



REPUBLIC OF KENYA



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**Helmann v Mbogo & another (Environment & Land Case
60 of 2014) [2024] KEELC 5266 (KLR) (9 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5266 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 60 OF 2014**

LL NAIKUNI, J

JULY 9, 2024

BETWEEN

WALTER ALOYS HELMANN PLAINTIFF

AND

JACQUELINE WAWIRA MBOGO 1ST DEFENDANT

EMILY KARENDI MBOGO 2ND DEFENDANT

RULING

I. Introduction

1. Before this Honorable Court is to make determination of the Notice of Motion application dated 26th June, 2023. It is by Jacqueline Wawira Mbogo and Emily Karendi Mbogo, the Defendants/Applicants herein which was premised under the provision of Order 5 Rule 8, Rule 21, Rule 28 and 29 and Order 9 Rule 9, Order 10 Rules 6 and 9 of the Civil Procedure Rules, 2010 and Articles 27, 40 and 50(1) of *the Constitution* of Kenya, 2010.
2. Upon service of the application, the Plaintiff/Respondent made responses through a Replying Affidavit dated 30th October, 2023

II. The Defendants/Applicants' case

3. The Defendants/Applicants sought for the following orders:-
 - i. Spent.
 - ii. That the Honorable Court be pleased to grant leave to the Law firm of Messrs. Ngunjiri Michael & Co. Advocates to come on record for the Defendants/ Applicants/ after and/or post - Judgment.



- iii. That this Honorable Court be pleased to find that the purported Service of the pleadings vide an affidavit of service dated 10th August, 2015 prepared by Stephen Muli Malei was defective and improper.
 - iv. That in the alternative to and without prejudice to prayer No.three (3) above, the Honorable court be pleased to summon the court process server namely Stephen Muli Mulei to attend before the honorable court on a date to be appointed by court for purposes of being cross-examined on his affidavit of service sworn on 10th August 2015.
 - v. That this Honorable Court be pleased to set aside the Ex - Parte proceedings (entire proceedings), Ex - Parte Judgment dated 19th June, 2018 and Ex - Parte orders/decrees dated 10th December, 2018 and the applicants be granted leave to file their Response/defence and the matter be heard and determined on merit.
 - vi. That the Honorable Court be pleased to re-open the Plaintiff's case, and the Plaintiff be recalled to testify de-novo.
 - vii. That the costs of this application be provided for
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 23 Paragraphed Supporting Affidavit of – Emily Karendi Mbogo, the 2nd Defendant/ Applicant herein sworn and dated 26th June, 2023 with nine (9) annexures marked “EKM - 1 to 9”. The Applicant averred that:-
- a. The Respondent filed this suit and failed to serve the Applicants with the pleadings and all court documents appertaining to it.
 - b. The Respondent proceeded to allegedly serve the said documents upon her mother and had an affidavit of service filed to that effect. (Annexed in the affidavit and marked “EKM - 2” was a copy of an affidavit of service dated 10th August, 2015 in proof of the same).
 - c. The Respondent never informed the court that he did not serve her or that the 1st Applicant lived in Germany and serve them as provided under the Civil Procedure Rules, 2010. She was aware that no application for substituted service was made by the Plaintiff.
 - d. As matter of fact, even the alleged service that was done in 5th May, 2014 and an affidavit of service was drawn and filed a year later in August 2015. Annexed in the affidavit and marked as “EKM - 3” was a copy of the Court summons dated 24th March, 2014 in prove of the same.
 - e. The alleged service was a sham and was meant to ensure that she did not have knowledge about this suit.
 - f. She did not own a home in Maua town as alleged in the affidavit.
 - g. The Respondent went ahead and purportedly appointed an advocate on her behalf and even went ahead and allegedly served court documents upon him that she was supposed to be served. Annexed in the affidavit and marked as “EKM - 4” was a copy of the proceedings, emphasis on pages 2, 3, 4 and 5 of the proceedings in prove of the same.
 - h. The Law firm of Messrs. Mbogo Muriuki & Co. Advocates were not their family advocates as alleged by the Plaintiff/Respondent and service upon the said Law firm, if at all was defective and improper.



- i. Even assuming service of pleadings was done to the Law firm of Messrs. Mbogo Muriuki & Co. Advocates, a fact which was denied, as the duly authorized agent, the service purportedly done on 10th July 2015 would have been fatally defective as the summons dated 24th March 2014 were already expired and therefore devoid of any legal force, in any case, the said summons returned in court were not stamped by the said firm. Refer to annexure marked as “EKM -3” above.
- j. Even assuming that the said Law firm of advocates were their family lawyer, which was vehemently denied, the Process server ought to have served her co-applicant and herself personally for onward transmission of documents to their preferred advocates and not purported to have taken documents to the said advocates.
- k. She was aware that there was no notice of appointment of advocates was filed on her behalf and or her co-applicant. This was enough proof that the said firm were at no time appointment by her co-applicant or herself.
- l. It was in the interest of justice that this court found that the service was a sham and any proceedings and/or orders obtained as a consequence of reliance of the said affidavit of service dated 10th August, 2015 be set aside/vacated. Annexed in the affidavit and marked as “EKM - 5 “i”” was a copy of the Judgement and “EKM - 5 “ii”” was a copy of the decree in prove of the same.
- m. Additionally, the Respondent sought interlocutory judgment in this suit and the same was granted despite the fact that this is a land matter. Annexed herein and marked “EKM 6” was a copy of the request for Judgment dated 10th August, 2016 in prove of the same.
- n. The interlocutory judgment was entered on 9th September, 2015. (See page 4 of the proceedings).
- o. She firmly believed that the respondent sought interlocutory Judgement so that he could dispense with the requirement of serving hearing notices and mention notices upon me and the 2nd Applicant. The said entry of interlocutory Judgment was improper and unknown in law for the reason that the dispute touched on land ownership and therefore not within the ambit of the provision of Order 10 Rule 6 and 7 of the Civil Procedure Rules, 2010.
- p. She stood to suffer irreparably if the Decree and Judgment were not set aside as her title deed to the suit property has been cancelled by Court and effected by the Land Registrar without any notice to herself. The same amounts to trial by stealth.
- q. She was aware that the ex – parte Judgment wrongly entered in this suit was being used by the Plaintiff/Respondent to lay a claim on the suit property that was registered in her name prior to being transferred to her Co - Applicant pursuant to the decree of this honorable court. Annexed in the affidavit and marked as “EKM – 7” was a copy of the application seeking to declare the suit property as matrimonial property.
- r. She had a proper defence which she intended to prosecute properly using her advocate on record. Annexed in the affidavit and marked as “EKM - 8” a copy of the Draft Defence in proof of the same.
- s. Her mother had sworn an affidavit in this matter disowning/denying having directed the process server to serve the law firm of Mbogo Muriuki & Co. Advocates with the court documents as alleged and/or at all. Annexed in the affidavit and marked as “EKM - 9” was a copy of the affidavit in proof of the same.



- t. She had made a similar application in court dated 29th March, 2023 that was struck out by court for allegedly non-compliance with Order 9 Rule 9 (a). Persuasive authorities on the issue including the case of: “Mukunya Mugo “A” & Another – Versus - Elizabeth Mugure Mukunya [2021] eKLR” point to the fact that no consent and/or leave was required to make the current application as her Co - Applicant and herself did not participate in the ex-parte proceedings and ex parte Judgment that she wished to be vacated. Be that as it may, she filed this application in compliance with directions of this court on 31st May, 2023.
- u. No prejudice would be suffered by the Respondent and it was in the interest of justice that this application was allowed.

III. The Response by the Plaintiff/ Respondent

5. The Plaintiff/Respondent opposed the application dated 26th June, 2023 through a 17th paragraphed affidavit sworn by the Walter Aloys Hellmann, the Plaintiff himself on 30th October, 2023 with three (3) annextures marked as “WAH 1 – 3” annexed hereto where he averred that:-
 - a. Paragraph 2 was denied and the Applicants were put to strict proof. Service of the suit, summons and all court processes upon the Applicants was proper, lawful and procedural.
 - b. Paragraph 3, 4 and 5 were denied and the Applicants were put to strict proof. As per paragraph 3 of the Affidavit of Service dated 10th August 2015, the pleadings and summons were served upon the Applicants advocates, upon the instructions of the 1st Applicant.
 - c. Paragraph 6 was denied and the Applicants were put to strict proof. The Applicants were at all times aware of the suit and the present applications an afterthought deliberately calculated to unlawfully shield the 1st Applicant from his matrimonial property claim.
 - d. Paragraphs 7, 8, 9, 10, 11 and 12 were denied and the Applicants were put to strict proof. The Law firm of Messrs. Mbogo Muriuki & Company Advocates were served upon instructions by the Applicants. The said Law firm continued to accept service of court processes on behalf of the Applicants. Annexed in the affidavit and marked as “WAH - 1” was a copy of the Hearing Notice dated 18th June 2015.
 - e. The Law firm of Messrs. Mbogo Muriuki & Company Advocates were also involved in the fraudulent transfer of the ownership of the suit property from the 1st Applicant to the 2nd Applicant. Annexed in the affidavit and marked as ‘WAH - 2’ was a copy of the Power of Attorney.
 - f. Paragraph 13 was denied and the Applicants were put to strict proof. The service of the suit and summons was properly effected upon the Applicant’s agent duly instructed to accept service by the Applicants.
 - g. Paragraphs 14, 15 and 16 were denied and the Applicants were put to strict proof.
 - h. Paragraph 17 was denied and the Applicants are put to strict proof. The 1st Applicant donated a Power of Attorney to the 2nd Applicant on the suit property to facilitate the fraudulent transfer, thus the 2nd Applicant cannot lay any ownership rights on the suit property.
 - i. Paragraph 18 was denied and the Applicants were put to strict proof. The judgment entered by the trial Court was regular. The suit property was first transferred to the 1st Applicant who



donated a Power of Attorney to the 2nd Applicant to facilitate the fraudulent transfer. Annexed in the affidavit and marked as 'WAH - 3' was a copy of the green card.

- j. Paragraph 19 was denied and the Applicants were put to strict proof. The draft Defence contained mere denials, falsehoods and raises no triable issues for determination by this Honourable Court.
- k. Paragraph 20 was denied and the Applicants were put to strict proof. The purported affidavit marked as "EKM – 9" was a sham and contains falsehoods constituting perjury. He craved leave of the Honourable Court to summon Mary I. Mbogo to appear in Court for cross-examination on the false averments therein.
- l. Paragraph 21 was denied and the Applicants were put to strict proof. He stood to suffer irreparable harm by the denial of the opportunity to pursue his matrimonial property rights should the application be allowed. The Applicants had already demonstrated their fraudulent ways by transferring the property to defeat his claim and to allow the application would result in the loss of the substratum of his matrimonial property claim.
- m. The Applicants were afforded opportunity to be heard but willfully kept away from the proceedings. They could not purport to seek to be heard now after such unreasonable delay despite having notice of the proceedings.

IV. The Further Affidavit of the 2nd Defendant/Applicant

6. The averments by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 21 Paragraphed Further Affidavit of – Emily Karendi Mbogo, the 2nd Defendant/Applicant herein sworn and dated 25th January, 2024 with fifteen (15) annexures marked as "EKM 1 to 15" annexed herein. The Applicant averred that:-
 - i. Contrary to the averment that her Co - Applicant and herself were aware of the present suit, she wished to state that the same was not true and that they only came to learn of this suit when the Plaintiff filed Mombasa Misc. Family Application No. E046 of 2022 (annexed in the affidavit and marked as "EKM – 10" was a copy of the Application made by the Plaintiff that was served upon the 1st Applicant prompting her to learn of this case).
 - ii. She was also aware that despite the Plaintiff claiming, on the Affidavit of service dated 10th August, 2015 that he had served the court process upon the 1st Applicant and herself, on or about July 2014, the Plaintiff's erstwhile Advocates, Messrs. J.A. Oboudha - Advocate admitted on 13th February 2015 (in court proceedings before in this case) that he had not served the defendants with documents in the case (refer to annexure marked as "EKM – 4" to the supporting affidavit to the Application).
 - iii. In response to the allegation that Law firm of Messrs. Mbogo & Muriuki & Co. advocates were her duly appointed agents, to receive the court documents, she vehemently denied the same and put the Plaintiff/Respondent to strict proof thereof. For purposes of clarity, the said firm of advocates was a firm located within Maua township that was only engaged by herself to help her sister (who was no longer a Kenyan Citizen) and the deponent registered a Power of Attorney in the year 2011. The advocate-client relationship terminated immediately after registration of the Power of Attorney and neither her sister (the 1st Applicant), her mother or herself have ever engaged them as their family advocates, as alleged or in any other capacity. She challenged the Respondent to prove the contrary.



- iv. For further clarity, the said Law firm had no relationship with her family and the attempt to connect the registration of Power of Attorney and this suit were the last kicks of a denying horse trying to hang on loose strings but nonetheless she reiterated the said firm of advocates were not her agents and were never at any time authorized to accept pleadings on her behalf.
- v. Interestingly, she wondered why the Plaintiff has attached a copy of a Hearing Notice of an Application to justify service. One wondered why the Plaintiff had avoided to demonstrate how the said firm accepted the pleadings i.e., the Plaintiff and accompanying documents and failed to counter - stamp or countersign against the Plaintiff's copy. This of the Law firm of messrs. Mbogo Muriuki & Co. Advocates in accepting the Hearing Notice in this case, if at all otherwise.
- vi. If any service was effected upon the said firm on or about July 2015, then such service of process was defective herself in both procedure and substance for the fact that it was not made to her co- applicant or herself and that it was done on summons that had long expired and therefore improper.
- vii. On the issue of being donated for the power of attorney, she reiterated that the Power of Attorney was done in good faith as her sister (1st Applicant) was based in Germany and any business to do with the suit property, that remains a family property utilized by her mother) including utility payment and land rates and rent payment can only be paid effectively if a Kenyan resident was the registered owner.
- viii. As it stood, the 1st Applicant by virtue of her German citizenship worked and was permanently domiciled at Germany and was a German and not a Kenyan Citizen as German laws did not permit dual citizenship by the time she acquired her citizenship.
- ix. To date most of utilities were in her name as that was the main intention of the transfer and not for fraudulent means as alleged by the Respondent and challenged him to strict proof of his intentional slander (annexed and marked EKM-11 an excerpt meter number details for the suit property for KPLC power utility which was in her name).
- x. The alleged suit property had always been a property used by her own mother, Mary I. Mbogo since they bought it as a family from one David Nyaga Jesse and at no point had it ever been a property held as a matrimonial property for the Plaintiff or her sister. The said Mr. Nyaga, a retired magistrate, truly aware of consequences of perjury, has sworn an affidavit confirming this fact (annexed in the affidavit and marked as "EKM – 12" was a copy of the affidavit sworn by David Nyaga confirming this fact).
- xi. The Plaintiff was a perennial liar who has at one time denied under oath having children with the 1st Applicant, despite having 3 children with her. Further, the Plaintiff conveniently failed to disclose to court that there exists a Pre-marital agreement entered in the year 2004 which stipulated that any property dispute would be determined by German Courts and using German laws and therefore his attempt to make a claim against the suit property in Kenya was motivated by spite against her Co-Applicant, who was now a qualified nurse in Germany and has moved on from the Respondent (annexed in the affidavit and marked as "EKM – 13" was a copy of the pre-nuptial agreement which stipulates that no claim for property against either party may be made by either party in case of divorce).
- xii. The averment that the substratum of the matrimonial property claim may be lost only confirmed that the Plaintiff was attempting to renege the Pre-marital agreement executed



between the 1st Applicant and himself through the backdoor by prosecuting the matter ex-parte and concealing material facts relevant to the case.

- xiii. She was aware that the Plaintiff had mastered double speak and dishonesty. For instance, she was aware that despite having a wife in Germany when purporting to marry her sister, he failed and conveniently so, to disclose to Kenyan authorities of his real status and insinuated he was a bachelor while all along knowing the same to be false and misleading. As a result, her sister (1st Applicant) entered into a void marriage to the Plaintiff, where no possible marital rights could be claimed.
- xiv. She also aware that the Plaintiff had been using (on numerous occasions) the alleged court process server to side step the law, when convenient or where court discretion is to be exercised. For instance, in a similar fashion of possible deceit, in Mombasa HC Misc. Family Application No. E046 of 2022, the said Muli Malei, in an unverifiable note claimed to have received the balance of legal fees from the Plaintiff to institute proceedings for matrimonial proceedings after conclusion of the divorce cause in Kenya in order to mislead the court that he had issued instructions to his erstwhile counsel, who allegedly failed to act on the instructions. This was despite no real evidence of such payments (annexed in the affidavit and marked as “EKM – 14” was a copy of the alleged instruction note whose authenticity is doubted).
- xv. She was also aware that the court did not find any merit in the Plaintiff’s application for leave to file the division of matrimonial cause out of time but nonetheless and on oxygen principles reluctantly allowed the Application (annexed in the applicant and marked was “EKM – 15” was a copy of the Ruling dated 14th July 2023 in Mombasa H.C Family Misc. Application No. E046 of 2022).
- xvi. There was no prejudice that the Plaintiff will suffer if they, the Defendants, were allowed to be heard on merits and prove their case against the Plaintiff who obtained Judgment by concealment of material facts in order to mislead the court. They had a proper defence in law to warrant being given their day in court for Hearing.
- xvii. This court has the powers to exercise its inherent power and discretion in favour of the Applicants. In any case, the Plaintiff would have a chance to prove his case as alleged.
- xviii. This application was made time immediately her Co - Applicant and herself became aware of existence of this suit i.e. After being served with documents in Mombasa H.C Family Misc. Application No. E046 of 2022 that sought leave to file a division of matrimonial Property suit out of time.
- xix. It was just, mete and in the interest of justice that this application be allowed.

V. Submissions

- 7. On 2nd November, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 20th May, 2024 be disposed of by way of written submissions and all the parties complied. Pursuant to that, all parties fully complied with the Court’s directions. The Honourable Court reserved a Ruling date on notice accordingly.

A. The Written Submissions by the Defendants/Applicants

- 8. The Applicants, through the office of Messrs. Ngunjiri Michael & Co. Advocates filed their written submissions dated 25th January, 2024. Mr. Njindo Advocate commenced the this was a classic case of trial by Stealth. Where a party institutes a suit, intentionally failed to serve the adversary, filed a



fictitious affidavit of service, requests an irregular interlocutory Judgment in an ELC Matter, proceeded to prosecute his case ex-parte while concealing lots of crucial information to court with an objective of obtaining a Judgment, which Judgment he would use to pursue a personal vendetta against his ex-wife. To remedy this situation, the Applicants had brought the present application immediately upon discovering the existence of the proceedings in this case. The Applicants, like any other litigants approaching a court of law are eager to have their date in court essentially to bring light to this case which has been engulfed by darkness due to concealment of material facts relevant to this suit by the Plaintiff. Like the good gospel of Luke in Luke 12:2-3, reads:- “that therefore whatever you have spoken in the dark will be heard in the light, and what you have spoken in the ear in inner rooms will be proclaimed on the housetops”. These submissions were therefore brought in support of the Application dated 26th June, 2023.

9. On the brief background, the Learned Counsel submitted that the Applicants had approached this Honorable court seeking several prayers as outlined on the face of the Application. Prayer 1 was already spent and their humble submissions were made in relation to prayers 2 to 7 on the face of the Application dated 26th June, 2023. They placed heavy reliance on among others, the following documents:-
 - a. The Notice of Motion dated 26th June, 2023 together with its supporting affidavit of an even date;
 - b. The annexures as annexed to the supporting affidavit and any other relevant document;
 - c. Affidavit sworn by Mary I. Mbogo; and
 - d. Further Affidavit sworn by Emily Mbogo
10. The facts precipitating this Application being that on or about the year 2014, the Plaintiff secretly filed this suit at Mombasa in regards to a suit property known as Kiegoi/Kinyanka/1993, clearly away from the proper territorial jurisdiction of the court that was proper to hear and determine the dispute. Upon filing the suit, the Plaintiff intentionally failed to serve the documents upon the defendants and filed a fictitious Affidavit of service sworn by Stephen Muli Malei, an employee/servant of the Plaintiff's erstwhile counsel.
11. Concurrent with the filling of the pleadings in this case, the Plaintiff filed an application for interim relief dated 18th March 2014. To demonstrate the clear mischief, the Plaintiff's advocate, admitted had not been done upon the defendants. One wonders how the Court process server served the Plaintiff but did not serve the Application filed under a Certificate of Urgency on the same date as the main suit. Be that as it may, after filing the fictitious Affidavit of service, the Plaintiff, again in a calculated move to deny the defendants, a chance to know the existence of this suit and in clear departure of the provision of Order 10 Rule 6 and 7, the Plaintiff sought and was granted interlocutory Judgment irregularly as the matter involved a land dispute, and interlocutory Judgment was clearly not available to him.
12. According to the Learned Counsel, as if the above averment was not enough, the Plaintiff never served at all any Notice of Entry of Interlocutory Judgment to the defendants, if any, as prescribed by law upon entry of the irregular interlocutory Judgment and proceeded to set the matter down for Hearing. Subsequently, the Plaintiff prosecuted this case ex-parte and obtained a Judgment delivered on 19th June 2018 and decree issued on 10th December 2018 (see annexures as “JWM - 5(i)” and “JWM - 5(ii)”). This information only came to light when the 1st Defendant/Applicant was served with an application seeking to extend time to file division of matrimonial property suit in Mombasa Misc. Family Application No. E046 of 2022. The application in the family court prompted the Defendants' advocate to write to this court, through the Deputy Registrar via a letter dated 25th January 2023,



wherein the Defendants discovered the existence of this suit when a Judgment had already been entered. It was this ex-parte Judgment dated 19th June, 2018 and the ex-parte proceedings herein that both the Applicants were seeking to have the same set aside. Arising from this background, they opined that the following issues fall ripe for determination, namely:-

- a. Whether the Applicants' advocate has complied with the provisions of Order 9 Rule 9 and 10.
 - b. Whether the Service of Pleadings was proper;
 - c. Whether the Request of Interlocutory Judgment in an E.L.C matter was proper;
 - d. Whether the ex-parte Judgment entered was an irregular Judgment.
 - e. If the ex - parte Judgment was irregular, whether the Applicants have a good defence to the suit.
 - f. Whether the Application is merited.
 - g. Who should bear the costs of this present Application
13. On whether the Applicants' advocate has complied with the provisions of Order 9 Rule 9 and 10 of the Civil Procedure Rules, 2010, the Learned Counsel submitted that the provision of Order 9 Rule 9 and 10 are a mischief rule piece of legislation. The mischief the provisions were meant to cure was to avoid litigants from withdrawing instructions from their Counsels once they have prosecuted a case to the end and then fail to pay the said advocate. This position was taken by Justice Okwany in the case of:- "Joel Mogire Mogaka – Versus - Pascalia Esther Akanga [2016] eKLR" when the court opined as follows:-
- “To my mind, the above order was intended to cure the mischief of parties changing lawyers or seeking to act in person after the entry of judgment in a bid to avoid paying their former lawyer's fees or meeting any other obligations that they may have had towards their said former lawyers.”
14. However, in this case the Applicants, the Defendants in the main suit had neither entered appearance nor ever appointed an advocate to represent them in the suit during the ex - parte proceedings, it is their humble but firm submissions that the provisions of Order 9 Rule 9 and 10 of Civil Procedure Rules, 2010 would not apply. On this, they sought to rely on the persuasive authority in "Mukunya Mugo "A" & Anor – Versus - Elizabeth Mugure Mukunya [2021] eKLR" where the court held as follows:-
- “It is clear from the proceedings herein that the Judgement in issue was entered after ex - parte hearing/proceedings of this matter. It is clear that Order 9 Rule 9 of the Civil Procedure Rules applies where the parties were represented by advocates and would wish to change the advocates and act in person after the Judgment. The essence of Order 9 Rule 9 of Civil Procedure Rules is to protect advocates from mischievous clients who wait until a judgment had been delivered and then sack the Advocates.....However, this Order 9 Rule 9 does not apply where there is an ex - parte Judgment and the party wishing to come on record was not a party in the ex parte proceedings. Being persuaded by the above findings of the Court and also taking into account the Defendant herein did not participate in the earlier proceedings then Order 9 Rule 9 of the Civil Procedure Rules does not apply herein.”
15. Consequently, the Learned Counsel submitted that this court be persuaded by the sentiments of Justice L. Gacheru above and found that compliance with Order 9 Rule 9 was not necessary in this application. Be that as it may, the Applicants' counsel, nonetheless and in compliance with strict compliance with the directions of this court seeks leave to come on record for the Applicants. No



prejudice will be occasioned on the Plaintiff and we therefore submit that the court be pleased to grant leave to the said counsel to represent the Applicants' post Judgment.

16. On whether the service of the pleadings was proper, the Learned Counsel submitted that they shall address the issue while considering two facets namely:-
 - i. Whether physical/personal service was done;
 - ii. Whether there is evidence of service of summons before 24th May 2015 i.e. within one year after there were issued.
17. On whether physical/personal service was done, the Learned Counsel submitted that it was trite law that service of summons upon the Defendants should be made in person. This was not done as the Affidavit of service admitted the 1st Defendant at the time of alleged service was in Germany, secondly even though, the law allowed service upon an agent, that agent must be an authorized agent. There was no indication whether the Defendants had an appointed authorized agent. The Applicants on their part have denied ever instructing the Law firm of Messrs. Mbogo Muriuki & Co. Advocates to act for them in this case. The Respondents had not proved this fact either. The affidavit of service dated 10th August, 2015, indicated that he met an unidentified 'elderly woman' at the alleged homestead of Defendants. On the affidavit of service, there was neither indication by the process server whether he introduced himself to the alleged elderly lady nor told her the purpose of his visit.
18. In any case, the unidentified elderly lady, who the process server claimed to be the mother of the Defendants, was not mentioned by name. Even assuming she was the mother, she could not be said to have capacity to direct the Process Server where to serve the summons and pleadings. Only the Defendants could have directed the Process Server to their authorized agents, if any. It was improper for the process server, IF AT ALL to purport to serve a firm of advocates without express authority by the Defendants, written or otherwise. The Learned Counsel urged the court to note that the mother to the Defendants have sworn an affidavit denying allegations of having been directed by the either of the Defendants to have documents served upon the Law firm of Messrs. Mbogo Muriuki & Co. Advocates. No evidence exists to the effect that the said Law firm was an agent to the Defendants for purposes of this case. The only link between the said Law firm and Defendants only being the instructions it undertook to register the Power of Attorney between the Defendants over 3 years prior to commencing of this case in the year 2014. They submitted that transaction did not make the Law firm of advocates an agent for any future brief, including in regards to this case.
19. Further, even though the 1st Defendant, an alleged ex - wife to the Plaintiff lived in Germany, the 2nd Defendant resided within Kenya, but not permanently in Maua, Meru County. There was no reason why service was not made upon her personally. The alleged Court Process server who allegedly effected service admitted, in his own return of service that the 1st Defendant was not in Kenya. Further, there is no evidence that the firm Mbogo Muriuki & Co. Advocates were the 1st Defendant's agent in this case. No record in court or elsewhere that the 1st defendant appointed the said advocate as her agents. It is therefore our submission that personal service was not possible; a fact which the Plaintiff knew. Consequently, the only way service would have been effected was substituted service. The Plaintiff did not seek leave to serve via substituted service and therefore no proper service was done. They urged the court to so find.
20. On whether there was evidence of service of summons before 24th May 2015 i.e. within one year after there were issued, the learned Counsel argued that Order 5 Rule 2 of the *Civil Procedure Act*, 2010 provides that summons shall be valid for the 1st twelve months after being issued and collected by the Plaintiff. Within the said period, as many attempts may be made to effect service. After expiry, a party



ought to seek for extension of the validity of the summons for a further 12 months period. In this instant case, several issues arise. First, the affidavit of service is dated 10th August, 2015 and was only filed then. Despite, a claim by the alleged process server, that he served the summons 4th July 2014, there was no real evidence of real and proper service of the said summons and pleadings upon the defendants on the said date. The said Mr. Mwenda, Advocate who allegedly received the documents was an unknown person whose receipt of documents could not be possibly verified.

21. In despite the process server claiming he served the documents on 4th July, 2014, the Plaintiff's erstwhile counsel Mr. J.A. Oboudha confirmed in court that by 15th June, 2015, an application dated 18th March, 2014 (filed together with the Plaint) had not been served upon the Defendants. One wonders how the process server allegedly travelled from Mombasa to Meru county on July 2014 and served the Plaintiff only and forgot to serve the application filed the same day as the Plaint under a Certificate. This was not logical and the only safe conclusion was that no service was effected to the Defendant on or before 24th March 2015 (i.e. exactly one year since the summons were issued by court on 24th March 2014). Consequently, even assuming service happened on 7th July 2015, a fact which has not been proven and was denied, the summons would have expired by then and therefore no proper service would have been done.
22. The issue of service in an application to re - open a case was central to the merits of an application. The Plaintiff/Respondent if genuine that he served the documents through the Process Server, would have procured an affidavit by the alleged licensed Process Server detailing how he effected service and to remove any doubt from this case. The Plaintiff had not made an effort to have the Process Server swear an affidavit confirming how, if at all, he effected service. The Learned Counsel submitted that the alleged process server had times a number being used by the Plaintiff to subvert the rule of law and fair administration of justice by the Plaintiff. He stated so, because it was the same person, Muli Malei Stephen, who the Plaintiff, again in Mombasa Family Misc. Application No. E046 of 2022 alleged to have received legal fees on behalf of J.A. Obuodha Advocate, but failed to file his case under division of matrimonial property. In the said instant case, (refer to the further affidavit sworn by the 2nd Applicant) the Plaintiff herein sought leave to file a division of matrimonial cause out of time on the basis that the said Muli Malei received the legal fees but did not undertake the instructions. The receipt was in a piece of paper and not in any official document. It was not a coincidence that the said Muli Malei has severally been used to excuse the Plaintiff's attempt to subvert the rules of natural justice. It was their humble but firm submission that no proper service was effected and they urged the court to so find.
23. On whether the Request of Interlocutory Judgment in an ELC matter was proper. The Learned Counsel submitted that from the ex-parte proceedings, it was evident that the Plaintiff made an application for entry of interlocutory Judgment. The said request was not backed by any law and was a nullity ab initio. The Plaintiff was represented by a Counsel and had the benefit of legal counsel and could not be heard to claim he was not aware of the fact that no interlocutory Judgment could be entered in an ELC Suit.
24. The Learned Counsel further submitted that the request was made to cleverly, again, in order to subvert rules of natural justice, including right to be heard, avoid having to serve the Defendants with any mention or hearing notice in the case as required where the defendants have not entered an appearance in ELC Matters. Evidently, even though the Plaintiff successfully albeit non-procedurally requested for entry of interlocutory Judgment, he failed to strictly follow the procedure upon entry of the said Judgment, which procedure includes, service of Notice of entry of Interlocutory Judgment upon the Defendants as provided for under Order 22 Rule 6 before execution of the decree.



25. Further, the request of Judgment was made allegedly pursuant to the provisions of goods and not land matters. They submitted that if at all service was done, a fact that is denied, the relevant provisions would have been Order 10 Rule 9 of the Civil Procedure Rules, 2010. The Plaintiff upon setting the matter for Judgment by the Deputy Registrar was therefore improper and irregular. In the case of:- “James Ngara Mukiri & another – Versus - Josephine Wangari Mukiri [2013] eKLR”, the Learned Judge while allowing the Defendants to file a Defence averred as follows:-

“In a situation as in the instant suit there is no provision for entry of interlocutory judgment as the plaintiffs claim does not fall under any of the provisions under Order 10 Rules 4, 5, 6 and 7 where interlocutory judgment may be entered. The plaint makes a claim for land and there is no claim for pecuniary damages to have entitled the court to enter the interlocutory judgment.”

26. A cursory look at the Plaint in this case brings this instant issue on all fours with “James Ngara Mukiri case (supra)” in that the dispute is strictly a land matter. They urged this Honorable court to be persuaded by the wisdom of the Learned Judge and set aside the interlocutory Judgment that paved way for conduct of ex-parte proceedings since it was irregularly entered by the Deputy Registrar.

27. On whether the ex - parte Judgment entered was an irregular Judgment if so whether the Application is merited. The Learned Counsel submitted that having proved that there was no proper service of court process and that the entry of interlocutory Judgment in this land matter was improper, we submit that ex-parte Judgment and proceedings thereto were un-procedural, irregular which had the effect of curtailing the Defendants’ opportunity to cross - examine and right to be heard. The issue of regular judgment was addressed in the case “Mwala – Versus - Kenya Bureau of Standards EA LR (2001)1 EA 148”, where the court stated;

“to all that I should add my own views that a distinction is to be drawn between a regular and irregular ex - parte Judgment. Where the judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a Memorandum of Appearance or Defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular Judgment on its record.”

28. The ex - parte Judgment in this case is an irregular Judgment as it was procured by inter alia, the cunning maneuver by the Plaintiff of failing to serve. Further, the Plaintiff requested for entry of interlocutory Judgment which was strangely allowed by the Deputy Registrar, Mombasa on 8th September, 2017, a procedure that was not lawful. The proceedings after entry of interlocutory Judgment, including the Hearing were founded on an irregular decision by the DR to enter an interlocutory Judgment and set the matter down for formal proof. It was therefore their humble submission that the Judgment can and ought to be set aside as a matter of right, ex debito justitiae to allow the defendants present their case and be heard.

29. In case of: “James Kanyiiita Nderitu & another – Versus - Marios Philotas Ghikas & another [2016] eKLR”, the right and the exercise of court’s discretion was actually not necessary but rather the inherent powers of court are invoked to correct a wrong and avoid affirming a nullity procedure. Even assuming the Judgment was regular, a fact that was denied, this court was under a mandate to consider the merits of the Application to re-open the case, especially where there was no entry of appearance for



the defendants. It was trite law that setting aside of a regular judgment was a matter of exercise of discretion. Such discretion is exercised on a case to case basis and considering the peculiar facts of each case. Superior courts had developed factors to consider while dealing with an application to set aside a regular Judgment which include:-

- i) the Defendant has a real prospect of successfully defending the claim; or
- ii) it appears to the court that there is some other good reason why;
- iii) the Judgment should be set aside or varied; or
- iv) the Defendant should be allowed to defend the claim.

30. Further, the courts have gone ahead to expand these factors to include the length of any delay by the Defendant must be taken into account, any pre-action delay was irrelevant; any failure by the defendant to provide a good explanation for the delay was a factor to be taken into account, but was not always a reason to refuse to set aside; the primary considerations are whether there was a defence with a real prospect of success, and that justice should be done; and prejudice (or the absence of it) to the claimant also has to be taken into account.
31. This prospects of re-opening a case were well discussed in case of:- “David Kiptanui Yego & 134 others – Versus - Benjamin Rono & 3 others [2021]eKLR” while the High Court allowed the Defendants application to re - open the case. In this instant, the facts of the case are that the Defendants, especially the 1st Defendant, who was based in Germany, avers that she was not aware of this suit. Secondly, she came to learn of the suit when the Plaintiff served her with court documents in Mombasa Misc. Family Application No. E046 of 2022 that had the ex-parte Judgment and decree in this case attached thereto. That this prompted her to, through her advocates, request for proceedings in this case vide a letter dated 25th January 2023. It was after the said documents in this case were availed and she got an opportunity to be advised of the effect of these proceedings, that the initial application dated 29th March, 2023 (that was wrongly dismissed by court for alleged non-compliance with Order 9 Rule 9) was filed under her instructions. The delay to file the defence since 2014 (when the case was filed) or even at least from the year 2018 (when Judgment was entered) was simply because of the fact that she was not aware of the suit. Being a resident of Germany and a German Citizen, they submitted that this explanation was plausible and urge the court to find the same explanation plausible. This applies also to the 2nd Defendant who remained in dark up until the 1st Defendant/applicant made her aware of these proceedings.
32. On whether there was a triable defence. The Learned Counsel submitted that the Applicants have a good defence to the case. As disclosed on the further affidavit by the applicants, the property is not matrimonial property and in any case, there was a pre-nuptial agreement between the Plaintiff and the 1st Defendant prohibiting either party in the alleged marriage from claiming property registered in the name of either party. Further, that any dispute between the 1st Defendant and the Plaintiff was to be dealt with by German courts. The draft defence challenges the Jurisdiction of this court. This was a triable issue. In any event, the 2nd Applicant who was the registered owner denied allegations of fraud leading up to her registration as the proprietor, which allegations were serious and by virtue of denying the same, the Plaintiff must prove them strictly. On the basis of this alone, the draft defence was plausible and they submitted that that the Defendants out to get their day in court by ring-fencing their right to be heard and allowing them to defend the suit.
33. On the prejudice to be suffered by the Plaintiff. The Learned Counsel submitted that no prejudice would be occasioned mother to the Applicants, who was an elderly citizen. It had never been matrimonial property. The Plaintiff having chosen to steal a match against the defendants, equity



could not come to his aid. Therefore, they submitted that looked at both ways i.e. whether the ex-parte Judgment was regular or granted to file Defence and re-open the case, set aside the proceedings and be allowed to file and serve a Defence in this case.

34. The Learned Counsel therefore submitted that the Applicants deserved a chance before the dock. The Applicants were victims of the gone-days of trial by ambush or in worst case scenario, trial by stealth where the Plaintiff laid down a plan and has been trying to actualize it by filing and prosecuting Mombasa High Court divorce cause No. 37 of 2011, while the parties' marriage had been annulled by a competent court in Germany in the year 2006, by fling the present suit to claim the suit property, by filing Mombasa HC Misc Family cause No. E046 of 2022-seeking leave to pursue this property as matrimonial property after he deceived the court into believing the same and ultimately filing Mombasa Family (O.S) No. E009 of 2023 seeking a share of the suit property which has never been matrimonial property.
35. On who should bear the costs for the application, the Learned Counsel submitted that its trite law that costs follow the event. Mr. Justice (Rtd.) Kuloba thus writes in his work, Judicial Hints on Civil Procedure, 2nd ed. (Nairobi:-Law Africa,2011),p.94:
- “ Costs are [awarded at] the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise.”
36. According to the Counsel, the Applicants had demonstrated that the application had merits and ought to be allowed for valid reasons. They therefore urged this Honorable court to be guided by the Obita dictum in the case:- “Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 others [2014]eKLR” where the Supreme Court held:-
- (18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or Respondent will bear the costs.”
37. In conclusion, the Learned Counsel humbly prayed that the costs of this application be provided for and the Plaintiff does cater for the costs of this Application.

B. The Written Submissions by the Plaintiff/Respondent

38. The Plaintiff through the Law firm of Messrs. Mwashushe & Company Advocates filed his written submissions dated 19th February, 2024. M/s. Mwashishe Advocate submitted that the Notice of Motion application dated 26th June 2023 was disingenuous. The Applicants in their application and affidavits had woven a false narrative with the material contradictions inevitably entangling themselves in a web of lies.
39. The Judgement dated 19th June 2018 restored ownership of the suit property upon the 1st Applicant, who had colluded with the 2nd Applicant to fraudulently transfer the property to the 2nd Applicant. Why would the 1st Applicant be willing to lose ownership of the suit property registered in her name? The mischief was simple. By divesting ownership rights from the 1st Applicant, the Plaintiff would be prevented from claiming any matrimonial property interest in the suit property. The fraudulent collusion was evident. The 2nd Applicant has admitted to the impugned Power of Attorney and subsequent fraudulent transfer. They submitted that the Applicants' hands were unclean and they



do not warrant the exercise of the Court's discretion in their favour. Prayer 1 was spent therefore the Learned Counsel would be submitting on prayers 2 to 7.

40. The Learned Counsel relied on the following four (4) issues for determination. Firstly, on whether or not the leave should be granted under Order 9 Rule 9 of Civil Procedure Rules, 2010 the Learned Counsel submitted that while they had no objection to the Applicants' advocate being granted leave to represent the Applicants. The submissions by the Applicants' Counsel in Paragraphs 11, 12 and 13 could not go unchallenged. This Honourable Court in its ruling dated 31st May 2023 struck out the Applicants' Notice of Motion dated 29th March 2023 for want of compliance with Order 9 Rule 9 & 10 of Civil Procedure Rules, 2010. These orders had not been appealed or set aside. The Applicants' in their submissions however attempt to had a do-over of the issue, and to relitigate. That issue was Res Judicata before this Court, and the Applicants' was required to comply with Order 9 Rule 9 & 10 of Civil Procedure Rules, 2010.
41. Secondly, on whether or not service of the suit was proper, the Learned Counsel submitted Order 5 Rule 8(2) Civil Procedure Rules, 2010 provides for service of Summons upon an advocate with instructions to accept service. The Affidavit of Service dated 10th August 2015 clearly stated the circumstances under which service was effected upon the Law firm of Messrs. Mbogo Muriuki, an Advocate Mr. Mwenda duly accepted service. The Law firm of Messrs. Mbogo Muriuki not only accepted service of the Summons and suit, but continued to hold themselves out as having instructions to accept services of notices for the Applicants. In Paragraph 8 of the supporting affidavit dated 26th June, 2023 the 2nd Applicant made a wild accusation that the Law firm of Messrs. Mbogo Muriuki was hired by the Plaintiff to accept service on behalf of the Applicants, essentially giving the impression that the said firm is unknown to the Applicants. Then, in paragraph 4 of her Further Affidavit dated 25th January 2024, the 2nd Applicants conceded to knowing the firm after having engaged them on the impugned Power of Attorney and in paragraph 6, concedes to the service (of the hearing notice) but alleging without proof that the same was a mistake. The argument that the Law firm of Messrs. Mbogo Muriuki never had instructions to receive service.
42. No evidence had been placed before the Court to disprove this service. Section 112 of the Evidence Act provides that "In civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him". The Applicants had failed to discharge the burden of proof that they did not instruct the said firm. The Applicants had also admitted that they know the said firm and that the said firm has also previously undertaken instructions over the suit property (He referred to paragraph 4 of the 2nd Applicant's Further Affidavit dated 25th January 2024). The Applicants' only complaint was the allegation that the said Law firm never had instructions to receive service. The Applicants were placing an undue burden on the Plaintiff to prove an Advocate - Client relationship between the Applicants and the Law firm of Messrs. Mbogo Muriuki, information which is privileged. If the said Law firm never had instructions to receive service as claimed, nothing could be easier than the Applicants obtaining written communication from the Law firm confirming the alleged position. This has not been done. The Law firm of Mbogo Muriuki was duly served and accepted service. Ordinarily, an Advocate would not accept service without instructions. No evidence had been provided by the Applicants to rebut this. There was nothing placed before the Court showing the firm's denial of the service or instructions to accept service. This was information that would be readily available to the Applicants and not the Plaintiff, yet despite being put to strict proof, the Applicants have failed to submit the evidence of their allegations.



43. The provision of Section 119 of the *Evidence Act*, Cap. 80 provides:-
- “The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”.
44. The Court of Appeal in the case of:- “Chase Bank (Kenya) Limited – Versus - Cannon Assurance (K) Limited [2019] eKLR”, held that:-
- “This provision in our *Evidence Act* embodies the doctrine of spoliation or suppression of evidence. Under this doctrine, it is generally the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy. Where such material is withheld, the court may draw adverse inference.” (See Woodroffe's Law of Evidence, 9th Edition at Page 811-816’).
45. In the case of “Kenya Akiba Micro Financing Limited – Versus - Ezekiel Chebii & 14 Others [2012] eKLR”, the learned Judge rightly stated that:-
- “Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party.”
46. The Learned Counsel submitted that the case of “Elizabeth Kavere & Another – Versus - Lilian Atho & Another [2020] eKLR” is persuasive. The High Court in upholding service under Order 5 Rule 8 held:
- “There is, of course, jurisdiction to set aside a default Judgment under Order 10 Rule 11 of the Civil Procedure Rules. However, this court having already determined that the service upon the Defendant was proper and within the provision of Order 5 Rule 8 (2) of the Civil Procedure Rules, the application for setting aside must disclose facts indicating that there was in fact no such service in accordance with the rules. There was no such evidence. The applicant merely renounced instructions on part of counsel to accept service on her behalf.....The default judgment of this court of 2nd October 2018 was regularly entered following service of the summons to enter appearance in accordance with Order 5 Rule 8 of the Civil Procedure Rules.” (Emphasis ours).
47. The Learned Counsel submitted that still on the issue of service, the Applicants falsely submit in paragraph 6 of their submissions that an admission by the Plaintiff's erstwhile Counsel was made on 26th May 2015 that service of the application had not been done. A reading of the court proceedings on 26th May 2015 would reveal that the Plaintiff's erstwhile Counsel had not served the hearing notice for the application dated 18th March 2014, and consequently, the Court ordered that the hearing notice to issue for the next hearing date, 15th June 2015. On 15th June 2015, the hearing was adjourned again to 9th September 2025. The Plaintiff's erstwhile Counsel duly complied and the hearing notice dated 18th June 2015, and the firm of Mbogo Muriuki duly accepted service (They referred the Honourable Court to the annexure marked as “WAH – 1” on the Plaintiff's Replying Affidavit dated 30th October 2023).
48. The Plaintiff's erstwhile Counsel duly informed the Court whenever a hearing notice was not served. There was full disclosure of the omission (s). There was nothing in the conduct of the Plaintiff's erstwhile Counsel to support the Applicants' false allegations that the trial was conducted by stealth.



They submitted that the service was lawfully effected under Order 5 Rule 8 of the Civil Procedure Rules, 2010 and prayed that the Court finds the same.

49. On the validity of the affidavit of service dated 10th August, 2015, the Learned Counsel submitted that Order 5 Rule 15 (1) of Civil Procedure Rules, 2010 provides for the particulars of an Affidavit of Service. The Affidavit of Service of compliant with the provisions of Order 5 Rule 15 (1). The Applicants had only offered a mere denial of the service. As submitted above, the Law firm of Messrs. Mbogo Muriuki existed and was known to the Applicants. The Law firm accepted the service of the Summons, held themselves out as the Applicants' advocates and continued to receive service. As submitted above, the Applicants had failed to discharge their burden of proof under of the provision of Section 112 of the *Evidence Act*, Cap. 80. Further, the Affidavit dated 23rd June 2023 sworn by Mary I. Mbogo was not credible. The affidavit had been drawn by the Applicants' firm, not an independent firm. This only shows collusion by the Applicants' family to defeat the Plaintiff's claim in the suit property. The authenticity of the affidavit had been challenged by the Plaintiff who had craved leave of the Court to cross-examine the deponent on the affidavit (they referred Paragraph 13 of the Plaintiff's Replying Affidavit dated 30th October 2023). Further, grounds (b) and (c) on the face of the application claims the deponent as the mother of the Applicants, (plus paragraphs 4 & 20 of the 2nd Applicant's Supporting Affidavit) contradicting paragraph 3 of the draft Statement of Defence denying the Applicants are sisters.
50. The Learned Counsel averred that the allegations in Paragraphs 23 and 24 of the Applicants' submissions that the process server had been used by the Plaintiff to subvert the rule of law was baseless, yet another example of wild accusations meant to distract from the core issues. The legal fees were paid to the erstwhile Counsel, not the Process Server, and receipt acknowledged together with the Law firm's stamp. In Paragraph 5 of the Plaintiff's Supporting Affidavit dated 16th December 2022 (they referred the Court to annexure marked as "EKM – 10" of the 2nd Applicant's Further Affidavit), the Plaintiff stated that the legal fees were paid to the Law firm, it was a gross misrepresentation of facts for the Applicants to allege otherwise in their submissions. Further according to the Learned Counsel, the Affidavit of Service was uncontroverted. They prayed that the Court found the same and it be upheld.
51. Thirdly, on the validity if the summons. The Learned Counsel submitted that the Applicants also falsely claim that the Summons had expired at the time of service. Under the provision of Order 5 Rule 2 (1) Civil Procedure Rules, 2010 provided that Summons shall be valid in the first instance for twelve (12) months beginning with the date of its first issue. The Summons were issued on 24th March 2014, service was effected on 4th July 2014, well within the twelve (12) months validity period. They prayed that the Court found the same.
52. Fourthly, on whether or not the proceedings and Judgment should be set aside and the issue of whether or not the ex - parte Judgment was irregular. The Learned Counsel averred that having submitted that service was compliant with Order 5 Rule 8(1) of the Civil Procedure Rules, 2010 and the Affidavit of Service dated 10th August 2025 valid under Order 5 Rule 15 (1), they acquiesced that the judgement and subsequent decree were regular.
53. On the interlocutory Judgment he averred that the endorsement of the Request for Judgment was subject to formal proof. There was no liability attaching to the Applicants at that stage, thus no prejudice occasioned to the Applicants. At the formal proof hearing, the Plaintiff was still required to state his case and produce evidence to prove his case. The proviso in Order 22 Rule 6 provides for a 10 day Notice of Entry of Judgment only where execution sought is in the nature of monetary payment, attachment or evicting. No such execution was sought by the Plaintiff therefore the 10 day Notice of Entry of Judgment was not mandatory.



54. Further on inordinate delay, the Learned Counsel submitted that the application has been brought with inordinate delay, having been filed about five (5) years after the decree was issued. The Applicants' had sufficient notice of the suit and decree. The suit was duly served upon their Advocate and the decree was duly registered against the property. The 2nd Applicant's averments in her Further Affidavit dated 25th January 2024 were materially contradictory. In paragraph 2, the 2nd Applicant claims that they only learnt about this suit after service in Mombasa Miscellaneous Case No. 46/2022, yet in paragraph 8, the 2nd Applicant states that the Power of Attorney was registered for ease of utility payments on the suit property. If the 2nd Applicant was attending to the suit property and making utility payments as alleged, then it is unlikely that she was not aware of the decree reverting ownership to the 1st Applicant.
55. On the issues of no triable issues raised in the Draft Statement of Defence. The Learned Counsel submitted that there were no triable issues raised in the draft Statement of Defence to warrant a re-trial. The Applicants make a mere denial to the Plaintiff's ownership claim on the suit property. There was no averment by the Applicants that the suit property belonged to either of them. There was no averment to show how the Applicants acquired the suit property.
56. According to the Learned Counsel, there was a material contradiction on the 2nd Applicant's alleged ownership of the suit property. In paragraph 17 of the Supporting Affidavit dated 26th June 2023, the 2nd Applicant laid claim to the property by stating ".....my title deed to the suit property....." (emphasis theirs), yet in under Paragraphs 8, 10 and 11 of the Further Affidavit dated 25th January 2024, the 2nd Applicant contradicted herself by stating that the Power of Attorney was for convenience on paying utilities in Kenya, and that the suit property was bought as a family. The 2nd Applicant's contradictory averments on the ownership of the suit property vindicated the Plaintiff's averments and finding of the Court's judgement on the Applicants' collusion to defeat his matrimonial claim on the suit property. Further, if the Power of Attorney was for convenience purposes as alleged, then the 1st Applicant was indeed the registered owner of the suit property and the 2nd Applicant has suffered no prejudice as the decree merely restored the ownership to the 1st Applicant. The 2nd Applicant as donee could not be said to obtain ownership rights on the property under a Power of Attorney and any purported subsequent transfer was fraudulent. The 2nd Applicant does not offer any answer to the Court's finding in the Judgement on why the transfer was effected after divorce proceedings were filed by the Plaintiff. The 1st Applicant was registered as the owner in 2005, for about seven (7) years, the utilities were paid under the 1st Applicant's name. There was no evidence on when the 1st Applicant's change of citizenship occurred to justify the Power of Attorney and fraudulent transfer.
57. Finally, on who should bear the costs of the Applications. The Learned Counsel argued that under the provision of Section 27 *Civil Procedure Act*, Cap. 21 costs follow the event. The application was without merit and they prayed that it was dismissed with costs to the Plaintiff.
58. On authorities, the Learned Counsel submitted that they relied on the following authorities:-
- a. Elizabeth Kavere & Another – Versus - Lilian Atho & Another [2020] eKLR.
 - b. Chase Bank (Kenya) Limited – Versus - Cannon Assurance (K) Limited [2019] eKLR.
59. In conclusion, the Learned Counsel submitted that the application was premised on conjecture. When put to task for proof, none had been provided, instead the Applicants had opted to insult and demean the Plaintiff's person, whilst flamboyantly quoting the Bible. They submitted that the application was not merited and ought to be dismissed with costs to the Plaintiff.



VI. Analysis & Determination.

60. I have carefully read and considered the Notice of Motion application dated 26th June, 2023 by the Defendant/Applicant, the responses by the Plaintiff/Respondent, the written submissions and the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
61. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
- a. Whether Honourable Court can grant leave to the firm of Messrs. Ngunjiri Michael & Co. Advocates to come on record for the Applicants/Defendants after and/or post - Judgment.
 - b. Whether the Applicants have met the threshold for setting aside an ex - parte Judgement.
 - c. Who will bear the Costs of Notice of Motion application dated 26th June, 2023.

Issue No. a). Whether Honourable Court can grant leave to the Law firm of Messrs. Ngunjiri Michael & Co. Advocates to come on record for the Defendant/Applicant after and/or post - Judgment

62. Under this Sub heading, the Honourable Court now wishes to apply the able legal principles, the provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides for change of Advocates to be effected by order of Court or consent of parties to wit:-

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

- (a) upon an application with notice to all the parties; or
- (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

63. The provision of Order 9, rule 10 provides.

“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

64. In this particular case the Defendants from the Court records, no Memorandum of Appearance was entered by the Law firm of Messrs. Mbogo Muriuki & Co. Advocates who according to the Applicants were not their family advocates as alleged by the Plaintiff/Respondent. The Counsel has applied for leave to represent the Defendants/Applicants in this matter. I am guided by the sentiments of Justice L. Gacheru in the case:- “Mukunya Mugo “A” & Anor – Versus - Elizabeth Mugure Mukunya [Supra]”, and find that it is not necessary for the compliance with Order 9 Rule 9 of the Civil Procedure Rules, 2010 although I have noted that the Defendant had sought leave. In my view, the leave to come on record is sufficient appointment and therefore I find and hold that counsel for the Applicants is properly on record.

Issue No. b). Whether the Applicants have met the threshold for setting aside an ex - parte Judgement

65. Under this sub title the Honourable Court is called upon to examine setting aside of the ex parte judgment dated 19th June, 2018 and ex-parte orders/decrees dated 10th December, 2018. The setting



aside of ex parte judgement is premised on provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010, which provides that:

“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.”

66. As was held in the case of:- “CMC Holdings Limited – Versus - Nzioki [2004] 1 KLR173”, the power of the court to set aside ex parte judgment is discretionary and the court is enjoined to consider the particular circumstances of each case. In that case, the Court of Appeal held as follows:-

“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. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle....

The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues...

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.”

67. This being an application to set aside an ex - parte Judgment the issue for consideration and determination is whether on the facts and circumstances the court ought to exercise its discretion in favor of the Defendant/Applicant and set aside the Judgment. In determining whether or not to exercise its discretion to set aside the court has to take into account the reasons that may have occasioned default in appearance and such reasons and/or explanations as the applicant may adduce. The Court of Appeal in the case of:- “Janes Kanyiiita Nderitu & Another – Versus - Marius Phillotas Chikas & another (2016) eKLR” summarized the criteria upon which the courts exercise discretionary jurisdiction as follows: -

“In regular default judgment, the Defendant will have been duly served with summons to enter appearance or to file a defence, resulting in default Judgment. Such a Defendant is entitled under Order 10 Rules 11 of the Civil Procedure Rules to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default Judgment and will take into account such factors as the reason for the failure of the Defendant to file his memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default Judgment was entered whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole, it is in the interest of justice to set aside the default Judgment, among others.”



68. In the case of “Shah – Versus - Mbogo (1967) EA 166” the court of appeal established the guiding principles that a court needs to consider in an application to set aside an ex - parte Judgment. The court stated thus:-

“ Firstly, there are no limits or restrictions on the Judge’s discretion to set aside except that if the judge 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 in itself to fetter the wide discretion given to it by the rules. Secondly, the discretion to set aside is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

The court of appeal reiterated the principles in the subsequent case of Patel -Versus - E.A Cargo Handling Services Limited (1974) EA 75 and the courts have continued to apply the said principles.”

69. It is therefore clear that in considering an application for setting aside ex - parte Judgment, the court should consider whether service was proper and hence the judgment was regular; and whether the Applicant has an arguable defence.
70. In the instant matter the Defendants/Applicant avers that they were not served with summons to enter appearance. However, the record shows the affidavit service sworn by Stephen Muli Malei on 10th August, 2015 which indicated that service was effected to the Defendants’ mother. According to the Defendants/Applicants the alleged service was done on 5th May, 2014 and an affidavit of service was drawn and filed a year later in August 2015. Annexed in the affidavit and marked as “EKM - 3” is a copy of the Court summons dated 24th March, 2014 in prove of the same. Further according to the 2nd Applicant, the Respondent went ahead and purportedly appointed an advocate on her behalf and even went ahead and allegedly served court documents upon him that she was supposed to be served. (Annexed in the affidavit and marked as “EKM - 4” is a copy of the proceedings, emphasis on pages 2, 3, 4 and 5 of the proceedings in prove of the same). The firm of Mbogo Muriuki & Co. Advocates were not their family advocates as alleged by the Plaintiff/Respondent and service upon the said firm, if at all was defective and improper. Even assuming that the said firm of advocates were their family lawyer, which was vehemently denied, the Process server ought to have served her co-applicant and herself personally for onward transmission of documents to their preferred advocates and not purported to have taken documents to the said advocates.
71. On the other hand, the Plaintiff/ Respondent in his submissions argued that Order 5 Rule 8(2) Civil Procedure Rules, 2010 provides for service of Summons upon an advocate with instructions to accept service. The Affidavit of Service dated 10th August 2015 clearly stated the circumstances under which service was effected upon the firm of Mbogo Muriuki, an Advocate Mr. Mwenda duly accepted service. The firm of Mbogo Muriuki not only accepted service of the Summons and suit, but continued to hold themselves out as having instructions to accept services of notices for the Applicants. In paragraph 8 of the supporting affidavit dated 26th June, 2023 the 2nd Applicant made a wild accusation that the Law firm of Messrs. Mbogo Muriuki was hired by the Plaintiff to accept service on behalf of the Applicants, essentially giving the impression that the said firm is unknown to the Applicants. Then, in paragraph 4 of her Further Affidavit dated 25th January 2024, the 2nd Applicants conceded to knowing the firm after having engaged them on the impugned Power of Attorney and in paragraph 6, concedes to the service (of the hearing notice) but alleging without proof that the same was a mistake. The argument



that the firm of Mbogo Muriuki did not have instructions to receive service. No evidence had been placed before the Court to disprove this service. Section 112 of the Evidence Act provides that “In civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”. The Applicants had failed to discharge the burden of proof that they did not instruct the said firm. The Applicants had also admitted that they know the said firm and that the said firm has also previously undertaken instructions over the suit property. They referred Court to paragraph 4 of the 2nd Applicant’s Further Affidavit dated 25th January 2024. The Applicants’ only complaint was the allegation that the said firm did not have instructions to receive service. The Applicants were placing an undue burden on the Plaintiff to prove an Advocate-Client relationship between the Applicants and the firm of Mbogo Muriuki, information which is privileged. If the said firm did not have instructions to receive service as claimed, nothing could be easier than the Applicants obtaining written communication from the firm confirming the alleged position. This has not been done. The firm of Mbogo Muriuki was duly served and accepted service. Ordinarily, an Advocate would not accept service without instructions. No evidence has been provided by the Applicants to rebut this. There was nothing placed before the Court showing the firm’s denial of the service or instructions to accept service. This was information that would be readily available to the Applicants and not the Plaintiff, yet despite being put to strict proof, the Applicants have failed to submit the evidence of their allegations.

72. The record does not show that the pleadings or the hearing notices and the notice of default judgment were served to the Defendants most especially being that the 1st Defendant is not in the country, the same should have been served through substituted service. My view not diverging into whether the summons to enter appearance were defective or not and the proceedings that led to the default judgment entered on 19th June, 2018 against the Defendants were irregularly taken and cannot stand. Process and Procedure is what ensures every party has a chance to have a fair and just trial. Adherence to the process and procedure levels the justice arena and enables litigants to access justice in a predictable and fair manner. It ensures no party steals a match on the other and when that happens there is a procedure that can be applied to even out.
73. In this instant suit, it is quite probable that the Defendants did not have an idea that the suit existed and there was no advertisement vide any national newspaper that could have increased the chance of the Defendants being aware of the suit. I have scrutinized the affidavits of services and left to wonder if the Plaintiff was not concerned that the alleged counsel of the Defendants never entered appearance nor filed a defence on behalf of the Defendants and why there was no application for substituted service before the Plaintiff filed for interlocutory judgment. The 2nd Defendant has denied that she was in Maua and that service was effected to her mother with any court documents. I entertain some doubts that the said process server actually effected the service as alleged. While service by advertisement is proper service, the Applicants have shown that the 1st Applicant was outside the jurisdiction of the court as she resided in Germany at the time of the alleged service. It was clear that being outside Kenya at the time of the filing of the suit she could not have possibly been served as alleged. In my view therefore, the circumstances of this case point to the fact that service was not proper/sufficient.
74. Where a Defendant in an application to set aside an ex - parte Judgment demonstrates that he was not served with summons, it follows that any ex - parte Judgment must have been obtained irregularly and the court in such instance will set aside the ex parte judgment unconditionally and will grant the defendant leave to defend the suit. Even where a regular judgment was obtained after due service the court may for sufficient cause and upon the applicant demonstrating he has a defence on merits, set aside the ex parte judgement on such terms as may be just. Besides the Applicants have stated that they have a defence that raises triable issues. They allege that the Applicants have a good defence to the case. As disclosed on the further affidavit by the applicants, the property is not matrimonial



property and in any case, there was a pre-nuptial agreement between the Plaintiff and the 1st Defendant prohibiting either party in the alleged marriage from claiming property registered in the name of either party. Further, that any dispute between the 1st Defendant and the Plaintiff was to be dealt with by German courts. The draft defence challenges the Jurisdiction of this court. This is a triable issue. In any event, the 2nd Applicant who was the registered owner denied allegations of fraud leading up to her registration as the proprietor, which allegations were serious and by virtue of denying the same, the Plaintiff must prove them strictly. On the basis of this alone, the draft defence was plausible and they submitted that that the Defendants out to get their day in court by ring-fencing their right to be heard and allowing them to defend the suit.

75. In my considered view, as the Plaintiff's claim is based on the ownership of land, which has been challenged by the Defendant/Applicant, I find and hold that the Applicant has demonstrated a triable defence.
76. Under the provision of Order 10, of the Civil Procedure Rules, 2010, addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Order 10 Rule 4 empowers Courts to enter interlocutory Judgment in cases where the Plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages. On the other hand, under Rule 9 gives the Plaintiff the leeway to set down a suit for hearing where no appearance is entered for other suits not provided for by this Order. Order 10 Rule 10 provides that in cases where a defendant has failed to file a defence, Rules 4 to 9 shall apply with any necessary modification. While Rule 11 empowers the court to set aside or vary a judgment that has been entered under Order 10.
77. Under the Order 10, rule 11 of the Civil Procedure Rules, provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside, it 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.”
78. In the case of “Patel – Versus - East African Cargo Handling Services Limited (1974) EA 75” the court of Appeal per Duffus, V.P stated as follows:-
- “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. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied there is a defence on merits. In this respect defence on merits, does not mean in my view, a defence that must succeed it means as Sheridan, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”
79. It is a settled principle of law that even where an ex - parte Judgment is regular, demonstration of an arguable defence is sufficient reason for the court to set aside such ex - parte Judgment.
80. The discretion of a court to set aside or vary ex - parte Judgment entered in default of appearance or defence is a free one and is intended to be exercised to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. This was the position in the case:- “Rayat Trading Co. Limited – Versus - Bank of Baroda & Tetezi House Limited [2018] eKLR”. In the exercise of this discretion the Court will consider inter alia if:
- i) the Defendant has a real prospect of successfully defending the claim; or
 - ii) it appears to the court that there is some other good reason why;



- iii) the Judgment should be set aside or varied; or
 - iv) the Defendant should be allowed to defend the claim
81. Similarly, in the case of, “Thorn PLC – Versus - Macdonald [1999] CPLR 660”, the Court of Appeal stipulated the following guiding principles:
- i) while the length of any delay by the Defendant must be taken into account, any pre-action delay is irrelevant;
 - ii) any failure by the Defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
 - iii) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and
 - iv) prejudice (or the absence of it) to the claimant also has to be taken into account.
82. One of the key factors to consider when setting aside an ex - parte Judgment is whether the Defendant has a defence on merit. In the case of, “Sebei District Administration – Versus - Gasyali & others (1968) EA 300” Sheridan J. observed that:
- “The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”
83. In the case of, “Tree Shade Motor Limited – Versus - DT Dobie Co Ltd CA 38/98”, the Court held that even when ex-parte judgment was lawfully entered, the court should look at the draft Defence to see if it contained a valid or reasonable defence. In the case of:- “International Finance Corporation – Versus - Utxafrica sprl [2001] CLC 1361”, it was stated that the test of a Defence having a real prospect of success means that the prospects must be better than merely arguable. The other matter to consider as whether to set aside or vary a Judgment entered include whether the person seeking to set aside the judgment made an application to do so promptly and the reasons advanced for the setting aside the default judgment. In the case of: “Law – Versus – St. Margarets Insurance Limited [2001] EWCA Civ 30, LTL”, the Court of Appeal allowed judgment in default to be set aside despite the defendant’s solicitors’ procedural errors in failing to file an acknowledgment of service and in failing to ensure that the statement of truth in relation to the evidence in support of the application was signed by the right person. The overriding objective required that the default judgment be set aside in order to enable the merits of the defence to be determined.
84. In the case of: “Rayat Trading Co. Limited – Versus - Bank of Baroda & Tetezi House Limited [Supra]” the Court held that:
- “If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant’s costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim.”
85. In deciding whether to impose such a condition, the court will consider factors such as whether there was any delay in applying to set aside, doubts about the strength of the defence on the merits, and



conduct of the defendant indicating a risk of dissipation of assets see, “Creasey – Versus - Breachwood Motors Limited [1993] BCLC 480)”. As to the amount, this is in the court’s discretion, which should be exercised by applying the overriding objective. However, a condition requiring payment into Court of a sum that the defendant will find impossible to pay ought not to be ordered, as that would be tantamount to refusing to set aside see, “M. V. Yorke Motors – Versus - Edwards [1982] 1 WLR 444” and “Training in Compliance Limited – Versus - Dewse (2000) LTL 2/10/2000”.

86. In the instant case, this Honourable Court has already opined itself that proper service was not effected on the Defendants and that at the time the interlocutory judgment was entered in 2018, the Defendants had not filed a memorandum of appearance neither had filed a defence thereto. Therefore the interlocutory judgment entered on 19th June, 2018 in favour of the Plaintiff invalid and irregular. In my considered opinion, the reasons advanced by the Defendants for not being part of the suit are valid and are acceptable.
87. The interlocutory judgment was entered on 19th June, 2018 and decree dated 10th December, 2018 and the present application is dated 26th June, 2023 brought more than five years after judgment was entered therefore there was an inordinate delay which the Defendants attribute to lack of service.
88. Be that as it may, being that I have already opined that the drafted defence raises triable issues, in this scenario it would be in the interest of justice, if the parties were heard fully on the merit of their respective claims. I however suggest that the matter should be heard expeditiously in order that justice is seen to be done. None of the Advocates should further delay the matter unnecessarily. In order to achieve this expediency and in the interest of justice and the parties, it is my considered opinion that the Court’s ex - parte Judgment entered on 19th June, 2018 be set aside in the conditions as provided in the conclusion and disposition below.

Issue No. c). Who will bear the Costs of the Notice of Motion application dated 26th June, 2023.

89. It is now well established that the issue of costs is discretionary of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

90. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

91. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition,



2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and “Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, (2014) eKLR”.

92. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.
93. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case:- “Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

94. In this case, as this Honourable Court is of the opinion that there shall be no orders as to costs.

VII. Conclusion & Disposition

95. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-
- a. That the Notice of Motion application dated 26th June, 2023 be and is hereby found to have merit in respect of prayers 2, 3, 5 and 6 with no orders as to costs but subject to fulfilment of the set out Pre – conditions herein below.
 - b. That this Honourable Court do and hereby grants leave to the Law firm of Messrs. Ngunjiri Michael & Co. Advocates to come on record for the Defendant/Applicant after and/or post - Judgment.
 - c. That this Honorable Court do and hereby sets aside the ex - parte proceedings (entire proceedings), ex - parte Judgment dated 19th June, 2018 and ex - parte orders/decreed dated 10th December, 2018 in the following terms:
 - i. The Defendant/Applicant statement of Defence be and is hereby deemed to be properly filed and served upon payment of the prerequisite Court filing fees;
 - ii. The Applicants shall file and serve the said Statement of Defence within 7 days of this order;
 - iii. The Defendant to pay the Plaintiff a sum of Kenya Shillings Twenty (Kshs. 20, 000.00/=) as thrown away costs within the next 7 days from this orders.



- iv. In default of compliance with order given in (i), (ii) and (iii) then the order vacating the interlocutory Judgment shall automatically lapse without further reference to the Court.
- d. That the Plaintiff/Respondent herein granted 7 days corresponding leave upon service to file any further documents arising from the filed Defence by the Defendant/Applicant herein.
- e. That for expediency sake, the matter be set down for hearing on 20th November, 2024. There shall be a mention on 1st October, 2024 for purposes of ascertaining compliance of his orders and/or conducting a Pre – Trial Conference session pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
- f. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 9TH DAY OF JULY, 2024.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Mwashishe Advocate for the Plaintiff/Respondent.
- c. Mr. Njindo Advocate for the Defendants/ Applicants

