Chepkoiywa & another v Too (Environment & Land Case 291 of 2012) [2022] KEELC 2389 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2389 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 291 OF 2012

JO MBOYA, J

MAY 26, 2022

BETWEEN

JAMES CHEPKOIYWA ..... 1ST APPLICANT

ARNOLD MASWAI ..... 2ND APPLICANT

AND

JANE TOO ..... RESPONDENT

RULING

Introduction

1. Vide Notice of Motion Application dated 11th February 2022, the Plaintiffs'/Applicants' have approached the court seeking the following Orders:

    a. This Honourable Court be pleased to review it ruling issued on the 6th October 2020 and set aside the Orders with subsequent Decree.

    b. The Suit be re-instated and the suit be heard on Merits to its logical conclusion.

    c. Costs of this Application be provided for.

2. The subject Application is based and/or anchored on the various grounds that have been enumerated in the body thereof and same is further supported by the Affidavits of James Chepkoiywa Chebet and Arnold Mwaswai, the 1st and 2nd Plaintiffs sworn on the 11th February 2022, respectively.

3. Upon being served with the subject Application, the Defendant/Respondent responded thereto vide Replying Affidavit sworn by one Aldrin Ojiambo, Advocate, who is the Counsel on record, for the Defendant/Respondent.

Depositions by the Parties:

Plaintiffs'/applicants' Case

4. Vide the Supporting Affidavit, which has been sworn by the James Chepkoiywa Chebet, who is the 1st Plaintiff/Applicant herein, same has averred that the 2nd Plaintiff/Applicant and himself entered into a Land Sale Agreement with the Defendant/Respondent, whereupon the Defendant/Respondent covenanted to sell and transfer unto them a portion of L.R No. 2259/300 (now L.R No. 21984/52).

5. It has been averred that the Sale Agreement between the 2nd Plaintiff/Applicant, the deponent and the Defendant/Respondent, was reduced into writing and therefore it was incumbent upon the Defendant/Respondent to effect the sub-division and transfer in favor of the Plaintiffs/Applicants.

6. Nevertheless, the deponent has further averred that despite the terms of the Sale Agreement, the Defendant/Respondent failed to sub-divide and thereafter transfer the sold portion of the suit property.

7. Further, the deponent has averred that as a result of the failure and/or neglect by the Defendant/Respondent to transfer the sold portion of the suit property, the 2nd Plaintiff/Applicant and himself, were constrained to and indeed filed the subject suit.

8. On the other hand, the deponent has averred that same instructed and/or engaged an advocate, namely, Mr. Charles Koech, who was acting for the Plaintiff/Applicants and that during various contacts with their appointed advocate, the advocate informed the 2nd Plaintiff/Applicant and the deponent that the subject matter was last in court on the 14th July 2020.

9. Other than the foregoing, the deponent has further averred that following the outbreak of Covid -19 pandemic, the 2nd Plaintiff/Applicant and himself travelled to and were held up at Mt. Elgon and same were thus unable to travel to Nairobi and ascertain the status of the subject matter.

10. Notwithstanding the foregoing, the deponent has further averred that despite being locked down in Mt. Elgon, same variously reached out to their advocate, but same were informed that no hearing date had been taken in respect of the subject matter.

11. However, the deponent has further averred that on the 9th February 2022, same was informed of a Notice to vacate the suit property, which had been served by and/or on behalf of the Defendant/Respondent herein.

12. The deponent has further averred that upon being served with the said Notice, same reached out to their advocates on record, with a view to ascertaining whether the advocate had been served with any Hearing notices in subject matter.

13. Nevertheless, the deponent has further averred that when same reached out to the advocate, the advocate indicated that he had not been served with any Hearing notice and/or any court process in respect of the subject matter.

14. Be that as it may, the deponent has averred that same was therefore constrained to visit the Court Registry and that when he sought to and indeed perused the court file, same discovered that the suit had been dismissed for want of prosecution.

15. On the other hand, the deponent has also averred that in the course of perusing the file, same established an affidavit of service which indicated that their Advocates had been served vide email address, namely, Ckoech25@gmail.com.

16. Having perused the court file, the deponent has further averred that same reached out to their advocate to confirm whether the email Address that was used belonged to the advocate, but the advocate denied and disputed that the said address was his email address.

17. Further, the deponent also stated that the advocate also informed same that his law firm, M/S Charles Koech & Associate, had not been mapped in the Judiciary e-filing portal.

18. Based on the foregoing, the deponent has further concluded the Defendant's advocates misled the court into believing that the Plaintiffs' had been served, whereas no evidence of such service was placed before the court.

19. In the premises, the deponent on behalf of the Plaintiffs/Applicants has thus averred that the Dismissal of the suit was procured and/or based on falsehoods and/or Misrepresentation, which is a crime under the *Oaths and Statutory Declarations Act*, Chapter 15, Laws of Kenya.

20. The 2nd Plaintiff/Applicant also swore an Affidavit in support of the said Application and same reiterated the Contents of the Supporting Affidavit by the 1st Plaintiff/Applicant.

Response by the Defendant/respondent:

21. Vide Replying Affidavit sworn on the 3rd March 2022, the deponent thereto, namely Mr. Aldrin Ojiambo, Advocate has averred that the advocate for the Plaintiff/Applicants was personally known to him and that during and in the course of the subject matter, the said Plaintiffs'/Applicants' previous Counsel and himself had engaged variously vide the Advocates cell no. 0720 453 932.

22. On the other hand, the deponent has further averred that other than engaging the previous Counsel vide tele- communication, the same also engaged the Plaintiffs' Advocate vide email correspondence and same exchanged various information, in respect of and pertaining to the subject matter.

23. In particular, the deponent has averred that on the 1st April 2021, the Plaintiffs'/Applicants' called him (Deponent), enquiring about the status of this matter, whereupon the deponent advised that the subject matter was listed for Mention on the 7th April 2021.

24. Other than the foregoing, the Deponent has also averred that pursuant to tele-communication alluded to, in terms of the preceding paragraph, the Plaintiffs'/Applicants' previous Advocate also forwarded his email Address for purposes of service.

25. Further, the deponent has conceded that same proceeded to and served the Plaintiffs'/Applicants' previous advocates vide the supplied email address, namely, Ckoach25@gmail.com.

26. Further, the deponent has also averred that other than the Plaintiffs'/Applicants' Advocate being served with Mention, wherein the subject matter was scheduled on the April 2021, there were various and numerous subsequent communication(s) between the Plaintiff's/Applicant's previous advocate vide the email address, which had been supplied by the Plaintiffs/Applicants' Advocate.

27. In the premises, the deponent herein has averred that the email address, namely, Ckoech25Qgamil.com, having been supplied by the Plaintiffs/Applicants' advocates, same belonged to the said Advocate. In this regard, the Deponent has thus contended that the denials alluded to by the Plaintiffs/ Applicants' were therefore meant to mislead the Court.

28. Based on the foregoing, the deponent herein has also contended that the Application by and/or on behalf of the Plaintiffs/Applicants is informed by conscious and deliberate Concealment of Material facts.

Submissions by the Parties:

29. The Application dated the 11th February 2022, came up for hearing on the 8th March 2022, on which date directions were given to have the Application canvased and/or disposed of by way of Written submissions.

30. Pursuant to the directions, details in terms of the preceding paragraphs, the Plaintiffs'/Applicants' proceeded to and filed written submissions on the 29th march 2022, whereas the Defendant/ Respondent filed her written submissions on the 4th April 2022.

31. Briefly, the Plaintiffs/Applicants have submitted that the Plaintiffs'/Applicants' previous advocate, namely, the firm of M/s Charles Koech & Associate was never served with the Hearing notice in respect of the subject matter.

32. Secondly, the Plaintiffs' counsel has further submitted that if the previous advocates for the Plaintiffs was served vide email address, namely, Ckoech25@gmail.com, then that email address was the previous Advocates' Personal Email Address and was not for the Law firm where the said advocate practiced.

33. Thirdly, the Plaintiffs'/Applicants' counsel has further submitted that if the court were to find that the Plaintiffs'/Applicants' previous counsel was served, which is denied, then the failure by the said Advocate to attend court was a Mistake of Advocate and that same should not be visited on the Plaintiffs/Applicants.

34. Fourthly, the Plaintiffs/Applicants have further submitted that same have since reported the Plaintiffs'/ Applicants' Previous Advocate to the Advocates Complaints Commission, because of the failure to act, if at all same was served. For clarity, the Plaintiffs' have contended that such failure would be in contravention of the instructions given to same, that is, the Advocate.

35. Fifthly, the Plaintiffs/Applicants' Counsel has submitted that the orders culminating into the dismissal of the Plaintiffs'/Applicants' suit was procured and obtained by fraud and/or mis-statement of facts at the instant of the Defendant/Respondent.

36. Sixthly, the Plaintiffs'/Applicants' Advocate has further submitted that the Parties herein, namely, the Plaintiffs and the Defendant were engaged in negotiations over and in respect of the subject matter and thus it was irrational on the part of the Defendant/Respondent's Counsel to move the court for purposes of dismissal, without intimating to the court about the on-going negotiations.

37. Seventhly, the Plaintiffs'/Applicants' Counsel has conceded that though the Application seeks Review, instead of setting aside, the court should still consider the Application and grant the Reliefs sought at the foot thereof.

38. On her part, the Defendant/Respondent has submitted that the Plaintiffs'/Applicants' previous Counsel was duly served with the various Mention and Hearing Notices and that upon service, appropriate Affidavit(s) of service were duly filed with the court.

39. In this regard, the Defendant's/Respondent's Advocate, has invited the Court to take note of the various Affidavit(s) of service which are on record, including the affidavit of service relating to the service of the Hearing notice upon the Plaintiffs/Applicants previous advocates.

40. Secondly, the Defendant/Respondent has submitted that the contention by the Plaintiffs'/Applicants' Advocate that the Plaintiffs' herein were never served, notwithstanding the fact that same was duly served vide known email address, means that the Plaintiffs/Applicants are being Dishonest and are thus not deserving of discretion.

41. Thirdly, the Defendant/Respondent has further submitted that having not taken proactive steps towards the hearing and disposal of the subject matter, the Plaintiffs/Applicants have displayed and/ or exhibited apathy, want of diligence and dilatoriness.

42. In the premises, the Defendant/Respondent has therefore submitted that the Plaintiffs/Applicants' are not deserving of the mercy and discretion of the Court.

43. Fourthly, the Defendant/Respondent has submitted that the Plaintiffs'/Applicants' Application, which seeks Review is pre-mature and misconceived. In this regard, the Defendant/Respondent has submitted that the Application does not fall within and/ or meet the threshold vide Order 45 Rule of the Civil Procedure Rules, 2010.

44. In the circumstances, the Defendant/Respondent has sought that the subject Application be dismissed with costs.

Issues for Determination:

45. Having reviewed the Application dated the 11th February 2022, the Supporting Affidavits thereto, the Replying affidavit by the Defendant/Respondent and having similarly, considered the Written submissions that were filed on behalf of the Parties herein, the following issues do arise and are germane for Determination;

    a. Whether the Subject Application has been filed by a duly recognized Agents on behalf of the Plaintiffs/Applicants and if not, whether the subject Application is Competent.

    b. Whether the subject Application, which seeks Review, meets and/or satisfies the threshold vide Order 45 Rule 1 of the Civil Procedure Rules,2010.

    c. Whether the Plaintiffs'/Applicants' have established Sufficient cause and/or basis to warrant the Orders sought.

Analysis and Determination

Issue Number 1. Whether the Subject Application has been filed by a duly recognized Agent on behalf of the Plaintiffs'/Applicants' and if not, whether the subject Application is Competent.

46. From the averments contained in the affidavit in support of the subject Application, as well as from the record of the court, it is common ground that the Plaintiffs' herein had hitherto engaged and/or retained the firm of M/S Charles Koech & Associates to act for and/or on their behalf.

47. It is also common ground that in the course of his retention, the said advocate, namely, Mr. Charles Koech, exchanged various correspondence vide email with counsel for the Defendant/Respondent.

48. It is also sufficient to note that the Plaintiffs'/Applicants' herein continued to communicate and/or engaged with the said advocates, even after the dismissal of the subject suit. Simply put, there is no contest that the Plaintiffs'/Applicants' herein were previously represented by the firm of M/s Charles Koech & Associates.

49. To the extent that the Plaintiffs'/Applicants' herein had and were represented by an advocate, if same were keen to engage and/or retain another advocate, then it was incumbent upon the incoming advocate to file and serve a Notice of Change of Advocates on all the Parties, including on the outgoing Advocate.

50. In respect of the foregoing observation, it is imperative to take cognizance of the provisions of Order 9 Rules 5 & 6 of the *Civil Procedure Rules* 2010, which provides as hereunder;

> 5. Change of advocate [Order 9, rule 5.]
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> 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 the court in which such cause or matter is proceeding and served in accordance with rule 6, 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.
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> 6. Service of notice of change of advocate [Order 9, rule 6.]
>
> The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).

51. Having perused the record of the court, I have not came across any Notice of Change Of Advocate that was ever filed by and/or on behalf of the current advocate who filed the current Application on behalf of the Plaintiffs'/Applicants'.

52. Contrarily, I have come across the Notice of Appointment of advocate dated the 14th February 2022, filed by and/or on behalf of the current advocates and in respect of which it is contended that same have since been appointed to act for and on behalf of the Plaintiffs/Applicants.

53. It is imperative to note that a Notice of Appointment of Advocate can only be filed and/or lodged, if the Party appointing the advocate has hitherto acted in person and not otherwise. For clarity, the Plaintiffs in the matter had never acted in Person.

54. To be able to appreciate the import and tenor of a Notice of Appointment of advocates and when same ensues, it is important to take cognizance of Order 9 Rule 7 of the *Civil Procedure Rules* 2010. For convenience, same is reproduced as hereunder;

> 7. Notice of appointment of advocate [Order 9, rule 7.]
>
> 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.

55. In my humble view, the purpose of a Notice of Appointment of Advocate, is separate and distinct from the purpose of a Notice of Change of advocate. In this regard, the two legal documents cannot be confused to mean one and the same thing.

56. In the premises, the current advocates having not filed and served the requisite Notice of Change of Advocate, for and on behalf of the Plaintiffs/Applicants, prior to and/or before the filing the subject application, it is therefore obvious and apparent that the Application has been filed by a stranger devoid of the requisite legal capacity.

57. It is also worthy to note that the Rules of procedure herein, were not crafted for cosmetic purposes and neither are Parties at liberty to trample upon the Rules of procedure. For coherence, the Rules of Procedure are meant to facilitate the conduct of court business in a systematic and pragmatic manner.

58. It is also imperative to note that Parties who disregard the Rules of procedure, like in the instant case, do so at their own peril.

59. In my considered view, having not filed the requisite Notice of Change of Advocate, the subject Application is therefore premature, misconceived and thus legally untenable. Simply put, the Application is stillborne.

60. As far as the place and significance of the Rules of procedure are concerned, I beg to adopt and restate two critical decisions that have underscored the necessity to adhere to and/or comply with the Rules of Procedure.

61. First and foremost, I take cognizance of and rely in the holding in the case of *Telkom K Ltd v John Ochanda (suing for and on behalf of 996 former employees of Telcom K Ltd)* (2014) eKLR, where the Court of Appeal observed as hereunder;

> 'The respondents are seeking umbrage under Article 159 (2) (d) of *the Constitution* which provides that justice shall be administered without undue regard to procedural technicalities. It does not avail them. We are content to state that the constitutional provision is not meant to whitewash every procedural failing and it is not meant to place procedural rules at naught. In fact, what has befallen the respondents is proof, if any were needed, that there is great utility in complying with the rules of procedure. Such compliance is neither anathema nor antithetical to the attainment of substantive justice. As has been said before, the rules serve as handmaidens of the lady Justice.'

62. Other than the foregoing succinct pronouncement by the Court of Appeal, it is also worthy to take note of the holding in the case of *Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012, where the Court stated as follows;

> "In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

63. With the foregoing legal pronouncements, I would be obliged to find and hold that the subject Application is fatally incompetent. Consequently and on this ground alone, I would proceed to strike out the Application.

Issue Number 2 . Whether the subject Application, which seeks Review, meets and/or satisfies the threshold vide Order 45 Rule 1 of the Civil Procedure Rules, 2010.

64. The subject Application primarily seeks review of the ruling and/or order of the court issued on the 6th October 2020. Essentially, by seeking review, the Plaintiffs'/Applicants' are thereby enjoined to implead and thereafter prove the known grounds for Review.

65. Nevertheless, before venturing to address whether the Plaintiffs' have impleaded and thereafter proven either of the three (3) known grounds for review, it is imperative to observe that the order dismissing the suit for want of prosecution was rendered and/or made on the 6th October 2021 and not the 6th October 2020, in the manner alluded to in the Application.

66. Based on the foregoing, it is therefore evident that the subject Application, which seeks Review of the Ruling issued on the 6th October 2020, is therefore directed against a non- existent Court order and/ or Ruling.

67. Other than the foregoing, it is worth stating that an Applicant who seeks to attract an order of review, under Order 45 Rules 1, 2 and 5 of the *Civil Procedure Rules*, is obliged to implead the grounds for Review at the foot of the Application and thereafter justify reliance on a particular ground by placing before the court sufficient material.

68. Nevertheless, in respect of the subject matter, even though the Plaintiffs'/Applicants' have sought Review, same have not impleaded any of the grounds to warrant invocation and reliance on Order 45 of the Civil Procedure Rules,2010.

69. Suffice it to note, that the Plaintiffs'/Applicants' are bound by the terms of the Notice of Motion Application placed before the court and it was thus incumbent upon the same to prove and establish a basis for review, premised on the Application and on the Affidavit.

70. Unfortunately, the Plaintiffs'/Applicants' herein have not brought themselves within the purview of Order 45 of the *Civil Procedure Rules*, 2010 and neither have same endeavored to prove the said grounds. In this regard, it is my humble observation that having not established any of the grounds for review, the subject Application is legally untenable.

71. Perhaps, it is time for the litigants and their advocates to discern the different circumstances where an Application for Review would suffice and where an Application for setting aside under Order 12 Rule 7 of the Civil Procedure Rules, 2010, would apply.

72. Be that as it may, I beg to terminate the address as pertains to whether the Plaintiffs'/Applicants' have established and/or proven a case to warrant review either as sought or at all, by adopting and endorsing the holding in the case of *Republic v Advocates Disciplinary Tribunal Exparte Apollo Mboya* [2019] eKLR, where the court stated as hereunder;

> 30. The principles which can be culled out from the above noted authorities are:-
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> i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
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> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
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> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
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> iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
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> v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
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> vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

31. Guided by the jurisprudence discussed above, it is my finding that the reasons cited by the applicant do not quality to be any of the grounds prescribed in Order 45 Rule 1 of the *Civil Procedure Rules*, 2010.

Issue Number 3. Whether the Plaintiffs'/Applicants' have established Sufficient cause and/or basis to warrant the orders sought.

73. Other than the foregoing issues, which I have alluded to and deliberated upon, it is not lost on the court that the critical ground upon which the review, variation and/or setting aside of the impugned orders is based, is that the Plaintiffs'/Applicants' previous counsel was never served with Mention and Hearing notices in respect of the subject matter.

74. First and foremost, the Plaintiffs/Applicants herein have contended that upon discovering that the suit herein had been dismissed for want of prosecution, same perused the court file and discovered that it was indicated that service of court process had been effected through an email address namely, Ckoech25@gmail.com.

75. It is the Plaintiffs/Applicants further contention that upon discovering the foregoing, same engaged their previous advocates, to ascertain and/or authenticate whether the under noted email address belonged to him or otherwise.

76. It has further been contended by the Plaintiffs/Applicants that the said email address did not belong to their previous advocate. Consequently, the Plaintiffs/Applicants' have therefore anchored their claim for setting aside on the basis that no service was ever effected upon the previous counsel.

77. However, despite the foregoing position, which is apparent in the supporting affidavits sworn by the Plaintiffs/Applicants, the same Plaintiffs/Applicants in their written submissions at paragraph 6.0 (ii) have thereafter conceded that indeed the undernoted email address belonged to their previous advocate, save that it was the advocates personal email address and same did not belong to the law firm where the advocate practiced.

78. Without engaging in semantics, it is important to note that the Plaintiffs' previous advocate namely, M/s Charles Koech & Associate, was evidently a Sole practitioner and hence no distinction can be drawn between his personal and/or official email address.

79. Notwithstanding the foregoing, evidence abounds that it is the Plaintiffs' previous advocate, who shared the undernoted email address with counsel for the Defendant and indeed when same was served with the Mention Notice dated 1st April 2021, the said advocate wrote back to the Defendant's advocate and acknowledged receipt of the Mention Notice.

80. Other than the foregoing, there is the affidavit of service sworn by one Elizabeth Muthoki Kisua, sworn on the 24th September 2021, which similarly alludes to receipt of a Hearing Notice dated the 21st September 2021 and which was to be served upon the Plaintiffs' previous advocates.

81. Vide the said affidavit of service, the deponent, who is a licensed court process server attests to having called the Plaintiffs' previous advocate on the 24th September 2021, vide the Advocate's Cell phone Number 0720 453 932 and that upon the deliberations between the process server and the Plaintiffs' previous advocate, the later shared his email address, namely ...25@gmail.com, for purposes of service.

82. Pursuant to the foregoing, the process server has adverted to dispatch of the Hearing notice to the Plaintiffs' previous Advocate's email Address and the said affidavit has been filed before the court.

83. Perhaps, for completeness, it is also worthy to note that there are other affidavits of service including the one sworn on 19th July 2021 and 5th November 2021, all of which speak to service of court process upon the Plaintiffs' previous Advocates on record.

84. For the avoidance of doubt, neither the Plaintiff's counsel on record nor the Plaintiff's/Applicant's themselves have chosen to impeach the contents of the said affidavit(s) of service. In any event, at No point in time did the counsel for the Plaintiffs seek to cross examine the deponent of the said affidavit(s) of service.

85. To the extent that the affidavit(s) of service, have not been impeached and/or otherwise controverted in any manner whatsoever, there is a presumption of service in favor of the Process server. Consequently, I am inclined to make the presumption that indeed the Plaintiffs' previous Counsel and therefore by extension the Plaintiffs' herein were duly served.

86. To vindicate the foregoing observation, it appropriate to refer to and restate the observation by the Court in the case of *Harun Miruka v Jared Otieno Abok & another* [1990] eKLR, where the Court stated as hereunder;

> " There is a qualified presumption in favour of the process server recognised in *MB Automobile v Kampala Bus Service* [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On Chitaley and Annaji Rao: The Code of Civil Procedure Vol II p 1670, the learned commentators say:
>
> "3. Presumption as to service:
>
> There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the

process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

87. Notwithstanding the foregoing, what becomes so apparent and evident is that though the Plaintiffs' previous Advocates and by extension the Plaintiffs' were duly served and were thus privy to the status of the subject proceedings, the Plaintiffs' herein has chosen to distort the facts in respect of the subject matter and are now seeking to rely on the distorted facts, with a view to attracting Equitable discretion in their favor.

88. In my considered view, a Party who seeks the Equitable intervention of the court is called upon to place before the court the true set of facts obtaining in the subject matter. Simply put, an Applicant seeking discretion must not conceal and/or distort the obtaining facts.

89. However, in this particular matter, the Plaintiffs' herein have not only approached the court with unclean hands, but have chosen to mislead the court, with a view to defeating, nay defrauding the Cause of Justice.

90. In the premises, the conduct of the Plaintiffs' herein defeats the establishment and/or proof of sufficient cause, which is imperative, before a court of law can exercise Discretion in favor of the Applicants.

91. For coherence, it may be important to discern what then does Sufficient cause mean and/or connote. In this regard, it is imperative to take cognizance of the decision in the case of The Hon *Attorney General v The Law Society of Kenya & Another*,Civil Appeal (Application) No. 133 of 2011 where sufficient cause was defined as:-

> " Sufficient cause" or "good cause" in law means: .....the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused". See *Black's Law Dictionary, 9th Edition*, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

92. In light of the foregoing definition, it cannot be said that the conduct of the Plaintiffs/Applicants, including distorting the facts, would meet the established threshold.

93. Simply put, the Plaintiffs/Applicants herein have not approached Equity with clean hands and Equity frowns upon the Plaintiffs herein, whose main aim is calculated to defraud the cause of justice.

94. Finally, it is also important to note that it is the plaintiffs herein who had filed the subject suit and therefore it behooved the Plaintiffs' to be at the fore front of pursuing and/or prosecuting the matter.

95. However, in respect of the subject matter, the Plaintiffs' adopted a lacklustre approach and because of the foregoing, the subject matter has remained in the court corridors up to and including the 6th October 2021, when same was dismissed for want of prosecution.

96. In the premises, it is appropriate to draw the attention of the Plaintiffs' to the holding in the case of *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others* [2015] eKLR, where the Court Of Appeal stated as hereunder;

> " Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a Constitutional Principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are

reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation.

Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them. The warning of Madan JA in *Belinda Murai & others v Amos Wainaina* (1978) LLR 2784, reigns true today. He said:

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel.

The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate..." (our emphasis)

97. In respect of the subject matter, the foregoing observation rings loud. Consequently, I adopt and reiterate same.

Final Disposition:

98. Having reviewed the issues for determination which were outlined herein before, it is now appropriate to come to the conclusion in respect of the subject Application.

99. Suffice it to state that the subject Application is laced, replete and wrought with Misrepresentation, doctored facts and same was therefore a deliberate scheme to defraud the Cause of Justice.

100. Consequently and in the premises, the subject Application is not only premature and misconceived, but same is similarly, an abuse of the Due Process of the Court.

101. In a nutshell, the Notice of Motion Application dated the 11th February 2022 be and is hereby Dismissed with costs to the Defendant/Respondent.

102. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Dr. Omondi Owino for Defendant/Respondent

Mr. Onduso H/B for Mr. Chesoli for the Plaintiffs/Respondents