Muthami v Muthami & another (Environment and Land Appeal 33 of 2021) [2022] KEELC 15608 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15608 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND APPEAL 33 OF 2021

LG KIMANI, J

DECEMBER 20, 2022

BETWEEN

MWATHI MUTHAMI ..... APPELLANT

AND

MBEERE MUTHAMI ..... 1ST RESPONDENT

MBEERE MUTHAMI ..... 2ND RESPONDENT

(Being an appeal from the ruling of the Honourable John Aringo, Senior Resident Magistrate-Kyuso delivered on the 21st April 2021 at Kyuso Law Courts in Principal Magistrate's Court ELC 14 OF 2019)

JUDGMENT

1. The Appellant filed a Memorandum of Appeal dated May 10, 2021 appealing from the ruling of Honourable John Aringo, Senior Resident Magstrate-Kyuso delivered on April 21, 2021 in Kyuso Principal Magistrate's Court ELC 14 of 2019 on the following grounds:

    1. Thatthe Learned Trial Magistrate erred and misdirected himself both in law and facts by failing to consider that the Appellant had not been served with a notice of the date the formal proof proceeded, a failure that denied the Appellant the right to listen and hear the claim against her.

    2. That the Learned Trial Magistrate erred and misdirected himself both in law and in facts by fettering his wide discretion by taking into consideration extraneous and supposed antecedents of the Appellant on matters before the action in court.

    3. That the Learned Trial Magistrate erred and misdirected himself both in law and in facts by failing to note that in view of the nature of proprietorship title in question, it was a triable issue as to how much each party was entitled to and that could only be resolved by full trial.

4. That the Learned Trial Magistrate erred and misdirected himself by being misconceived about the nature of the proprietorship title in question, hence he arrived at the wrong conclusion on the issue that was central to the case.

5. That the Learned Trial Magistrate erred and misdirected himself both in law and in facts by unreasonably and unnecessarily fettering his wide discretion to set aside the ex-parte judgment by a misconception that, a mutation of the title could override or overtake or overrun the constitutional right to a hearing and to be heard.

The Appellant prays that this appeal be allowed and the ruling of the trial magistrate dismissing the Appellant's notice of motion dated January 12, 2021 be quashed, set aside, varied and/or be substituted with orders allowing the application.

2. The background to the Appeal is that before the trial court the Appellant was the Defendant while the Respondents were the Plaintiffs. Judgment in default of appearance and defence was entered against the Appellant and the suit proceeded for formal proof undefended. The Respondents sought to sub-divide the suit Land Parcel No Kitui/Kyuso B 1306 measuring 33.9 HA into 3 equal portions claiming that it was jointly owned by themselves and the Appellant who is the 1st Respondents co-wife in equal shares. The orders sought were granted by the Trial Magistrate the Hon. John Aringo in a judgment dated July 23, 2020 which ordered as follows;

> " The Defendant is hereby ordered to do and facilitate all that appertains to the subdivision of land parcel Kitui/Kyuso B 1306 measuring 33.9 HA into 3 portions for each of the registered owners with each co-proprietor getting a 1/3 of the total as set out in part "B" of the title deed. This must be done within 30 days of the judgment. In default the Executive Officer, Kyuso Law Courts do sign all the necessary documents and requisite papers to enable subdivision of the suit property and the registration of the respective parcels to the respective co-proprietors so that they may be issued with title deeds. The Defendant do pay costs of the suit".

3. Subsequently the Appellant filed the application dated January 12, 2021 seeking inter alia;

> " The interlocutory judgement and final judgement entered on July 23, 2020 be set aside and the Defendant be granted leave to defend the suit.
>
> The annexed draft defence be deemed as dully filed and served upon payment of requisite court fees."

4. In a ruling dated April 21, 2021, the trial court found that the defendant had not made out a sufficient case on merits to justify setting aside of the default judgement. The application was thus dismissed with costs. It is this ruling dated April 21, 2021 that forms the basis of this appeal.

5. In her supporting affidavit, the Appellant stated that on or about December 24, 2020, she saw surveyors and other people on her land and was served with the court documents upon inquiry. She stated that the land in issue belonged to her late husband Muthami and that the 1st Respondent is her co-wife while the 2nd Respondent is their nephew. According to the Appellant, there was a misunderstanding during the adjudication process and the three of them were registered as joint owners of the suit property. It was her averment that if the land is sub-divided into 3 equal parts, her children will be seriously disadvantaged as some of them live on that land and were not consulted during the sub-division of the land. It was also her claim that she was not served with the Plaint and Summons to enter appearance.

6. In response of the Application the Respondents stated that the Appellant was served with summons to enter appearance by a competent process server and that the interlocutory judgment is regular and cannot be set aside. Further, that since the title deed confirms that the 3 parties herein have equal share to the suit property, the property being divided equally is not going to prejudice any party.

7. The Honourable Trial Magistrate delivered his ruling on 21st of April 2021, finding that there was an affidavit of service sworn by a competent process server confirming service at the Applicants home. The Court also noted that all the parties in the matter are close relatives who are said to occupy the suit property and was satisfied that the summons were properly served.

8. The trial court further held that it was inequitable and impractical to set aside the default judgment since it would occasion injustice to the respondents who had incurred costs to progress the suit. The court also took note of the intended defence which conceded that all the parties to the suit have a share in the property and that it has no jurisdiction to vary the record of the title deed and dismissed the application with costs.

Appellant's submissions

9. Counsel for the Appellant chose to submit on grounds 1, 2 and 5 and did not submit on the rest and submitted that the Appellant was deprived of a right to a hearing and that she had triable/plausible issues for trial, especially the fact that of sub-division of the property without evicting any member from their occupied portions. She submitted that she was entitled to be heard on that basis and that subdivision should follow the pattern used by the clan. On ground 1 of the Appeal, the Appellant submitted that the Trial Magistrate failed to note that the Appellant had not been served with the hearing notice of the date of the formal proof. Quoting Order 10 rule 11 of the *Civil Procedure Rules (2010)*, counsel submitted that the trial court is granted a very wide discretion to set aside or vary any judgment or any consequent decrees, orders upon such terms as it is appropriate to do justice to the parties.

10. The Appellant relied on the case of *John Muthee Ngunjiriv Ali Ibrahim* (2021) eKLR while submitting that the lack of service for the hearing notice rendered the judgment vitiated by that irregularity. He further claimed that there was no service of the Amended Plaint upon the Appellant, while a new prayer had been added to the Plaint.

11. Further, the Appellant submitted that according to the *John Muthee Case* (Supra) a regular ex-parte judgment may be set aside upon the applicant demonstrating that he has a defence on merits. The Appellant also relied on the cases of *Joseph M'Rukiri v Thangicia M'Imunya*(2021) eKLR and the case of *James Kanyiita Nderitu & Anotherv Marios Philotas Ghikas & Another* Civil Appeal No6 of 2015(2016)eKLR.

12. Submitting that the trial court in charge of the proceedings had a duty to ensure that the defendant had been served at every stage of the proceedings, the Appellant cited the cases of *Landmark Freight Services Limitedv Zakhem International Limited* (2021) eKLR, *Pithon Waweru Maina v Thuku Mugiria*(1983) eKLR and *Wachira Karamiv Bildad Wachira*(2016)eKLR.

13. On grounds 2 and 5, counsel for the Appellant submitted that the trial court focused on extraneous matters and appeared to have been fettered his discretion by saying that the Appellant had rejected all attempts to mediate and resolve the matter out of court and that the Appellant had waited too long and the issues raised had been overtaken by events yet she was not aware of the proceedings in question.

14. Finally, the Appellant submitted that the fact that the land in dispute has been subjected to subdivision and the mutation exercise is no bar to setting aside the impugned judgment in order to give a party

a chance to be heard. According to counsel for the Appellant, mutation of a parcel of land or sub-division of land is not an irreversible exercise cast on rock and stones or metal while relying on the case of *David Otieno Ohandov Henry Opiyo Akama & 2 others* (2020) eKLR.

Respondents' submissions

15. The Respondents urged the court to take note of the affidavit of service sworn by Raphael Kyalo dated November 22, 2019 which confirmed service of summons and the particulars the Appellant did not deny.

16. Counsel submitted that Order 5 rule 16 of the *Civil Procedure Rules* provides an avenue for the rectification of mischief if a process server is in doubt by cross-examining him/her on the contents of the affidavit. They relied on the decision in *Agigreen Consulting Corp Ltdv National Irrigation Board* (2020) eKLR that held that there is a presumption of service as stated in the process server's report and the burden lies on the party questioning it to show that the return is incorrect.

17. The Respondents submitted that 'equity aids the vigilant and not the indolent' and that the Appellant slept on her rights. They relied on the case of *INMv AJMN* (2022) eKLR and *Shahv Mbogo* (1967) EA 166 which found that the discretion to set aside an ex-parte judgment is not designed to assist the person who has sought to obstruct or delay the course of justice. Also relying on the holding in *Mwala v Kenya Bureau of Standards* EA LR (2001) 1 EA 148, they submitted that the judgment and impugned ruling were regular.

18. It is the Respondent's view that the Appellant did not raise any triable, that the Appellant did not explain with sufficiency her reasons for delaying to file her defence as well as snubbing all attempts to resolve the matter amicably for over 6 years in order to warrant setting aside of the judgment. They stated that the Appellant is only interested in causing unnecessary delay in the matter and that the court should not come to the aid of the Appellant.

19. In addition, the Respondents submitted that no party has been prejudiced as the suit property has been sub-divided into three equal portions as decreed by the lower court judgment stated July 23, 2019.

Analysis and determination

20. I have considered the grounds raised in the Memorandum of Appeal, the record of appeal and submissions filed by Counsel for the parties. As the first appellate court, this court's mandate is to re-evaluate the trial court ruling in order to come to its own conclusion as was succinctly stated by the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal stated that;

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

21. The Appellant submitted on grounds 1, 2 and 5 of the Memorandum of Appeal. However, it is noted that Counsel did not abandon the other grounds of appeal and I therefore propose to deal with all grounds of appeal and combine them based on the issues raised. I will thus deal with ground 1, grounds 2 and 5 combined and grounds 3 and 4 combined.

Ground 1

22. The question of whether or not the Appellant was served with a notice of hearing of the date for formal proof was not an issue raised before the trial court. The Appellant filed 3 affidavits sworn on January 12, 2021, further affidavit sworn on 9th February, 2/2021 and a supplementary affidavit sworn on April 12, 2021 in none or those affidavits does she raise the issue of failure to serve a hearing notice. On the face of the application dated January 12, 2021 the appellant claimed that she was never served with summons to enter appearance, but did not raise the ground of failure to serve a hearing notice. The issue was only raised in submissions but since the same was not pleaded the Respondent did not have an opportunity to reply to the same. The Counsel was thus giving evidence from the bar. In the case of *Michael Mbogo Kibuti v Attorney General* [2020] eKLR, the Court of Appeal confirmed the principle that parties are bound by their pleadings and stated as follows;

> "We are aware of the principle that a party is bound by their own pleadings as so ably articulated in Stephen Mutinda Mule's case (Supra) cited by counsel for the respondent and which quoted with approval the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltdv. Nyasulu [1998] MWSC 3, in which the learned Judges also quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated: -
>
> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

23. This ground of appeal would fail on that basis alone. However even if the same had been raised it is my view that the Appellant has not shown that it is a requirement of the law that when a Party to a suit has been served with summons to enter appearance and file defence and fails and/or neglects to do so, the Plaintiff in such a case has a legal obligation to serve hearing notice on such a Party. The case relied on by the Appellants Counsel *Johnson Muthee Ngunjiriv Ali Ibrahim* (2021) eKLR to show that the Applicant ought to have been served with a hearing notice is distinguishable from the present case since the court in that case had directed that the Defendant despite not having entered appearance be served with a hearing notice.

24. Order 6 Rule 1 of the *Civil Procedure Rules* provides for appearance of parties and states that where a party has been served with summons to appear he shall unless some order be made by the Court file his appearance within the time prescribed in the summons. The said appearance is to be signed by either the party or the advocate if represented. The same is to be filed and served on the Plaintiff within 7 days of filing and an affidavit of service to be filed. Order 6 Rule 3 provides for address of service and states as follows:

    (1) The advocates of the defendant shall state in the memorandum of appearance the addresses for service being the place of business within Kenya and postal address.

    (2) A defendant appearing in person shall state in the memorandum of appearance his addresses for service being either his place of residence or his place of business and his postal address, and if he has neither residence nor place of business in Kenya he shall state a place and postal address within Kenya which shall be his addresses for service.

    It is to the address of service provided in the Memorandum of Appearance that a party is to be served.

25. Order 10 of *Civil Procedure Rules* further provides for the consequences of non-appearance and default of defence and failure to serve. Rule 2 provides that;

> Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant he shall file an affidavit of service of the summons unless the summons has been served by a process-server appointed by the court."

Rule 9 provides for the general rule where no appearance is entered and states;

> "Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing."

26. In the present case the trial court was satisfied that the Appellant was served with summons to enter appearance but he did not enter appearance or file a defence. I have looked at the affidavit of service of one Raphael Kyalo sworn on November 22, 2019 which clearly stated the manner in which summons were served and I find no fault in the courts finding that the defendant was properly served with summons to enter appearance.

27. Having failed to enter appearance, I do not find any support for the Appellants submission that she ought to have been served with a hearing notice. In my view the judgment entered in this case on the basis of the affidavit of service was a regular judgment.

28. In *Shah v Mbogo & Another* (1967) EA 116 at page 123 the Court enumerated the principles governing the exercise of the Court's discretion to set aside judgment obtained ex parte and stated;

> " The discretion is intended to be exercised to avoid injustice or hardships or excusable mistake or errors, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to abstract or delay the cause of justice."

Ground 2 and 5

29. Did the trial Court fetter its wide discretion in setting aside the ex parte judgement by;

    i. Considering extraneous considerations and antecedents on matters before action?

    ii. Misconceiving that a mutation of file could override the constitution right to a hearing

30. The Court of Appeal in the case of *CMC Holdings Ltdv Nzioka* (2004) eKLR stated with regard to setting aside judgment.

> " In an application for setting aside exparte judgment, the Court exercises its discretion in allowing or rejecting the same. The discretion must be exercised judiciously.

31. Indeed, in the Court of Appeal case of *James Kanyita Nderitu & Another v Marios Phiolas Ghate & Another* Civil Appeal No 6 of 2015 (2016) eKLR the Court held that an irregular judgment ought to be set aside *ex debito justicia* as of right."

32. In the case of a regular judgment, setting aside of judgment under Order 10 and Rule 11 is discretionary but the said discretion is exercised judiciously. The said Rule reads as follows;

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

In the case of *Kimani v McCounell* (1966) EA 547 Hanas J stated;

> " In light of all the facts and circumstances both prior to subsequence of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."

33. In the case of *Pithon Waweru Maina v Thuku Mugiria*, Civil Appeal No 27 of 1982 Potter JA in quoting Duffus P in *Patel v EA Cargo Handling Services Ltd*., [1974] EA 75 stated at page 1 of his judgment:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just" .....The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules."

34. In the same appeal Kneller JA quoting Harris J in *Shah v Mbogo and Another* [1967] EA 116 at 123 BC on the principles governing the exercise of the court's discretion to set aside a judgment obtained ex-parte stated:

> " The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice."

35. Therefore, the object of setting aside is to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

36. On whether or not to interfere with a courts discretion comprehensive principles that are accepted as applying to an application concerning the exercise of a judge's discretion are provided in the leading case of *Mbogo v Shah* [1968] EA in which De Lestang VP (as he then was) observed at page 94:

> " I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or

because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

37. It would be wrong for this Court to interfere with the exercise of the trial judge's discretion merely because this Court's decision would have been different. As was held by the Court of Appeal in *CMC Holdings Ltd v Nzioki* [2004] KLR 173:

> "In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. 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 ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error.

38. In *Pindoria Construction Ltd v Ironmongers Sanytaryware* Civil Appeal No 16 of 1976 it was held that:

> "It is a common ground that it is a matter for discretion whether or not to set aside a judgement under rule 8 of Order 9B of the Civil Procedure Rules. It is also well settled that the Court of Appeal will not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice... The appellant was not altogether free from blame. He could have tried harder to be present at the date of hearing. He delayed considerably in filing his application to set aside the ex parte judgement. The trial Judge's exasperation at his behaviour was understandable. Although he should not have been precluded from defending the claim against him he has to be penalised to some extent in view of his somewhat dilatory actions."

39. I have looked at the considerations the trial court took into account in exercising its discretion and in my view they were not extraneous considerations and neither did they amount to a fetter on the Court's discretion. The Court considered the following while exercising its discretion;

> (i) The Appellants antecedents and the entire court record in that she snubbed attempts to mediate and resolve the dispute herein (ii) Failure to enter appearance (iii) The Appellant was only jolted into action by execution proceedings (iv) that she waited too long and execution of the decree had to a large extent been carried out and the application overtaken by events (v) Mutations had been carried out and new parcels issued new numbers vi) it was inequitable to impractical and unjust set aside judgment. Vii) Finally, the Court concluded that the Appellant came across as someone who deliberately sought to obstruct or delay the course of justice and that the discretion of the Court to set aside was not designed to assist such a person.

40. I am guided by the cases cited above in finding that these two grounds of appeal fail for the reason that I find that the trial court did not misdirect itself in exercise of its discretion and thus did not arrive at a wrong decision.

Ground 3 and 4

41. On these grounds the Court considered the draft defence and found that the Appellant conceded that the Respondents were entitled to a portion of the suit land but was only opposed to distribution of the land which was inequitable. The Court considered that the proprietorship section of the title deed to the suit land showed that the ownership of the land was 1/3 for each of the parties to the suit.

The Court found that it could not alter or vary the entitlement provided under the proprietorship section. The court further observed that the suit land was obtained through the land adjudication process which had occurred not too long before the court process and apparently the parties were unable to resolve some of the issues raised through the said process. The entries in the proprietorship section were made as a result of that process and the court was bound by them. According to the trial Court the defence filed fell short.

42. In the case of *CMC Holdings Ltd v Nzioki* (supra) the court found it necessary for the trial court to consider whether the defence filed or the draft defence provided raises triable issues in determining whether to exercise discretion in favour of the applicant in an application for setting aside judgement;

> " The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard ex parte and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

43. I have perused the draft defence filed by the Appellant where she stated that the land in dispute belonged to the deceased one Muthami who was her husband together with her co-wife the 1st Respondent herein. She stated that she wanted the land to be subdivided equitably and especially as per the clans agreement and subdivision dated September 6, 2013 and September 7, 2013. She further claimed that the Respondents have other pieces of land both at Kyuso and Kamuwongo while she did not have any other land, which fact ought to be considered while sharing the suit land. I have also looked at the title deed for the suit land parcel Kitui/kyuso B/ 1306 issued on 14th October 2016 and noted that the said title deed is registered in the name of the parties to this appeal Mwathi Muthami, Mbeere Nuthami and James Musyoka Matiti. Under the proprietorship section of the said title deed it is shown that the land is owned by the said proprietors in portions of 1/3 each. I have looked at the claim by the Plaintiffs and their main prayer was for "an order of sub-division of land parcel Kitui/

kyuso B/ 1306 for each party to get his respective portion and title deed". I have also looked at the judgement of the trial court which ordered the Defendant;

> " do and facilitate all that appertains to the subdivision of land parcel Kitui/kyusoB/ 1306 measuring 33.9 Ha into 3 portions for each of the 3 registered owners with each co-proprietor getting a 1/3 of the total as set out in part "B" of the title deed. This must be done within 30 days of this judgement in default the executive Officer, Kyuso law courts do sign all the necessary and requisite papers to enable the subdivision of the suit property and the registration of the respective parcels to the respective co-proprietors so that they may be issued with title deeds"

44. Having considered all the above, I am in agreement with the trial Court and find that the title deed for the suit land clearly shows that the proprietors held the land in shares of 1/3 each and no good grounds had been shown by way of affidavits that would have compelled the court to change the said shares. Further, the judgement of the trial court had allowed the Appellant an opportunity to participate in the subdivision of the land into the three portions. I therefore find that the defence filed did not raise any triable issues that warranted setting aside the judgment. These above two grounds of appeal must therefore fail.

Final determination

45. The appeal herein lacks merit and the same is dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 20TH DAY OF DECEMBER, 2022.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgment read virtually in the presence of:

Musyoki Court Assistant

No attendance for the Appellant

No Attendance for the Respondent