of Surveys conducted investigations into the survey/ consolidation of the suit properties and by letter dated 26/8/2014 Ref CT/178/Vol 14/170 confirmed that Deed Plan No. 356256 was fraudulently procured through utterance of fake documents and proceeded to cancel the said Deed Plan and requested the Land Registrar to ensure that the said Deed Plan was **not** entered into the Land Register.
31. That the Architect of the fraud engineered the disappearance of the files relating to the suit properties from the Lands Registry; attempted to hide or destroy the Exparte applicant's records at the Companies Registry on account of misrepresentation that the Exparte applicant no longer existed after the death of its Founder Director, the Late Haideralli Kanji Sayani and hiding or destroying the entire family files at Nyayo House with a view to destroy all traces of potential children and heirs of Mr. and Mrs. Sayani, which matters were brought to the attention of the Hon. Attorney General vide letter written by Senior Counsel Fred Ojiambo, a partner of Kaplan & Stratton on 31/3/2015.
32. That on 21st and 26th May 2015, the Exparte applicant also brought to the attention of the public by issuing in the Daily Nation and the Standard Caveat Emptor Notices.
33. That at the leave stage and at the hearing of the Motion, the Exparte applicant informed the court that it was not aware of the persons who were behind the insidious scheme or activities complained of.
34. That the matter was adjourned severally to give the Respondents an opportunity to file their responses to the application and submissions but which they failed to do.
35. The Exparte applicant has given a chronology of events leading to the delivery of judgment in this matter on 21/9/2016, which judgment was delivered in the presence of Ms Kerubo, counsel for the Respondents. That the reasons why the Respondents never filed any responses to the application was because they were aware of their insidious scheme to deprive the Exparte applicant of the property.
36. That this court meticulously assessed the evidence on record and reached a correct finding which judgment was regular and that the court's discretion to set aside its judgment is intended only to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist the person who has deliberately sought by evasion or otherwise to obstruct or delay the cause of justice or sensitive insidious schemes.
37. That this application is meant to defeat the cause of justice and an attempt to use this Court as a conduit to sanction and perpetrate the insidious scheme and activities meant to deny and deprive the Exparte applicant its proprietary rights and interests to the suit properties.
38. That the applicants' purported registration as owners of the suit land was done on 5/10/2016 after the Court had quashed the alleged amalgamation of the properties and in the presence of stay orders issued on 13/8/2014 prohibiting the Respondents from issuing title to the subject property (ies) to any other person or persons other than the Exparte applicant.
39. That throughout the proceedings leading to the impugned judgment, the Exparte applicant did not know the person behind the scheme to fraudulently obtain title to the said properties and that this court also noted in the judgment that the Director of Surveys had completely refused, neglected and or failed to provide details on the identities of who had applied for the quashed Deed Plan as well as when the amalgamation was done.
40. That the author of the said amalgamation has conceded that the amalgamation Deed Plan is fraudulent and hence it was cancelled by the 3rd Respondent.

41. That the applicants cannot claim to be innocent purchasers for value but are active engineers and pilots of the insidious scheme to deprive and deny the Exparte applicant its rights and interests to its properties.
42. That even assuming that the suit properties were available for allocation which they were not, then the procedure adopted by the applicants herein to be allocated the land was flouted as the new allocation could only be done by the National Land Commission pursuant to **Section 12 of Land Act** by way of public auction, public tendering, public lots or public exchange and not in secrecy.
43. That the Exparte applicant only learnt of the fraudulent Certificate of Title when a letter dated 21/8/2017 was written to Equity Bank, being one of the tenants who was being asked to remit rents to the applicants herein hence, the applicants remained behind the scenes in a hope that the Court proceedings would not adversely impact on their insidious scheme and only surfaced one year after the issuance of the impugned Certificate of Title to try and take over the suit premises from/through the tenant for the Exparte applicant.
44. That the impugned certificate of title being a product of fraud is null and void as it was issued on the Deed Plan which was cancelled by the Director of Surveys. That the applicants cannot benefit from their illegal acts and that Exparte applicant has already sought vide JR 554/2017 to quash the certificate of title LR 180647 amalgamated and obtained conservatory orders.
45. That the Caxton House was only recently renovated by the Exparte applicant at a great expense of over Kshs. 150 million and that the NLC confirmed its approval to renew the lease in favour of the Exparte applicant on 18/1/2016 and renewals done vide letters of allotment dated 16/8/2016 hence the applicants cannot be entitled to any rents which praters would contravened the conservatory orders made in JR 554/2017.
46. That in any event, the applicants had already sought leave to appeal the judgment to the Court of Appeal vide **CA Civil Appeal No. Nai 212/2017** and that the application was only withdrawn two days after the Exparte applicants' advocates drew the attention of this court of the same.
47. That the application also concealed from this court the existence of conservatory orders in JR 554/2017 and the filing **of Civ App 212/2017** before the Court of Appeal hence they are not deserving of this Court's discretionary orders.
48. That as the certificate of title was issued pursuant to an invalidated Dead Plan. Such title does not clothe the certificate with any validity hence there is no basis for claiming for rent accruing from the said properties.
49. That the incorporation of Sadhani Ltd in 2011 in a naive so strikingly close to that of the Exparte applicant was meant to deceive the Respondents to issue title in the name of the applicants.
50. That if the applicants were genuine, there is no reason why they did not lay claim to their property for one year after obtaining the title.
51. That the *Principle of Audi alteram partem* does not arise since the proceedings were properly initiated against Respondents who are custodians of files and documents and that Court Proceedings are open to the public. Further, that the applicants could not have failed to see a *Caveat Emptor* hence these proceedings are an afterthought.
52. The applicants also filed supplementary affidavit and further supplementary affidavits on 23/10/2017 and 6/11/2017 whereas the 3rd Respondent NLC filed a further replying affidavit on 1/11/2017 sworn by Zacharia Ndege, with the Exparte applicant filing a further replying affidavit on 23/10/2017.
53. In the supplementary affidavit sworn by David Some Barno and fled on 23/10/2017, the applicant further deposed that the substantive issues raised by the Exparte applicant can only be canvassed after setting aside judgment and the matter re-heard. Further, that the applicants seek for setting aside of judgment for non-service not for discretion but *Ex debito Justitiae* since they have an interest to be affected by the decision of the Court.
54. It was further alleged that as holders of letters of allotment issued to them on 3/10/2013, they hold interests over land and that Deed Plan No. 356256 hence they are affected parties who should have been served with the application.
55. That the judgment of 21/9/2016 was made condemning the applicants unheard for non-service hence it violated the principle of natural justice which is a right espoused in **Article 47 of the Constitution**.
56. The Applicants depose that they have never been convicted of fraud and that they only want to be heard. Further, that neither NLC nor Director of Survey filed any replying affidavits to illuminate the contested issues on the suit property, hence it is upon this court to make a decision.
57. That the firm of Oyugi & Co. erroneously filed an application before the Court of Appeal seeking enlargement of time to file an appeal out of time but that no such appeal was filed and that upon being correctly advised the application was withdrawn on 19/9/2017.
58. That the Exparte applicants cannot claim ownership of properties whose leases elapsed in 2010 and that the said properties no longer exist as they have been amalgamated into a single title LR No. 209/20737.
59. That the judgment of 21/9/2016 was based on undisclosed un rebutted facts which would have led to recommendations for prosecution of the Exparte applicants' directors for reasons that:-

i. is the Ministry of Lands never issued a lease extension of 50 years to the Exparte applicant.

ii. that the Exparte applicant was seeking to rely on forged letters of allotment dated 13/7/2015.

iii. that it amounts to perjury for the Exparte applicant to allege that the lease was extended for 50 years.

iv. that during the pendency of the Judicial Review proceedings, the Exparte applicant forged letters of allotment to the Department of Survey for processing of Deed Plan and that the NLC by letter dated 24/5/2016 wrote to the Director of Survey confirming that the letters of allotment were forgeries.

60. That while the Judicial Review proceedings were pending the Exparte applicant's forged letters of allotment hence they did not believe in the merits of their own case.

61. Further, that the Exparte applicant misrepresented to Court that it had an extension of the lease in 2008 before expiry of the lease in 2010. That if the Exparte applicants had extended lease in 2008 then they would not be relying on the 16th August 2016 letters of allotment hence the Exparte applicants had no preemptive right over the properties in issue as the lease expired in 2010 before **Section 13 of 2012, Lands Act** was enacted.

62. That between the holder of a Title deed and letters of allotment, it is the former who has secured legal rights over the property.

63. That unless the judgment is set aside, the applicants stand to be prejudiced and further, that the Exparte applicants have used the same fraud to file JR 554/2017 where the applicants herein have raised a preliminary objection to jurisdiction of the Court.

64. In the further supplementary affidavit of David Some Barno sworn on 6/11/2017. It was deposed that there are 2 other companies registered in the names of Sayani Investments Ltd vide CPR/2010/71422 and CPR/2010/71458 and quite different from the Exparte applicants herein hence the identity of the Exparte applicants must be clarified by setting aside the Exparte judgment.

65. In a further affidavit filed by the Exparte applicants on 30/10/2017 sworn by Karim Jetha, it was deposed inter alia, that *paragraphs 18 and 19* of the supplementary affidavit sworn by Mr. Barno offends provision **of Order 19 of the CPR** as they set forth matters of hearsay and arguments and not confined to matters of fact.

66. That notwithstanding, it was deposed in contention that the extension of the lease to the Exparte applicant was confirmed by the Ministry of Lands and Commissioner of Lands by letters dated 13/8 and 4th December 2007 and 14th January 2008 which fact was also confirmed by the National Land Commission.

67. That allegations that the Exparte applicant forged letters of allotment dated 13/1/2015 are false, without a basis and in bad faith as the Exparte applicant is not the author or custodian of any documents at the National Land Commission and Ministry of Lands and that therefore if the letters were forged then the Exparte applicant is not party to that alleged forgery.

68. That the Exparte applicants are not privy to the internal communication, between the National Land Commission and Ministry of Lands and Director of Survey as contained in the letters dated 6/5/2016 and 24/5/2016 and how the applicants herein accessed the same.

69. That the Director of Survey upon conducting investigations established that Deed Plan No. 356256 was procured by utterance of fake documents and wrote a letter dated 26/8/2014.

70. That as at 14/8/2012 when the applicants purportedly wrote a letter to the Commissioner of Lands seeking to be allocated the suit land, the Office of the Commissioner of Lands had ceased to exist and that such allocation could only have been done by National Land Commission.

71. That following investigations and formal hearings before National Land Commission in November 2015, it was re-affirmed by National Land Commission that the extension of leases was valid and the Exparte applicants were issued with allotment letters dated 16/8/2016.

72. The 3rd Respondent National Land Commission filed a further Replying affidavit sworn by Zachariah Ndege on 1/11/2017 and deposing in response to the applicant's Supplementary affidavit dated 23/10/2017 confirming that vide letter dated 6/5/2016 the Director of Survey sought verification from National Land Commission regarding the authenticity of three letters of allotment in relation to the to the reallocation of LR 209/923-924 & 925.

73. Further that the letters of allotment purportedly issued by the 3rd Respondent NLC to Sayani Investment Ltd on 13/7/2015 were signed by one Orlando E.L.S (Mrs) on behalf of the 3rd Respondent National Land Commission. That the said letters are not genuine as they were not issued by the 3rd Respondent and neither were they signed by the said Orlando E.L.S (Mrs) as alleged. That as at 13/7/2015, the investigations had not been finalized hence the 3rd Respondent could not have issued the letters of allotment.

74. That the NLC did through the said Mrs. Orlando E.L.S inform and confirm on 24/5/2016 to the Director of Survey that the said letters of allotment were not of genuine and that the source of the said forged letters of allotment are subject of an active internal investigation.

75. Further, that it was following conclusion of investigation by the 3rd Respondent that it was resolved to issue fresh letters of allotment to the Exparte applicant in accordance with the provision of **Section 13(1) of the Land Act, 2012.**

76. The NLC reiterated that it was not privy to the process under which the allocation and preparation of the leave Certificate over the property known as LR 209/20737 issued to Sadhani and Kelbukwo Limited the applicants herein on 23/9/2016 or to any other subsequent transaction among from the same. The parties' advocates argued the application orally on 6/11/2017 with Mr. Bwire submitting on behalf of the applicants and reiterating the contents of his clients' pleadings and affidavits as substantially reproduced hereinabove.

According to the applicants they were never cited as parties to the proceedings nor were they served with pleadings to appear and defend their rights/interests.

77. That his clients only became aware of these proceedings in August 2017 after writing to Equity Bank then tenant upon which the Exparte applicants counsels wrote protesting the applicants' demands for rent of payment by Equity Bank Ltd to them; which letter did not even disclose the case number of the suit hence the applicants had to investigate the matter. It was submitted that the applicants were entitled to be served with the substantive Notice of Motion.

78. That albeit the main motion was filed in July 2014, the applicants were issued with letters of allotment in 2013 hence the reliefs sought against the Respondents who never responded to the motion affected the interests of the applicants. It was further submitted that **Order 53 Rule 3(2) of the CPR** are clear on joinder of persons likely to be affected by the proceedings.

79. It was submitted that in this case, **Article 47 of the Constitution** was violated in that the applicant were not heard. Reliance was placed on **General Medical Council Vs Sparkman [1943]2 All ER 337**.

80. It was submitted that there was tention to urge the merits of the Judicial Review which is erroneous as the applicants are simply seeking for setting aside of the judgment owing to the interests that the applicants have in the matter.

81. It was further argued that this court has jurisdiction to hear and determine the application for setting aside of judgment as the applicants were not served with any documents to appear and defend the claim by the Exparte applicants. Several cases among them. **R Vs Registrar of Titles & Another Exparte Twahir Mohammed** were cited on the inherent power of the court to set aside judgment.

82. It was submitted that there are matters of fraud and abuse of judicial process to be canvassed hence the court should *Ex debito justiciae* and in the public interest set aside the judgment to allow parties ventilate on the competing interests over the same parcel of land where NLC indicts the applicant for fraud hence where are matters which will be opened up to the court for canvassing, so that the applicant is given an opportunity to ventilate its grievances. It was submitted that as the impugned judgment had been used to cancel a Deed Plan and to grant Conservatory Orders in **JR 554/2017**, the applicants cannot defend the said JR matter without first getting the opportunity to be heard on the original proceedings especially because NLC acknowledges the applicants' title. It was submitted that this court was denied an opportunity to interrogate issues before granting Judicial Review orders hence the applicant has been left with a paper title.

83. It was submitted that despite judicial tie having been spent, the application should be allowed in the interest of justice as stipulated in **Article 48 of the Constitution**, whether costs are ordered or not, since the applicant seeks for fair determination through reopening of the matter and one decision made by the court.

84. In opposing the application, Mr. Muthui, Counsel for the Exparte applicants submitted replying on the filed affidavits sworn by his clients Karim Jetha on 13/10/2017, further replying affidavit sworn on 30/10/2017 and list and bundle of authorities filed on 23/10/2017.

85. According to Mr. Muthui, the fact that the applicant has title to land issued on 5/10/2016 well after judgment of this court cannot be a basic for setting aside of the judgment.

86. That this court after quashing the impugned Deed Plan No 356256, the author thereof, the Director of Surveys also cancelled it on the basis that it was issued on the basis of utterance of a fraudulent act.

87. Further, it was submitted that in the JR proceedings the Exparte applicants challenged abuse of statutory powers by the 3 Respondents hence the Respondents were the proper persons to be served with the JR application as even the Court was not aware as to who was being issued with the title to the property since the Respondents failed to disclose to the court the person who were alleged to be fraudulently pursuing the title.

88. That the court could not have directed service on persons who were unknown and especially where on 21/5/2015 the Exparte applicant published **Caveat Emptor** notices in the *Daily Nation* and the *Standard* Newspapers hence the applicants should have come up to challenge proceedings as interested parties.

89. The Exparte applicant's counsel further submitted that this court has no jurisdiction to set aside a judgment which had already crystalized into a decree as was held in **TELKOM (K) Ltd Vs John Ochanda [2014]eKLR** where the Court of Appeal held that once a proper judgment is entered, the court becomes *functus officio* and cannot revisit its own judgment. Further reliance was placed on **Dhanj Jadra Ramji Vs Commissioner of Prisons & Another**. It was further submitted that even if this court has jurisdiction to set aside its own judgment, it must apply the principle espoused in the **Shah Vs Mbogo (1967) E.A 116, 24** where the Court of Appeal held that the Court's discretion to set aside Exparte judgment is intended to executed to avoid injustice and hardship resulting from accident, inadvertencies, or excusable mistake or error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

90. It was submitted that the applicant is guilty of inordinate delay as it appears to have known of the proceedings but sought to pursue title hence it is not entitled to the discretionary powers of the court. Further, that **Section 158 of the Land Act** does not protect title obtained through fraud or corrupt practices. Counsel maintained that the applicants had the opportunity to defend the Judicial Review Application which they failed to utilize hence the court should not set aside judge in vain especially where the author of the Deed Plan had cancelled it on account that it was issued fraudulently hence there is no practical reason for setting aside the judgment. Mr. Muthui further maintained that

the applicant's failure to disclose to court that as at 22/9/2017 there were other proceedings pending in court and the appeal CA No. 212/17 was intended to mislead the court to grant a stay and for the results to be collected from a tenant yet there was JR 554/2017 where Mativo J issued conservatory orders stopping the applicant from interfering with the suit property.

91. It was therefore submitted that the applicants are before this court with unclean hands. Mr. Muthui further submitted that authorities relied on by Mr. Bwire counsel for the applicants are irrelevant because they deal with a party being given a right to be heard where such parties are known unlike in this case where parties (the applicants) were unknown and the Exparte applicant had no means of knowing who they were, and that it appears the applicant was concealed in order to process a title fraudulently and now wants to disturb a judgment of the court; unlike in the cited authorities where the persons who brought the applications to be heard were known.

92. It was submitted that the circumstances prevailing in the cited cases were different and that even then, the court in some cases declined to interfere with the judgment. It was denied that NLC had indicated the Exparte applicant, and a submission made that letters of allotment issued have only been bought to these proceedings. More so, that NLC investigated the matter and discovered fraudulent process used by the applicants to obtain the documents which they were now relying on.

93. Counsel urged the court to dismiss the application with costs.

94. On the part of the Respondents, Mr. Munene, State Litigation Counsel submitted opposing the application while associating himself with submissions by Mr. Muthui Advocate for the Exparte applicant and adopting the grounds of opposition filed on 17/10/2017. On the prayer for stay of execution of the judgment, Mr. Munene submitted that as the applicant was not yet admitted as a party to the proceedings, it could not obtain stay of execution of a judgment which is a substantive relief. He relied on **Kibucho Ltd Vs Official Receiver [2016]eKLR**.

95. Further, that the court is *functus officio* hence it cannot revisit its judgment. Reliance was placed on **Dickson Muricho Muriuki Vs Timothy Kagundu & Others [2013]eKLR**.

96. In Mr. Munene's view, if the applicant claims for rights over the land, nothing prevents it from going before the ELC Court to seek Declaration on Ownership of the Land.

97. Miss Masaka, Counsel for the 3rd Respondent opposed the application relying on the affidavit filed on 13/10/2017 and a further replying affidavit dated 1/11/2017. She submitted that NLC did not participate in the proceedings giving rise to the impugned judgment but stated that the documents relied on by the applicant, as earlier explained did not emanate from NLC and that neither did NLC participate in the processing of the same.

98. It was submitted that the 1st Respondent only issued a Deed Plan which was cancelled. She submitted that her client does not associate with the applicant as the Deed Plan was cancelled by the 3rd Respondent on being informed that the same was not obtained properly.

99. It was submitted that the applicant's claim that it was not accorded a hearing was incorrect but that nonetheless, the court has residual jurisdiction to revisit its judgment on condition that the applicant demonstrates that it deserves the orders sought. Further, that it must demonstrate that it has sufficient in the matter, and not an interest acquired after the judgment and in addition, that the applicant must demonstrate that its right to be heard was wrongly deprived and that it was deliberately not informed of the ongoing proceedings. Counsel associated herself with the position taken by Mr. Muthui, counsel for the Exparte applicant and reiterated that if the applicant says that it had ownership documents then it ought to have known of the existence of these proceedings and further, that it had not demonstrated that its right to be heard was denied.

100. It was submitted that the application was brought after inordinate delay of one year after the impugned judgment yet the applicant claims that it had documents of ownership of the prime property in the CBD.

101. It was further submitted that even if the court was to set aside judgment and hear the matter afresh, the documents sought to be relied on are not genuine documents and therefore cannot influence this court to give them judgment hence the court's discretion should not be exercised in vain.

102. That in view of what now emerges to be a dispute of ownership of land between the applicant and the Exparte applicant, the right forum for the applicant is the ELC where the applicant should initiate proceedings upon which the court will interrogate documents and test the evidence to be adduced.

103. The court was urged to dismiss the application so that parties can engage in the ordinary court for Land Law matters.

104. In a rejoinder, Mr. Bwire, Counsel for the applicant submitted reiterating his earlier submissions and maintained that his client relies on the letter of allotment issued in 2013 before these proceedings were instituted.

105. Further that the **Mirugi Kariuki case** is clear on the right to be heard. Further, that his clients had provided background information on context in which the impugned Deed Plan was cancelled.

106. He maintained that there are many questions to be resolved and that **Order 53 of the Civil Procedure Rules** is clear that service of pleadings must be made on persons who would be affected by the decision, not just people who are known. He maintained that there is a reference to where facts of who has applied for a Deed Plan can be found.

107. Further, that *Caveat emptor Notices* cannot amount to service of notice of proceedings pending before court and maintained that it was clear that the applicant was never served.

108. He urged the court to invoke the inherent power under the doctrine of *ex debito justitiae* to set aside the judgment because if his clients knew that there were ongoing proceedings they would have approached the court before judgment was delivered.

109. On the accusations of non-disclosure, it was submitted that the applicant was desperate after becoming aware of these proceedings and that it was a different advocate who advised them to appeal. He further submitted that JR 554/2017 was a matter that he did not know existed until after he took over instructions on 22/9/2017. It was further submitted that the previous advocate Mr. Oyugi did not communicate properly to his clients on **Section 158 of the Land Registration Act**.

110. On delay, it was submitted that delay does not vitiate the right to be heard.

111. On *functu officio*, it was submitted that sense is critical.

112. On stay of execution, it was submitted that it was a temporary relief for conservation.

113. On whether this was an ELC matter, it was submitted that the court can set aside these proceedings and forward the file to the ELC.

114. On whether documents did not emanate from NLC it was submitted that it was on that the suspect documents and not the applicant's aside.

115. Further, that matters of non-disclosure are technicalities which had been remedied by the withdrawal of the Court of Appeal proceedings.

116. Counsel for the applicant urged this court to be proportionate, fair and accord the applicant an opportunity to be heard before a final decision can be reached.

DETERMINATION

117. I have carefully considered this long inching matter, the application by the applicant, Responses thereto and lengthy detailed submissions made by the parties' advocates and all the authorities cited.

118. First is that I must make a few observations. This matter was heard on 6/11/2017 and Ruling slated for 19/12/2017. However, the file was never availed to me after the same was taken to the registry on request from the Exparte applicant's counsels through the Deputy Registrar until much later and as was perusing it, I discovered that the Exparte applicant's further affidavit was missing from the court file and so was the 3rd Respondent's Replying affidavit. I therefore had the matter mentioned on 25/1/2018 after recess and on 26/2/2018 and brought those facts to the attention of parties' advocates, who availed the said documents. On the latter date, the court did give a stern warning to the parties and their advocates to stop any attempts to interfere with the court in its writing of the ruling after certain facts came the attention of the court from the registry staff who even feared that the file unless properly secured was likely to vanish. I therefore set the matter for ruling on 7/3/2016 at 11.30 a.m. This was the period that the court was in transmission following my initial transfer to Bungoma and regrettably for good reasons this file was inadvertently locked up in the cabinet with other files where judgments and rulings had already been written pending delivery. It was not until I was taking stock of all the pending judgments for submission of the list to the Hon Chief Justice as I was preparing to depart to my new station that I stumbled on the file and hence the delay.

119. Upon reporting in the new station I had to settle on dealing with challenges of a new station, the new cause lists and I also had to proceed on leave before giving fresh dates for delivery of judgments/rulings and embarking on writing the same amidst other challenges including frequent power outages and personal health issues associated with new and different environment. The delay is therefore highly regretted as it was never intentional and this affected all the 13 or so other cases that I declared to the Chief Justice and the Principal Judge prior to my departure to the new station.

120. Having taken into account all the foregoing, the main issue for determination in this hotly contested matter is whether the applicant is entitled to the orders sought namely, setting aside of the judgment and whether a stay order is merited to stay implementation of the judgment entered into on 21/9/2016, one year before the application for setting aside and stay was made.

121. Commencing with the prayer for joinder of the applicant to these proceedings as a party, and without going into many intricacies, am of the most considered view that the applicant was a necessary party to these proceedings since it indeed from the long arguments heard by this court, was directly affected by the proceedings that took place before the court.

122. Accordingly, I find that the applicants have made out a case for joinder as interested parties to these proceedings.

123. The other question is whether the applicant is entitled to a stay of execution of the judgment dated 21/9/2016. It is worth noting that the present application was made on 22/9/2017 exactly one year (12 months and one day) after judgment on the substantive Notice of Motion was entered.

124. Upon entry of the said judgment, a decree was drawn and the Exparte applicant embarked on the process of having the said judgment implemented by the Respondent herein.

125. As the present application was being argued, there were disclosures that other JR proceedings in JR 554/2017 had been instituted, conservatory orders issued and the Deed Plan subject of the original proceedings had been cancelled and therefore what the applicant is complaining of could not be reversed by an order of stay. This is so for reasons that this court could not issue a retrospective stay of a judgment that was already implemented. Therefore, albeit I agree that this court exists to administer justice, and that it has discretion to

order for stay of implementation of a decree or set aside its own judgment, the court cannot administer justice in vain.

126. As was observed by the Court of Appeal in **Dickson Muncho Muriuki Vs Timothy Kagundu Muriuki & 6 Others [2013]eKLR**, upon delivery of judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment should be executed.

127. Albeit, this court does not agree that as far as the entire application is concerned, the court was *Functus officio* having delivered a judgment, as it indeed has residual or inherent powers to revisit the proceedings either by way of review, for good reasons, or setting aside of judgment, it is the view of this court that staying implementation of a judgment made over one year prior to the application is an exercise in futility and therefore on that ground I would decline the prayer for stay of execution of judgment of 21/9/2016. The prayer is dismissed.

128. On the prayer for setting aside of judgment, arguments for and against grant of this prayer were made quite strongly by all parties.

129. The rationale underlying the court's discretionary power to set aside a default judgment is easy to state. Where a claim is determined as a consequence of a party's failure to comply with procedural rules, that determination ought not necessarily be determinative. It ought not because the court's primary function is to determine claims on their substantive merits. To ensure that the court has power to comply with that primary purpose it ought therefore have the power to revoke, in appropriate circumstances, judgments entered in default, i.e. judgments entered on grounds other than substantive ones. The application of this power, particularly its translation into concrete rules that can be applied consistently, has not however been straightforward. Embedded in the myriad rules developed to guide the courts in exercising this jurisdiction lie distinctions between the following: (a) regular and irregular judgments; (b) arguable and triable issues; and (c) the "real prospect of success" test, the *ex debito justitiae* rule and the "bound to lose" test. This has led to a degree of confusion in the application of the associated tests which in turn may have obscured the true rationale behind the discretionary power to set aside default judgments.

130. The principles which guide the exercise of discretion to set aside a default judgment are now well settled. The case of *Evans v Bartlam [1937] A C 473*, set the pace. Lord Atkin [at p. 480] stated as follows in regard to those principles.

“One is that, where judgment was obtained regularly, there must be an affidavit of merits meaning that the applicant must produce to the court evidence that he had a prima facie defense...The principle obviously is that unless and until the court has pronounced a judgment upon merits or by consent it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure”.

131. In the same case, Lord Wright [at 489] remarked:

“In a case like the present, there is a judgment, which though by default is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown, the court will not prima facie desire to let a judgment pass on which there has been no proper adjudication...The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms, as to costs, or otherwise, which the court, in its discretion is empowered by the rule to impose”.

132. Courts have been consistent in following the principles enunciated in *Evans v Bartlam* (supra): see for example *Patel v E.A Cargo Handling Services Ltd [1974] EA 75*, *Chemwolo & Anor v Kubende [1986-89]1 EA 74*, *Mbogo v Shah [1968] 1 EA 93* and *Macho Credit Limited v Giro Commercial Bank Limited [2014] eKLR*.

1. In *Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743* it was held:

“It is trite law that an ex parte order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the act or principle of setting aside of ex parte orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called “inherent”. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfill itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside ex parte orders, which by their very nature are provisional.”

134. Kimaru, J in Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009 stated as follows concerning the court's inherent jurisdiction and power and I concur:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”

135. What the parties must however appreciate in this matter is that it is not in doubt that the applicants herein were not parties to the proceedings giving rise to the impugned judgment. The record clearly shows that indeed, it was not possible for the Exparte applicants to know who the shadow beneficiaries of the impugned Deed Plan was. The Exparte applicants made concerted efforts to serve the Respondents and to bring them into the proceedings so that the Respondents could disclose what was happening to the impugned process but the Respondents could see no evil and hear no evil. They remained tight lipped.

136. Furthermore, the Lands Registry file relevant to the impugned Deed Plan could not be traced by the Exparte applicants and therefore, their suspicion that the Respondents must have been working in concert with unknown persons to deprive the Exparte applicants their rights to their property whose lease had expired but who were making efforts to have the same renewed to no avail as the Lands Registry records were missing. These records apparently became available after the judgment of this court which the applicants seek to set aside to accord them a hearing.

137. I observe that the parties especially the applicant herein and the Exparte applicants' counsels made concerted efforts to defend their respective clients positions and in the process largely urging this court to determine the perceived merits and demerits of the now underlying dispute between the two, which is ownership of the property in dispute and whether either of them had fraudulently acquired titles to the said properties.

138. I must however, from the onset declare that this court is devoid of jurisdiction to delve into the merits or demerits of the claims and counter claims by the applicant and Exparte applicant on the extent to which either of them is the rightful owner of the disputed property, or who of the disputing parties is fraudulent in their dealing with the subject properties.

139. What this court was asked to do in the original proceedings leading to the impugned judgment was to determine the legality and procedural propriety of the Respondents in consolidating or amalgamating LR Nos 209/923, 924 and 925 into LR No 209/20737 which amalgamation was done without giving the applicant a hearing, the Exparte applicant being the original grantee thereof; *Mandamus* to compel issuance of a grant and prohibition to prohibit issuing of grants to any other persons to the detriment of the Exparte applicant owner thereof by virtue of being the owner of the original grant which had expired but for which it legally claimed to have preemptive rights.

140. The Exparte applicant at *Paragraph 9* of the grounds on the face of the Notice of Motion was clear that the Respondents had issued Deed Plan No. 356256 to a stranger and that as the Registry file relating to the said property had gone missing, they were unable to get any clue as to which stranger it was that was benefiting from the process.

141. Further, it was averred throughout the proceedings that it was not possible for the applicant to know the stranger as the files at the Lands registry had gone missing and that therefore only the Respondents who were custodians of the said records could shed light on who the stranger was. Indeed, the court adjourned the matter severally to ensure that the respondents were properly served with the application to participate in the proceedings and shed light on the matter; to no avail. The court record shows all the affidavits of service filed by the Exparte applicant.

142. Surprisingly, on the judgment day, the Respondents send Miss Kerubo Advocate to attend court and take the judgment. The court had on 13/7/2016 and on prior dates directed that despite the Respondents not participating in the proceedings even after service upon them of process, they should be served with a judgment notice.

143. The record shows and there is no dispute that the relevant file at the Lands Registry vanished after the then Commissioner of Lands approved extension of the Exparte applicant's leases on the subject properties. After complaints were raised by the Exparte applicant's advocates, the Director of Surveys responded on 24/7/2014 stating that the matter was being investigated and that the Exparte applicants would be informed of the results of the investigation.

144. The results of the investigations were never revealed to the Exparte applicant and neither were they filed in court in response to the substantive motion and the court did make all those observations in the substantive judgment which is herein sought to be set aside and vacated.

145. Naturally, under **Order 53 of the Civil Procedure Rules**, this court would have directed that persons who were likely to be directly affected by the decision of the court in the matter be served with the application. However, in the instant case, and from a reading of the pleadings and affidavits and documentation from the Respondents and the Exparte applicant, it was not possible to decipher the identity of the **'stranger'** or the persons who were veiled behind the amalgamation of the titles giving rise to the impugned Deed. If the Respondents had appeared in the proceedings and disclosed the person in whose favour the Deed plan was being issued if at all it was being issued and why

the file relating to the subject properties was missing from the Lands Registry or could not be accessed by the Exparte applicant, then the court could not have proceeded with the hearing and determination of the proceedings without first ordering on its motion the joinder of those other persons of interest.

146. For those reasons, I do not agree with the applicants herein that they were denied an opportunity to be heard in the matter and or that the court or the exparte applicants deliberately or inadvertently omitted them from participating in the impugned proceedings. In other words, the applicants should not be heard to claim that they were denied the right to be heard but that they seek for an opportunity to be heard in response to the notice of motion filed by the exparte applicants.

147. Further, I find no material to show that there was an orchestrated or even inadvertent failure by the Exparte applicants to ensure that the applicants herein were served to participate in these proceedings. The applicants have not even suggested what mode of service, in the circumstances of this case as described by the Exparte applicant and the court's judgment, the Exparte applicant or the court could have ensured their attendance and or participation in the proceedings, in the absence of any clue as to who the secret beneficiaries of the actions or inactions at the Lands Offices were.

148. The question that I must pose, therefore is whether, had the applicants been known, whether they could have been necessary parties to these proceedings and the answer is an obvious Yes. This is because from their detailed belated pleadings and strong submissions, they had an interest in this matter not just after the judgment but clearly, they are the persons who are the veiled strangers who this court strongly believes were being protected by the dead silence of the Respondents.

149. However, it is not clear from the record whether the Respondents made the applicants aware of these proceedings or misled them into believing that all was well. Knowing what happens behind the scenes in land matters in this country, it is possible that some individuals at the Lands Office were beneficiaries of the top secret that led to the disappearance of the records subject of this dispute at the Lands Office for their own benefit and therefore must have assured the applicants that all was well. In addition, it would not be surprising if the missing file was in an individual's house or briefcase and transactions or business with the applicants was going on as if nothing sinister was going on.

150. This matter reveals so much of the rot that existed in our Lands Offices in the past and as I write this ruling, my greatest hope is that things are changing for the better.

151. The court entertains doubt that the applicants were fully aware of the proceedings leading to the judgment of the court delivered on 21/9/2016 in view of the dead silence on the part of the Respondents who only appeared to wake up from their slumber after the applicants filed the application for setting aside of judgment. So much must have gone on that cannot be described in this ruling.

152. However, as I have stated, the Exparte applicant is not to blame for the failure to bring the applicants on board to participate in these proceedings. Neither would this court be sacrificed for the failures, actions and inactions of the respondents who have only spilled the beans after judgment is being challenged.

153. In my humble view, had the applicants been heard on their allegations, whether or not the court would have arrived at the same decision is immaterial. This is because as correctly submitted by Mr. Bwire, the right to be heard before one is condemned is essential.

154. In this case, albeit the judgment did not condemn the applicants, and neither can the said judgment be described as irregular, but the decision affected the applicants yet they were nowhere in the picture and eyes of the court. They were not within reach by all means.

155. In addition, although the judgment did not focus on the issue of a dispute over ownership of the now disputed property, it is now clear that there is such dispute which can only be determined by a court of competent jurisdiction namely, the Environment and Lands Court. Before that happens, this court has inherent jurisdiction to set aside judgment on its own motion in order to give an aggrieved party an opportunity to ventilate their grievances and on terms. This is so, even where the judgment being challenged was entered into regularly, as was in this case. In my humble view, the questions as to whether there was fraud or illegalities committed by either of the parties to these proceedings can best be determined if all the parties are accorded an opportunity to ventilate those issues. This is so because the court hearing the merits of those issues has the power to refuse to enforce any transaction that is found to have been fraudulent.

156. In **Birket V. Arcon Business Machines Ltd [1999] 2 All ER 429** The Court of Appeal in England held that -

“If a transaction was on its face manifestly illegal, the court would refuse to enforce it, whether or not either party alleged illegality. If a transaction was not on its face manifestly illegal but there was persuasive and comprehensive evidence of illegality, the Court might refuse to enforce it even if illegality had not been pleaded or alleged. The principle behind the court's intervention of its own motion in such a case was to ensure that its process was not being abused by an invitation to enforce sub silentio a contract whose enforcement was contrary to public policy”

157. In **Makula International Ltd Vs His Eminence Cardinal Nsubuga and Another [1982] HCB II**, the Uganda Court of Appeal held that -

“...a court of law cannot sanction what is illegal and an illegality once brought to the attention of the Court, overrides all questions of pleadings including admissions made thereon.”

158. Having given serious consideration to the controversial issues raised in this matter, and based on the decision in **JMK Vs MWM [2015] eKLR CA 15/2015 at Mombasa per Makhancha, Ouko & Kathurima M'inoti JJA** and the case of **Republic Vs Principal Magistrate at Mombasa Exparte Ali Sheikh & Sons JR 78/2013**, I would exercise this court's unfettered discretion and set aside the judgment entered on 21/9/2016 so as to allow the applicants to participate in those proceedings and in the interest of justice, fair play and good administration

of justice. In **Kenya Bus Services Ltd & Others Vs AG & Others (2005)** [EA111] the Court of Appeal was clear that it is trite that an Exparte order can be set aside by the Judge who gave it or by another Judge.

159. In addition, a court of justice has no jurisdiction to do an injustice. This court has inherent power to reverse its own orders in the interest of justice especially where there are seriously disputed issues like in this case where issues of fraud and counter accusations have been levelled by respective parties against each other. In my humble view, although the Judicial Review court will not go into determining merits of the dispute between the parties, but the party who ought to have been heard and who was not heard because of the dead silence of the Respondents will feel that justice has been done, even if at the end of the day, the court finds that they have no case.

160. The Court of Appeal in the case of **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016]** eKLR stated as follows in an appeal challenging the superior court's discretion to set aside a judgment in default:

“We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664, at 711:

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

The approach of the courts where an irregular default judgment has been entered is demonstrated the following cases. In Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010, the High Court expressed itself thus:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.”

Earlier in Kabutha v. Mucheru, HCCC No. 82 of 2002 (Nakuru) Musinga, J. (as he then was) had expressed the principle thus:

“[W]ith respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.

(See also, Bouchard International (Services) Ltd v. M'Mwereria [1987] KLR 193, Remco Ltd v. Mistry Jadva Parbat & Co. Ltd. & 2 Others [2002] 1 EA 233 and Baiywo v. Bach [1987] KLR 89.”

161. Albeit the above authorities relate to default judgments in ordinary civil litigation, but the principles espoused therein are applicable to judicial review proceedings as well.

162. It is for the above reasons that I exercise my unfettered discretion and grant the prayer for joinder of the applicant to these proceedings as an interested party; I grant the order setting aside the judgment of 21/9/2016 in order to accord the applicant/ interested party herein an opportunity to be heard on the issues raised by both the exparte applicant and the respondents and direct that this file be placed before the

Presiding Judge of the Environment and Land Court for directions on its future conduct.

163. I decline to grant the prayer for the rents lease, licence and or any other interest derived from the subject property LR No. 209/20737 to be paid into a joint interest account of advocates for the parties and order that status quo as regards the rent collection shall be maintained until the dispute is heard and determined on its merits

164. As earlier stated in the prayer for stay of execution of the judgment of this court which is impugned, I however, decline to nullify the actions that may have been taken by the Exparte applicants and the Respondents in executing the judgment of this court as the judgment did not deal with merit issues in the dispute which have emerged and which issues can be ventilated before the Environment and Land Court. furthermore, it is contended that the applicants' purported registration as owners of the suit land was done on 5/10/2016 after this Court had quashed the alleged amalgamation of the properties and in the presence of stay orders issued on 13/8/2014 prohibiting the Respondents from issuing title to the subject property (ies) to any other person or persons other than the Exparte applicant. That being the case I find that there are many more pending issues to be determined by the court.

165. On costs, as the court finds that the Respondents are wholly responsible for the situation that the Exparte applicant now finds itself in, I order that the costs of this application and of the proceedings leading to the judgment which has been set aside shall be borne by the 1st, 2nd and 3rd Respondents jointly and severally, and payable to the Exparte applicant.

166. Parties to take dates for mention before the Environment and Land Court.

167. Those are the Orders be of the Court.

Dated, Signed and Delivered in open court at Nairobi this 27th day of September 2018.

R.E. ABURILI

JUDGE