



**The County Government Of Kilifi v Mohamed & 10 others (Land  
Case 51 of 2014) [2022] KEELC 3633 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3633 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
LAND CASE 51 OF 2014  
LL NAIKUNI, J  
JULY 20, 2022**

**BETWEEN**

**THE COUNTY GOVERNMENT OF KILIFI ..... PLAINTIFF**

**AND**

**IBRAHIM MUSA MOHAMED ..... 1<sup>ST</sup> DEFENDANT**  
**STEPHEN MACHARIA KIMANI ..... 2<sup>ND</sup> DEFENDANT**  
**KILIFI DISTRICT LAND ADJUDICATION & SETTLEMENT  
OFFICER ..... 3<sup>RD</sup> DEFENDANT**  
**KILIFI DISTRICT LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**  
**DIRECTOR OF LANDS ADJUDICATION & SETTLEMENT  
OFFICER ..... 5<sup>TH</sup> DEFENDANT**  
**CHIEF LAND REGISTRAR ..... 6<sup>TH</sup> DEFENDANT**  
**THE ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**  
**NATIONAL LAND COMMISSION ..... 8<sup>TH</sup> DEFENDANT**  
**NATIONAL EDUCATION BOARD ..... 9<sup>TH</sup> DEFENDANT**  
**KILIFI COUNTY EDUCATION BOARD ..... 10<sup>TH</sup> DEFENDANT**  
**CABINET SECRETARY MINISTRY OF EDUCATION SCIENCE &  
TECHNOLOGY ..... 11<sup>TH</sup> DEFENDANT**



## RULING

### I. Preliminaries

1. By way of a Notice of Motion application dated 29<sup>th</sup> April, 2021 and filed in Court on 30<sup>th</sup> April, 2021 is what is before the Honorable Court for its determination. The application made by the 2<sup>nd</sup> Defendant/Applicant is premised under the provision of Sections 1A & 3A of the [Civil Procedure Act](#) Cap. 21 and Order 51 Rule 15 of the [Civil Procedure Rules](#), 2010. More specifically, the Application seeks for the following orders:
  - a. That the proceedings taken herein resulting in the marking of the suit as settled are set aside.
  - b. That the Plaint is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

### II. The 2<sup>nd</sup> Defendant's Case

2. The 2<sup>nd</sup> Defendant/Applicant's application is made on the grounds, testimonial facts and the averments of the 10 Paragraphed Supporting Affidavit sworn on 30<sup>th</sup> April, 2021 by the 2<sup>nd</sup> Defendant, Stephen (aka Suleiman) Macharia Kimani. He deponed that he was the 2<sup>nd</sup> Defendant/Applicant in the suit and was aware of the facts of the case hence competent and conversant to swear the affidavit. He stated that he had not been aware that the matter was coming up in Court since he had not been served with any hearing or Judgement notice. He stressed that it was incumbent upon the Plaintiff and the 1<sup>st</sup> Defendant to have served all the parties with appropriate notices. He averred that he was of the opinion that the National Land Commission (Hereinafter referred as "The NLC") had no jurisdiction to revoke a title deed when litigation to vindicate such a title was pending before Court. In any case, he informed Court that the NLC had been named as the 8<sup>th</sup> Defendant in this suit. He argued that such revocation of title by the NLC "suo moto" and without hearing of the affected parties contravened the doctrine of "Lis Pendens" and was an abuse of the Court process, the rule of law and natural justice principle of "audi alteram partem". He stated that in any event, the NLC has no power to revoke land title deeds whose vindication is pending before court. The impugned decision of the NLC and the court's ruling contravene the above doctrines as the 2<sup>nd</sup> Defendant was condemned unheard. He observed that the Court fell into an error when it failed to ensure that all the interested parties in the matter were served with a notice of hearing and delivery of ruling in the application for dismissal of suit for want of prosecution.
3. Further, he noted that there was no application before the Court for marking the matter by way of Plaint before it as settled or compromised and the order made by Court was not founded on any prayer or application before Court. He held that it was made without jurisdiction. He averred that at the time of appealing had lapsed at the time he learned about the ruling. He therefore urged Court to exercise its inherent powers to set aside the proceedings and impugned ruling which were in every respect a nullity for the several reasons which he reiterated – a). want of service of hearing and ruling notices and b) want of application or prayer to mark the case as settled as the order of 26<sup>th</sup> February, 2018 was made without jurisdiction; c). there was no settlement of issues in dispute and if there was it was only between the Plaintiff and the NLC, without involving all the other parties; d). Delay in prosecution of the suit was not explained and also the court never explained the said application.
4. He deponed that the unilateral decision of the one Defendant in a case to nullify title to land, made during the pendency of the case, could not be a ground for marking a suit as settled. If the decision



of the NLC was made during the pendency of this action, it was not open to the Plaintiff to defend the application by the 1<sup>st</sup> Defendant, as according to the Plaintiff, the cause of action was overtaken by events and the County Government had not filed either an application of withdrawal of suit, or an application to adopt the decision of NLC as an order of court.

5. He opined that the order marking the suit as settled tended to vindicate without hearing the decision of NLC yet the registered owners of the land were not privy to that decision. The 2<sup>nd</sup> Defendant and registered owner of the suit land could not now appeal the decision of this court, or challenge the impugned decision of the NLC, due to effluxion of time for no fault of his part.

### **III. The Replying Affidavit By The Plaintiff**

6. On 5<sup>th</sup> November, 2021, the Plaintiff responded to the application by the 2<sup>nd</sup> Defendant/Applicant through filing of a 14 Paragraphed Replying Affidavit dated 3<sup>rd</sup> November, 2021. It was sworn by Farida K. Jadi, an Advocate of the High Court representing the Plaintiff herein. She averred as an Advocate of the High Court of Kenya practicing as such in the law firm of Messrs. Madzayo Mrima & Jadi Advocates and having the conduct of the matter on behalf of the Plaintiff she was competent to swear this affidavit. She indicated having seen and read the contents of the Notice of Motion Application by the 2<sup>nd</sup> Defendant herein together with the Supporting Affidavit of Mr. Stephen Macharia Kimani sworn on 30<sup>th</sup> April, 2021.
7. From the very onset, she averred that the Application filed by the 2<sup>nd</sup> Defendant/Applicant was incompetent, a non - starter, vexatious, frivolous and an abuse of the Court process having been brought under the wrong provisions of the law. She informed Court that the suit herein related to two (2) parcels of land being Land Reference Numbers Mazera/Mgumo Patsa 600 and 601 (Hereinafter referred to as “The Suit Properties”) which properties had always been used as public primary and Secondary school.
8. She deponed that the suit properties had also been subject of Court proceedings in several suits including MSAHCC Petition No. 56 of 2013 (Kelvin Mumba Kajiwe & Another -Versus - Ibrahim Musa Mohammed & 4 others. She stated being aware that the suit properties had also been a subject of proceedings and investigation before the National Land Commission the same being public properties being used for the benefit of school going children of Kilifi County and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein had purportedly acquired title deeds to the same.
9. She further deponed that she was aware that following the Investigations and directions from the National Land Commission in the year 2015, the title deeds for the suit properties herein were reverted back to the public and the title deeds in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants revoked. She held that 1<sup>st</sup> and 2<sup>nd</sup> Defendants were well aware of the revocation of the title deeds as they were also parties to the proceedings before the National Land Commission. She annexed a copy of a letter from the National Land Commission dated 7<sup>th</sup> October, 2015 marked as “FKJ - 1”.
10. She posited that all the Defendants in this suit were served with the pleadings and summons and in fact the 2<sup>nd</sup> Defendant did file his statement of defence and List of documents which She annexed herein and marked them as “FKJ - 2”. She held that from the Supporting Affidavit of Mr. S. M Kimani, it was clear that he was aware of the decision of the National Land Commission leading to the cancellation of the title deeds herein and if he had been aggrieved with the decision thereof then his recourse in challenging the decision lied somewhere else and not in this suit as per the law.
11. She deponed that in view of the fact that the title deeds for the properties herein were revoked, all the prayers as sought in the filed Plaint were granted, the matter was overtaken by events. It was



also closed as per the ruling of Honorable Justice Yano delivered on 10<sup>th</sup> November 2020. According to the deponent, the Application herein by the 2<sup>nd</sup> Defendant/Applicant which sought to set aside proceedings and again dismiss the suit is a total waste of Court's judicial time and an abuse of the Court process. Her contention was that in view of the fact that the title deeds herein were revoked as rightly held to be public land which had illegally been acquired by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Defendants herein were not entitled to any costs since granting them costs was against public policy. In any event, it was the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who ought to pay costs to the County Government having caused the filing of this suit.

#### **IV. Submissions**

12. On 27<sup>th</sup> January, 2022 while all parties were present in Court, the Honorable Court directed that the Notice of Motion application dated 29<sup>th</sup> April, 2021 be canvassed by way of Written submissions. Pursuant to that, all parties complied by 7<sup>th</sup> March, 2022. The Honorable Court reserved a ruling date to be on notice.

##### **A. The 2<sup>nd</sup> Defendant/Applicant's Written Submissions**

13. On 7<sup>th</sup> march, 2022, the Learned Counsel to the 2<sup>nd</sup> Defendant/Applicant the esteemed Law Firm of Messrs. Stephen (Aka Suleiman) Macharia Kimani Advocates filed their written submissions dated 6<sup>th</sup> March, 2022. Mr. SM. Kimani Advocate as a preliminary issue opined that due to the indisposition for over a fortnight preceding the late filing of these submissions, the Applicant at the earliest opportunity sought the indulgence of the Learned Counsel for the Plaintiff/Respondent and the court to admit the same out of time. He submitted that the Notice of Motion application was grounded on five facts set out on the face of the motion, and an affidavit of Mr. Stephen Macharia Kimani. In a nutshell, the application was grounded on the fact that there was no agreement on or settlement of issues in dispute, given that what was before court was an application by the 1<sup>st</sup> Defendant to strike out or dismiss the suit for want of prosecution. There was no room for the Plaintiff or the other Defendants to plead a settlement or agreement which the court could be invited to adopt as an order of court.
14. Secondly, the decision of one of the pendency of these proceedings was in contravention of the doctrine of lis pendens - adjudicating of matters without Courts permission which were already pending before this Court. Therefore, this could not be the basis of a settlement of the issues in dispute in the case. In any event the National Land Commission had no power to revoke land title deeds whose vindication was pending before court, in this suit where it was a party as the 8<sup>th</sup> Defendant herein.
15. The Learned Counsel submitted that by doing so behind the back of the other Defendants, it contravened the doctrine pendete file and the principle of natural justice of audi alteram partem as the 2<sup>nd</sup> Defendant/Applicant, like the other Defendants, were condemned unheard. Further, by so doing, the NLC pulled the carpet under the feet of the court and the other parties, to the advantage of the Plaintiff. He submitted that they could not in the same proceedings seek to benefit from the NLC's illegal act.
16. The Learned Counsel further submitted that the court in its impugned ruling granted a prayer which was not sought in the application before it. There was no application to mark the suit as settled and the ruling decreeing that the issues in dispute had been settled by the ignoble act of NLC's cancellation of title deeds in contravention of the doctrine of lis pendens was made without jurisdiction, and outside the purview of the application before the court. It was also clear that the other Defendants were deprived of an opportunity to express themselves on all alleged settlement of the issues in dispute, which brought the case to an abrupt end, without a plenary hearing.



17. The Learned Counsel submitted that the Application was only opposed by the Plaintiff/Respondent. All the other parties had not responded to the application, probably because as government departments, they were either complicit, complacent, or are otherwise content with the cancellation of the title deeds by the NLC.
18. The Learned Counsel submitted that in its Replying Affidavit dated 3<sup>rd</sup> November, 2021 and filed on 5<sup>th</sup> November, 2021, it was alleged that the application was incompetent, a non - starter, vexatious, frivolous and an abuse of court process for reasons that it was filed under the wrong provisions of the law. Under the current constitutional dispensation, the court should bend towards sustaining and determining a matter on merit other than dismiss it for want of form or a technicalities. Even before the coming into force of the current constitution, the court was more often than not inclined to excuse the citing of wrong provisions. No suit or application could ordinarily be defeated, or an objection thereto taken, for want of form. This averment and any submissions on it, did not render the application before court incompetent, vexatious or frivolous, and would therefore be untenable. The applicant's claim that the court acted ultra vires in granting a remedy that was not sought in the application before it was jurisdictional and could not be trifled with.
19. The Learned Counsel submitted that the Plaintiff further alleged that the two (2) parcels of land which were the suit property had always been used as public schools and that following the investigation and directions of the National Land Commission (NLC), the suit properties had reverted back to the public and the title deeds in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants revoked. The learned Counsel contention was that this was a matter of fact. It could not be proved without an interlocutory application served on all the parties concerned. After all, there was already conflict of interest in that the NLC was named as the 8<sup>th</sup> Defendant in this suit and had not filed a statement of defence denying or confirming that it had undertaken transparent investigations where the title owners were invited to answer the allegations that the suit land was public land. The court also was not invited to consider the record of proceedings of objections/appeals under the *Land Adjudication Act*, which were filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein. This unilateral averment in the Replying Affidavit by the Plaintiff and submissions in reply in the impugned proceedings which are now sought to be set aside, deprived the court an opportunity to look into and weigh the evidential value to attach to previously determined proceeding and decrees, which pronounced the 1<sup>st</sup> and 2<sup>nd</sup> Defendant as owners of the suit land.
20. The Learned Counsel submitted that the National Land Commission had no jurisdiction to cancel title deeds pendent lite. It was their submission that it was worth noting that the NLC were reportedly investigating the issuance of title deeds to the suit land when this matter was still on going. A decision to revoke the title deeds were made in year 2005. The Plaintiff had filed this suit in the year 2014. The National Land Commission did not have jurisdiction to revoke the titles issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants since the matter of the validity of the suit land titles was Res Judicata in previous proceedings in which the Honorable Attorney General had represented the public interests before a court, and therefore the doctrine of lis pendens applied. NLC, having been sued as the 8<sup>th</sup> Defendant in this suit, unequivocally demonstrated that its investigations were not all inclusive. Had it involved the Plaintiff and the property owners, there was no need to file suit and name all these parties as the Defendants, without contravening the inter alia, the choice of remedy principle. The Learned Counsel held that it was curious, and probably an abuse of court process, if the Plaintiff came to court while it knew the NLC was at the Plaintiff's instance or complaint, regularly seized of the matter. This case was also not withdrawn by the Plaintiff even after it reportedly learnt about the ignoble revocation of the two (2) title deeds by the NLC.



21. The Learned Counsel submitted that under the *constitution*, the NLC did not have jurisdiction over private land and its recommendation could not be relied upon in revocation of a title deed which was simultaneously the subject of litigation. He argued that even though the NLC was empowered under the provision of Article 67 of the *Constitution* of Kenya to investigate and make recommendations, it was restricted to do so on inquiries into historical land injustices on public land and ancestral land. Its decision to revoke the title deeds was in contravention of the Sub - Judice principle as these proceedings were pending before the court. Its decision on the two title deeds was a nullity, and of no legal consequences. To buttress his point, he referred Court to the case of “Malindi ELC Case No. 217 of 2014 – *Azzuri Limited v George Kadenge Ziro & 5 Others*, Hon. Mr. Justice J. Olola (ELC) observed that:-

“As, Lord Justice Cranworth stated while commenting on the doctrine of lis pendens in *Bellamy vs. Sabina* (1857) 1 De J. 566 that where litigation is pending between a Plaintiff and the Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were not so, there could be no certainty that the proceedings would ever end.”

22. The Learned Counsel submitted that in paragraph 22 of the same ruling, Mr. Justice J. Olola (ELC) held that:-

“The Plaintiff herein seeks to benefit from a process that was clearly and pertinently sub - judice. In as much as the proceedings before the commission were conducted in disregard of the fact that the matters were pending determination before this court, they are of no legal consequences.”

23. The Learned Counsel submitted that before then, Madan JA in *Mawji v US International University & Another* [1976] KLR 185, observed that:

“The doctrine of lis pendens under section 52 of *TPA* is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by the common law. It is based on expedience of the court. The Doctrine of Lis pendens is necessary for the final adjudication of the matters before court and in general interests of public policy and good effective administration of justice. It therefore overrides Section 23 of the *RTA* and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

24. The Learned Counsel submitted that the principle of natural justice - ‘audi alteram partem’ and the act of revoking the title deeds of the original registered owners (1<sup>st</sup> and 2<sup>nd</sup> Defendants) by NLC without hearing them contravened the natural justice doctrine audi alteram partem, which would render it an abuse of court process and rule of law. It was also a direct contravention of the natural justice principle aforesaid.

25. The Learned Counsel submitted that the application before court which led to the impugned ruling was for an order to dismiss the suit for inaction. The Plaintiff and the 1<sup>st</sup> Defendant only actively participated in that process. In the absence of an application specifically praying for the marking of the suit as settled on account of the ignoble cancellation of the suit title deeds by NLC, the court without



hearing all the other defendants gave a ruling on matters which were not before it, and therefore were ultra vires its jurisdiction.

26. The Learned Counsel submitted that there was no settlement of issues in dispute that when the application for dismissal of the suit for want of prosecution came up for hearing, the court made an order marking the suit as settled. That prayer was not in the application and neither had the parties settled the issues in dispute. The order was thus made without jurisdiction.
27. The Learned Counsel submitted that the decision of the NLC to nullify the two (2) title deeds made during the pendency of this case, could not be the basis for marking as settled the issues in dispute in this suit. The decision of NLC having been made during the pendency of this case, it was not open for the Plaintiff to defend the application by the 1<sup>st</sup> Defendant, as according to the Plaintiff, the cause of action was overtaken by events and the Plaintiff had not filed either an application for withdrawal of suit, or an application to adopt or reiterated as an order of this court, by a side wind. Due to the effluxion of time, the applicant could not and cannot now appeal or challenge the impugned decision of the NLC as time for appealing, or seeking judicial review orders of certiorari, had lapsed. This portended that the impugned decision of NLC had now been given the imprimatur of the court order as a settlement of the case, yet there had been no settlement of the issues in dispute through a plenary hearing or otherwise.
28. The Learned Counsel concluded by submitting that it was only fair and just that the order and the proceedings marking the suit as settled be set aside and the Plaintiff dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The costs of this application should be awarded to the 2<sup>nd</sup> Defendant herein.

#### **B. The Plaintiff/Respondent's Written Submission**

29. On 8<sup>th</sup> February, 2022, the Learned Counsel for the Plaintiff/Respondent herein the esteemed Law firm of Messrs. Madzayo, Mrima & Jadi Advocates filed their written Submissions dated 7<sup>th</sup> February, 2022. M/s. Jadi Advocate submitted that the Plaintiff herein relied entirely on the averments made out in Replying Affidavit of Farida K. Jadi sworn on the 3<sup>rd</sup> November, 2022 and filed in court on 5<sup>th</sup> November, 2021. She strongly stated that application herein was incompetent and an abuse of the court process, the same having been brought under the wrong provisions of the law. She stated that the provision of Order 51 Rule 15 of the *Civil Procedure Rules, 2010* made a provision whereby the Court would set aside an order made ex - parte. On the contrary, she argued that the order by Hon. Justice Yano marking the matter as settled was never made ex parte. In any event, no such order had been annexed by the 2<sup>nd</sup> Defendant/Applicant herein and one wondered which order was the court being asked to set aside.
30. The Learned Counsel submitted that the application herein was an abuse of the court process whereby 1<sup>st</sup> Defendant/Applicant was seeking to have the proceedings herein set aside and at the same time to dismiss the matter with costs. This was a total abuse of the court process. Further, the prayers as prayed by the 2<sup>nd</sup> Defendant/Applicant could only be implied to mean that the Applicant was basically seeking for the review of Court's order reviewed. But the order was non existent having not been annexed. The Application having been brought under the wrong provisions of the law did not support a grant of orders for review. Further, the Applicant had failed to set out the grounds for such review thus the application was for dismissal.
31. The Learned Counsel submitted that the two parcels of land being Plot No Mazera/Mgumo Patsa 600 and 601 – suit properties had always been public properties being used as Kajiwe Primary and Secondary Schools since time immemorial. They submitted that even before the filing of the suit herein, the said properties had been subject of investigations at the National Land Commission. The



Applicant herein was well aware of this and in fact participated in the proceedings before the National Land Commission.

32. The Learned Counsel submitted that this matter never took off for hearing since immediately after filing the same and following investigations by the National Land Commission, the suit properties which had illegally been acquired by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were reverted back to school. A letter to this effect had been annexed. All the issue raised by the Applicant in the supporting Affidavit seem to challenge the decision of the National Land Commission revoking the title deeds. She argued that the 2<sup>nd</sup> Defendant/Applicant having been so aggrieved with the decision could only challenge the same after following due procedure and not in these proceedings. This court was not the right forum to challenge the decision of the National Land Commission.
33. The Learned Counsel submitted that in their view of the Decision of the National Land Commission, the prayers sought by the Plaintiff/Respondent had been granted, thus the matter herein was already overtaken by events and the Plaintiff could not proceed with Proceedings in vain. The National Land Commission had a part of its mandate powers to do investigations and also revoke illegally acquired title deeds. Any party aggrieved with such decision of the National Land Commission had a right to appeal as per the procedure laid down in the National Land Commission Act. She urged the Court to dismiss the application by the 2<sup>nd</sup> Defendant/Applicant with Costs.

#### **V. Analysis And Determination**

34. I have carefully considered the Notice of Motion application dated 29<sup>th</sup> April, 2021 by the 2<sup>nd</sup> Defendant/Applicant herein, the supporting and replying affidavits, the written submissions from the parties, the cited authorities, relevant provision of the Constitution of Kenya and statutes. I have also studied and perused the file and the proceedings, the case law cited and analyzed the provisions relied on. In order to arrive at an informed, reasonable and just decision, the Honorable Court has condescended the matter into four (4) salient issues for its determination. These are:-
  - a. Whether the Notice of Motion application dated 29<sup>th</sup> April, 2021 satisfies the established ingredients of setting aside of proceedings and orders?
  - b. Whether the Application merits to set to aside of proceedings taken herein resulting in the marking of the suit as settled;
  - c. Whether the filed Plaintiff can be struck out after the case has been settled?
  - d. Who to bear the costs of the instant Application?

#### **ISSUE No. a). Whether the Notice of Motion Application dated 29<sup>th</sup> April, 2021 Satisfies the Established Ingredients of Setting Aside of Proceedings and Orders?**

35. Under this sub heading, I wish to state that the 2<sup>nd</sup> Defendant/Applicant has raised several issues of critical legal assessment. The main dispute was that this matter while still pending before this Court was adjudicated or deliberated on exclusively between the Plaintiff, the 1<sup>st</sup> and the 8<sup>th</sup> Defendants to a point of revocation of the title deeds belonging to the 2<sup>nd</sup> Defendant herein. The 2<sup>nd</sup> Defendant this was contrary to the Doctrine of “Lis Pendent” and “Sub – Judice”. This Court fully agrees with the contention advanced by the 2<sup>nd</sup> Defendant/Applicant on this aspect and the fact that the 8<sup>th</sup> Defendant, the NLC was a party to this suit. On the matter, I am particularly impressed by the legal analysis founded by the decision of Azzuri Limited v George Kadenge Ziro & 5 Others (*Supra*) cited by the Learned Counsel for the Defendant/Applicant herein.



36. Additionally, the Court has also noted the observation made by the 2<sup>nd</sup> Defendant/Applicant to the effect that the delivery of the Ruling by this Court on 10<sup>th</sup> November, 2020 by my brother Justice Yano failed to adhere with the principles of natural justice - “audi alteram partem” in that no notices were served upon the parties. Indeed, that the same was delivered ‘Ex – parte” contrary to the provisions of Order 51 Rules 15 of the Civil Procedures Rules, 2010. The only difficulties this Court perceives from these bone of contention is that these are issues to be fully and adequately deliberated not at the interlocutory stage but full trial as they would require adducing of empirical and documentary evidence. This has been lacking here.
37. On the other hand, one of the preliminary issues of law raised by the Plaintiff/Respondent while attacking the application by the 2<sup>nd</sup> Defendant/Applicants application was that it was vexatious, frivolous and scandalous for having been brought under the wrong citation. Of course, the 2<sup>nd</sup> Defendant/Applicant has responded so adequately by referring Court to the new Constitutional dispensation under the provisions of Article 159 (2) (d) where matters are not to be considered on procedural technicalities of form but dealt with substantially on merit. Suffice to say, without taking the risk of being an academic exercise, the Honorable Court wishes to spend a little bit of time on this aspect. As indicated the application was brought before Court under the provisions of Sections 1A & 3A of the Civil Procedure Act, Cap. 21 and Order 51 Rule 15 of the Civil Procedure Rules, 2010. The provision of Section 3A of the Civil Procedure Act gives the court inherent power to make such orders as may be necessary for the ends of justice to be met, while Order 51 Rule 15 of the Civil Procedure Rules gives the court power to set aside any order made “ex – parte”. The court’s discretionary power should, however, be exercised judiciously, with the overriding objective founded under the provisions of Sections 3 and 19 of the Environment and land Act, No. 19 of 2011 which enable Courts to facilitate the just, expeditious, proportionate and accessible to resolution of disputes. This is what has been termed as the Overriding Objectives (Oxygen rule) which ensures that justice is done to all the parties. That the court’s discretion to set aside an ex parte ruling/judgment is not restricted, but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court’s favor or discretion to adduce sufficient and plausible reasons that are demonstrable, and persuasive to the court. It is therefore necessary for party seeking reinstatement to show that there were sufficient reasons preventing them from appearing in court.
38. The jurisdiction of the Court to review and set aside its decisions is wide and unfettered. In the case of *Shah v Mbogo & Another* [1967] 6A U7 the Eastern Africa Court of Appeal laid down the guiding principle in the exercise of this judicial discretion. The court’s discretion to set aside an ex - parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. That conversely, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice. In the present application the 2<sup>nd</sup> Defendant/Applicant deponed that as at the time for appealing had lapsed, when he learnt about the ruling, he besieged the court to exercise its inherent powers to set aside the proceedings and impugned ruling which are in every aspect a nullity for the following reasons:
- a. Want of services of hearing and ruling notices.
  - b. Want of application or prayer to mark the case as settled. The order of 26<sup>th</sup> February, 2018 without jurisdiction.
  - c. There were no settlement issues in dispute and if there was it was only between the Plaintiff and NLC, without involving all the other parties.



- d. Delay in prosecution of the suit was not explained away, and the rulings of court did not address the said application.
39. The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated ‘a sufficient cause’ (emphasis is Mine) warranting setting aside of the ex-parte decision or proceedings. On this very pertinent issue of Sufficient cause, the Honorable Court has decided to relied on several cases as stated herein. These are the case of “*Wachira Karani v Bildad Wachira* [2016] eKLR, the Court held that:
- “Sufficient cause is thus the cause for which the Defendant could not be blamed for his absence. Sufficient cause is a question of fact and the Court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the Defendant must demonstrate that he was prevented from attending Court by a sufficient cause.....”
40. In yet another case which this Court has found useful is that of “*BML v WM* [2020] eKLR, where the Court of Appeal cited with approval the Supreme Court of India in the case Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* (2011), where sufficient cause was defined as follows:-
- “Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been ‘not acting diligently ...”
41. In the case of *Kenya Power & Lighting Co. Limited v Esther Wanjiru Wokebii* Civil Appeal No. 326 of 2013 (2014) eKLR, the Court established the criteria for consideration for an order of stay of proceedings as follows:-
- “Having made that finding, it is obvious that Order 42 rule 6(2) cannot come to the aid of the Applicant. The Court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations”.
40. The Court then quoted Ringera J (as he then was) when he stated the following when confronted by a similar application in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000
- “As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”



40. In *Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Ltd* (2015) eKLR, the Court observed that;

“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

40. Similarly, in the case of *Pius Kawinzi Kithoka v Jacinter Kavindu Makau*, (aforesaid) the Court made the following observation:

“The Applicant has given no explanation at all for this delay. In my view, it shows lack of seriousness in pursuing the appeal at worst, and at best a vexing tardiness which disentitles him from the Court’s discretion. Equity does not aid the indolent”

**ISSUE No. b). Whether the Application Merits to set to aside of Proceedings taken herein Resulting in the Marking of the Suit as settled;**

40. It is evident that the Ruling of this Court was delivered on 10<sup>th</sup> November, 2020 by my brother Justice Yano, dismissing the suit for want of prosecution as no steps had been taken from the year 2014, was a reasonable thing to do. Besides, this application filed after close to five months after the said ruling. Although in our jurisdiction there is no clear cut or arithmetic way of calculating delay, it is left to the Court to determine based on the circumstances of the case inordinate delay is. It is the explanation that accompanies the delay that unlocks the discretion of the Court. In this case no explanation was forthcoming from the 2<sup>nd</sup> Defendant/Applicant. The Court finds that the application suffers from unexplained inordinate delay.

41. The court must be cognizant of the fact that judicial time is precious and must not be wasted in engaging itself in academic exercises by hearing cases in a full trial where it is plain and obvious that a plaint discloses no reasonable cause of action or defence in law, where a Plaint is scandalous, frivolous, vexatious, where a plaint may prejudice, embarrass or delay the full trial of the action or where the plaint is otherwise an abuse of the court process. In this particular instant the other parties were present when the Ruling was delivered. It is not in order that the 2<sup>nd</sup> Defendant/Applicant instituted this suit through Order 51 Rule 15 which provides for setting aside of ex parte orders.

42. It is trite that this Court in conducting its proceedings and functions is guided by Article 159 of the *Constitution*, Section 3A of the *Civil Procedure Act* and the principles of Natural Justice. Having stated the above this Court will proceed to determine if the reasons advanced by the 2<sup>nd</sup> Defendant/Applicant fit the description of sufficient cause stated above.

43. In the case of “*Patriotic Guards Limited v James Kipchirchir Sambu*, Nairobi CA No. 20 OF 2016, (2018) KLR, the Court stated:-

“It is settled law that whenever a Court is called upon to exercise its discretion, it must do so judiciously... judicious because the discretion to be exercised is judicial power derived from the law and as opposed to judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by Court to do real and substantial justice to the parties in the suit.”

44. It is trite law that section 3A is applicable by the Courts where there is a vacuum but not where there are provisions to cater for such as in this instance case.



### **ISSUE No. c). Whether the Filed Complaint can be Struck Out after the Case has been Settled?**

45. Under this sub heading, the Court holds outrightly that It will not be in prudent for the court to strike out a Complaint to a suit that was already settled. From the reasons give here above and the fact that the Applicant has not shown the court the reasons as to why he would it to set out proceedings for want of prosecution one year after the delivery of the verdict that settled the matter in question. It is the observation of the court also that the Applicant brought this application under Order 51 Rule 15 of the Civil Procedure Rules, 2010 which provides for setting aside of ex parte orders. A quick perusal of the proceedings of 10<sup>th</sup> November, 2010 M/s. Jadi Advocate for the Plaintiff and M/s. Njau Advocate for the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> 9<sup>th</sup>, 10 and 11<sup>th</sup> Defendants were present when the ruling was delivered by virtual means. Clearly, the orders were not ex parte. The absence of one party does not make the proceedings ex parte if the other parties to this suit were present.
46. The provision of Section 3A of the Civil Procedure Act relates to the wide powers of the Court to exercise its discretion to the end of justice between the parties. This Court already expressed itself in the ruling delivered on 2020. The Applicant has not established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought. This court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice as was decided in “Wachira Karani v Bidad Wachira Civil Suit No. 101 of 2011 [2016] eKLR.

### **ISSUE No. d). Who will bear the Costs of the application**

47. It is now settled that matters of Costs are discretionary. Costs are the awards granted to any litigant after any legal action, proceedings or process of litigation. The proviso of Section 27 (1) of the Civil procedure Rules, 2010 holds that Costs do follow the events. By events here it means the results or outcome of any legal action or proceedings or process in litigation.
48. In the instant case, the application by the 2<sup>nd</sup> Defendant/Applicant dated 29<sup>th</sup> April, 2021 has not been successful. Thus, it follows that the result of that legal process is that costs should be awarded to the Plaintiff/Respondent herein as the only party that participated in the adjudication of the application herein. They are entitled to costs.

### **VI. Conclusion & Disposition**

49. In the end and having analysed the issues framed and on the preponderance of probability, the Honorable Court makes the following findings:-
- a. That the Notice of Motion application dated 29<sup>th</sup> April, 2021 be and is hereby dismissed for being without merit.
  - b. That the costs to the Respondents.

It is so ordered accordingly.

**DELIVERED, DATED AND SIGNED THIS 20<sup>TH</sup> OF JULY 2022**

**HON. JUSTICE MR. L.L. NAIKUNI (JUDGE).**

**ENVIRONMENT & LANDS, AT MOMBASA**

In the presence of:-



- a. M/s. Yumnah Hassan, Court Assistant.
- b. No appearance Advocate for the Plaintiff/Respondent.
- c. No appearance for the 1<sup>st</sup> Defendant.
- d. M/s. Kimani Advocate holding brief for SM Kimani Advocate for the 2<sup>nd</sup> Defendant/Applicant.
- e. Mr. Makuto for the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> Defendants

