REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 921 OF 1998

JAMES WAIBOCI……..…..….1ST PLAINTIFF/RESPONDENT

EUSTACE KENT NKOMBE…….....…..2ND PLAINTIFF/RESPONDENT

VERSUS

PASHITO HOLDINGS LTD. ……..…..1ST DEFENDANT/APPLICANT

SHITAL BHANDARI….……..….2ND DEFENDANT/APPLICANT

COMMISSIONER OF LANDS……....…3RD DEFENDANT/APPLICANT

WILSON GACHANJA……..…..….4TH DEFENDANT/APPLICANT

MAYWOOD LIMITED…….…..…..5TH DEFENDANT/APPLICANT

MITEMA HOLDINGS LTD. …….……6TH DEFENDANT/APPLICANT

MOVA CONSTRUCTION CO. LTD. ….7TH DEFENDANT/APPLICANT

DIRECTOR OF SURVEYS……..8TH DEFENDANT/APPLICANT

RULING

1. The Application, the Prayers, the Depositions

The Defendants took out a Chamber Summons dated 18th August, 2003 which they filed on the same day. This was brought under Order IXA rule 10 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21).

The Defendants' prayers were –

> (a) that, the Court be pleased to set aside the Judgement and Decree entered against the Defendants on 11th March, 1999 in default of appearance and defences, and that, the various defences filed herein be deemed to be in order, so that the matter proceeds to hearing;
>
> (b) that, the costs of the application be costs in the cause.

The grounds stated on the face of the Chamber Summons are as follows:

(i) that, the Defendants did indeed file their defences in time, but strangely enough, these defences had not been found in the Court file;

(ii) that, the Defendants do have good defences which should be heard before a final Order is granted.

Further support for the application is found in the affidavit of Mohammed Nyaoga, an Advocate in the firm of M/s. Mohammed Muigai & Co. Advocates which has the conduct of this matter on behalf of the 2nd, 5th, 6th and 7th Defendants. He depones that his firm had entered appearance and filed defences quite in time as required under the law, and the same papers were duly served upon the Plaintiffs' Advocates who acknowledged by signature on the back thereof on 8th July, 1999. He avers that the memorandum of appearance and the defences were duly paid for at the Registry and were stamped "filed". The deponent states that his firm was also served with written statements of defence from the 3rd, 4th and 8th Defendants and those were also stamped with the Court Registry stamp. Thus, all the eight Defendants have defences filed in Court, and filed on time. On 1st August, 2003 the second Defendant came to the deponent's office complaining that adverse orders have been registered against his property which is the subject of the main suit; that the said Orders had been registered against L.R. Numbers Nairobi/Block 90/584, Nairobi/Block 90/585 and Nairobi/Block 90/586, pursuant to a Judgement entered in Court. The 2nd Defendant had been informed of this position at the Lands Registry on 31st July, 2003. Thereupon, the deponent conducted a search on the Court file; and what did he find? (a) that, interlocutory Judgement had been entered against the 3rd and 8th Defendants on 11th March, 1999 allegedly for failure to file defence; (b) that, interlocutory Judgement had been filed against the 1st, 2nd, 4th, 5th, 6th and 7th Defendants on 29th June, 1999 allegedly for failure to file defence; (c) that, by their letter of 15th February, 2000 the Plaintiffs' Advocates had applied for a Preliminary Decree and thereafter a Decree was issued in favour of the Plaintiffs. The deponent averred that the Court file did not have any of the Defendants' defences including those for the 2nd, 4th, 5th and 6th Defendants for whom his firm was acting and for whom defences had been filed and served upon the Plaintiffs' Advocates. The deponent stated that since the filing of the defences as aforesaid, the Plaintiffs have never attempted to prosecute their suit. He averred that no notice was ever issued to the Defendants regarding interlocutory Judgements having been entered against them. The deponent doubted the honesty of the Plaintiffs in securing the interlocutory Judgement, considering that their Advocates had all along been aware that defences had been filed and in time. The deponent considered that the interlocutory Judgement entered on the 29th of June, 1999 and the subsequent Decree given on the 10th of May, 2000 were irregular.

For the Plaintiffs, Samuel Kanogo Ritho, an Advocate acting on their behalf, swore a replying affidavit on 25th August, 2003 in which he avers as follows:

(a) that, the deponent's firm was served with a memorandum of appearance for and on behalf of the 2nd, 5th, 6th and 7th Defendants dated 22nd May, 1998 on 25th May, 1998;

(b) that, M/s. Mohammed & Muigai Advocates after filing the memorandum of appearance dated 22nd May, 1998 and serving the Plaintiffs' Advocates on 25th May, 1998 did not file defences within the time required by Order VIII rule 1(2) in that the 2nd, 5th, 6th and 7th Defendants' defences dated 8th July, 1998 were filed and served on that same date;

(c) that, as the date of the defences of the 2nd, 5th, 6th and 7th Defendants was 8th July, 1998 the 15 days from 25th May, 1998 had lapsed, as it was already 43 days from 25th May, 1998;

(d) that, on 25th June there was no Defence filed by M/s. Mohammed and Muigai Advocates for and on behalf of the 2nd, 5th, 6th and 7th Defendants and since it was more than 30 days from 25th May, 1998 the deponent's firm applied for Judgement to be entered against the 2nd, 5th, 6th and 7th Defendants because they had not filed their defences within the time prescribed by Order VIII rule

1(2); and the said Judgement was entered on 25th June, 1998;

(e) that, annexed documentation shows clearly that the memorandum of appearance by M/s. Mohammed & Muigai, Advocates for the 2nd, 5th, 6th and 7th Defendants dated 22nd May, 1998 were filed on 25th May, 1998 and served on the deponent's firm on 25th May, 1998 but no Defence was field until 8th July, 1998 which was more than 43 days later and this was long after the interlocutory Judgement had been entered on 29th June, 1998;

(f) that, as regards the other Defendants, the 1st, 3rd and 8th Defendants, they had also not filed their defences on 29th June, 1998 when the Plaintiffs applied for interlocutory Judgement to be entered against them and it was entered for failure to file their defences;

(g) that, the interlocutory Judgements entered on 25th June, 1998 and 29th June, 1998 respectively were so entered more than 15 days from 25th May, 1998 when the memorandum of appearance for 2nd, 5th, 6th and 7th Defendants had been filed and served;

(h) that, although the Judgements were entered on 25th June, 1998 and 29th June, 1998 the Decree was not extracted until 10th May, 2000;

(i) that, the 2nd, 5th, 6th and 7th Defendants did not file their Defences until 8th July, 1998 which was more than 40 days from the date of service of the memorandum of appearance;

(j) that, the interlocutory Judgements entered on 25th June, 1998 and 29th June, 1998 are regular Judgements in that they were entered after the expiry of the 15 days allowed by Order VIII rule 1(2), after 25th May, 1998;

(k) that the suit involves allocations of land meant for public purposes and which had been reserved for a Police station and a water reservoir, and the Commissioner of Lands had no authority to allocate the said land by Legal Notice No. 236 of 1964 which rendered the allocation of the suit land illegal and void ***ab initio***.

The Plaintiffs also had grounds of opposition to the Defendants' application dated and filed on 25th August, 2003. These grounds are based on the depositions of counsel for the Plaintiff, and there is no need to elaborate them here.

2. Submissions for the Defendants/Applicants

Hearing first took place on 3rd December, 2003 when Mr. Nyaencha for the 2nd, 5th, 6th and 7th Defendants made his clients' case for the setting aside of the Judgement and Decree of 11th March, 1999. Consistent with the affidavit tendered for the Defendants, Mr. Nyaencha stated that the defences had been filed "in good time" even if not filed in strict compliance with the deadline. Counsel did not, however, give specific dates in relation to the "good time". This has given me anxiety, as the affidavit filed by counsel for the Plaintiffs/Respondents is quite specific on the correct sequence in law for the filing of papers in litigation, and it is contended for the Plaintiffs that the Defendants failed to comply with the legal requirements.

Such omission notwithstanding, counsel for the Applicants urged that whatever merits the Plaintiffs' request for interlocutory Judgement would have had, "the matter should have been set down for formal proof, before final Judgement and final Decree were issued." Counsel further submitted that the Registrar had no jurisdiction to enter Judgement in the matter, and the whole suit should have been set down for hearing.

Mr. Nyaencha went on to argue that even assuming there was "no Defence and the matter is not one

where the suit must be set down for hearing, the practice is that where there is a defence, the parties are to be given a chance to argue it." I have, with respect, found some difficulty with this argument; for it entails a circumlocution, and is not entirely logical. The Civil Procedure Code sets out detailed procedures to facilitate the trial process, and Order VIII rule 1(2) thereof specifies the time by which the Defence is to have been filed and served. Obviously, where such a time comes and there is no Defence on record, then the conditions will have been satisfied for a request for interlocutory Judgement. There cannot be a practice which dictates that even in such a case, where a Defence is missing, "the parties are to be given a chance to argue it." My expectation, in such a situation, is that a Defendant caught in such a plight has a clear opportunity to apply before the Court for a setting aside of the interlocutory Judgement, and secondly, to request the Court for an extension of time for filing a Defence; and thereafter a proper hearing of the main suit ***inter partes*** would take place.

Mr. Nyaencha made further pleas for a hearing for the Defendants, in these terms: ***"The nature of the suit is special; it is a matter dear to public policy; land allegedly belonging to the public is excised by the Commissioner of Lands and granted to a first party who then sells to an innocent purchaser for value who is not aware of the defects***." Counsel urged that the Court should not miss the opportunity to "go into the root cause of all ***these matters and provide a Judgement after a hearing."***

Such is an interesting proposition which would raise difficulties for a legal system such as ours, which is essentially accusatorial, rather than inquisitorial. On what basis does the Court "go into the root cause of all these matters"? In an inquisitorial system, the Court would do that. But the accusatorial process is the hallmark of the common law system which is part of Kenya's juridical heritage. It operates by the adversary method. Every suitor comes with a specific claim, asserts his position and seeks remedies against his opponent. The opponent squarely addresses the claims by traversing them in the pleadings, and then leading evidence in the form of things perceived and tending to establish the claims in the pleadings. The conduct of the adversary process has been greatly facilitated by the Civil Procedure Rules, that regulate in detail the manner in which parties come before the Court, and in which they respond to each other. It is not, I think, proper for counsel to expect that this Court should admit parties to the litigation process other than ***via*** the Civil Procedure Act (Cap. 21) and the auxiliary Civil Procedure Rules.

Mr. Nyaencha graciously conceded that the interlocutory Judgement which is the object of the application, was entered before the defences were filed. I take this to imply that the Defendants do concede that the Plaintiffs in seeking and obtaining interlocutory Judgement, had by no means acted other than in accordance with the applicable law. And in that case, I have to observe that, not only had the Defendants failed to file their defences on time, but when they belatedly filed them they were, in effect, putting the cart before the horse: the right course of action was, first, to apply for the Judgement to be set aside, and second, to seek leave of the Court to file and serve their defences within an extended time-limit. They did not do this; and no wonder the basis in principle of their prayers, as articulated by Mr. Nyaencha, now appears somewhat strained.

Counsel had to seek yet a further basis for his clients' prayers that the interlocutory Judgement be set aside and a full hearing of the main suit allowed. He relied on ***The Supreme Court Practice***, 1997 Vol. 7 to seek a dispensation which in England attaches to Judgements against the state. Order 13 r. 7A of the Supreme Court Practice Rules provides that *"Where the defendant is a State, as defined in section 14 of the State Immunity Act, 1978…the plaintiff shall not be entitled to enter judgement…except with the leave of the Court."* Counsel submitted that this principle should apply in the instant matter, because three of the parties, namely the 3rd Defendant (Commissioner of Lands), the 4th Defendant (Wilson Gachanja) and the 8th Defendant (Director of Surveys) had been represented by the Attorney-General. So counsel submitted*: "If it is the State appearing, then there can be no Judgement against* it *in default of appearance and Defence"*, and "*there should be an application for leave before Judgement is entered against the State."* I find myself unable to agree with this submission, which is to the effect that every time the Attorney-General's name appears, on behalf of any Defendant, it necessarily signifies that the suit is against "the State", and that, therefore, even where the Defendant is acknowledged to have failed to comply with the Civil Procedure Rules, the whole trial process must wait on the convenience of the Defendant. If such were the case, it would hardly be possible for parties suing any public authority at all

to have access to justice.

Mr. Nyaencha also cited other cases which, he submitted, would justify setting aside the interlocutory Judgement. ***In Ngua v. Agip (Kenya) Ltd*** [1981] KLR 319 it was held by the Court of Appeal:

> *"The fact that considerable damage would result is not sufficient reason for depriving the defendant of the opportunity to file a defence. Where a party has entered appearance he must be given reasonable notice of the hearing of final proof to enable him to defend."*

In the words of Simpson, Ag. J.A. (P. 323):

> *"The circumstances wherein a suit may be set down for hearing under these rules are stated in these rules. Thus in compliance with Order IXB rule 1(1) where a defendant has appeared he must be given reasonable notice of the hearing of formal proof in order that he may have an opportunity if he so desires either to defend or seek leave to file a defence out of time. The appellant was given no notice. This entitles him to have the* ***ex parte*** *judgement set aside and in consequence all subsequent orders including the order appealed against are nullified. The appeal must be allowed."*

No doubt, the ***Ngua*** case contains principles which favour the Defendants. It is noted in the head note to the case report that "the main issue raised [on appeal] was the failure to notify [the] defendants of the hearing of formal proof as required under the rules." It is reported that (P. 320):

"The respondent having obtained judgement against the appellant in violation of the rules of procedure Order IXA rule 8, the Court cannot justifiably uphold such a judgement, and as a result that improperly obtained judgement must be set aside…"

At this point it is to be remembered that in the case of the interlocutory Judgement which is the subject of the instant application, the ***formal-proof step was omitted***. It will, therefore, be a relevant and a fateful question in this application, firstly, whether it was right to omit the formal-proof stage, and secondly, whether the Defendants were required to be notified of ***the intent to obtain interlocutory Judgement, in a situation in which formal proof was not going to take place***. Counsel for the Defendants/Applicants submitted that, as formal proof was in the instant matter excluded, the Defendants were not accorded a chance to defend.

Counsel also relied on a High Court decision, in ***Kenya Safari Lodges & Hotels Ltd v. Tembo Tours & Safaris Ltd*** [1985] KLR 441. The Honourable Mr. Justice Harris in that case (P. 445) thus remarked:

> *"The defendant, in support of its application, contends that it has both a good defence on the merits to the Plaintiff's claim and a valid counterclaim… This brings into the picture the decision of the House of Lords in* ***Evans v. Bartlam*** *[1937] A.C. 473, where the principles governing the setting aside of default judgements were considered. 'In a case like the present, said Lord Wright (at page 489), 'there is a judgement, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown* ***the Court will not prima facie desire to let a judgement pass on which there has been no proper adjudication****….The Court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the court in its discretion is empowered by the rule to impose.'"*

The important principle emerging from the ***Kenya Safari Lodges*** case is that, firstly, the Court has a discretion on whether or not to set aside a default Judgement which necessarily has not satisfied the condition of ***proper adjudication***, and secondly the Court may apply the instrument of ***cost awards***, to address defaults on the part of the Applicant which had result ed in the default Judgement being entered.

Mr. Nyaencha also referred to another decision of this Court, ***Stephen Mugera Gakenge v. Kenya Commercial Bank Ltd & Another***, Civil Case No. 1558 of 2001. The Applicant's counsel in that case contended that, as a matter of procedural law, the Deputy Registrar had no mandate or jurisdiction to enter interlocutory Judgement because the claim was not a liquidated claim. The Honourable Mr. Justice Nyamu held as follows:

> *"I find that the claim does not fall under rules 3, 4, 5 or 6 but fell under rule 8 and as a result the Deputy Registrar ought to have given directions that [the] claim be set down for hearing and had no mandate whatsoever to enter the interlocutory judgment he entered on [2nd November, 2001]. This claim is neither liquidated, nor is it a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. It is only in these categorised cases where the Deputy Registrar is authorised to enter interlocutory judgements."*

The point emerging from the ***Stephen Mugera Gakenge*** case is an important one, namely, that all questions before the Court requiring adjudication must brought for hearing before a Judge, and the Deputy Registrar's mandate and jurisdiction are strictly limited to the application of automatic outcomes of the play of the rules of civil procedure. I think this is a principle of the judicial process which is in every respect correct and meritorious.

Counsel submitted that, where ***ex parte*** judgement is entered and damages are liquidated, the suit has to move to the next phase, which is formal proof; but the suit in the instant case, he contended, does not fall in that category. In the instant case, in the absence of defences, counsel submitted, the suit should have been set down for hearing ***inter partes***; and thus the Deputy Registrar had no jurisdiction to enter interlocutory Judgement. Even as he admitted that the defences were not filed timeously, counsel submitted that the nature of the matter required being set down for a hearing.

Counsel contended that the Defendants did have a sufficiently weighty defence to merit an opportunity for a full hearing. He underlined in this regard the fact that the second Defendant is a third party, an innocent purchaser for value, and quite unaware of any defects in relation to the suit property; all his searches at the Lands Office had drawn one and only one answer: the land was properly available on the market for sale and purchase. Counsel urged that all the parties be given a chance to have the matter heard in Court, with evidence adduced and the regular examination process conducted. Counsel submitted that no prejudice would be suffered by the Plaintiff if the matter went to full hearing; while on the contrary, substantial prejudice would be suffered by the Defendants if they are not accorded an opportunity to prosecute their defences. Counsel stated that at the moment, it is the 2nd Defendant who is paying all the rates, and he is destined to suffer considerable prejudice if the interlocutory Judgement is not set aside.

3. Submissions for the Plaintiffs/Respondents

Mr. Ritho commenced his submissions by addressing the status of each of the parties. He submitted that the only parties who should be accorded a hearing are: 2nd, 5th, 6th and 7th. This issue of joinder of parties and their participation in the suit, is an intriguing one. Mr. Njoroge who on 27th January, 2004 turned up for the 3rd, 4th and 8th Defendants, had little to say. Mr. Njoroge remarked, on 17th February, 2004 during a scheduled hearing, that as the application had only been filed by the 2nd, 5th, 6th and 7th Defendants, his attendance was purely a matter of course, for the reason that his clients would be affected in the same way as the Defendants/Applicants. In his words: *"The Judgement and Decree to be set aside affect all the Defendants equally."* Mr. Nyaencha proposed that counsel for the 3rd Defendant be allowed to stay in Court, but upon the condition that he undertakes to file and serve papers within a certain limited period of time. Mr. Ritho was of the view that the 3rd, 4th and 8th Defendants did have a clear relevance as parties in this case, but he too proposed that Mr. Njoroge be not heard unless he made a formal application on behalf of these parties. It was somewhat puzzling that Mr. Njoroge did not show much keenness to play a role in the suit and in the instant application. He said he had not filed any papers because he had lost his files. It became necessary for me to give directions as follows:

> *"Counsel for Defendants No. (3), (4) and (8) shall file and serve papers in response to the*

application within the next 21 days. Thereafter the Plaintiff and the other Defendants/Applicants shall have leave to file any necessary replying or supplementary or further affidavits within 14 days and to serve the same on all the parties."

This direction was not complied with, and at the next date of hearing, 17th May, 2004 Mr. Nyaencha proposed that any possible responses by the 3rd, 4th and 8th Defendants be overlooked, as the application had come to Court under certificate of urgency. It became necessary to adjourn to 29th June, 2004 when Mr. Ritho began his submissions by noting that no formal applications had been received from the 3rd, 4th, and 8th Defendants and hence only the 2nd, 5th, 6th and 7th Defendants had sought by their application to set aside the Judgement and decree in the suit.

Mr. Ritho remarked the now-acknowledged fact that at the time the said interlocutory Judgement and Decree had been obtained the Applicants had not yet filed and served their defences as required under the Civil Procedure Rules. He submitted that on this account, the interlocutory Judgement was in every respect a regular Judgement which, ***but for good reasons***, should be allowed to stand.

Mr. Ritho noted that the Plaintiffs' Plaint had no claim for damages, and their only prayer was that the suit land be declared a public land for the construction of a police station and a water reservoir in the estate. The Plaintiffs had drawn up a Decree and the Court agreed to issue it, granting the same on 10th May, 2000. Counsel submitted that the interlocutory Judgements against the Defendants, since they were regular Judgements, could only be set aside "*if the Defendants have an arguable defence*", and on this point the case, ***Kingsway Tyres & Automart Ltd. v. Rafiki Enterprises Ltd.,*** Civil Appeal No. 220 of 1995 was cited. The relevant passage in the Court of Appeal decision reads as follows:

*"There are ample authorities to the effect that, notwithstanding the regularity of it, a court may set aside an **ex parte** judgement if a defendant shows he has a reasonable defence on the merits. The respondent did not annex to its application in the lower court a draft defence… It was desirable, we think, for the respondent to annex to its application a draft defence to include all that and any other defences it may have had to the appellant's claim. Be that as it may, the defences…were not such as would have, properly, influenced the court below to exercise its discretion in favour of setting* aside…

*"In the above circumstances, we come to the conclusion that the learned judge in the court below, improperly exercised his discretion in setting aside the ex parte judgement. We, therefore, allow the appeal, set aside the order vacating the **ex parte** judgement, and order that that judgement be restored."*

By the principles in the ***Kingsway Tyres*** case, counsel submitted, the Defendants had not made a proper case for the setting aside of the ***ex parte*** Judgement. He considered the position of the Plaintiff to carry more weight, considering that the suit properties had, during the time of approval of estate development plans, been reserved to the development of Loresho Police Station (L.R. Nairobi Block/90/307) and for a water reservoir (L.R. Nairobi Block/90/229). The reservation had been made when the development plan for Loresho was approved, on 26th November, 1977. The reservation for public purposes was made by virtue of Legal Notice No. 236 which was itself made under the Kenya Independence Order in Council, 1963 (L.N. 718 of 1963). By virtue of the said Legal Notice issued by the Governor-General, it was declared under the Forests Act (Cap.385) that:

"'unalienated Government land' means land for the time being vested in the Government which -

(a) is not the subject of any conveyance lease or occupation licence from the Crown;

(b) has not been dedicated or set aside for the use of the public, but includes outspans; and

(c) has not been declared to be a Central Forest or a forest area."

Counsel submitted that the above-cited provision not having been repealed to-date, the land reserved as indicated earlier, remained for public use and was not available to be alienated by the Commissioner of Lands. Counsel submitted that if the public purpose contemplated had ceased to be valid, then the suit land could have been allocated to individuals, after compliance with Section 9, 12 and 13 of the Government Lands Act (Cap. 280).

Counsel at this point cited the Court of Appeal decision in ***Town Council of Ol Kalou v. Ng'ang'a General Hardware***, Civil Appeal No. 269 of 1997. Giving the majority Judgement in the case, the Honourable Justice of Appeal Gicheru (as he then was) remarked:

> *"If under section 9 of the Government Lands Act the suit premises was not available for alienation and … the procedures laid down in sections 12 and 13 of the said Act were not complied with in the process of alienating the said premises, it is possible that the appellant's defence may not have been 'so weak as to be beyond redemption and incurable by amendment.' Indeed the appellant's defence to the respondent's claim in the superior court, as I understand it, oscillated on the illegality of the allotment of the suit premises to the respondent by the Commissioner of Lands. Whether or not the said allotment was illegal and whatever effect such illegality, if proved, may have had on the respondent's title to the suit premises, it was, in my view, a factor militating against striking out the appellant's defence… [A]t the stage of the pleadings in the superior court when the respondent's application to strike out the appellant's defence was made, the said defence cannot in the circumstances be said to have been beyond rescue by amendment. In the result, I would allow this appeal with costs to the appellant, set aside the orders of the superior court and order that the suit from which this appeal arises be remitted to the superior court for trial."*

Mr. Ritho submitted that the area covered by the suit plots in the instant matter had not been vested in the Government after the development plan had been drawn and approved; and hence the Commissioner of Lands did not act lawfully when he allocated the said plots to the 5th, 6th and 7th Defendants as the first allottees who then sold the same to the 1st and 2nd Defendants, who now claim they are innocent purchasers for value without notice.

Counsel submitted that the concept of "innocent purchaser for value without notice", was an equitable one which would not, in the present circumstances, be available to the Defendants. Counsel relied on ***Phillips v. Phillips*** (1861) 4 DE G.F. & J 208, P. (1164 ER), where the following passage (P. 214) in the Judgement of Lord Westbury, L.C. occurs:

> *"I undoubtedly was struck with the novelty and extent of the doctrine that was thus advanced, and in order to deal with the argument it becomes necessary to revert to elementary principles. I take it to be a clear proposition* that ***every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more***. *If, therefore, a person seised of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz, the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor."*

On the authority of the above case, counsel submitted that as the suit plots were never vested in the Government, the Commissioner of Lands had no authority to allocate the said plots to the 5th, 6th and 7th Defendants. He submitted that the Commissioner of Lands had conveyed no legal rights at all to the alleged purchasers, and the suit plots remained land reserved for the public use which had been intended.

Mr. Ritho submitted that the failure by the 3rd, 4th and 8th Defendants to respond to the Plaintiff's application should be taken in judicial notice, as showing an admission that these parties had been in error. To support this contention, counsel relied on the provision of Order VI rule 9(1) which thus provides:

> *"…any allegation of fact made by a party in his pleading shall be deemed to be admitted by the*

opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it."

Insofar as the Commissioner of Lands did not challenge the application, counsel submitted, he is to be taken to have admitted its content; and therefore every action effected by the Commissioner, should be deemed illegal.

4. Final submissions for the 2nd, 5th, 6th and

7th Defendants/Applicants

Mr. Nyaencha restated his argument based on the persuasive authority of ***Stephen Mugera Gakenge v. Kenya Commercial Bank Ltd. & Another***, Civil Case No. 1558 of 2001, and submitted that the interlocutory Judgement had been entered without authority by the Deputy Registrar.

Counsel relied on the fact that the second Defendant's defence was filed and duly stamped on 8th July, 1998, and the defences of the 5th, 6th and 7th Defendants filed on 8th July, 1998 again duly stamped, to make a case that the Applicants were entitled to consider their defence papers duly filed. Counsel also submitted that the Decree issued following entry of the interlocutory Judgement was not served on the Defendants; that there was no service of any approval notice for the decree; and that there was no service of the Judgement. Mr. Nyaencha submitted that where there is an interlocutory Judgement, it was not equitable to proceed to enforcement before effecting service of it.

Counsel urged that the two defences which were filed do have merits, and should have a chance of being prosecuted, in a full trial.

In his final submission, counsel urged that public policy should dictate that there be a full hearing in a matter such as the instant one, where the question before the Court had a clear bearing on the Government's land policy.

5. Final Analysis and Orders

(i) It is common ground that the Plaintiffs had obtained Judgements against the Defendants, respectively on 25th June, 1998 and 29th June, 1998 and these were followed by a Decree which was extracted on 10th May, 2003 and, relying thereupon, the Plaintiffs subsequently secured the registration of restrictions against the suit properties which are registered in the names of the first and the second Defendant.

(ii) It is not in doubt that the Plaintiff had complied with the formal requirements of the law, in obtaining the Judgement and Decree, once it was clear that the Defendants had not filed their defences.

(iii) Although the Defendants apparently did file their defences, they did so only quite belatedly, when the impugned interlocutory Judgement had already been entered.

(iv) In these circumstances, the Plaintiffs have maintained that the Judgement entered and the Decree issued were in every respect regular and should not be set aside as prayed by the Defendants, in their Chamber application of 18th August, 2003.

(v) Counsel for the Plaintiff has, however, acknowledged that there exist case-authorities which would permit a setting aside of such an ***ex facie*** regular interlocutory Judgement as the instant one. One of such authorities is ***Kingsway Tyres & Automart Ltd. v. Rafiki Enterprises Ltd***., Civil Appeal No. 220 of 1995. This case serves as authority for the proposition that an entirely regular interlocutory Judgement can be set aside where the Defendant ***happens to have***, and ***places before the Court, a reasonable defence on the merits***; and assessment of such merits may be made on the

basis of a ***draft defence***. Obviously this would require that the draft defence be annexed to the application.

(vi) From the case law, it is clear that a Defendant who seeks the setting aside of an interlocutory Judgement, because he had been prevented by some cause from filing and serving his papers as required, has a duty to bring before the Court an explanation of the circumstances in which such hardship had arisen, and it is for the Court to assess the merits of the request and to apply its discretion as necessary.

(vii) While at the beginning the 2nd, 5th, 6th and 7th Defendants had claimed that they had duly filed and served their Defences as required by law, they later conceded that they did so only belatedly when the prescribed time limit had expired. They had no good, or indeed any, reasons to offer for their dilatoriness, and in this respect, at the very least, their omission must be held to have occasioned unwarranted costs to the Plaintiffs.

(viii) Counsel for the Plaintiffs made submissions verging on attempts to prove that the allocation of the suit land by the Commissioner of Lands was so patently unlawful that, the Defendants were unlikely to defend successfully against the Plaintiffs' claim in the main suit, and that on this account, the defences would be largely unmeritorious. Such an attempt by the Plaintiffs, however, was in my view improper, as I did indicate to counsel; for it would necessarily entail arguing the main cause which the interlocutory Judgement is to be assumed to have brought to an end. The fact that the Plaintiffs' counsel could adopt this approach, would have given some credence to the Applicants' position, that this is a case that deserved to go on to full hearing, so that issues of merit would be appropriately ventilated.

(ix) The following belatedly - filed defences are now on record: that of 2nd Defendant, dated 8th July, 1998; that of the 5th, 6th and 7th Defendants dated 8th July, 1998; and that of the 3rd, 4th and 8th Defendants (undated). As these defences, quite clearly, have not complied with the filing and service rules of civil procedure, I must in the first place regard them as no more than drafts. Drafts as they are, on the weight of authority, I should make reference to them, for the purpose of ascertaining whether or not they raise triable issues - and this provides an objective basis for the Court's exercise of discretion, in an application to set aside an interlocutory Judgement.

(x) I have been able to peruse the said defences, and I have concluded that they certainly carry triable issues - e.g. the 2nd Defendant's draft defence, paragraphs 4, 6(a), 6(c), 6(d), 6(e), 6(g), 6(h); the 5th, 6th and 7th Defendants' defence - paragraphs 3, 8, 12; the 3rd, 4th, 8th Defendants' defence - paragraphs 1, 3, 6, 8, 11. To give an example, in the 2nd Defendant's draft defence -

· paragraph 4:

"The 2nd Defendant denies the contents of paragraph 18 of the plaint and further states that his plots are not part of the plots reserved for the building of [a] water reservoir and that his said plots are separate and distinct and in any event the 2nd Defendant is an innocent purchaser for value without any notice of any defect in title if any."

Paragraph 3 of the draft defence of the 5th, 6th and 7th Defendants states-

"The 5th, 6th and 7th Defendants deny the contents of paragraph 7 of the plaint and further [state] that the Plaintiffs have no ***locus standi*** *to institute the proceedings."*

· Paragraph 8 of the draft defence of the 3rd, 4th and 8th Defendants asserts -

"…the Defendants aver that under Section 75 of the Constitution and the Land Acquisition Act any land acquired becomes Government land for the purpose of that acquisition and the suit premises

fell under acquisition by purchase for the purpose of urban development."

(xi) Counsel for the Defendants has submitted that the matters in issue in the pleadings, contentious as they were, did not under the law allow occasion for the Deputy Registrar to enter interlocutory Judgement, and the matter should have been brought before a Judge for normal hearing. I am in agreement with the principle in the High Court case, ***Stephen Mugera Gakenge v. Kenya Commercial Bank Ltd. & Another***, Civil Case No. 1558 of 2001, that a matter which does not entail a claim for pecuniary damages, or for detention of goods with or without a claim for pecuniary damages, is not a proper one in respect of which the Deputy Registrar can enter interlocutory Judgement. On this account, I think, notwithstanding the appearance of regularity in the interlocutory Judgement that was entered in this matter, the action taken by the Deputy Registrar was improper, and there is, thus, a basis for setting aside the Judgement in question.

(xii) The Defendants have stated that no notices had been received from the Plaintiffs prior to the issue of the Decree, and thus the Defendants had played no part in the drawing up of the Decree. To begin to execute such a decree, again without any notice at all to the Defendants, is in my view inequitable.

(xiii) The Defendants have submitted, and I believe, with justification, that the creation of an opportunity to hear the suit on its merits, would be in the interests of justice, and more particularly so, as hardly any prejudice would thereby be caused to the Plaintiffs, whereas an upholding of the interlocutory Judgement would be gravely prejudicial to the Defendants and especially to the second Defendant.

From the findings and the conclusions emerging from the foregoing analysis, I am inclined to resolve the conflict inherent in the Defendants' Chamber application of 18th August, 2003 in favour of the Applicants, provided that they shall bear the costs.

I will make the following Orders:

1. I hereby set aside the Judgement and Decree entered against the Defendants herein, on 11th March, 1999.

2. I hereby order that the defences filed herein shall be deemed to be in order, subject to payment of the applicable Court fees, and on that basis counsel shall take a suitable hearing date at the Registry - ***this to be given on the basis of priority***.

3. The Defendants/Applicants shall bear the costs of the present application in any event.

DATED and DELIVERED at Nairobi this 8th day of October, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the 2nd, 5th, 6th, 7th Defendants/Applicants: Mr. Nyaencha instructed by M/s. Mohammed & Muigai, Advocates

For the 3rd, 4th, 8th Defendants: Mr. Njoroge, instructed by Hon. The Attorney-General

For the Plaintiffs/Respondents: Mr. Ritho, instructed by M/s. S. K. Ritho & Co. Advocates