DIM Agencies Limited v Kenya Airports Authority (Environment & Land Case E055 of 2021) [2022] KEELC 3750 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3750 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E055 OF 2021

JO MBOYA, J

JUNE 23, 2022

BETWEEN

DIM AGENCIES LIMITED ..... PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY ..... DEFENDANT

RULING

1. Vide the Notice of Motion dated May 19, 2022, the Defendant/Applicant seeks the following Reliefs/ Orders;

   a) .....Spent.

   b) That this Honourable Court do grant Leave to the Office of the Attorney General to come on record after Judgement on behalf of the Defendant/Applicant.

   c) That the Ex-parte default Judgement entered against the Defendant/Applicant on or about November 11, 2021and all consequential orders be set aside and the Defendant/Applicant be granted unconditional leave to file its Defense to the Plaintiff/Respondent's claim.

   d) That pending the hearing and final determination of the instant application inter parties, there be Interim order of stay of execution of the Decree dated December 21, 2021pursuant to the Default ex-parte Judgement on record.

   e) That the Costs of this Application be provided for.

2. The subject Application is premised and/or anchored on the various grounds which have been enumerated at the foot thereof and same is further supported by the affidavit of one, Margaret Munene, the Company secretary of the Defendant/Applicant.

3. Upon being served with the subject application, the Plaintiff/Respondent herein responded thereto vide a Replying affidavit sworn by one, Ashok Doshi, sworn on the June 6, 2022.

Deposition by the Parties:

The Defendant's/applicant's Case:

4. Vide Supporting Affidavit sworn by one Margaret Munene, (hereinafter referred to as the deponent), same has averred that though the Defendant/Applicant was duly served with the Summons to enter appearance and Plaint in respect of the subject matter, the Defendant/Applicant failed to enter appearance and file pleadings in the matter.

5. Further, the deponent has averred that the failure to enter appearance and/or file Statement of Defense in the matter was informed and/or occasioned by in advertent bureaucratic and unprocedural delay obtaining at the Defendant's/Applicant's offices.

6. On the other hand, it has also been averred that the failure to enter appearance and file Statement of Defense was also informed by oversight and that in any event, the inadvertence and oversight alluded to, were neither deliberate nor intentional.

7. Besides, the deponent has also averred that the inadvertence and/or oversight which informed the failure to entre appearance and/or file defense, are regreted and in any event excusable.

8. Be that as it may, the deponent has further averred that upon discovery of the fact that no appearance had been entered and no Defense filed, same proceeded to and instructed the office of the Attorney General to take up the matter and to file the requisite pleadings, with a view to vindicating the interests of the Defendant/Applicant.

9. Nevertheless, the deponent has also averred that the suit property, namely, L.R No. 9042/617, is indeed located within Jomo Kenyatta International Airport and in fact, same constitutes an annexation of part of the airport land. For clarity, the deponent has stated that the said property actually falls within a controlled area fenced by the Defendant/Applicant and is earmarked for the expansion of the airport.

10. Further, the deponent has averred that part of the suit property is also affected by the proposed dualing/upgrading of the Airport South road by Kenya National Highway Authority.

11. Based on the foregoing, the deponent has thus averred and/or contended that what is claimed by the Plaintiff/Respondent, is indeed Public land, which was grabbed and/or annexed by the Plaintiff/Respondent in connivance with certain Government officials, albeit irregularly and/or illegally.

12. Consequently and in the premises, the deponent has averred that the Defendant/Applicant has a triable Defense, which ought to be heard and/or entertained by the court.

13. Further, the deponent has also averred that even though the Defendant/Applicant did not enter appearance or filed statement of defense, the Defendant/Applicant ought to have been served with the application seeking Leave to enter Interlocutory Judgement against same, insofar as the Defendant/Applicant comprises of (sic) Government.

14. Essentially, the deponent has therefore implored the court, to allow the application and set aside the default Judgment and thereby allow same to enter appearance and file a Statement of Defense, albeit on such terms and conditions, as the Court may deem fit and expedient.

Response by the Plaintiff/respondent:

15. Vide Replying Affidavit sworn on the June 6, 2022, one Ashok Doshi has averred that the Plaintiff/ Respondent herein is the lawful and registered proprietor of the suit property and in respect of which same was duly issued with a certificate of title/ Grant.

16. On the other hand, the deponent has further averred that the Defendant/Applicant herein entered upon and/or trespassed onto the suit property and as a result of such trespass, the Plaintiff/Respondent was constrained to and indeed served the Defendant/Applicant with a Demand notice and notice of intention to sue vide letter dated the January 25, 2021.

17. Further, the deponent has also averred that despite being served with the Demand notice and notice of intention to file suit, the Defendant/Applicant persisted in the trespass and hence it became necessary to file and or mount the subject suit.

18. It has further been averred that upon the filing of the subject suit, the Defendant/Applicant herein was duly served with the summons to enter appearance and Plaint and therefore same was obligated to enter appearance and file statement of Defense, if any.

19. To the extent that the Defendant/Applicant failed to enter appearance and/or file Defense, the deponent has averred that the Defendant/Applicant, was therefore not keen and/or desirous to defend the subject suit.

20. At any rate, it has been averred that the conduct of the Defendant/Applicant herein of neither entering appearance nor filing any statement of Defense, shows that the Defendant/Applicant is not a respecter of the Rule of law and hence same ought not to be afforded any latitude by the court.

21. Other than the foregoing, the deponent has also averred that after the filing and service of the summons to enter appearance, the subject matter came up before the court on various occasions and that during the various occasions, the Defendant/Applicant was duly served with court process, including Mention Notices.

22. In any event, it has also been stated that the Defendant/Applicant herein was similarly served with a duly extracted Decree on the December 21, 2021, as well as the Plaintiff's/Respondent's Party and Party bill of costs, but despite such service, the Defendant/Applicant, continued to disregard and/or show scant respect for the court process.

23. Based on the foregoing, the deponent has averred that the Defendant/Applicant herein has exhibited a conduct that shows that same was keen to delay, obstruct and or defeat the cause of justice and in this regard, the Defendant/Applicant is not deserving the discretion of the court.

Submissions by the Parties:

24. The subject matter came up on the June 2, 2022, whereupon it transpired that there were two Application pending before the court, namely, the Application dated the May 16, 2022, filed by the Plaintiff/Respondent and seeking for Garnishee orders and the application dated the May 19, 2022, the latter filed by the Defendant/Applicant and which, essentially sought for the setting aside of the Default Judgment.

25. Owing to the existence of the two Applications, the court was constrained to and indeed issued directions that the subject application be heard and disposed of in the first instance, given the nature of the reliefs/ Orders sought at the foot thereof.

26. On the other hand, the court proceeded to and directed that the subject application be canvased and be disposed of by way of written submissions. Consequently, timelines for filing and exchange of the written submissions were set and/or granted.

27. Pursuant to the foregoing, the Defendant/Applicant proceeded to and filed her written submissions on the June 10, 2022, whereas the Plaintiff/Respondent filed her written submissions on the June 17, 2022. For clarity, the two sets of submissions are on record.

28. Briefly, the Defendant/Applicant herein has submitted that by virtue of it constitution, same is a State Corporation and hence falls within the definition of Government.

29. Based on the foregoing contention, the Defendant/Applicant has contended that no interlocutory Judgment could therefore be sought for and/or obtained as against the Defendant/Applicant, albeit without Leave of the court having been applied for with Notice to the Defendant/Applicant.

30. In support of the foregoing submissions, the Defendant/Applicant has invoked and relied on the provisions of Order 10 Rule 38 of the *Civil Procedure Rules* 2010. Besides, the Defendant/Applicant has also relied on the decision in the case of *First Community Bank versus Ready Consultant Ltd & 3 Others* (2021)eKLR and *Gulf Fabricators v County Government of Siaya* (2020)eKLR.

31. Secondly, the Defendant/Applicant has further submitted that the failure to enter appearance and/or file statement of Defense was occasioned and/or informed by inadvertence, bereaucratic lapses and oversight, obtaining at the offices of the Defendant/Applicant.

32. Nevertheless, the Defendant/Applicant has further submitted that the inadvertence, bereaucratic lapse and oversight, which underlined the failure to enter appearance and/or file Statement of Defense, were neither deliberate nor intentional.

33. In the premises, the Defendant/Applicant has contended that the lapses alluded to, were therefore not meant to delay, defeat and/or obstruct the Due process of the Honourable court.

34. Thirdly, the Defendant/Applicant has submitted that despite the failure to enter appearance and file Statement of Defense, which was informed by the inadvertence, same has a triable defense, which raises pertinent issues worthy of investigation by the court during the hearing.

35. In support of the submissions that same has triable defense, worthy of interrogation and/or investigation, the Defendant/Applicant has invoked and relied on the decision in the case of *Patel versus E. A Cargo Handlers Services* (1974) EA at page 75, *Party Ltd versus Fuzi Island Development Ltd & 4 Others* (2019)eKLR.

36. Finally, the Defendant/Applicant has submitted that setting aside ex-parte/default judgment is discretionary in nature and that the court should endeavor to exercise its discretion in such a manner to ensure that that justice is done to all parties. In this regard, the Defendant/Applicant has added that the court ought not to shut the door of justice on a Party merely because of a mistake and/or blunder by the Party.

37. In support of the foregoing submissions, the Defendant/Applicant has relied On the case of *Philip Keipto Chemwolo & Another versus Kubende* (1986)eKLR, as well as *Shah versus Mbogo & Another* (1967) E.A.

38. On her part, the Plaintiff/Respondent has submitted that the Defendant/Applicant was duly and effectively served with the Summons to enter appearance, the Plaint and various court processes, but same ignored and/or refused to adhere to the court process.

39. In any event, the Plaintiff/Respondent has further submitted that the conduct of the Defendant/Applicant herein of failing to enter appearance and filing a statement of Defense was informed by a desire to delay, obstruct and/or defeat the Due process of the court.

40. In the premises, the Plaintiff/Respondent has therefore submitted that the actions and/or omissions by the Defendant/Applicant, were neither inadvertent nor excusable.

41. In support of the foregoing submissions, the Plaintiff/Respondent has relied on the decision in the case of *Elijah Murimi Muriithi & Another versus Martin Kingori Maina* (2022)eKLR.

42. Other than the foregoing, the Plaintiff/Respondent has also submitted that the Defendant/Applicant is a State corporation with a separate and distinct legal entity, separate from the Government and hence it is erroneous for the Defendant/Applicant to purport to be part of the Government.

43. Further, it has been submitted that by virtue of not being part of the Government, the *Government Proceedings Act*, Chapter 40, Laws of Kenya, do not apply to and/or affect the operations of the Defendant/Applicant, either as alleged or at all.

44. Besides, it has also been submitted that the Defendant/Applicant was not entitled to be served with an application seeking for entry of Interlocutory Judgment in terms of Order 10 rule 8 of the *Civil Procedure Rules* 2010.

45. In support of the foregoing submissions, the Plaintiff/Respondent has relied on the decision in the case of I*kon Prince Media Company Ltd versus Kenya National Highways Authority & 2 Others* (2015)eKLR and *David G Katiba versus District Land Registrar, Muranga* (2012)eKLR.

46. Finally, the Plaintiff/Respondent has submitted that same is bound to suffer grave injustice and prejudice should the Judgment be set aside, either in the manner sought by the Defendant/Applicant or at all.

47. In the premises, the Plaintiff/Respondent has sought for the dismissal of the subject Application, which Application has been termed to be an abuse of the Due process of the Court.

Issues for Determination:

48. Having reviewed the Application dated the 19th May 2022, the Supporting Affidavit thereto and the Replying affidavit filed in opposition thereto and upon considering the written submissions filed on behalf of the Parties, the following issues do arise and are thus germane for Determination;

    i. Whether the Defendant/Applicant constitutes and/or forms part of the Government and whether the provisions of Order 10 Rule 8 of the *Civil procedure Rules 2010* apply to the Defendant/Applicant.

    ii. Whether the Applicant has shown any sufficient cause and/or reasonable Explanation for the failure to enter appearance and file Defense.

    iii. Whether the Defendant/Applicant has a triable Defense worthy of interrogation/investigation by the court during the Plenary Hearing.

    iv. Whether the Defendant/Applicant is entitled to the Discretion of the Court.

Analysis and Determination

Issue Number 1

Whether the Defendant/Applicant constitutes and/or forms part of the Government and whether the provisions of Order 10 Rule 8 of the Civil procedure Rules 2010 applied to the Defendant/Applicant.

49. So much time and space has been taken by counsel for the Defendant/Applicant to ventilate the position that the Defendant/Applicant herein constitute and/or comprises part of the Government and hence same is affected by the *Government proceedings Act*, Chapter 40 Laws of Kenya.

50. Pursuant to the foregoing, the Defendant's/Applicant's advocate has therefore proceeded to and contended that by virtue of being part of the government, no interlocutory judgment could be sought for and/or entered against the Defendant/Applicant, without leave of the court, albeit on notice to the Defendant/Applicant.

51. It has further been submitted that premised on the basis that the Defendant/Applicant constitutes part of the government, the provisions of Order 10 Rule 8 of the *Civil Procedure Rules*, 2010, therefore apply to and/or govern all proceedings where the Defendant/Applicant is a Party.

52. Perhaps, to be able to understand the meaning and import of the Provisions of Order 10 rule 8 of the *Civil Procedure Rules* 2010, it is appropriate to reproduce same and in this regard same are reproduced as hereunder;

> 8. Judgment in default against the Government [Order 10, rule 8.]
>
> No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day.

53. Other than the foregoing provisions, it may also be necessary to take note and/or cognizance of the provisions of Section 12(1) of the *Government Proceedings Act*, Chapter 40 Laws of Kenya, which touches on and/or concern proceedings against the Government. For coherence, Section 12(1) provides as hereunder;

> " 12. Parties to proceedings (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.
>
> (2) No proceedings instituted in accordance with this Part of this Act by or against the Attorney- General shall abate or be affected by any change in the person holding the office of Attorney-General."

54. Having reproduced the foregoing position, it is now appropriate to determine whether or not the Defendant/Applicant herein constitutes the Government, part of the government or Department of the government, so as to warrant same be bound by the *Government Proceedings Act*, Chapter 40 Laws of Kenya.

55. To my mind, the Defendant/Applicant herein is a State Corporation, duly established and created pursuant to an Act of Parliament, namely, *Kenya Airports Authority Act* and wherein the Defendant/Applicant is constituted as a body corporate with perpetual succession.

56. On the other hand, it is imperative to note that the Defendant/Applicant herein is an autonomous, Corporate and Statutory body imbued with the requisite legal capacity and/or power to sue and/or be sued in her own name.

57. Essentially, the Defendant/Applicant herein does not comprise of and/or constitute the government and or department of the government, either in the manner adverted to by counsel of the Defendant/Applicant or at all.

58. On the other hand, it is my finding and holding that the provisions of the *Government Proceedings Act*, Chapter 40 Laws of Kenya, as well as the Provisions of Order 10 Rule 8 of the *Civil Procedure rules* 2010, do not apply to the Defendant/Applicant or at all.

59. With respect, the contention by counsel for the Defendant/Applicant that the Defendant/Applicant constituted government and is thus affected by the provisions of the *Government proceedings Act* is therefore not only fallacious and misconceived, but wholly erroneous.

60. Be that as it may, the issues that I have adverted to hereinbefore are not novel and in any event, same have previously attracted judicial attention and pronouncement in various Decisions of Courts of Competent Jurisdiction.

61. To vindicate the foregoing, it is appropriate to take cognizance of the decision in the case of in *Kenya Revenue Authority v Habimana Sued Hemed & another* [2015] eKLR

> " There are three arms of Government, and they are clearly defined and recognized universally over the ages. We do not need to redefine them here. Kenya Revenue Authority collects taxes for the Government, and they do a good job of it. It is nonetheless an autonomous, corporate, statutory body specifically with power to sue and be sued. The appellant cannot hide behind the cloak of the Attorney General when it is accused of breaching the law or otherwise violating people's rights purely in order to take advantage of the 30 days statutory notice!
>
> It would be ridiculous, nay, fallacious even, for one to imagine that KRA would be immunized, or shielded by the law against issuance of injunctive orders against it, even where such orders are merited and may be necessary for preservation of property, and protection of peoples' fundamental rights as happens many times.
>
> We cite with approval the words of Mbogholi Msagha J in Gurdoba Enterprises Limited vs Kenya Revenue Authority (civil case No. 676 of 1998), where he opined that;
>
> "Kenya Revenue Authority ...must submit itself to the rigors of litigation and stop operating under the shadow of the Government when it comes to legal proceedings."
>
> Ojwang J (as he then was) faced with a similar situation in Menginya Salim Murgani vs Kenya Revenue Authority, HCCC No. 1139 of 2002) was of similar persuasion when he stated in reference to the appellant:
>
> "the body parliament intended was a responsible and accountable one, empowered to discharge its legal obligations without resorting to reserved privilege when obligations fall upon it".
>
> These two decisions, together with Osiemo J's impugned decision, though coming from the High Court are good law, which we hereby endorse."

62. Other than the foregoing decision, a similar contention was also considered and addressed vide the decision in the case of *Bob Thompson Dickens Ngobi v Kenya Ports Authority & others* [2017] eKLR, where the Court equally found Kenya Airports Authority to be disqualified from the definition of a government department under the *Government Proceedings Act*. The Court found thus:

> " Even though the decision was strictly rendered with regard to the provisions of the Kenya Revenue Authority, I consider the 1st and the 3rd defendants to be created in the like manner, by acts of parliament and both have been given legal personally in that they are capable of suing and being sued independent of the office of the Attorney General.
>
> Infact the two statutes creating the two defendants are explicit. That the two run as distinct corporates not as government department. I take notice that both recruit their personnel including the legal personnel independent of the office of the Attorney General whose involvement is limited to representation in the board of directors."

63. In view of the foregoing, it is therefore safe and sound to find and hold that the Defendant/Applicant herein is a body corporate with perpetual succession and common seal and hence same is a Corporate entity, which subsists independent and separate from the government.

64. Notwithstanding the foregoing, it is also appropriate to state that the nature of claims which were sought at the foot of the Plaint dated the February 12, 2021, were such that no interlocutory Judgment could have been entered and/or endorsed against the Defendant/Applicant even in the event of default. For clarity, there was no liquidated and/or pecuniary claim that was sought for, to warrant entry of interlocutory Judgment.

65. Be that as it may, though a request for entry of interlocutory Judgment was made by the Plaintiff/ Respondent same was declined by the court vide orders made on the May 26, 2021, where the court was explicit, in declining to enter and/or endorse the request for interlocutory Judgment.

Issue Number 2

Whether the Applicant has shown any sufficient cause and/or reasonable Explanation for the failure to enter appearance and file Defense.

66. The Defendant/Applicant herein has contended and/or averred that the failure to enter appearance and/or file Statement of Defense was caused by inadvertent bureaucratic delay and/or oversight on her part.

67. Nevertheless, despite adverting to and/or alleging the inadvertent and bureaucratic delay and oversight, the Defendant/Applicant has however been unable to break down and elucidate the components of what constitutes the bureaucratic delay or oversight.

68. On the other hand, the Defendant/Applicant has also not explained, why the purported bureaucratic delay and/or oversight spurned a duration of more than 14 months, reckoned from March 19, 2021, when the Summons to enter appearance and Plaint were duly served on same.

69. On the other hand, it is worthy to note that other than the Summons to enter appearance and Plaint, the Defendant/Applicant was also served with various court processes, inter alia the Decree of the court issued on the December 21, 2021.

70. Nevertheless, it is evident, apparent and/or obvious that the Defendant/Applicant herein was never diligent in attending to and/or addressing the issues pertaining to the subject matter.

71. To my mind, the conduct exhibited and/or displayed by the Defendant/Applicant herein is one that ought to be frowned upon and/or discouraged. For clarity, the conduct exhibited by the Defendant/ Applicant offends the Provision of Articles 10 and 232 of *the Constitution* of Kenya 2010, which provisions underscores the principles and values of governance as well as the principles and values of Public service.

72. However, the question that does arise is whether the slovenliness and/or lethargy of the Defendant/ Applicant should attract discipline and/or punishment by shutting the Door of Justice on the Defendant/Applicant.

73. Suffice it to note, that Courts of law do not exist for purposes of meting out punishment and/or discipline to the offending Parties, the Defendant/ Applicant, not excepted.

74. Contrarily, Courts of law are the bastion of justice and hence same are called upon to prosper the Rule of law and ensure that Justice is served on all the Parties and where appropriate, to endeavor to determine Disputes on merits.

75. To buttress the foregoing position, it is worthy to take cognizance of the decision in the case of *Philip Keiptoo Chemwolo & Another v Augustine Kubende* (1986) eKLR, where the Court observed as hereunder;

I think a distinguished equity judge has said:

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."
>
> I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline. In this case, the appellants offered to pay the costs. The respondent will not agree.

76. Other than the foregoing decision, it is also worthy to re-visit the holding of the Court in the case of *Belinda Murai & 9 Others versus Amos Wainaina* (1979)eKLR, where the Court stated as hereunder;

> A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule. It is also not unknown for a final court of appeal to reverse itself when wisdom accumulated over the course of the years since the decision was delivered so requires. It is all done in the interests of justice. A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress.

77. Based on the jurisprudence flowing from the forgoing decisions, I am compelled, despite the detestable conduct by the Defendant/Applicant, to refrain from exacting punishment and/or discipline on the Defendant/Applicant merely on the mistake or blunders committed by same.

Issue Number 3

Whether the Defendant/Applicant has a triable Defense worthy of interrogation/investigation by the court during the Plenary Hearing.

78. The dispute at the center of the case herein relates to the property, known as L.R No. 90/42/617, which the Plaintiff/Respondent claims to belong to and registered in her name. In this regard, the Plaintiff/Respondent, has impleaded the right to ownership as envisioned under the provisions Sections 24 and 25 of the *Land Registration Act*.

79. On the other hand, the Defendant/Applicant contends that what comprises the suit property is actually Public land, falling within the Jomo Kenyatta International Airport and which in any event, has been fenced by the Defendant/Applicant.

80. Besides, the Defendant/Applicant has further contended that what comprises the suit property was illegally excised from the land belonging to and vested in the Authority vide Legal Notice No. 201 of June 7, 1994.

81. Essentially, the Defendant/Applicant has thus challenged the propriety and/or validity of the Plaintiff's/Respondent's title to and in respect of the suit property and seeks to have the validity of the Plaintiff/Respondent title, addressed, reviewed and determined by the court.

82. Simply put, the issues which the Defendant/Applicant, wishes to raise before the court indeed espouse/ connote genuine bona fide and triable issues, which can only be investigated during a Plenary hearing.

83. As to what constitutes a Triable issue, it is imperative to take cognizance of the decision in the case of Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76, Sir William Duffus P held:

> " 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 it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

Issue Number 4

Whether the Defendant/Applicant is entitled to the discretion of the Court.

84. Having found and held that the Defendant/Applicant herein has displayed and/or exhibited a triable Defense, which raises *Bona fide* triable issues, the question that remain outstanding is whether same ought to benefit from the discretion of the court.

85. To be able to answer the question raised in the preceding paragraph, it is appropriate to consider the nature and extent of the discretion of the court and the purpose for which the discretion was donated to the court.

86. In this regard, there is no better answer than the remarks of the Court of Appeal in the case of Patel V E.a. Cargo Handling Services Limited (1974) E.a.75, this Court held as follows:

> "There are no limits or restrictions on the judge's discretion 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 condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

87. Other than the oft-cited words which were espoused in the foregoing decision, the extent, scope and tenor of the courts discretion while dealing with setting aside and/or variation of a default Judgment, was also re-visited in the case of *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR; where the Court of Appeal pronounced itself thus:

> " The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties."

88. In a nutshell, I find and hold that a refusal to set aside the default Judgment herein, will inflict and/or occasion grave Injustice and hardship on the Defendant/Applicant and particularly, that the Defendant/Applicant would be deprived of the opportunity to contest the registration of the suit property in the name of the Plaintiff/Respondent.

89. In any event, a refusal to set aside the default Judgment, despite the contention that the suit property falls within the Jomo Kenyatta international Airport and is thus Public land, may be tantamount to vindicating (sic) what may appear to be illegal alienation of Public land. In the premises, I am minded to exercise discretion in favor of the Defendant/Applicant.

Final Disposition:

90. Having addressed and/or dealt with the issues that were outlined for determination, it must have become obvious that thus court is inclined to set aside and/or vary the default Judgment.

91. However, what remains outstanding is a considerations of the terms upon which the default Judgment ought to be set by the court, in exercise of the discretion to set aside the default judgment, taking into account that the impugned Judgment was a regular judgment.

92. Consequently and in the premises, the orders that commend themselves to me are as hereunder;

    a. The Application dated the May 19, 2022 be and is hereby allowed.

    b. The Default Judgment dated the November 11, 2021 and the resultant Decree be and are hereby set aside.

    c. The Defendant/Applicant be and is hereby granted Leave to enter appearance and file Statement of Defense and same to be filed and served within 21 days from the date hereof.

    d. The Plaintiff/Respondent be and is hereby granted liberty to file Reply to Defense, if any and same to be filed and served within 21 days from the date of service of Statement of Defense.

e. The Parties herein do file their respective Bundle of documents and same to be filed and exchange within 14 days from close of pleadings.

f. Thrown away costs assessed and certified in the sum of kes.50, 000/= only be and are hereby awarded to the Plaintiff/Respondent and same to be paid with 14 days hereof and in default the Plaintiff/Respondent be at liberty to execute.

93. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2022.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Kevin Court Assistant

Mr. Isaac Renee for the Plaintiff/ Respondent.

Mr. Allan Kamau for the Defendant/ Applicant.