



**Osogo (Suing as The Registered Trustee of Kenya Youth Hostels Association)  
& 4 others v Maseki & 6 others; Hadassah Hotel (Objector) (Environment &  
Land Case 1042 of 2013) [2022] KEELC 2430 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2430 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1042 OF 2013  
LC KOMINGOI, J  
MAY 12, 2022**

**BETWEEN**

**JAMES OSOGO (SUING AS THE REGISTERED TRUSTEE OF KENYA YOUTH  
HOSTELS ASSOCIATION) ..... 1<sup>ST</sup> PLAINTIFF  
GIDEON CHRIS MAINA (SUING AS THE REGISTERED TRUSTEE OF KENYA  
YOUTH HOSTELS ASSOCIATION) ..... 2<sup>ND</sup> PLAINTIFF  
MUSA MUKANGWA ..... 3<sup>RD</sup> PLAINTIFF  
FRANCIS MUTHINI (SUING AS THE CHAIRMAN OF KENYA YOUTH  
HOSTELS ASSOCIATION) ..... 4<sup>TH</sup> PLAINTIFF  
GIDEON CHRIS MAINA (SUING AS THE TREASURER OF KENYA YOUTH  
HOSTELS ASSOCIATION) ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**MUTAVI IRUNDUA MASEKI ..... 1<sup>ST</sup> DEFENDANT  
LIVINGSTONE SIMEL SANE ..... 2<sup>ND</sup> DEFENDANT  
TIMOTHY VITALIS OKWORO ..... 3<sup>RD</sup> DEFENDANT  
SUPERIOR FONE COMMUNICATIONS LIMITED ..... 4<sup>TH</sup> DEFENDANT  
REGISTAR OF DOCUMENTS ..... 5<sup>TH</sup> DEFENDANT  
TIMOTHY ISAAC BRYANT (PRACTICING LAW IN THE FIRM NAME AND  
STYLE OF BRYANT & ASSOCIATES) ..... 6<sup>TH</sup> DEFENDANT  
GITONGA GERRY GRAHAM (PRACTICING LAW IN THE FIRM NAME AND  
STYLE OF BRYANT & ASSOCIATES) ..... 7<sup>TH</sup> DEFENDANT**

**AND**



**RULING**

1. Interlocutory judgement was allegedly entered against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants on 1<sup>st</sup> October 2013. On 21<sup>st</sup> November 2013, interlocutory judgement was entered against the 4<sup>th</sup> Defendant. The final judgement in this matter was entered 24<sup>th</sup> October 2019.
2. There are two pending applications in this matter. The first application is the 4<sup>th</sup> Defendants' Notice of Motion dated 23<sup>rd</sup> September 2021. It is brought under Article 50 and 159 of *the Constitution*, order 10 rule 11, order 12 rule 7, order 22 rule 18 and order 25 of the *civil procedure rules*.
3. The 4<sup>th</sup> Defendant seeks orders:-
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. Spent.
  - e. That the Interlocutory judgement dated 21<sup>st</sup> November 2013 and the final judgement dated 24<sup>th</sup> October 2019 be set aside.
4. The grounds in support are listed at paragraphs 1 to 9 on the face of the motion. The application is supported by the annexed affidavits of Rahab Mwiwaki Karoki, Ngugi Mwangi and Alfred K. Nyairo.
5. In her affidavit sworn on 23<sup>rd</sup> September 2021, Rahab Mwiwaki Karoki, a director of the 4<sup>th</sup> Respondent deponed that in early September, she was informed by M/s Kimandu & Ndegwa Company Advocates who act for her in other legal matters that they had seen the 4<sup>th</sup> Defendant's case reported in the Kenya Law Reports 2018 eKLR as a judgment of the court. She added that her advocates on record informed her that her file had gone missing and all efforts to trace it were futile and as such, they were not aware of the hearing date.
6. She further deponed that her Advocates obtained the court records which show an affidavit of service by one Emilio Mugo of court pleadings and summons to enter appearance purportedly served upon the 4<sup>th</sup> Defendant's manager, one Moses Muchai on 6<sup>th</sup> September 2013. She added that the said affidavit was false in material particulars in that the 4<sup>th</sup> Defendant never had a manager by the name of Moses Muchai and in September 2013, the 4<sup>th</sup> Defendant had no offices in the suit premises.
7. She deponed that she learnt of this matter from the 1<sup>st</sup> Defendant (now deceased) who issued her with the Notice of Motion dated 20<sup>th</sup> August 2013 and the pleadings thereto. She further deponed that she consulted Mr. Ngugi Mwangi of then Mutiso Ngugi & Co. Advocates who had acted for the 4<sup>th</sup> Defendant in the conveyance over the suit land and they agreed to instruct M/S Nyairo & Co. Advocates to represent the 4<sup>th</sup> Defendant since Mr. Ngugi Mwangi was a potential witness. She added that she then gave M/S Nyairo Advocates the documents received from the 1<sup>st</sup> Defendant (deceased) but there were no summons.
8. She deponed that on her counsel's information that the proceedings are irregular due to failure of the Plaintiff to effect service of summons upon the 4<sup>th</sup> Defendant. She added that the proceedings proceeded despite there being an undetermined application for injunction that had been fully



canvassed but the ruling has not been delivered. She also deponed that there is no provision for grant of an interlocutory judgment on an unliquidated claim.

9. She deponed that there was an order issued on 19<sup>th</sup> March 2013 to enjoin Equity bank limited to whom the property is charged but there is no evidence on record that the said bank was enjoined. She further deponed that the 4<sup>th</sup> Defendant stands to suffer greatly having paid kshs.125 million for acquisition of the property and spent millions in its development and considering that they have had possession since 2013. She further deponed that this decision will affect third parties including the chargee bank, hotel residents, employees and suppliers.
10. The affidavit of Alfred King’oina Nyairo, Advocate on record for the 4<sup>th</sup> Defendant is sworn on 23<sup>rd</sup> September 2021.He deponed that on 5<sup>th</sup> September 2021, he received information from Mr. Ngugi Mwangi Advocate that he had received information from their mutual client the 4<sup>th</sup> Defendant that judgement in this matter had been delivered ex-parte sometime in the year 2019. He added that regrettably, their file could not be traced at all therefore he opted peruse the court record to find out for himself.
11. He deponed that he found that they had filed a Notice of Appointment to represent the 4<sup>th</sup> Defendant as opposed to filing a memorandum of appearance since no summons to enter appearance was included in the court documents forwarded to them. He also deponed that he had filed a replying affidavit sworn by Rahab Mwihaki Karoki in response to the Plaintiff’s application dated 20<sup>th</sup> August 2013 which had not been determined to date. He further deponed that the Plaintiffs unprocedurally and before determination of their Notice of Motion application applied for interlocutory judgement which judgement was also made in error as there is no provision in law for such a procedure and as such it ought to be set aside to allow the 4<sup>th</sup> Defendant which has a good defence to be heard.
12. The affidavit of Ngugi Mwangi was sworn on 23<sup>rd</sup> September 2021.He deponed that he acted for the 4<sup>th</sup> Defendant in the purchase of the suit land and when the instant suit was filed in 2013, it was agreed to instruct the firm of M/S Nyairo & Co. Advocates to act for the 4<sup>th</sup> Defendant. He also deponed that he personally knows that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are professional colleagues are deceased and that Kimani Muhoro; a professional colleague who represented the 2<sup>nd</sup> 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants is also deceased.

#### **The Plaintiffs’ response to the 4th Defendant’s application.**

13. In opposition, the Plaintiffs filed the replying affidavit sworn by the 5<sup>th</sup> Plaintiff on 5<sup>th</sup> November 2021.He deponed that the Plaintiffs’ claim as captured in their plaint dated 20<sup>th</sup> August 2013 was both for recovery of land and pecuniary damages in form of compensation for loss of use of the suit property. He further deponed that interlocutory judgment entered on 1<sup>st</sup> October 2013 against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants on and on 21<sup>st</sup> November 2013 against the 4<sup>th</sup> Defendant was proper.
14. He added that the 4<sup>th</sup> Defendant was duly served with summons to enter appearance and pleadings and an affidavit of service was filed on 18<sup>th</sup> September 2018 confirming service. He pointed out that the 4<sup>th</sup> Defendant duly participated in the suit through M/S Nyairo & Company Advocates upto the recording of the consent dated 19<sup>th</sup> September, 2013 but despite being informed that the matter was scheduled for formal proof hearing on 18<sup>th</sup> March 2018 and 8<sup>th</sup> May 2018 by counsel for the Interested Party, neither the 4<sup>th</sup> Defendant nor its Advocates appeared only to bring this application 8 years after interlocutory judgement was entered.
15. He deponed that on 30<sup>th</sup> June 2017, the trial Judge Mary Gitumbi addressed the Notice of Motion application dated 20<sup>th</sup> August 2013 in the presence of the Advocates for the Plaintiffs and the Interested



- Party which is Equity Bank Limited. He further deponed that the 4<sup>th</sup> Defendant's draft defence has no merits and if the orders sought are granted, the Plaintiffs will be greatly prejudiced since they have commenced execution process and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have died therefore the circumstances of the case have equally changed.
16. He also deponed that the chargee bank participated in the suit and the suit property has already reverted back to trustees of Kenya Youth Hostels Association. He added that he did not receive any monies allegedly paid in purchase of the suit property by the 4<sup>th</sup> Defendant and that the 4<sup>th</sup> Defendant is at liberty to seek compensation from the other Defendants save for the 5<sup>th</sup> Defendant who neither entered appearance nor participated in the matter. He added that since the 4<sup>th</sup> Defendant admitted that it was served with pleadings and summons, there is no need to cross-examine the process server.
  17. In reply to the Plaintiffs' replying affidavit, the 4<sup>th</sup> Defendant filed the supplementary affidavit sworn on 19<sup>th</sup> November 2021 by its director; Rahab Mwihi Karoki. She deponed that the 4<sup>th</sup> Defendant's draft defence annexed to her affidavit raises serious triable issues which ought to be considered by the court. She further deponed that the 4<sup>th</sup> Defendant dealt with the valid officials of Kenya Youth Hostels Association registered as a body corporate under the *Trustees (Perpetual Succession) Act* who were the 1<sup>st</sup> -3<sup>rd</sup> Defendants duly appointed and registered in 2007 as their names are endorsed in its certificate of incorporation. He added that pursuant to a certificate of exemption, Kenya Youth Hostels Association had been exempted from the provisions of *Societies Act*.
  18. On her counsel's advice, she deponed that the Plaintiffs have no capacity to bring this suit as the property was held by the 1<sup>st</sup> -3<sup>rd</sup> Defendants as the registered trustees of the Kenya Youth Association which is a corporate entity with a distinct legal personality. She further deponed that the Plaintiffs failed to disclose that the suit property had been mortgaged to International Youth Federation of which the Plaintiff is an affiliate and which recognized the 1<sup>st</sup> to 3<sup>rd</sup> Defendants as officials of Kenya Youth Hostel's association. She added that the lender had vide its foreclosure notice dated 11<sup>th</sup> November 2004 issued its intention to exercise its statutory power of sale and Kenya Youth Hostels Association's trustees had given a go ahead to procure a purchaser to enable them settle the debt.
  19. She deponed that the 4<sup>th</sup> Defendant paid kshs.2,320,000/= to Kaplan & Stratton Advocates who were acting for the lender; International Youth Hostels Federation for the discharge of the suit property and the balance to Kenya Youth Hostel's Association which was confirmed by the 6<sup>th</sup> and 7<sup>th</sup> Defendants in their letter dated 8<sup>th</sup> May 2013. She pointed out that the Patron of Kenya Youth Hostels Association acknowledged that the 1<sup>st</sup> -3<sup>rd</sup> Defendants were the trustees of Kenya Youth Hostels Association in the letter dated 10<sup>th</sup> May 2013. She also deponed that Desiral Company Limited, a company associated with the patron filed Milimani HCCC No. 157 OF 2013 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in their capacity as trustees but the suit was later withdrawn. She also deponed that if the suit land has already been transferred pursuant to the decree, the said can be reversed.
  20. The Plaintiffs filed a further replying affidavit to the 4<sup>th</sup> Defendant's supplementary affidavit sworn on 19<sup>th</sup> November 2021. The affidavit is sworn on 10<sup>th</sup> January 2022 by the 5<sup>th</sup> Plaintiff. He deponed that the 4<sup>th</sup> Defendant's supplementary affidavit should be struck out as it introduced new facts that were not in the core of this suit or raised in the 4<sup>th</sup> Defendant's Notice of Motion application dated 23<sup>rd</sup> September 2021. He pointed out that the 2<sup>nd</sup> Defendant annexed new documents which were in her possession at the time of filing the said application and a second draft defence which begs the question whether the court should consider the 1<sup>st</sup> or 2<sup>nd</sup> draft defence.
  21. He reiterated that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants were never the registered trustees of Kenya Youth Hostels Association. He admitted that it is an associate of Hostels International formerly International Youth



- Hostel Federation. He deponed that if this court is inclined to allow the application, then the 4<sup>th</sup> Defendant should pay thrown away costs of kshs.16,154,606/= as per the certificate of taxation, auctioneer's charges of kshs.5,585,331.55/= and the legal fees incurred by the Plaintiffs in the transfer of the suit property. He also urged the court to make a status quo order since the Plaintiffs are apprehensive that the 4<sup>th</sup> Defendant will transfer the property.
22. The 4<sup>th</sup> Defendant's supplementary affidavit sworn on 19<sup>th</sup> November 2021 triggered the Plaintiffs' application to strike it out. It is not merited since the Plaintiffs' filed a reply to the issues raised therein.
23. The second application is the 6<sup>th</sup> and 7<sup>th</sup> Defendant's application dated 28<sup>th</sup> October 2021. It is brought under Article 159(2) (d) of *the Constitution* of Kenya, Order 10 Rule 11, Order 9, Order 22, Order 59 of the Civil Procedure Rules, Section 3A of the *Civil Procedure Act* and any enabling provisions of the law.
24. The 6<sup>th</sup> and 7<sup>th</sup> Defendants seek orders;
- a. Spent.
  - b. That leave be granted to the firm of Meritad Law Africa LLP Advocates to come on record for the 6<sup>th</sup> & 7<sup>th</sup> Defendants/Applicants after judgement;
  - c. Spent.
  - d. Spent.
  - e. That this Honourable court be pleased to set aside ex debito justitiae the interlocutory judgement entered herein against the 6<sup>th</sup> & 7<sup>th</sup> Defendants on 10<sup>th</sup> October 2019 as the same is defective and irregular.
  - f. That the Honourable Court be pleased to set aside final judgment entered herein against the 6<sup>th</sup> and 7<sup>th</sup> Defendants on 31<sup>st</sup> January 2019.
  - g. That the Honourable court be pleased to lift ,stay and/or vacate orders of warrants for attachment to issue to the 6<sup>th</sup> and 7<sup>th</sup> Defendants issued by the Deputy Registrar, Honourable I. Barasa on 21<sup>st</sup> October 2021.
  - h. That the 6<sup>th</sup> & 7<sup>th</sup> Defendants/Applicants' statement of defence annexed herein be deemed as property served and duly filed thus part of the record upon payment of the requisite fees;
  - i. That the Honourable court be pleased to order the attendance of Emilio Mugo Caesar for cross-examination on the affidavit of service dated 18<sup>th</sup> September 2013; and
  - j. That costs of the suit be borne by the Plaintiff's /Respondents.
25. The second application for determination was filed by the 6<sup>th</sup> and 7<sup>th</sup> Defendants. It also seeks to set aside the judgement herein.
26. In support of the application, the 6<sup>th</sup> and 7<sup>th</sup> Defendants filed the supporting affidavit sworn on 28<sup>th</sup> October 2021 by the 6<sup>th</sup> Defendant. He deponed that he learnt of the Notice to show cause herein from the Advocate for the 4<sup>th</sup> Defendant through tele conversation on 18<sup>th</sup> October 2021. He added that upon perusal of the court file, he learnt that M/S Kimani Muhoro Advocates was on record on his behalf yet he never instructed the said firm. He contested service of summons in this matter as well as service of mention dates, hearing dates and Notice of entry of judgement.



27. He deponed that the affidavit of service of summons filed by Emilio Mugo Ceaser is false since he was out of the country on 6<sup>th</sup> September 2018, the date which the deponent alleges to have effected service upon him. He contended that the 6<sup>th</sup> and 7<sup>th</sup> Defendants will be condemned unheard if the judgement is not set aside being that they have been ordered to compensate the plaintiffs for loss yet they represented the 1<sup>st</sup> to 3<sup>rd</sup> Defendants in a sale transaction of sale of land which is the subject of this suit in their capacities as Advocates of the High Court.

#### **The Plaintiffs' reply to the 6th and 7th Defendants' application.**

28. In reply to the 6<sup>th</sup> and 7<sup>th</sup> Defendant's application, the Plaintiffs filed the preliminary objection dated 11<sup>th</sup> December 2021 arguing that the law firm of Meritad Law Africa LLP is not properly on record as it contravenes order 9 rule 9. He contended that the law firm of Kimani Muhoro Advocates is on record for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants pursuant to the Memorandum of appearance dated 19<sup>th</sup> September 2019 and filed on even date.

29. The Plaintiffs also filed the replying affidavit sworn on 1st December 2021 by the 5<sup>th</sup> Plaintiff. He reiterated averments in the Plaintiff's replying affidavit sworn in opposition to the 4<sup>th</sup> Defendant's Notice of motion application and deponed that the 6<sup>th</sup> and 7<sup>th</sup> Defendants were represented by Kimani Muhoro Advocates and the fact that they are Advocates of the High court who represented the 1<sup>st</sup> to 3<sup>rd</sup> Defendants in the impugned transaction, they were aware of this matter.

30. The 6<sup>th</sup> and 7<sup>th</sup> Defendants filed the further affidavit sworn on 24<sup>th</sup> February 2022 by the 6<sup>th</sup> Defendant. He deponed that the Plaintiffs did not disclose the existence of Miscellaneous Criminal Application No.194 of 2014 where the 6<sup>th</sup> and 7<sup>th</sup> Defendants were directed to deposit the sum of kshs.31,565,548.40/= with the court being the subject of the sale of the suit property. He reiterated the need for them to be heard so as all the issues are dealt with.

#### **The 4th Defendant's submissions.**

31. They are dated 31<sup>st</sup> January 2022. Counsel for the 4<sup>th</sup> Defendant raised the following issues for determination:-

- a. Whether the interlocutory judgement entered on 21<sup>st</sup> November 2013 was valid and whether the proceedings and resultant judgement should be set aside.
- b. Whether the draft defence attached raises triable issues.

32. Counsel submitted that the Plaint dated 20<sup>th</sup> August 2013 is not a money claim therefore the interlocutory judgement entered herein is irregular. He further submitted that under order 10 Rule 6 of the procedure rules, interlocutory judgement can only be entered where the claim is for pecuniary or in other words liquidated damages( or is a money claim) or; where it is a claim for detention of goods with or without a money claim. He put forward the case of *Beatrice Wanjiru Kamuri v John Kibira Muiruri* [2016] eKLR and the case of *Solomon Mwobobia Nkuraaru v Jacob Mwiti* [2015] eKLR. He also submitted that the interlocutory judgement was entered based on a false affidavit of service which also offends provisions of Order 5 Rule 15 of the *Civil Procedure Rules*, 2010 since it does not disclose the time at which the summons were served, the name and address of the person identifying the person served and witnessing the delivery. He relied on the case of *Said Abdala Azubedi v Samuel Mbugua Ikumbu* [2018] eKLR and the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR.



33. He also submitted that the defence raises triable issues therefore the matter should be heard. He relied on the case of *Sebei District Administration v Gasyali* [1968] EA 300. He also submitted that unless the orders sought are issued, the 4<sup>th</sup> Defendant will be condemned unheard which is against Article 50 of *the Constitution* of Kenya and the rules of natural justice which provide that no party should be condemned unheard.

#### **The 6<sup>th</sup> and 7<sup>th</sup> Defendant's/Respondents written submissions.**

34. They are dated 25<sup>th</sup> February 2021. Counsel representing the 6<sup>th</sup> and 7<sup>th</sup> Defendants submitted on the following issues.
- a. Whether the firm of Merited Law Africa LLP Advocates are properly on record.
  - b. Whether the judgement entered on 31<sup>st</sup> January 2019 should be set aside?
  - c. Who should bear the costs of this application?
35. On whether Merited Law Africa LLP Advocates are properly on record, counsel submitted that an advocate may seek for orders to come on record while seeking for other orders as long as the prayer to come on record is dealt with in the first instance. He added that Merited Law Africa has a prayer to come on record among other prayers thus it is in compliance with Order 9 Rule 9 of the *Civil Procedure Rules*. He put forward the case of *Saleh Muhsin Shigog v Augus M. Dishu & others* [2019] eKLR.
36. Issue (ii) was extensively covered by the 4<sup>th</sup> Defendant in their submissions.

#### **The Plaintiffs' /Respondent's written submissions.**

37. They are dated 6<sup>th</sup> April 2022. Counsel for the Plaintiff's submitted that the Plaintiff's issues for determination are;
- a. Whether there is a regular interlocutory judgement against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants.
  - b. Whether the final judgement on record was obtained regularly and if so, whether the same can be set aside and the warrants of attachment issued against the 6<sup>th</sup> and 7<sup>th</sup> Defendants vacated.
  - c. Whether the 6<sup>th</sup> and 7<sup>th</sup> Defendants should be granted leave to file their statement of defence at this stage of the proceedings; and
  - d. Who should bear the costs of the 4<sup>th</sup> Defendant's application and the 6<sup>th</sup> and 7<sup>th</sup> Defendants' application?
38. It was counsel's submission that the Deputy Registrar did not enter any interlocutory judgement but simply directed that the matter be heard. He pointed out that the Registrar's exact directions were; "The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants herein having been served with summons to enter appearance and having failed to file appearance and defence within the stipulated period upon request dated 10<sup>th</sup> October 2013...You are now directed to proceed to set the suit down for hearing as provided under Order 10 Rule 9 of the *Civil Procedure Rules*,". He relied on the case of *James Ngara Mukiri & Another v Josephine Wangari Mukiri* [2013] eKLR where faced with similar facts, the court made a finding that the Deputy Registrar only made an endorsement that the suit was ripe for formal proof hearing in accordance with order 10 Rule 9 of the Civil Procedure Rules.



39. He relied on the case of *Segment Bank Limited v Segment Distributors Limited* [2017] eKLR to submit that the final judgement of the court was regular as parties were served with summons and pleadings. He added that the judgement having been regular, it is the court's discretion on whether to set it aside.
40. He urged the court to consider that the Applicants did not provide any plausible reason for their failure to file defence within 14 days of entering appearance. He added that the inordinate delay in bringing the applications was not explained and that the draft defences filed are a sham and they do not raise triable issues. He also submitted that the Plaintiffs will suffer the most prejudice since they have partially executed the decree and since the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are deceased, reopening the matter will be cumbersome.
41. On whether the 6<sup>th</sup> and 7<sup>th</sup> Defendants should be granted leave to file their draft defence, he put forward the Supreme court case of *Nicholas Korir Salat v The Independent Electoral and Boundaries Commission & 7 others* [2014] e KLR to submit that delay in meeting statutory timelines must be explained.
42. I have considered the notice of motions, the ground of opposition, the affidavits in support and the responses thereto. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-
- a. Whether the firm of Merited Law Africa LLP Advocates are properly on record.
  - b. Were summons to enter appearance served on the Applicants?
  - c. Whether there is a valid regular and lawful Interlocutory judgment entered against the Applicants
  - d. Whether the Proceedings were regular.
  - e. Whether the final default judgement was regular/irregular.
  - f. Should the Defendants be granted leave to file their defence?
43. Order 9, rule 9 of the *Civil Procedure Rules* bars change of advocates after judgement without consent from the previous advocate and without an order of the court. Order 9 Rule 10 of the *Civil Procedure Rules* provides:-
- “An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”
- Leave to allow Meritad Law Africa LLP Advocates to come on record for the 6<sup>th</sup> and 7<sup>th</sup> Defendants after judgement is prayer (a) of the 6<sup>th</sup> and 7<sup>th</sup> Defendants' Notice of Motion application. The same is allowed.
44. The 4<sup>th</sup> Defendant contended that it was not served with summons to enter appearance. Summons were issued in this matter on 5<sup>th</sup> September 2013. The 4<sup>th</sup> Defendant however appears to admit service as it was represented by counsel in the matter who actively took part then became indolent towards the end of 2013. There is an affidavit of service of summons and pleadings filed on 18<sup>th</sup> September 2018.
45. The 6<sup>th</sup> and 7<sup>th</sup> Defendants also contested service of summons. However, they entered appearance through Kimani Muhoro Advocates. There is no evidence that the said Advocates did not have instructions to represent them. They cannot therefore dispute the said Advocates' participation in these proceedings.



46. The Applicants did not demonstrate that the affidavits of service were incorrect and in any case, there is admission of service. The Court of Appeal in *Shadrack Arap Baiywo v Bodi Bach* [1987] eKLR, held that:-

“When there is an affidavit of service on record, 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.”

47. The Applicants contended that interlocutory judgement was irregularly entered as this suit has no liquidated claim. The applicable procedure for interlocutory judgement is Order 10, rule 6 of the *Civil Procedure Rules* which provides:-

“Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.”

48. In their plaint dated 20<sup>th</sup> August 2013, the Plaintiffs claim against the 4<sup>th</sup> Defendant is for cancellation of the conveyance dated 4<sup>th</sup> January 2013 registered in favour of the 4<sup>th</sup> Defendant against title to Land Reference No.209/956/2 Nairobi, eviction against the 4<sup>th</sup> Defendant, a permanent injunction against it and orders that the OCS Kilimani supervises the eviction.

49. The Plaintiffs’ inadvertently applied for interlocutory judgment instead of judgment in default of defence pursuant to Order 10 Rule 9 of the *Civil Procedure Rules*. On 12<sup>th</sup> November 2013, the record indicates that the Deputy Registrar correctly gave directions under Order 10 Rule 9 of the Civil Procedure Rules which provides, “Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing” The deputy registrar did not enter interlocutory judgement under Order 10 Rule 6 but set the suit down for hearing under Order 10 Rule 9. Therefore there is no interlocutory judgement entered against the 4<sup>th</sup> Defendant. Similarly, judgement entered against the 6<sup>th</sup> and 7<sup>th</sup> Defendants on 1<sup>st</sup> October 2013 was correctly entered under Order 10 Rule 9 of the *Civil Procedure Rules*.

50. The 4<sup>th</sup> Defendant also argued that proceedings were irregular since there was a pending Notice of Motion dated 20<sup>th</sup> August 2013 yet the court proceed to enter judgment without determining that application. On 30<sup>th</sup> June 2017. Counsel for the Plaintiffs, in the presence of counsel for the Interested Party told the court that the Plaintiffs had abandoned that application. There was no objection from any of the parties hence the court was not obliged to determine an abandoned application. The proceedings were therefore regular.

51. The default judgment against the Applicants was regular. The default against the 4<sup>th</sup> Defendant being that despite service of Plaint and Summons to enter appearance by the Plaintiffs, it did not file a memorandum of appearance and defence. On the 6<sup>th</sup> and 7<sup>th</sup> Defendants, the default is they entered appearance but failed to enter a defence within the statutory period.

52. Order 10 Rule 11 of the *Civil Procedure Rules*, 2010 provides:-

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”



53. Following the finding that the judgement was regular, the Court has discretion on whether to set aside the default judgement. In *James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR the court stated:-

“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 others...”

54. In *Abdalla Mohamed & another v Mbaraka Shoka* [1990] eKLR the Court of Appeal held that:-

“The tests for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merits; secondly whether there would be any prejudice; and thirdly, what is the explanation for any delay”.

55. The Court in *Patel v E.A Cargo Handling Services Ltd* (1974) EA 75 cited by the Court of Appeal in *Stephen Wanyee Roki v K-Rep Bank Limited & 2 others* [2018] eKLR held that;

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules.”

56. Taking into account the factors for consideration in the above stated authorities, the reasons advanced by the 4<sup>th</sup> Defendant for its failure to enter appearance have no merit. Equally, the 6<sup>th</sup> and 7<sup>th</sup> Defendants’ contention that M/S Kimani Muhoro Advocates had no instructions to enter appearance on their behalf was unsubstantiated. The Applicants therefore elected not to file their respective defences. The judgement against the Applicants was entered on 12<sup>th</sup> November 2013 while that against the 6<sup>th</sup> and 7<sup>th</sup> Defendants was entered on 1<sup>st</sup> October 2013. They brought their applications over 8 years after the respective judgements were entered. There was no plausible explanation for the delay.

57. In *Abdalla Mohamed & another* (Supra) the Court of Appeal stated:-

“...considering the lapse of more than four years since interlocutory and final judgments were entered against the appellants and January 18, 1988 when the application to set aside these judgments was filed; and taking into account that by this date the final judgment had been satisfied with part of the decretal sum of money applied for purposes which would not be easy to reverse without occasioning considerable hardship to the respondent; and in view of the absence of a plausible explanation for this inordinate delay; the trial judge could not have exercised his discretion in favour of the appellants without prejudice to the respondent.”

58. Considering the authority above and the whole justice of the case, counsel who represented the 6<sup>th</sup> and 7<sup>th</sup> Defendants is deceased and so are the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 4<sup>th</sup> Defendant is in possession of



the suit land though the Plaintiffs have transferred title in part execution of the judgement herein. The prejudice that the Plaintiffs will suffer can be remedied by way of thrown away costs.

59. In *William Ntomauta M'ethanga Sued as M'mauta Nkari v Baikiamba Kirimania* [2017] eKLR, the court of Appeal stated that in considering whether to set aside default judgement, the draft defence is to be considered. The 4<sup>th</sup> Defendant filed two separate draft defences. Both are considered. The 6<sup>th</sup> and 7<sup>th</sup> Defendant's draft defence is also considered and they raise triable issues.
60. There is need to determine who the registered trustees of Kenya Youth Hostels Association were at the time of the impugned transaction. There is also the issue whether the 4<sup>th</sup> Defendant paid the registered trustees and whether the 6<sup>th</sup> and 7<sup>th</sup> Defendants' role was regular.
61. It is not in dispute that the 4<sup>th</sup> Defendant/Applicant is in possession of the suit property. It is in the interest of justice that it be given an opportunity to prosecute its defence. The same goes for the 6<sup>th</sup> and 7<sup>th</sup> Defendants.
62. In conclusion, I find merit in this application and same is allowed in the following terms:-
  - a. That leave is hereby granted to the firm of Meritad Law Africa LLP Advocates to come on record for the 6<sup>th</sup> and 7<sup>th</sup> Defendants.
  - b. That the interlocutory judgement dated 24<sup>th</sup> October 2019, the decree and all consequential orders are hereby set aside on condition that the 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Defendants do pay throw away cost of Kshs.20,000/- to the Plaintiff within 21 days from the date of this ruling.
  - c. That the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants draft defences be deemed to be duly filed upon the payment of the requisite fees.
  - d. That any other defendant do file their defence within twenty-one (21) days from the date of this ruling.
  - e. That the parties do comply with order 11 of the Civil Procedure Rules.
  - f. That costs of this application be borne by the 4<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Defendants.
  - g. That the matter be mentioned for pretrial conference on 14<sup>th</sup> June 2022 to confirm compliance.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 12TH DAY OF MAY 2022.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Ndinda for Mr. Mbaabu for the Plaintiffs

No appearance for the 1st – 3rd Defendants

Ms Kemboi for Mr. Nyairo for the 4th Defendant

Mr. Lumumba for Mr. Saende for the 6th and 7th Defendants

Mr. Mutiso for the Objectors

Steve - Court Assistant

