Mburu & 2 others v Kariuki (Suing as the Administrator of estate of Primus Oloo Obwayo) (Environment and Land Appeal 1 of 2021) [2022] KEELC 4736 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEELC 4736 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL 1 OF 2021

LN GACHERU, J

JULY 27, 2022

BETWEEN

CHARLES MWANGI MBURU .... 1ST APPELLANT

PAUL WAITHAKA MBURU .... 2ND APPELLANT

GERALD MACHARIA MUGUCHU .... 3RD APPELLANT

AND

PETER NDUNGU KARIUKI .... RESPONDENT

SUING AS THE ADMINISTRATOR OF ESTATE OF PRIMUS OLOO OBWAYO

(Being an Appeal from Ruling and Order of Hon. Atiang Mitullah of 31 st December 2020, in Murang'a CMCC No. 246 of 2013)

JUDGMENT

1. The Respondent herein Peter Ndung'u Kariuki, was the Plaintiff in Murang'a Civil Case No 246 of 2013, wherein he sued the Appellants herein Charles Mwangi Mburu, Paul Waithaka Mburu and Gerald Macharia Muguchu, as Defendants and sought for the following orders;

   a) A Permanent Injunction to restrain the Defendants from trespassing, constructing or attempting to develop any of the two parcels of land, Makuyu/Karia-ini Block 3/19, and Makuyu/Karia-ini Block 3/64, or in any other manner dealing whatsoever with the said land.

   b) Costs of the suit and interest thereon at Court's rate.

   c) Any such other relief as this Honourable Court may deem just and fit to grant.

2. The Respondent who was the Plaintiff in the said suit had alleged that he is the Administrator of the estate of Primus Oloo Abwayo(deceased), who was the registered owner of the two parcels of land being Makuyu/Kariaini Block 3/19, and 3/64, (herein referred to as the suit property). He had also

averred that in the year 1988, the deceased was allotted one parcel of land measuring about 6 acres by Marema Farmers Cooperative Society Ltd, and after 2 years, the Society issued the members with title deeds, but the deceased Primus Oloo Abwayo, was not around to follow up his title deed, since he was at that time living in Siaya District after his retirement from Kakuzi Ltd.

3. Further that in the year 2006, two years after the death of Primus Oloo Abwayo, the Plaintiff and his uncle Lucas Obanda Oloo, went to enquire about the parcel of land from Marema Farmers Cooperative Society Limited, and they found out that the land had been divided into two portions measuring 1.446 Ha, which had gone to James Mburu Mwangi (deceased) and the other one Gerald Macharia Muguchu, the 3rd Defendant (now deceased).

4. The Plaintiff contended that the Defendants actions amount to trespass, which is injurious to the Plaintiff's interests as the Defendants have illegal title deeds to the deceased parcels of land. Further, that the Defendants have denied the estate of Primus Oloo Abwayo, the enjoyment of the said land, and thus the Plaintiff prayed for Permanent Injunction to restrain the Defendants from the said parcels of land being Makuyu/Karia-ini Block 3/19 and 3/64 respectively.

5. The Appellants herein as Defendants contested the above suit vide a joint statement of Defence dated August 29, 2013.

6. The Appellants(Defendants) denied that the Plaintiff was the administrator of the estate of Primus Oloo Abwayo, and also denied that the said Primus Oloo Abwayo, was the registered owner of the land parcels No Makuyu/Karia-ini Block 3/19 and 3/64 respectively.

7. Further, the Defendants averred that the late Primus Oloo Abwayo, was not issued with title deeds for the two parcels of land, since he had already sold his share in Marema Farmers Cooperative Society Ltd to one James Mburu Mwangi(deceased), the father to 1st and 2nd Defendant(Appellants).

8. That the said Primus Oloo Abwayo, entered into a written agreement for sale of his share to one James Mburu Mwangi, the late father to the 1st & 2nd Defendants(Appellants) on or around April 13, 1976, and pursuant to that sale, James Mburu Mwangi(deceased), the father to the 1st & 2nd Defendants was allotted a plot measuring 6 acres by Marema Farmers Co-operative Society Ltd.

9. Further that James Mburu Mwangi, then as beneficial owner of the said plot sold 2 acres to the 3rd Defendant herein Gerald Macharia Muguchu, and he instructed Marema Farmers Co-operative Society Ltd, to effect the necessary subdivisions and procure the issuance of the respective titles of the resultant subdivisions in his name and that of the 3rd Defendant. That the said title deeds were issued on February 2, 1990.

10. The Appellants herein as the Defendants also averred that they are the beneficiaries of the estate of the late James Mburu Mwangi, and they were jointly entitled to Makuyu/Karia-ini Block 3/19, by transmission pursuant to the Letters of Administration issued on November 26, 2002, and confirmed on June 26, 2005, in Succession Cause No2048 of 2002, at Nairobi. That pursuant to the said grant of Letters of Administration, the Appellants (1st & 2nd Defendants) were issued with the title deed in respect of land parcel No Makuyu/Karia-ini Block 3/19, on May 15, 2009.

11. Therefore, the Defendants (Appellants herein) denied that they are trespassers on the suit property and that the family of Primus Oloo Abwayo, has been denied use and enjoyment of the suit property and that the said estate has suffered irreparable loss and damage.

12. It was also their Defence that the suit was Statute barred by dint of the provisions of Section 7 of the *Limitations of Actions Act*, Cap 22 Laws of Kenya, and they urged the Court to dismiss the Plaintiff's suit with costs.

13. There were various interlocutory applications and Pre-trial conferences. All the parties were represented by their respective advocates. In particular, the Defendants(Appellants) were represented by the Law Firm of Kimani Kahiro & Co. Advocates, who had Entered Appearance on August 29, 2013, and filed the Statement of Defence on the even date. In the course of mentioning the matter to confirm whether the same was ready for hearing, the Court was informed on March 17, 2014, that the 3rd Defendant had passed on and there was need to substitute him.

14. From the Court record, the 3rd Defendant was never substituted and on May 8, 2015, the Plaintiff's(Respondent's) Advocate sought to withdraw the suit against the 3rd Defendant. On the same date, the trial Court ordered as follows;

> "Leave is hereby granted to the Plaintiff to withdraw the suit against the 3rd Defendant alleged to be deceased with no orders as to costs. Parties to fix the matter for pre-trial hearing date at the Registry".

15. With the above withdraw of the suit against the 3rd Defendant who is allegedly deceased, it meant that any claim against him was also withdrawn.

16. From the Court record, the matter appeared in Court severally for mentions and on June 21, 2018, the matter was fixed for hearing on August 9, 2018.

17. However, on August 9, 2018, the Plaintiff's Advocate Mr Ndungu informed the Court that the 3rd Defendant was deceased and he sought to withdraw the suit against him (though the same had already been withdrawn on May 8, 2015.

18. The 1st & 2nd Defendants were represented by Mr Kimani James. In the presence of the two Advocates, the matter was fixed for hearing on November 28, 2018, by consent.

19. Come November 28, 2018, Mr Ndungu for the Plaintiff was present in Court. The Law Firm of Kimani Kahiro Advocates was absent. It was noted that the date was taken by consent. The Plaintiff had two witnesses present in Court and was ready to proceed, with the hearing of the case.

20. From the Court record, it is recorded as follows; -

> " case to proceed"

21. Indeed, the matter proceeded for hearing exparte, in the absence of the Defendants.

22. PW 1 was the Plaintiff Peter Ndung'u Kariuki, the Respondent herein, who testified in Court and produced various exhibits. PW 2 was one John Nguci Ngugi, who was allegedly a member of Marema Farmers Cooperative Society Ltd, and he testified that he knew the late Primus Oloo Abwayo.

23. After close of the Plaintiff's case, Judgement was reserved for December 13, 2018. The trial Court delivered its Judgement on December 13, 2018, and found in favour of the Plaintiff(Respondent).

24. Further in Paragraph 14 of the said Judgement, the trial Court concluded as follows; -

> " It follows therefore that subsequent transfer to the 1st and 2nd Defendants were also irregular. This Court orders that Permanent Injunctive Orders are hereby issued against the Defendants as prayed in the Plaint. The Court having found that the titles were improperly issued, orders that the title deeds issued to the 1st, 2nd and 3rd Defendants are hereby revoked

and ownership of the land hereby reverts back to the estate of the deceased. The Defendants shall pay costs of the suit".

25. The above orders meant that the Defendants title deeds stood cancelled. However, the Orders of cancellation of the Defendants' titles had not been sought in the Plaint and again though the Court ordered cancellation of the 3rd Defendant's title, the suit against him had been withdrawn and that in effect meant that there was no suit against the 3rd Defendant.

26. From the annextures that have been attached and provided in the Record of Appeal, it is evident that the title deeds held by Gerald Macharia Muguchu for Makuyu/Kariaini Block 3/64, reverted to Primus Oloo Obwayo on July 16, 2019, vide a Court Order in Civil Suit No 246 of 2013, which was issued on May 17, 2019.

27. Further the title deed for Makuyu/Kariaini Block 3/19, which was registered in the names of Charles Mwangi Mburu and Paul Waithaka Mburu on May 15, 2009, through transmission was registered in the name of Primus Oloo Obwayo (Deceased), vide a Court Order in Civil Suit No246 of 2013, issued on May 17, 2019.

28. It is on the above background that the Appellants herein filed a Notice of Motion Application dated February 7, 2020, and sought for the following orders;

    i. That the Court be pleased to order that the Judgment dated December 13, 2018, in its entirely be set aside and the matter be heard on merit.

    ii. That the title deeds of the two parcels of land, Makuyu/Karia-ini Block 111/19, and Makuyu/ Karia-ini Block 111/64, issued to the Respondent be revoked pending the hearing and determination of the Application and/or the matter be heard on merit.

    iii. That the subsequent Decree in its entirely be set aside pending the hearing on merit.

    iv. That a restriction be issued restraining the Land Registrar Murang'a Lands Registry, forbidding any dealings on land title NoMakuyu/Karia-ini Block 3/19, and Makuyu/ Karia-ini Block 3/64.

    v. That the Applicants be at liberty to apply for such further Orders and/or Directions as the Honourable Court may deem just and expedient.

    vi. That costs be provided for.

29. The said application was supported by various grounds and the Affidavit of Paul Waithaka Mburu, the 2nd Appellant herein.

    These grounds are:

    1. That the matter proceeded Exparte and judgment against the Applicants (Appellants) was delivered on December 13, 2018.

    2. That the Notice of delivery of judgment was not served upon the Applicants/Appellants.

    3. That Judgment was delivered without notifying the Applicants.

    4. That the Applicants have a constitutionally protected right to a fair hearing.

    5. That the Applicants were condemned unheard.

6. That trial Court failed to consider the facts that the Applicants had already filed a Defence, and accompanying documents in support thereof and it was only due to the absence of the Applicants' Counsel on the date of the hearing that the matter proceeded in their absence, resulting in the said Judgment.

7. That the Defence raises triable issues.

8. That the Plaintiff(Respondent) withdrew the case against the 3rd Defendant in Murang'a Civil Case No246 of 2013, one Gerald Macharia Muguchu, who is deceased.

   However, the Judgment of 13th December 2018, still revoked the title deed of Makuyu/Karia-ini Block 3/64, and reverted its ownership to the Respondent, yet the Plaintiff (Respondent) had withdrawn the case against him.

9. That the Respondent fraudulently obtained a Decree in Murang'a Chief Magistrate's Case No246 of 2013, against the 3rd Defendant's Gerald Macharia Muguchui's Land Parcel NoMakuyu/Karia-ini Block 3/64, and effected ownership changes in the Land Registry Murang'a despite having withdrawn the case against him.

10. That the Plaintiff/Respondent had filed an application seeking eviction Orders of the Defendants/Appellants and/or their relatives from land Parcel No Makuyu/Karia-ini Block 3/19 and Makuyu/Karia-ini Block 3/64, and thus the said Application.

30. In his Supporting Affidavit, the 2nd Appellant had averred that he only became aware of the exparte Judgment when they received a Notice to vacate dated May 24, 2019, which was served upon their mother who lives in Makuyu. That the Defendants/Applicants nor their Advocates were never served with a Notice of delivery of Judgment. He also averred that the Applicants (Defendants) were honest litigants, who were condemned unheard and they should not be punished for the mistakes of their advocates. He urged the Court to allow their Application on the best interest of justice, fairness and equity. Further, that the said application had been brought in good faith.

31. The Application dated February 7, 2020, was opposed by the Plaintiff/Respondent through the Grounds of Opposition dated March 5, 2020, wherein it was averred that:

    i. The Applicants/Defendants had filed an application dated August 16, 2019, which was heard and dismissed. That they later appealed and their appeal was also dismissed.

    ii. That the application dated February 7, 2020, was an abuse of the Court process as it was similar to their previous application dated 16th August 2019, which was heard and dismissed.

    iii. That if the Applicants were dissatisfied with the outcome of their Appeal, they ought to have appealed further and not to return to the same Court. That what the Applicants were doing was a serious abuse of the Court process. That the said application was meant to mislead the Court. The Respondent urged the Court to disallow the said mischievous acts.

    iv. The Respondent urged the Court to dismiss the said application dated February 7, 2020, with costs to the Respondent.

32. The Applicants (Defendants) filed a Further Affidavit through Paul Waithaka Mburu, dated March 9, 2020, and averred that they had made new discovery.

33. That the Plaintiff/Respondent had filed a Petition for Letters of Administration in the Estate of Primus Oloo Obwayo, being Succession Cause No34 of 2017, dated October 9, 2017, at Murang'a High Court.

34. That as of the date of filing the said Petition dated November 3, 2017, the Plaintiff (Respondent) had listed the deceased properties as Makuyu/Kariaini/Block 3/19, yet the Exparte Judgment was issued on December 13, 2018, and therefore that act of listing the deceased's property was fraudulent and misleading the Court.

35. That in the Petition, the Plaintiff/Respondent had used a search dated November 23, 2006, which showed that the land belonged to Primus Oloo Abwayo, which was also misleading as the Green Card for Makuyu/Kariaini Block 3/19, does not have such an entry. That the said parcel of land had never been registered in the name of Primus Oloo Abwayo, until after the *Exparte* Judgment was issued on December 13, 2018, and a Decree extracted.

36. Further, that the Plaintiff/Respondent was granted Letters of Administration, on February 11, 2019, and thereafter made an Application to amend the title numbers on March 20, 2019. It was also averred that the Plaintiff/Respondent had filed Summons for Confirmation of Grant dated February 17, 2020, and in the Consent over the mode of distribution of the estate of Primus Oloo Obwayo, the two parcels of land Makuyu/Kariaini/Block 3/19, and Makuyu/Kariaini Block 3/64, were to be wholly inherited by Peter Ndung'u Kariuki.

37. Further that even after having withdrawn the case against the 3rd Defendant (Gerald Macharia Muguchu – deceased) the Plaintiff/Respondent still added Makuyu/Kariaini/Block 3/64, as part of the deceased's estate, yet it had not been included in the Petition for Letters of Administration

38. The said application was canvassed by way of written submissions. The Law Firm of Kimani Kahiro & Associates, for the Defendants/Applicants filed their written submissions on March 13, 2020, and urged the Court to allow the application as the Defendants were never served with Notice of Judgment delivered on December 13, 2018.

39. The Plaintiff/Respondent through the Law Firm of V.M. Ndungu & Co. Advocates, filed his written submissions on March 19, 2020, and urged the Court to dismiss the Defendants/Applicants application dated February 7, 2020, with costs.

40. On December 31, 2020, the Court delivered its Ruling and dismissed the Defendants/Applicant's Application dated February 7, 2020.

41. The trial Court held that there was a similar Application dated June 19, 2009, which was dismissed on July 25, 2019. Further, the trial Court held that the said Application dated February 7, 2020, was an abuse of the Court process and there were no basis to set aside the exparte Judgment delivered on December 13, 2018.

42. It is on the above background and the fact that the Notice of Motion Application dated February 7, 2020, was dismissed on December 31, 2020, that the Appellants herein who were the Applicants filed the instant Appeal, vide a Memorandum of Appeal dated January 11, 2021.

    The grounds of Appeal are;

    1. That the Learned Magistrate erred in law and in fact when it failed to appreciate that Notice of Delivery of Judgement was never issued.

    2. That the Learned Magistrate erred in law and in fact when he failed to find that the further supporting affidavit sworn by Paul Waithaka Mburu on March 9, 2020 had no nexus with the present application and did not advance the orders sought on the application dated February 7, 2020, whereas there is a nexus between this matter and High Court Murang'a, Succession Cause No 34 of 2017, Estate of Primus Oloo Obwayo (deceased), as the two parcels of land

namely Makuyu/Kariaini Block 111/19 and Makuyu/Kariaini Block III/64 form the subject matter of both cases.

3. That the Learned Magistrate erred in law and in fact when he failed to consider the fact that there was fraud and illegality.

4. That the Learned Magistrate erred in law and in fact in failing to note that there was discovery of new facts and evidence which had not yet been discovered at the time of filing the application dated 19th June 2019.

5. That the Learned Magistrate erred in law and in fact in failing to consider that the Respondent had withdrawn the case against the 3rd Defendant(Deceased), yet proceeded to change ownership of his parcel of land Makuyu/Kariaini Block 111/64, and include it as part of the Respondent's estate in the High Court at Murang'a, in Succession Cause No 34 of 2017,Estate of Primus Oloo Obwayo(deceased), Indeed the Respondent through documentary evidence Summons for Confirmation of grant filed on February 20, 2020 included land parcel NoMakuyu/Kariaini Block III/64(in as much as the Respondent withdrew the suit against the 3rd Defendant)as part of the Respondent's estate which had not been previously included while filing the Petition for Letters of Administration on November 3, 2017.

6. That the Learned Magistrate erred in Law and in fact in failing to consider that a certified Copy of title deed(s) in the name of Primus Oloo Obwayo(deceased) was never produced before Court prior to revocation of title deed.

7. That the Learned Magistrate erred in Law and in fact in failing to consider that indeed it is the Respondent who has totally abused and misled this Honourable Court.

8. That the Learned Magistrate erred in Law and in fact in failing to note that the Appellants as honest litigants with a triable defence on record, ought to have been accorded a fair opportunity to be heard on merit.

9. That the Learned Magistrate erred in law and in fact in failing to consider the evidence on record in the defence and documents filed before the Court demonstrating that the appellant had acquired the title deed legally.

10. That the Learned Magistrate erred in Law and in fact in failing to appreciate that its action of dismissing the application had the implication of the appellants losing their land estimated to be valued at Kshs 21,000,000/= to which they have been registered proprietors via transmission since May 15, 2009, and indeed the Respondent through documentary evidence had admitted that there was a sale agreement to that effect.

11. That the learned Magistrate erred in law and in fact in failing to uphold the overriding objective of law in the constitution of Kenya allowing for the hearing of matters to their logical conclusion, since by failing to allow the Appellants to be heard, the Appellants were denied a right to a fair hearing.

12. That the learned Magistrate erred in law and in fact in failing to find that there were triable issues raised by the Appellants' defence and thus the Appellants were entitled to have their defence heard on its merits at trial.

Therefore, the Appellants urged the Court to;

(a)) Allow the Appeal and that the Ruling dated December 31, 2020, be set aside in its entirety and the matter be remitted for re-hearing before a different Court or upon such terms as this Court deems fair and just.

(b) Costs of the Appeal be provided for.

43. The Appeal is opposed vide the Grounds of Opposition filed by the Respondent on March 7, 2022. These grounds are:-

1. The Ruling delivered by the learned Magistrate was sound in law and facts
2. The Application in the lower court was res judicata having had a similar application dismissed.
3. A similar application was dismissed in the lower court, and the Appellants appealed and their appeal was dismissed and then they used part or comments on the appeal ruling as a guise to go back to lower Court, with another application for review which is now the subject of this appeal and which is an abuse of Court process.
4. The Appellants cannot have both appeal and review on the same matter as this is against the law.
5. The judgment was executed in 2019 and titles reverted back to the owner, and the Appellants are no longer on the suit parcel.
6. The hearing date in the lower Court was taken by consent but, the Appellants did not attend and after the judgment, they consented to an application to amend the decree
7. The application in lower court was made in year 2020, for a Judgment delivered in 2018, hence there was unreasonable delay.
8. The key witnesses for the Respondent have passed on, hence it will be prejudicial.
9. The judgment sought to be reviewed was sound in law and fact having taken hearing date by consent and having amended the decree by consent.
10. The Succession case cited has no bearing in this case and this is a Land matter. This Court has no jurisdiction in respect of Succession proceedings.
11. The alleged 3rd appellant is deceased hence is it wrong for them to represent a dead person when they know they need to do administration on that part.
12. The Plaintiff/Respondent produced record from ownership of shares from where the land was bought and green card which proved ownership. The Appellants were not shareholders but were alleging were sold land by the Respondent when by law were clear it could not be sold to non-shareholders.
13. The lower court considered defence and written statement filed by the Appellants in arriving at the judgment.
14. The lower Court noted that the subdivision on titles and certificate filed by Appellants/ Defendants were illegal as they retained the same number after subdivision.
15. There is no evidence of fraud as alleged nor is there a criminal case on such, hence this is used to mislead court.

44. The Appeal was canvassed by way of Written Submissions.

45. The Appellants through the Law Firm of Bikundo Associate & Co. Advocates, filed their submissions on May 5, 2022, and submitted that there were sufficient reasons as to why the Appellants were not in attendance in Court for the hearing of the case on November 28, 2018. That the Appellants were never served with the Notice of entry of the *Exparte* Judgement that was delivered on December 13, 2018, which ought to have been served to the parties and/or their advocates. They relied on Order 21, Rule 1 of the *Civil Procedure Rules*, which provide: -

> "In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates"

46. It was also submitted that it is trite law that a certified copy of title deed must be produced in Court before a judgment affecting alteration of land is delivered, but in this case, there was no copy of title deed in the name of Primus Oloo Abwayo, that was produced for the land parcels NoMakuyu/Kariaini/Block3/19 and Makuyu/Kariaini/Block 3/64. That the Civil Procedure is very clear on the above. The Appellants relied on Order 21 Rule 6 of the *Civil Procedure Rules* which provides:

> "Where there is a prayer for judgment, the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced to the Court before any such Judgment is delivered".

47. It was further submitted that the Respondent as a Plaintiff had withdrawn his case against the 3rd Defendant (Gerald Macharia Muguchu), who is now deceased, in order to proceed for full hearing through his Advocate. However, he proceeded to file an application to amend the title numbers and he included the title deed belonging to the 3rd Defendant, being Makuyu/Kariaini Block 3/64. Further, that the Respondent went ahead and changed the ownership of the said Makuyu/Kariaini/Block 3/64, as shown in the Green Card.

48. The Appellants further submitted that there was fraud, illegality and gross abuse of the Court by the Respondent and his advocate and they urged the Court to disallow and/or stop the mischievous acts by the Respondent and his advocate. It was further submitted that though the Respondent had withdrawn his case against the 3rd Defendant in the lower Court, in the Summons for Confirmation of Grant filed on February 20, 2020, the Respondent went ahead and included the land parcel owned by the 3rd Defendant, yet he had withdrawn case against him.

49. The Appellants finally submitted that the Appeal herein is Merited and should be allowed with costs.

50. The Respondent too filed his written submissions dated May 20, 2022, through VM Ndungu & Co Advocates. He submitted that when the Appellants failed in their Appeal in Murang'a ELC Appeal No21 of 2019, they went back to the lower Court and filed the application dated February 7, 2020, which was also dismissed and which they have appealed herein.

51. That the 3rd Appellant is deceased and has not been substituted. It was also submitted that the land herein reverted back to the Respondent and the Appellants have been evicted. That to allow a retrial would highly prejudice the Respondent, as the land has already reverted back to him. Further, that during the amendment of the Decree, no new title was added and the Appellants were present and they did consent to the said minor amendment of the Decree.

52. Further, that there was no new evidence that has been found as all the evidence was available at all the time. That the titles were cancelled and reverted back to the Respondent based on the law and facts.

That this Appeal seeks to overturn a Judgment that was delivered in the year 2018, for a case filed in 2013, and in which a hearing date had been taken by consent.

53. That the application dated February 7, 2020, was dismissed because a similar Application had been filed in the same Court, and dismissed. Further, that the Judgment of the Court that was delivered in the year 2018, has been implemented and to order otherwise, would be prejudicial to the Respondent. It was also submitted that the Appellants have not discovered any new evidence.

54. That in the Judgment, the Court considered the Appellants, Defence, Witness Statements and bundle of documents and the Respondent urged the Court to dismiss the Appellants submissions and Appeal. It was the Respondent's further submissions that the case law cited are not applicable herein because the facts, issues and circumstances differ. Further that the Succession Case that the Appellants' are alluding to is not related to this matter.

55. It was also submitted that the right to be heard can never be allowed to defeat the end of justice. He relied on the case of *William Macharia Maina & Another v Francis Barchuro & 3 Others, Kibiwott Yator Kuryases & 3 others (IP)* eKLR, where the Court held that Constitutional right to be heard should not create injustice and prejudice to others and application to set aside and hear afresh was dismissed and/or declined.

56. The Respondent urged the Court to dismiss the instant Appeal with costs to the Respondent.

57. The above analysis consists of the pleadings that were before the trial Court, the Written Submissions, the findings of the said trial Court and the Memorandum of Appeal herein.

58. The Appellants have urged this Court to allow the instant Appeal, whereas the Respondent has urged the Court to dismiss the said Appeal.

59. As provided by Section 78 of the *Civil Procedure Act*, this Court is called upon to analyse the whole evidence and pleadings presented before the trial Court, evaluate the same, weigh it, interrogate and scrutinize the same, and arrive at its own independent conclusion. The Court too will give due deference to the findings of the trial Court, unless they fall foul of proper evaluation of the evidence on record or that the trial magistrate acted on the wrong principles while arriving at his findings. See the case of *Mbogo v Shah & Another* (1968) EA 93, where the Court held.

> "I think it is well settled that this Court will not interfere with the exercise of discretion by the inferior Court, unless it is satisfied that the decision is clearly wrong because it has misdirected itself, or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.

6O. The Appeal hearing is against a Ruling that was delivered on December 31, 2020, wherein the trial magistrate dismissed an Interlocutory Application dated February 7, 2020, which had sought to set aside an Exparte Judgement that was delivered on December 13, 2018.

61. In his findings, the trial magistrate held as follows: -

> "I have gone through the Court record. The Applicants main prayer is setting aside of the judgment which was delivered on December 13, 2018. I have noted from the Court record that a similar order was sought by the Applicants by way of an amended Notice of Motion dated June 19, 2019, which application was dismissed on July 25, 2019"

62. While scrutinizing the above findings of the trial Court, this Court comes to a conclusion that the above paragraph shows that the trial Court found that the Notice of Motion dated February 7, 2020, was the resjudicata to the amended Notice of Motion dated June 19, 2019, and thus its dismissal.

63. This Court has also perused the amended Notice of Motion Application dated June 19, 2019, and has noted the prayers sought are:

    (a) That the Judgment dated December 13, 2018 in its entirety be set aside pending Review and/or Appeal.

    (b) That the Decree given on February 8, 2019 and April 25, 2019, in its entirety be stayed and/or set aside pending review and/or Appeal.

    (c) That an injunction be issued restraining the Land Registrar Murang'a Lands Registry from effecting the changes in the ownership of Makuyu/Kariaini Block3/64, Makuyu/Kariaini Block 3/19 as ordered in the Amended Decree given on April 25, 2019.

    (d) That the amendments made on the Decree of April 25, 2019, be struck out.

64. From the Court records, the said Application was dismissed on July 25, 2019 and the trial Court held;

> "I have read the submissions of the applicants and the Respondents. The Submissions of the Applicants are in my view should be raised before either an appeal or review. This Court cannot sit on an appeal of its own decision .... For those reasons, this application fails and is hereby dismissed with costs to the Plaintiff/Respondent".

65. The Court has also considered the prayers sought in the Notice of Motion dated February 7, 2020, and among the prayers sought are:

> "The Court be pleased to order the judgment dated December 13, 2018, in its entirety be set aside and the matter be heard on merit and that the subsequent decree on its entirety be set aside pending hearing on merit."

66. Having now considered the instant Appeal, the Response to the same, the Record of Appeal, the written submissions and the entire proceedings at the lower Court, the Court finds the issues for determination are; -

    (i) Whether the Notice of Motion dated February 7, 2020 is resjudicata to the amended Notice of Motion dated June 19, 2019.

    (ii) Whether the Appeal is merited

    (i) Whether the Notice of Motion dated February 7, 2020 is Resjudicata to the amended Notice of Motion dated June 19, 2019.

67. The doctrine of resjudicata is provided for under Section 7 of the *Civil Procedure Act* which provides; -

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court".

68. The above doctorine is invoked to prevent parties from litigating over the same issues endless as in law, any litigation has to come to an end, once a decision has been reached by a competent Court and the same cannot be re-opened to be started all over again unless the decision reached has been set aside(see the case of *Benson Ngugi v Francis Kabui Kinyanjui and others*, Civil Appeal; No 1 of 1986 (1989) KLR 146).

69. It is also trite that the doctrine of Resjudicata applies to applications too, just as it applies to suits because there must be an end to litigation (see the case of Abok James Odera v John Patrick Machira Civil Appl No 49 of 2001.

70. From the above provisions of Section 7 of the *Civil Procedure Act*, no Court has power to try an issue in which the matter has been directly and substantially in issue in an earlier matter, and the parties were the same (see the case of *Naftali Sule v Evans Gundo* Civil case No 251 of 1988 (LLR HCK 7357).

71. In essence, the doctrine of resjudication is based on these three maxims;-First, no man should be vexed twice, over the same caseSecondly, that it is in the interest of the state that there should be on end to litigation andThirdly, that a Judicial decision must be accepted as correct.

72. Taking into account the above introduction of the doctrine of Resjudicata and what it entails, this Court now considers the two applications and find as follows; -

73. There is no doubt that the suit at the trial Court proceeded exparte. The Appellants herein who were Defendants were absent and an exparte judgement was entered on December 13, 2018. They filed the amended Notice of Motion dated June 19, 2019, to set aside the said Judgement pending Review and/or Appeal.

74. Therefore, it is clear that the application dated June 19, 2019, was to set aside exparte Judgments to enable the Applicants who are Appellants therein file for either Review and/or Appeal. The said Application was dismissed.

75. The Application dated February 7, 2020, was seeking for among other prayers setting aside of the exparte judgement so that the suit could be heard interparties on merit. Though the Appellants had sought for setting aside of the exparte judgement, in the two applications, the reasons of setting aside were different;- the first one was pending review and/or appeal and the second application was for the purposes of having the matter heard interparties and on merit.

78. The Court finds that the two Applications though brought under the same Order were seeking different reliefs and thus this Court finds that the Notice of Motion Application dated February 7, 2020, was not resjudicata to the Amended Notice of Motion Application dated June 19, 2019.

(ii) Whether the instant Appeal is merited?

79. As rightfully submitted by the Respondent, the Appeal herein is on the Ruling that was delivered on December 31, 2020, and not the substantive suit.

80. The application in issue is dated February 7, 2020 and had sought among other prayers to set aside an exparte judgement of December 13, 2018, and for the matter to be heard interparties and on merit. The said application was dismissed by the trial Court on the ground that the Appellants had sought similar prayers as they had sought in an amended Notice of Motion Application dated June 19, 2019, which was dismissed by the trial Court on July 25, 2019.

81. However, this Court has found that the two applications had sought different prayers and were in essence different.

82. The first Application was pending Review or Appeal and the second application which is the subject of this Appeal had sought to have the exparte Judgement set aside and matter to be heard on merit.

83. It is evident that the Appellants herein had filed a Defence. The Appellants had attended Court on various occasions, and they were therefore interested in defending the suit.

84. The date of the hearing had been taken in the presence of the appellants Advocate. On the hearing date, the Appellants who were Defendants and their advocate were absent. Since there was no one present in Court to explain the reasons of their absences, the matter proceeded in the absence of the Defendants as provided by Order 12 Rule 2 of the *Civil Procedure Rules* which Provides;

> "If on the day fixed for hearing, after the suit has been called on or hearing outside the court, only the plaintiff attends, if the court is attends satisfied —
>
> (a) that notice of hearing was duly served, it may proceed exparte;
>
> (b) that notice of hearing was not duly served, it shall direct a second notice to be served; or
>
> (c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing."

85. However, when the Plaintiff/Respondent attempted to execute the exparte Judgement that was delivered in Court on December 13, 2018, the Appellants filed the Notice of Motion Application dated February 7, 2020, seeking to set aside the said exparte Judgement and the matter be heard on merit.

86. Order 12 Rule 7 of the *Civil Procedure Rule* provides as follows; -

> "Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just".

87. It is evident from the above provision of law that a Court that has entered an exparte judgement has discretionary power to set aside such an exparte judgement/order. However, the said discretion must be exercised judiciously.

See the case of *Shah v Mbogo & Another* (1968) E.A. 93, where the Court held;

> The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, but not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct and delay the cause of Justice."

88. It is also not in doubt that the Court's discretion to set aside an exparte judgement is not restricted, but, the same should be exercised so that it does not cause injustice to the opposite party (See the case of *Patel v E.A. Cargo Handling services* and (1974) E.A. 75, where the Court held;

> "There are no limits or restrictions on the Judge's discretion to set aside or vary an exparte judgement except that if he does vary the judgement, he does so on such terms as my 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 Court by the rules"

89. Having noted that the exparte judgement was entered herein after the Appellants failed to attend Court for hearing, then the Court finds that the said *exparte* judgement is a regular Judgement.

90. Given that the Judgement entered on December 13, 2018 was a regular one, it cannot be set aside as a matter of right (*Ex-debito justitiae*).

91. However the Court has discretion to set it aside once the Applicants have satisfied several tests: See the case of Gandhi Brothers v HK Njage t/a H.K. Enterprises; HCCC No 1330 of 2001, where the Court held;

> "If the default Judgement is a regular one, the Court has unfettered discretion to set aside such Judgement and any consequential decree or order upon such terms as are just ... (See Patel v E.A. Cargo Handling Services Ltd. (1975 E.A. 75 Philip Chemwolo & Another v Augustine Kubende (1986) KLR ...

92. Further, where there is a regular Judgement, the Court will not usually set aside the said Judgement, unless it is satisfied that there is a Defence on merit. A Defence on merit does not mean a Defence that must succeed, but one that raises triable issues, and that it is on an issue which raises a prima facie Defence and which should go for adjudication or a trial (See the case of Kenya Commercial Bank Ltd. v Reuben Waweru D. Kigathi & another Nairobi HCCC No325 of 1999).

93. This was the same position held by the Court of Appeal in the case of (*Ceneast Airlines Ltd v Kenya Shell Ltd*. Civil Appeal No 174 of 1999), where the Court held that it will not interfere with a Regular Judgement, unless it is satisfied that there is a Defence on merit which discloses triable issues.

94. As the Court had analysed at the beginning of this Judgement, the suit before the trial Court had been contested by the Appellants herein. The Appellants had alleged that the late Primus Oloo Abwayo, had sold his shares at Marema Farmers Co-operative Society Ltd to one James Mburu Mwangi, the father to the 1st and 2nd Appellants in 1976. The said James Mburu Mwangi thereafter got registered as the proprietor of the suit property in 1990.

95. Further the 1st and 2nd Appellants became registered as the proprietors of their portion of land in 2009, through transmission. Further, it was alleged that 3rd Defendant, Gerald Macharia Muguchu had bought his parcel of land from the late James Mburu Mwangi, and later got registered as a proprietor of Makuyu/Kariaini block 3/64. The Appellants had attached exhibits in their allegations.

96. However, the suit against the 3rd Defendant, was withdrawn, but the trial Court entered a Judgement that also touched on Land Parcel No Makuyu/Kariaini/Block 3/64, which belonged to 3rd Defendant. Therefore issues raised by Appellants are weighty issues and needed to be interrogated by the Court through an interparties hearing. Each party should have been given an opportunity to advance its case.

97. It is also clear from the Court record that the Appellants had filed their Defence within the stipulated time as allowed by the law and they appeared in Court severally for various interlocutory applications and pre-trial proceedings. They were represented by an advocate. Therefore, the Appellants were interested in their case. The fact that their Advocate failed to attend Court on the date of the hearing should not be visited upon the Appellants as they had explained in the Application reasons for their absence in Court on the date of the hearing. In the application dated February 7, 2020, the Appellants gave explanation as to why they did not attend Court. In his Ruling, the trial Magistrate held that those were not good reasons to set aside an exparte Judgement.

98. However, it is clear that the Appellants herein have a Defence on merit that raises triable issues. This Court also finds that the explanation given by the Appellants that one of the Appellant was sick and

the other one went to pick him from hospital, upon discharge was plausible. The Appellants cannot be faulted for failure to attend Court or be held to have deliberately obstructed or delayed the cause of Justice. In fact injustice was visited upon when the matter proceeded in their absence, and their title deeds were cancelled without hearing their evidence and/or Defence. They had alleged in their Defence that they got registered as proprietors of Makuyu/Kariaini Block 3/19, in the year 2009, through transmission. That is a triable issue!!

99. A Court has discretion to decide whether or not to set aside an exparte Judgement and that it should ensure that a litigant does not suffer injustice or hardship as a result of excusable mistake or error (See the case of *Philip Chemwolo & Another v Augustine Kubende*(1982-88)KAR 1036, where the Court held;

> "Blunders will continue to be made from 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 heard on merit. 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 parties and not for the purpose of imposing discipline."

100. The Appellants herein had explained the reasons for failure to attend Court, and the said explanation was not disputed by the Respondent. Even if the Appellants advocates did not appear in Court on the date of the hearing, the mistakes of their Advocates should not be visited upon the Appellants herein. (See the case of *Patriotic Guards Ltd v James KipchirChir Sambu* (2018) eKRL, where the Court of Appeal Quoted with approval, the case of *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR, where the Court had held;

> "...............While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."

101. The Appellants had a Defence on record when the matter was heard exparte and the trial magistrate stated that she had considered the said Defence and dismissed it. However, the Appellants were not in Court to advance their Defence. It would be correct to hold and find that the matters raised in the Appellants Defence were not considered at all and indeed could not be considered without the Appellants input.

102. When the trial Magistrate dismissed the Appellants application dated February 7, 2020 on December 31, 2020 he seemed not to have considered whether or not the Defence which was already on record was reasonable or raised triable issues.

(See the case of *Tree Shade Motors Ltd. versus DT Dobie & Co (K) Ltd and Joseph Rading Wasambo* (Civil Appeal No38 of 1998).

103. The triable Magistrate herein only emphasized that the said application was similar to an already dismissed application, which this Court has found was not. Further, the trial magistrate held that the 2nd Appellant had stated that they could not attend Court on the hearing, date as 1st Appellant was being discharged from hospital and he was facilitating to the said discharge. That such could not form a basis of setting aside the Judgement. However, this averment by the Appellants was not disputed by the Respondent herein and the Court finds that the trial Court did not apply the right approach to the issues that were raised before him.

104. The Appellants had even raised the issue of Confirmation of Grant at the High Court which touched on the suit property that was registered in the name of the 3rd Defendant and whose suit had already been withdrawn.

105. The Court finds and holds that though the Appellants were absent on the date of the hearing which date had been taken by consent and which hearing, led to the delivery of the Judgement on December 13, 2018, given that the Appellants had a Defence on record that raises triable issues, the trial Court was bound in law to exercise its discretion and set aside the said exparte Judgement to allow the Appellants herein to put forward their Defence.

106. The Court will be persuaded by the following findings of other Courts.

i. *Kingways Tyres & Automart Ltd v Rafiki Enterprises Ltd* and Appeal No 230 of 1995, where the Court held;

> "Notwithstanding the regularity of an exparte Judgment, a Court may set aside the same if a Defendant shows he has a reasonable Defence on merits"

ii. *Pithon Waweru Maina v Thuku Muguria* (1983) eKLR where the Court held;

> "The principles that govern exercise of Judicial discretion to set aside an exparte Judgement obtained in the absence of an appearance or defence by Defendant are outlined".

iii. *Lucy Bosire v Kehancha Div Land Dispute Tribunal & others* (2013) eKLR, where the Court held,

> " It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty e.g not having his case determined on its merits"

iv. *CMC holdings ltd v Nzioki* (2004) IKLR 173 where the Court held;

> "That discretion must be exercised upon reasons and must be exercised judiciously......In law the discretion that a Court of law has in deciding whether or not to set aside exparte order was meant to ensure that a litigant does not suffer injustices or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion, if the Court turns its back to a litigant who clearly demonstrate such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle......the answer to that weight, matter was not to advise the Appellant of the recourse open to it as the Learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the Appellant by its advocate"

107. The Court notes that the Appellants herein had also raised two issues that they were never served with the Notice of Judgement as provided by Order 21, Rule 1 of the *Civil Procedure Rules* and that the Respondent did not produce a copy of title deed as provided by Order 21 Rule 6 of the said Rules.

108. The Court has gone through the exhibits produced in Court and indeed there is no copy of title deed that was produced by the Respondent bearing the name of Primus Oloo Abwayo. That contravened the provisions of the above stated order. Further there was no evidence that immediately after the

judgement was entered on December 13, 2018, being an exparte Judgement , the Appellants were notified of the same as provided by Order 21 Rule 1 of the *Civil Procedure Rules*.

109. The application dated February 7, 2020, had also been brought under Section 3A, of the *Civil Procedure Act* which Section grants the Court powers to make such Orders that are necessary for the end of justice to be met. The Court finds that if the trial Court had invoked the said Section 3A of the *Civil Procedure Act*, properly, the necessary orders that should have been issued is to set aside the exparte judgement of December 13, 2018, and allow the matter to be heard interparties and determined on merit. The trial magistrate failed to invoke the said provision of law judiciously. This was therefore an incorrect exercise of discretion which resulted in denial of justice.

110. It is not in doubt that Courts in Kenya have variously held that administration of justice requires that all substances of disputes should be heard and decided on merit. See the case of *Ithagi Kahihia & Another v Edward Gikonyo & Another* Nairobi Civil Application No 350 of 2004 where the Court held;

> "Administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits........"

111. Having now carefully considered the Memorandum of Appeal dated January 11, 2021, the Grounds of Opposition to this Appeal, the Record of Appeal, the entire proceedings at the lower Court and the written submissions, the Court finds and holds that the trial magistrate erred both in law and in facts while determining the Notice of Motion Application dated February 7, 2020.

112. The Court finds and holds that the Appellants herein had given plausible reasons for their absence in Court when the matter proceeded for hearing and that the Appellants had a Defence on record which raises triable issues, and which Defence ought to have been interrogated by the Court before a final order would be issued of cancellation of the Appellants' title deeds.

113. Further the Appellants were entitled to be heard and not be condemned unheard as the exparte Judgement of December 13, 2018, had drastic effect of cancelling their title deeds, which according to the Appellants had been registered in their favour in 1990, for 3rd Defendant(now deceased) and the year 2009 for the 1st &2nd Appellants through transmission. See the case of *Mbaki & Others v Macharia & Another (2005) 2 EA 206*, at page 210 where the Court held stated;

> "The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

114. Having carefully considered the totality of the evidence herein, the Court finds and holds that the Notice of Motion Application dated February 7, 2020, was merited and ought to have been allowed.

115. For the above reasons, the Court finds the Appeal herein is merited and the same is allowed entirely on the following terms;-

116. That the Ruling delivered by the trial Court on December 31, 2020, be and is hereby set aside in its entirety and it is substituted with the following orders;-

    a. The Notice of Motion Application dated February 7, 2020, ,be and is hereby allowed in terms of prayers No3, 4, 5, 6 and 7.

       The costs of the said application and this appeal is awarded to the Appellants.

b. The matter is remitted back to Murang'a Chief Magistrates Court for re-hearing of the suit, being Murang'a Civil Case No 246 of 2013, on merit, in the presence of all the relevant parties herein.

c. The parties to ensure this matter and/or the suit is heard and determined expeditiously, since it is an old case.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 27TH DAY OF JULY, 2022.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

Mr Ongeri for the Appellants

Mr Ndungu for the Respondent

L. GACHERU

JUDGE

27/7/2022