



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

BETWEEN

REPUBLIC.....APPLICANT

AND

THE CHIEF LAND REGISTRAR.....1ST
RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

AND

DOMINIC NGARE.....1ST INTERESTED PARTY

MARGARET WAMBUI KENYATTA.....2ND INTERESTED
PARTY

NANCY MUGECHI NGARE.....3RD INTERESTED PARTY

JAMES MACHARIA GICHUKI.....4TH INTERESTED PARTY

CECILIA WANJIRU NGATIA.....5TH INTERESTED PARTY

PETER MUCHIRI NGATIA.....6TH INTERESTED PARTY

THERESIA WAIRIMU NGATIA.....7TH INTERESTED PARTY

KAGIRI NDIRANGU.....8TH INTERESTED PARTY

EX-PARTE

JAMES NJOROGE NJUGUNA

RULING

Introduction and background

1. Before I proceed to consider the substance of the applications to set aside judgment it is important to set out the facts leading up to the dispute between the parties. The subject matter is a parcel of land **LR No. 11916/2** and the case revolves around a chain of transfers of the subdivisions from the original piece

of land to the interested parties herein.

2. Joseph Njuguna Njoroge (deceased) was the father of the *ex parte* applicant, James Njoroge Njuguna, and the sole proprietor of the parcel registered as **LR No. 11916/2** comprising 24.815 hectares situated in Karen, Nairobi. Joseph Njuguna Njoroge died on the 21st April, 1980. The deceased was married to Felistas Wanjiru and had three sons namely; James Njoroge Njuguna, the ex-parte applicant, Paul Waweru Njuguna and Ephraim Njoroge Njuguna.

3. In the statement supporting the application for judicial review, the ex-parte applicant states that in December 1986 his mother, Felistas Wanjiru, unlawfully and fraudulently caused a half-portion of the suit premises **LR No. 11916/2** to be transferred to her name in such a manner as to create a joint tenancy between her and her deceased husband. The land was then registered as **LR No. 11916/3** measuring 5.394 hectares.

4. According to the material before the court, after registration of **LR No. 11916/3**, Felistas Wanjiru further subdivided it into four portions, namely **LR No's 11916/16, 11916/17, 11916/18 and 11916/19** measuring 1.226, 1.715, 1.214 and 1.239 hectares respectively. On diverse dates between March 1987 and January 1993 she transferred the plots as follows; **LR No. 11916/16** was transferred to the 1st and 3rd interested parties; Dominic Ngare and Nancy Mugechi Ngare for valuable consideration, **LR No. 11916/17** was sold to James Gichuki, the 4th interested party who later sold it to Kagiri Ndirangu, the 8th interested party, **LR No. 11916/18** was sold to Margaret Kenyatta, the 2nd interested party who later sold it to Mr and Mrs Ngatia, the 6th and 7th interested parties and **LR No. 11916/19** was transferred to Cecilia Wanjiru Waweru, the 5th interested party who later sold it to Mr and Mrs Ngatia, the 6th and 7th interested parties.

5. Apart from the above **LR No. 11916/3**, the deceased had subdivided **LR No. 11916/2** into five plots No. 4, 5, 6, 7 and 8. **Plot No. 4** was sold to W. B. Mukuria, **Plot No. 7** was sold to E.N. Kimwaki and J.K. Kimwaki. **Plots 5, 6 and 8** were given to the three sons. These plots were not registered but were subdivided and sold by the sons as follows; James Njoroge Njuguna sold **LR No. 11916/14** to Margaret Kenyatta and **LR No. 11916/13** to Gabriel Kiarie and Eliud Gitumbi; Paul Waweru Njuguna sold **LR No. 11916/9** to Patrick John Kamau and **LR No. 11916/12** to Margaret Kenyatta and P.J. Kamau and Ephraim Njoroge Njuguna sold **LR No. 11916/11** to Margaret Kenyatta and kept **LR No. 11916/10** for himself.

6. Since 1993, there has been a protracted litigation between James Njuguna, Felistus Wanjiru and some of the interested parties in relation to subdivision of **LR 11916/3** through various civil suits in which the *ex-parte* applicant was a plaintiff namely, **Nbi HCCC No. 5507 of 1993, Nbi HCCC No. 810 of 2004 and Nbi Misc Application 381 of 2004**. In those suits, the *ex parte* applicant claimed that his mother had fraudulently registered herself as the proprietor of the piece of land and that the purported transfer by his late father to his wife was illegal and fraudulent since there was concealment of material facts and misrepresentation and that there was absence of the Land Control Board's consent prior to the transactions. However, these proceedings were either withdrawn or dismissed. It is instructive to note that **HCCC No. 5507 of 1993** was withdrawn unconditionally upon receipt of the sum of Kshs. 100,000.00 paid to James Njuguna in full and final settlement.

The Judicial Review Application

7. James Njuguna filed the application for judicial review on the basis that he was the legal representative of the estate of his father having obtained a grant of letters of administration ad litem issued on 15th January 2004 in **Nairobi P & A Cause No. 69 of 2004**. By the Notice of Motion dated 12th April 2007 he moved the court where he sought the following orders;

(1) *That orders of mandamus be issued compelling the respondents herein to cancel all entries and dealings made in the register pertaining to L R No. 11916/2 after the death of JOSEPH NJUGUNA NJOROGE the ex parte applicants' deceased father.*

(2) That further in the alternative the Honourable Court be pleased to issue orders of certiorari to remove to this Honourable Court for purposes of quashing all entries and fraudulent dealings made in the register pertaining to LR No. 11916/2 after the death of JOSEPH NJUGUNA NJOROGÉ the ex-parte applicant's deceased father.

(3) That the respondents do bear the costs of the suit.

8. It was his case that Felistus Wanjiru, without his knowledge or consent unlawfully and fraudulently transferred **LR No. 11916/2** to her name thereby creating **LR No. 11916/3** which was registered by the respondent in her favour. He also alleged that the transfer was a forgery having been executed by his deceased father six years after his death and in the circumstances the parties who obtained title through her could not obtain good title.

9. The matter was heard by Hon. Justice Mbogholi Msagha and in a judgment delivered on **26th October 2010**, he granted the prerogative orders of *certiorari* and *mandamus* as prayed. The result was that all entries made after the deceased death effecting transfers of the subdivisions of **L.R. No. 11916/2** were cancelled on the basis that without a confirmed grant Felsitus Wanjiru could not obtain good title and could therefore not pass good titles to the interested parties.

10. There are now two applications before me seeking to set aside orders issued by the Hon. Justice Mbogholi Msagha on 26th October 2010. The applications are opposed by the *ex-parte* applicant.

The first application

11. The first application is a Notice of Motion filed by the 4th interested party, James Macharia Gichuki dated 22nd March 2011 and filed on the same date. It seeks an order that the **“judgment dated 26th October 2010 herein, the Decree and Orders made pursuant to the judgment be set aside.”** The application is supported by the two affidavits of James Macharia Gichuki sworn on 22nd March 2011 and the affidavit of Mohamed Akram Khan sworn on 22nd March 2011.

12. The principal ground of the application is that the *ex-parte* applicant did not serve the 4th interested party with his Notice of Motion. The applicant contends that the claim by Mr Peter Ngoge, Advocate, to have served the 4th interested party at Norwich House is untrue as the applicant has never had any office or business at the said premises.

13. The 4th interested party also states that he has a good defence to the *ex-parte* applicant's claims and had he been served with the motion, he would have adduced evidence that would have resulted in the dismissal of the *ex-parte* applicant's motion. Among the grounds proffered are that the *ex-parte* applicant is not the personal representative of the estate of his father as Joseph Njuguna Njoroge left a valid will in which the only executors were the deceased's late wife Felista Wanjiru and Mr Mohamed Akram Khan, an advocate.

14. The applicant also contends that the *ex-parte* applicant's motion is based on the allegation that his late mother ‘disinherited him’ when she transferred the property bequeathed to her to the 4th interested party and others when contrary to his allegation, the *ex-parte* applicant in fact inherited **LR No's 11916/13 and 14** which he subsequently sold to Gabriel Kiarie and Eliud Gitumbi and Margaret Wambui Kenyatta and whose transfers were registered after the death of his father.

15. Based on these and other grounds the applicant seeks this court's order to set aside the judgment.

The second application

16. The second application is the Notice of Motion filed on behalf of the 6th and 7th interested parties, Therese Wairimu Ngatia and Peter Muchiri Ngatia and it seeks orders that, **“this court be pleased to set**

aside the judgment delivered on 26th October 2010 and the decree and orders made pursuant to the judgment.”

17. The application is supported by the affidavit of Therese Wairimu Ngatia sworn on 28th March 2011 and that of Peter Muchiri Ngatia sworn on 28th March 2011. There is also a supplementary affidavit sworn by Therese Wairimu Ngatia sworn on 3rd May 2012. The grounds on which the application is founded are set out on the face of the application and can now be summarised.

18. The 6th and 7th interested parties aver that they were not served with the Notice of Motion filed in court on 12th April 2007. They also aver that if the application was served they would have substantial defences to the *ex-parte* applicant's claim. They aver that they are the absolute and indefeasible owners of **LR 11916/18** and **19** and their title cannot be challenged except on ground of fraud or misrepresentation to which they are proved to have been party.

19. The applicants also contend that the *ex-parte* applicant did not have the legal capacity to file these proceedings on behalf of his father's estate because he was neither the executor nor administrator of the estate as his father. Joseph Njuguna Njoroge, had left a will in which he had appointed his advocate Mr M A Khan and his wife Felista Wanjiru as the joint executors and trustees of his estate.

20. The applicants also assert that the *ex-parte* applicant's motion is legally incompetent because it sought to "cancel all the entries made in the register of **LR No. 11916/2** after the death of his father" which entries include the six transfers registered from July 1981 to April 1984 in respect of LR 11916/9, 10, 11, 12, 13, and 14 and because those parcels were not subdivisions of **LR 11916/3** and have nothing to do with the fraud alleged against this mother, the orders given by the court are nullity and should be set aside *ex debito justitiae*.

21. On the whole the applicants submit that the judgment of 26th October 2010 was obtained through a calculated and deliberate misrepresentation and fraudulent concealment of material facts.

Issues for Determination

22. Before I proceed to consider the response filed by the *ex-parte* applicant, I think it important to put this matter in perspective. The applicants raise several issues which go to the merits of the Notice of Motion that was determined by Hon. Justice Mbogholi in his judgment. Some of the issues raised were in fact determined by the learned judge and which if I were to make a determination would amount to sitting on appeal on a decision from a judge with concurrent jurisdiction.

23. The applications before the court relate to setting aside proceedings primarily on the ground of lack of service. If I am satisfied that I have jurisdiction then I will consider the application and if I set aside the orders of the learned judge then the *ex-parte* applicant would be entitled to urge his application afresh in light of the responses proffered by the interested parties. I take the position that it would be improper for me to make specific findings on matters which may well be the subject of full determination at a later stage. My conclusion is that the issue of jurisdiction and service of the motion for judicial review are decisive in the matter and those are the issues I will deal with.

24. I would also like to state that the parties have filed substantial submissions and authorities which have been very illuminating. Nevertheless I think the issues for consideration are rather narrow and I will confine myself to what is strictly necessary to determine the dispute between the parties in relation to the application before me. In the circumstances I think that there are only two issues for consideration;

(a) Whether this court has jurisdiction to set aside the orders of Justice Mbogholi Msagha given on 26th October 2010.

(b) If so, whether the court should set aside the orders on the grounds of lack of service of the motion.

Jurisdiction

25. The *ex-parte* applicant raised a preliminary objection to the applications on the basis that this court lacks jurisdiction to review, stay, set aside, quash or block execution of the prerogative orders of *certiorari* and *mandamus* granted on 26th October 2010.

26. Mr Ngoge, counsel for the *ex-parte* applicant, submitted that this court cannot set aside the prerogative orders issued by the court on 26th October 2010 in all situations because the only remedy provided under **section 8(3) and (5)** of the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** for an aggrieved party is to appeal against the order. **Section 8(3)** provides as follows;

No return shall be made to any such order and no pleadings in prohibition shall be allowed but the order shall be final subject to the Right of Appeal therefrom conferred by sub-section (5) of this section.

Section 8(5) of the Act reads as follows;

Any person aggrieved by an order made in exercised of the Civil Jurisdiction of the High Court under this section may appeal therefrom to the Court of Appeal.

27. Mr Ngoge relied on the decision in ***Kuria Mbae v The Land Adjudication Officer – Chuka and Another Nairobi HC Misc. Appl. No. 257 of 1983*** where the Court (Mbito and Mango JJ) observed that, “*There is no doubt or dispute that a party aggrieved by the decisions of this court in granting or refusing an order of certiorari is entitled to appeal to the Court of Appeal. However, according to section 8(3) of the Act, this court’s order on such application is final and cannot be subject of pleadings or prohibition. There is also no provision in the said Act or any other law making such a prerogative order of this court subject to the usual pleadings available in proceedings under the Civil Procedure Act.*” Their lordships based their decision on the fact that the ***Law Reform Act*** provided a complete code for judicial review matters and since there was no provision for setting aside prerogative orders granted by the court, the court lacked jurisdiction.

28. Mr Ngoge also relied on the case of ***Republic v Municipal Council of Mombasa and Others ex-parte Adopt-A-Light Limited Nairobi CA Civil Appl. No. 15 of 2007 (Unreported) [2008] eKLR*** for the proposition that prerogative orders were final in nature and this court lacks jurisdiction to set them aside. In that case the Court of Appeal declined an order of stay under **rule 5(2)(b)** of the ***Court of Appeal Rules*** on the grounds that issuing a stay would have the effect of setting aside the orders. The Court observed, “*Furthermore, the order of certiorari granted by the superior court quashing the resolutions of the Council and the Agreement is final and conclusive and took effect immediately. If the application is allowed the effect would be to reverse the decision of the superior court and legalise the resolution and the contract already nullified until the determination of the appeal. This Court has no jurisdiction at this stage to undo what the superior court has done. It can only reverse the order of certiorari upon the hearing of the appeal.*” [Emphasis mine]

29. I take the position that the case cited is not authority for the proposition that the High Court lacks jurisdiction to set aside prerogative orders but rather as I have quoted, the Court of Appeal was dealing with an application for stay pending appeal and its decision should be read as deciding that the Court of Appeal will only reverse an order of *certiorari* upon hearing the appeal. The case is therefore not applicable to the circumstances of this case as an application to set aside judgment is not interlocutory or interim in nature, its effect is final and after the judgment has been set aside, the matter is to be reheard afresh. My view is fortified by the decision in the case of ***Republic v Public Procurement Administrative Review Board ex-parte Kenya Electricity Generating Company Limited CA Civil Appl. No. 63 of 2010 (Unreported) [2010] eKLR*** where the Court of Appeal noted that, “[F]rom its nature, an order of *certiorari* cannot be stayed pending appeal by interlocutory proceedings. Rather it can only be set aside in the appeal itself.”

30. I also take a contrary from their lordships in the ***Kuria Mbae case (Supra)*** for several reasons. First, **section 8(3) and (5)** of the ***Law Reform Act*** does not specifically exclude either the inherent power of the

court to do justice and prevent an abuse of its process. Secondly, Order 53 rule 2 of the **Civil Procedure Rules** which gives practical effect to prerogative orders requires that all persons directly affected be served with the motion. In the event a party is not served, is the court to remain powerless to act? In my view, the rules of natural justice are so well entrenched in our jurisprudence and cannot be ignored. Apart from their constitutional underpinnings, various decisions of our courts are testimony to this position. Thirdly, the applications before the court seek to set aside proceedings for want of service. I do not think that the law intended the Court of Appeal to exercise original jurisdiction to set aside what are in essence *ex-parte* proceedings. The jurisdiction of the appellate court is to hear appeals from the High Court and not applications for aside *ex-parte* proceedings.

31. The court exercising judicial review jurisdiction has inherent jurisdiction to set aside a judgment wrongly entered. (See generally **Magon v Ottoman Bank [1967] EA 609**, **Mulira v Dass [1971] EA 227**, **Ali Bin Khamis v Salim Kirobe [1956] EACA 1956**). I would also adopt the words of Justice Nyamu in **Kenya Bus Service Ltd and Others v Attorney General and the Minister for Transport and Others Nairobi HC Misc 413 of 2005** where he stated that, “Where there is no specific provision to set aside, the courts power or jurisdiction would spring from inherent powers of the court. Whereas ordinary jurisdiction stems from Acts of Parliament or statutes, the inherent powers stem from the character and the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations.”

32. The courts have not remained powerless and in many cases have acted to do justice to parties. In the case of **Republic v Registrar of Titles and Another ex parte Saida Twahir Mohamed Hatimy Mombasa HC Misc. Appl. No. 46 of 2005 (Unreported) [2005] eKLR** the court dealt with the issue of the effect of non-service. Justice Mwera stated that, “the duty is on the applicant to serve such affected parties if the applicant omits or fails to serve such persons directly affected, then, they are entitled to come before the court and seek that the orders obtained without due service be set aside as being a nullity.”

33. On the basis of what I have stated I am satisfied that I have jurisdiction to hear and determine this matter and the *ex-parte* applicant’s preliminary objection lacks merit.

Whether the applicants were served

Service generally

34. I now turn to the second issue framed for determination which concerns the service of process. Service is an integral part of the rules of natural justice. In the case of **Republic v Vice Chancellor Jomo Kenyatta University of Agriculture and Technology Nairobi HC Misc Civil Appl. 30 of 2007 (Unreported) [2008] eKLR**, the court observed that, “The rules of natural justice dictate that a party should not be condemned unheard. Where the principles of natural justice have been breached, the Court will readily grant an order of certiorari to quash any such decision arrived at in disregard of such principles.”

35. Without belabouring the point, it is now well established where orders are obtained in breach of the rules of natural justice such orders cannot survive judicial scrutiny. The principle was clearly stated in **Craig v Kanseen [1943] 1 All ER 108, 113** where Greene MR stated, “The cases appear to me to establish that an order which can be properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that an appeal from the order is not necessary. In my opinion, it is beyond question that failure to serve process where the service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex-parte* proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it, is one which has never adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument that cannot be sustained.” These sentiments represent the law in Kenya and were approved by the Court of Appeal in the case of **Provincial Insurance Co., of East Africa v Mordecai Nandwa Kisumu Civil Appeal No. 179 of 1995 (Unreported)**.

36. In ***Omega Enterprises (K) Limited v KTDA and Others Nairobi Civil Appeal No. 59 of 1993 (Unreported)***, the Court of Appeal in setting aside an injunction order made ex-parte stated, “Hence the order of the superior court was illegal, invalid, void and of no effect , and the confirmation of an irregular ex parte injunction order ... without the appellant being given the opportunity to be heard was clearly in breach of the rules of natural justice and attracts ex debito justitiae the right to have it set aside.’

37. It is therefore not in doubt that this court has jurisdiction not only to set aside ex-parte proceedings but to do so *ex-debito justitiae* where there has been no service of a party directly affected by the order.

4th interested party

38. The 4th interested party, James Macharia Gichuki, purchased LR No. 11916/17 from Felista Wanjiru in 1987 and later sold it to Dr Kagiri Ndirangu (deceased) in 1992. He states that he came to learn of the judgment from the deceased widow who informed him that there was a problem with the property that had been sold to her deceased husband.

39. In the affidavit of service sworn by Peter O. Ngoge on 2nd October 2007, he states as follows in respect of service upon the 4th respondent;

[7] THAT on 26th July 2007 at about 3.00 pm in the afternoon I proceeded to Norwich House Nairobi to effect service of process mentioned herein upon Mr James Macharia Gichuhi whose officers were located on 2nd floor.

[8] THAT Mr James Macharia Gichuhi was pointed to me by the ex-parte applicant who accompanied me to his office.

[9] THAT Mr James Macharia who is the 4th interested party herein acknowledged service by writing his name and ascribing his signature at the back of my original copies returned hereto as served.

40. The 4th interested party has denied all the allegations of service on the ground that he is a retired surveyor who had worked with the City Council of Nairobi. He deponed that and he did not have any office or business at Norwich House as alleged or indeed at any other time. He also denied service by Mr Ngoge as alleged or that he ascribed his signature on the documents.

41. In the replying affidavit sworn on 4th April 2011 and filed on 5th April 2011, James Njuguna Njoroge, reiterates that the 4th interested party was served by Mr Ngoge as alleged. The ex-parte applicant goes further to question why the 4th interested party did not explain to the court why the widow of the late Dr Kagiri Ndirangu, who was represented throughout the proceedings, did not inform him of the ongoing proceedings. He also questions why the Dr Kagiri’s widow could not notify the court to order the 4th interested party to participate in the proceedings.

42. In my view, the issue can be dealt with easily as the assertions by the 4th respondent have not been controverted. The *ex-parte* applicant did not deal with the issue of whether Mr Gichuki had any office in Norwich House leaving the lingering question how the 4th interested party could have been served court process at a non-existent office. I am therefore left to conclude that the 4th interested party was not served and it is on this basis that I allow the fourth respondent’s application.

43. I also hold that the duty cast upon the *ex-parte* is to serve all the parties directly affected. This duty is not discharged merely on the ground that the parties would have received information about the suit from another party as argued by the *ex-parte* applicant.

6th and 7th interested parties

44. In relation to the 6th and 7th interested parties, Mr Ngoge depones as follows in the affidavit of service sworn on 2nd October 2007;

[10] THAT on the 8th August 2007 at about 3.00 pm I proceeded to the AMREF offices and effected service of court documents mentioned above on the 6th and 7th interested parties hereto Mr Peter Muchiri Ngatia and Ms Theresia Wairimu Ngatia but declined to sign and stamp at the back of my original copies citing no reasons at all.

[11] THAT Peter Muchiri Ngatia and Teresia Wairimu Ngatia were pointed out to me by the ex-parte applicant hereto and I believe that service effected in accordance with order V of the Civil Procedure Rules.

45. The affidavit of service is clearly inadequate in that it did not state how the Mr Ngoge identified the 6th and 7th respondents or set out the circumstances under which the parties were served. James Njoroge Njuguna, in his affidavit sworn on 4th April 2011 and filed on 5th April 2011 merely depones at paragraph 4 that he was present when the 6th and 7th interested parties were served and he was the one who pointed out the parties to Mr Ngoge.

46. In response to the allegations of service, Mr and Mrs Ngatia have sworn detailed depositions explaining why it is not possible that they could have been served. In their affidavits sworn on 1st March 2011, Mr and Mrs Ngatia explain in detail that they reside at their matrimonial home in Lavington but they work in different areas in Nairobi. Mr Ngatia works at AMREF which is along Langata Road while Mrs Ngatia works at the American Embassy which is at Gigiri. They explain that every morning that the two of them drive to work separately and spend their day at work until evening. It is their case that it is unlikely that they would have been served together at the AMREF offices particularly because there is no reason why she would have been there. It is also the interested parties' case that the security arrangements at AMREF are such that there would have been a record of Mr Ngoge and the *ex-parte* applicant visiting the AMREF premises.

47. The applicants also aver that there has been a lot of litigation between the *ex-parte* applicant, his mother and the interested parties and in which they have participated. In their view, it would be unlikely that they would refuse to participate in proceedings concerning the suit properties had they been served as alleged.

48. The interested parties' depositions are not contested by Mr Ngoge or the *ex-parte* applicant. Mr Ngoge in his replying affidavit of 5th April 2011 states at paragraph 17 that, "*I want to deny each and all singular malicious allegations (sic) of the 6th and 7th interested parties made against me to the effect that they were not served with the ex-parte notice of motion ...*" Clearly such an averment does not assist the *ex-parte* applicant's case.

49. Apart from the bare and bland denial of both Mr Ngoge and the *ex-parte* applicant, the detailed evidence by the 6th and 7th interested parties is not contradicted in any manner and I must therefore make a finding in their favour that they were not served with the Notice of Motion filed on 12th April 2007 in this matter.

Conclusions

50. Even if I were wrong on the ground of service of the applicants, I would nevertheless still set aside the judgment for the reason that when the *ex-parte* applicant moved the court he sought the, "*Cancellation of all entries made in the register of LR No. 11916/2 after the death of his father.*" These parcels include **LR Nos. 11916/9, 10, 11, 12, 13 and 14** which are not sub-divisions of **LR No. 11916/3** and which have nothing to do with the fraud allegedly committed by the *ex-parte* applicant's mother and which fraud forms the basis of the suit. The effect of the order was to disentitle Gabriel Kiarie and Eliud Gitumbi, Estate of P. J. Kamau and Ephraim Njoroge Njuguna of their properties without affording them

a hearing. There is also evidence that the representative of the 5th interested party, who is deceased, were not served with legal process.

51. Having come to the conclusion that the 4th, 6th and 7th respondents were not served with the Notice of Motion filed on 12th April 2007, it follows that the judgment of Hon. Justice Mbogholi Msagha must be set aside. I therefore make the following orders;

- (a) The 4th interested parties' Notice of Motion dated 22nd March 2011 is allowed with costs to the applicants.
- (b) The 6th and 7th interested parties Notice of Motion dated 28th March 2011 is allowed with costs to applicants.
- (c) The judgment dated 26th October 2010 be and is hereby set aside.

DATED and DELIVERED at NAIROBI this 28th day of September 2012

D.S. MAJANJA

JUDGE

Mr O. P. Ngoge instructed by O P Ngoge and Associates Advocates for the ex-parte applicant

Mr E. Bitta, Senior Litigation Counsel, instructed by the State Law Office for the respondents.

Mr R. Raiji instructed by Riunga Raiji and Company Advocates for the 4th and 8th interested parties.

Mr T. Moya instructed by Waweru Gatonye and Company Advocates for the 2nd interested party.

Mr K. Mubea instructed by Kimondo Mubea and Company Advocates for the 1st and 3rd interested parties

Mr M. Murage instructed by Maina Murage and Company Advocates for the 6th and 7th interested parties.