Adala v Chief Land Registrar; National Water Harvesting & Storage Authority (Formerly National Water Conservation & Pipeline Corporation) (Applicant) (Petition 33 of 2020) [2023] KEELC 19071 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19071 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

PETITION 33 OF 2020

LL NAIKUNI, J

JULY 6, 2023

BETWEEN

HEZEKIAH OMONDI ADALA ..... PETITIONER

AND

CHIEF LAND REGISTRAR ..... RESPONDENT

AND

NATIONAL WATER HARVESTING & STORAGE AUTHORITY (FORMERLY NATIONAL WATER CONSERVATION & PIPELINE CORPORATION) ..... APPLICANT

RULING

I. Introduction

1. The ruling before this Honorable Court is for the determination of a Notice of Motion application dated 29th September, 2021 moved by the National Water Harvesting & Storage Authority (formerly National Water Conservation & Pipeline Corporation), the Applicant herein. It was against the Petitioner and the Respondent herein, The application was brought under the provision of Rule 5 (d) & (e),19 and 25 of the *Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules, 2013* (Also referred as "The Mutunga Rules"); Order 40 Rule 1(a), Order 42 Rule 6, Order 51 Rule 1 of the *Civil Procedure Rules, 2010*; Sections 1, 3, 20 of the *Environment and Land Court Act*, No. 19 of 2011 and Sections 1A and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya.

2. Upon effecting service of the said application, all the parties tendered their replies accordingly. Thereafter, the Honorable Court provided directions on how to dispose off the said application.

II. The Applicant's case

3. Vide the afore stated application, the Applicant sought for the following orders:

    a. Spent.

    b. Spent.

    c. Spent.

    d. This Honorable Court be pleased to join the Applicant as a Respondent in this matter.

    e. The Honorable Court be pleased to review its Decree issued on 29th June 2021 and the orders issued therein and set it aside together with other consequential orders.

    f. The Petition be heard *de novo*: and

    g. The costs of this application be awarded to the Applicant.

4. The Applicant relied on the grounds on the face of it, the testimonial facts and the averments made out under the 31 Paragraphed Supporting Affidavit of Sharon Obonyo together with eight (8) annextures marked as "SO – 1 to 8" annexed thereof. She averred as follows:-

    a. She was the acting Chief Executive Officer of the National Water Harvesting & Storage Authority (Successor of the National Water Conservation & Pipeline Corporation) who are the Applicant in this matter and hence duly authorized and competent to swear this affidavit hereof.

    b. Vide Legal Notice Number 270 of 24th June 1988, the Applicant was established under the auspices of the *State Corporations Act* Chapter 446 of the Laws of Kenya;

    c. Among its core functions, the Applicant was tasked with the commercialization and improvement of water sector operations throughout the Republic of Kenya.

    d. In the defunct Coast Province, the Applicant set its operations in, among other areas, the current day Shanzu Ward within Mombasa County after allocation by the defunct Municipal Council of Mombasa in the year 1989.

    e. According to the Survey Map Sheet No D. 4, the said portion of land was captured under FR. 290/112.

    f. On the ground, the said premises are situated off the Mombasa-Malindi Highway stretching from the end of Shanzu Teachers' Training College, which is adjacent to Applicant's Shanzu Ward Station, and rolls all the way down to past Pride Inn Paradise Beach Resort, Serena Road to the Beach front of the Indian Ocean.

    g. Pursuant to the National Water Master Plan, the Applicant would develop its Shanzu Ward station periodically to 'sustain its dynamic operations that was in tandem with population growth, consumption capacity as we as legislative and policy framework. So far, the Applicant had had the following developments thereon *inter alia*:

        i. Staff quarters housing approximately 33 staff members;

        ii. The Applicant further drilled and developed the borehole that supplies water to various hotels and holiday resorts along Shanzu beach that attract tourists the world over, residential areas as well as schools and other learning institutions; and

iii. For security and service delivery improvement purposes in the area, the Ministry of Interior was allowed by the Applicant to erect the Shanzu Location Provincial Administration Block.

h. Increasingly, the Applicant's operations had been stretched beyond its limits with the burgeoning consumption demands that is proportionate to the rapid population growth.

i. Currently, the supply deficit stands at a whopping 152 million litres of water a day in Mombasa County alone.

j. At the heart of the Applicant's upgrade of its operational capacity in its Shanzu Ward station is the suit premises: Land Reference Number MN/I/10121.

k. The suit premises, that was currently registered to the 1st Respondent albeit irregularly and unlawfully, has been hived off the Applicant's Shanzu Ward station.

l. Hence, pursuant to the National Water Master Plan, the Applicant in the year 2016 earmarked a number of its property for development and/or regularization of title documents to boost its operational capacity.

m. It was at this time that the Applicant realized that a number of its properties had since been illegally and irregularly allocated to private entities: the suit premises being amongst the said properties.

n. Accordingly, the Applicant applied to the 2nd Respondent for registration of restrictions over the various illegally and irregularly allocated properties inclusive of the suit premises.

o. It was against the backdrop of the foregoing that the 1st Respondent commenced the instant proceedings.

p. However, the Applicant's interests over the suit premises notwithstanding, the 1st Respondent, in a bid to steal a march on the Applicant, commenced the instant proceedings chiefly seeking to remove the said restriction without involving the Applicant.

q. The Applicant only became aware of the instant proceedings when it was notified by the 2nd Respondent of this Honorable Court's decree passed on 29th June 2021.

r. .To further exacerbate the situation, the 1st Respondent was now in the process of transferring the suit premises to a 3rd party thereby muddle the intricate web of illegal and irregular dealings over the suit premises.

s. Pressed for an urgent need to increase its operating capacity to meet the burgeoning water consumption for the proportionately rapidly growing population, the Applicant's operations stand to be stifled to a calamity that can only be prevented by allowing the instant motion as laid.

t. The upshot was that had the Applicant been given an opportunity to participate in the instant proceedings, this Honourable Court would not have arrived at the decision it did.

u. It was antithetical to the inalienable right to fair hearing as a facet of the Rules of Natural Justice to condemn a party unheard.

v. Be it as it may, it matters not that the same decision would have been arrived at as denial of the right to be heard renders any decisions made null and void ab initio.

w. It logically follows that the Decree passed on 29th June 2021 was irregular as it was obtained through material non-disclosure as pleaded herein earlier.

x. Justice and fairness dictate that the orders sought herein ought to be granted.

III. The responses by the Petitioner

5. The Application was opposed by the Petitioner through a 23 Paragraphed Replying Affidavit dated 29th October, 2021 and sworn by Hezekeah Omondi Adala to the allegation in the Application. He averred that:

a. He instituted the subject Petition against the Registrar of Title on 14th October 2020 as a result of the Registrar's action of placing a restriction on his and title Number 10121/I/MN on the grounds that the provision of Section 76 of the *Land Registration Act* that mandated the Registrar to follow certain procedure before the same was done. He had further relied on the Constitutional Provisions on Right to fair Administrative Action under Article 47 which mandates that he be heard before any such drastic action could be taken.

b. His prayers were specific and directed against the Registrar of Land for his actions and the functions performed by that office under the provision of Section 77 of the *Land Registration Act* and were not and could not be against any other party.

c. The Registrar being the proper party was served and was represented at the hearing and the court in deed after hearing both parties found that the restriction imposed on the subject suit land was oppressive, unjustified and unlawful thereby removing it. Such an order could not be issued against any other party as the same was directed against the registrar specifically.

d. The suit was not about determination of ownership as his ownership was not in question and was not brought into question in the suit which was about the Registrar's exercise of his functions. As per the above paragraph if the Registrar and or the Applicant herein felt they had any right/interest in the subject property they were called upon to follow the due procedure of the law. His title had never been revoke. The suit was never about revocation of his title. The same could not be brought in the subject suit. The Applicant thus needed to be well guided in the procedure to follow appropriately.

e. In any case the Applicant herein had not brought forward and or attached any documents of title to allege ownership but a long history to try and justify why the restriction which was found to be unjustified should remain.

f. The Applicant had no "*locus standi*" to be in this suit. They had by their own admission indicated that they transferred assets to Coast Water Works Development Agency. The said agency was always aware and participated in the subject suit. He referred Court to the averments made out under the Replying Affidavit in the Petition wherein was attached a letter from Coast Water Works Development Agency affirming the same and as being the basis of placing the restriction.

g. The restriction was placed at the instance of Coast Water Works Development Agency and who were always in the picture in the subject suit. The restriction having been ordered removed the Applicant herein now could not come later in the day and claim that they were the ones who were behind the restriction.

h. Havinginstituted the suit as a result of the restriction which was placed unlawfully and unprocedural, even with the Applicant's application there was nothing to show the lawfulness and the procedure followed for placing the said restriction.

i. It was curious to note that despite the letters internally exchanged dating back to the year 2000 the Applicant if at all had any claim had never brought any proper suit to revoke the title issued to the Deponent. The Applicant now sought to be enjoined in this suit where he petitioned for removal of illegal restriction. The Applicant must follow the correct procedure as laid down by the law and which was not the instant application.

j. More importantly, nowhere was it shown that his land, the land subject reference Number 10121/I/MN was within the Applicants' land. The Applicant had just attached many documents without any clarity as to how his property was related to their alleged land. There was no survey report or anything apart from unsubstantiated allegations. The same thus could not be a basis for overturning the finding of the Learned Judge which was restricted on the Registrar's functions under the law.

k. The application never met the legal requirement for the grant of prayers for review. He was enlightened by his Advocates on record that the position of the law was that it was not permissible to pursue an appeal and an application for review concurrently. If a party choose to proceed by way of an appeal, he automatically lost the right to ask for a review of the decision sought to be appealed. That courts have held that....."once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.

l. The Applicant herein was a government parastatal, the Attorney General was all along participating in this matter and the application was a backdoor attempt by the Respondent in a different clothing to try and have another bite at the Cherry and was otherwise an abuse of the process of the court. The Attorney General having participated all along in the process at the hearing had no option but to proceed with their appeal already instituted before the Court of Appeal.

m. A review may be granted whenever the court considered that it was necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be have taken a different view of the matter.

n. It was further a requirement for review to be considered there be discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application had to be made without unreasonable delay. The instant application was not only untenable but had been brought after undue and unreasonable delay and was thus untenable and he would urge this Honourable court to dismiss the same.

o. From the application and the attachments by the Applicant, there was nothing to suggest any error on the record or any new evidence as regards the Registrar's exercise of his functions in placing the restriction that was the subject of the Petition that found it unjustified consequent order for its removal.

IV. Submissions

6. On the 25th October, 2022, while all parties were present in court, the Honorable Court directed that the Notice of Motion Application dated 29th September, 2021 be canvassed by way of written

submissions. Pursuant to that, the Court reserved a ruling date on notice after confirming that parties had fully complied.

A. The Written Submissions by the Applicant

7. On the 26th July, 2022, the Learned Counsel for the Applicant through the Law firm of Balala & Abed Advocates filed their submissions dated 26th July, 2022. M/s, Mwangi Advocate submitted that was before the Honourable Court for determination was the Applicant's Notice of Motion application dated 29th September 2021. She asserted that the application sought a raft of orders to wit; an order as well as an order of temporary injunction restraining the 1st and 2nd Respondents from further dealings in the suit property pending the hearing and determination of this application. The Applicant further prayed for review of the said decree, joinder to the suit, leave to defend the suit and an order for the Petition to be heard afresh amongst others. The grounds in support were contained on the face of the application together with affidavit in support.In that application, the Applicant contended that all that parcel of land known as Land Reference No. 10121/I/MN which was the disputed property herein was illegally and unlawfully hived off parcels contained in Survey Plan FR. No. 290/112. The said parcel had been allocated to it and which the Applicant had been occupying since then.

8. In hindsight, the Applicant realized that instead of Survey Plan FR. No. 290/112, the disputed parcel had been hived off Survey Plan FR. No. 286/112. This Honorable Court indulged the Applicant to have the same amended. As such, these submissions would focus on FR. No. 286/112 and Land Reference No.10121/I/MN. The Learned Counsel observed that, in his Replying Affidavit dated 29th October, 2021, the 1st Respondent acknowledged, among other things, that the main suit that gave rise to the instant application was not about ownership but rather against the Land's Registrar for his actions and functions under the provision of Section 77 of the *Land Registration Act*.

9. However, going by the issues raised by the Applicant in the instant application, the Learned Counsel observed that this Honorable Court saw the need to protect the substratum of this suit by ordering a detailed background survey exercise to be undertaken onto FR. No. 286/112 and Land Reference No.10121/I/MN. When this matter came up for further directions on 13th July 2022, this Honorable Court directed parties to file their submissions on the Applicant's Application dated 29th September 2021. The Counsel informed Court that, it was that application which was now before the Honourable Court for determination.

10. The Learned Counsel considered the following six (6) issues for determination:

    i. Whether this Honorable Court should stay execution of its decree issued on 29th June 2021,

    ii. Whether this Honorable Court should issue temporary injunction restraining the 1st and 2nd Respondents from further dealings in the suit property pending the hearing and determination of this application,

    iii. Whether this Honorable should set aside its decree and other consequential orders issued on 29th June 2021,

    iv. Whether this Honorable Court should Review its decree issued on 29th June 2021,

    v. Whether this Honorable Court should join the applicant in this suit and grantit leave to file its pleadings; and

    vi. Whether the Petition should be heard de novo

11. The Learned Counsel indicated that apparently it appeared that the first two issues, that is on the stay of execution and injunction to have been overtaken by events as this Honorable Court had been kind enough to protect the substratum of this suit thus far. However, without prejudice to theforegoing, the Counsel urged the Honourable Court to preserve the subject matter of the suit by expressly staying execution and issuing temporaryinjunction as prayed. Be that as it may, they sought to address the Honourable Court on the following remaining issues.

12. Firstly, on whether this Honorable Court should set aside its decree and other consequential orders issued on 29th June, 2021. The Learned Counsel referred the Honourable Court to the provision of Order 10 Rule 11 of the *Civil Procedure Rules 2010* which stipulates thus:

> " 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."

13. She cited the case of "*James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR, the Court of Appeal sitting in Mombasa had an opportunity to pronounce itself on this issue. It held thus;

> In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 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.

The Court went ahead thus:-

> " In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment."

14. Additionally, the Learned Counsel referred Court to the case of Siaya Civil Appeal No. 10 of 2019: *Gulf Fabricators v County Government of Siaya* [2020] eKLR, Aburili J quoting the decision of the court in the case of "*Shah v Mbogo & another* [1967] E.A. stated thus:-

> " The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice, the motion should therefore be refused."

The Court went ahead and added that;

> " I hasten to add that Justice is better served when both parties to a dispute are accorded an opportunity to be heard on merits to enable each of the parties ventilate their issues, unless it is demonstrably shown that the party in question has sought to merely delay of obstruct the cause of justice".

15. The Learned Counsel submitted that the Applicant indicated in its application of 29th September 2021 that it became aware of the instant proceedings when it was notified by the 2nd Respondent of this Honorable Court's decree passed on 29th June 2021. The 1st Respondent in his Replying Affidavit stated that the Applicant being a government parastatal was always represented by the Attorney General who participated in the suit and as such, could not bring this Application. From the record, the Honorable Attorney General entered appearance on behalf of the Chief Land Registrar, the 2nd Respondent herein. The Applicant was not a party to the proceedings. The issues that had been raised by the Applicant in the instant application were issues of ownership that were not in issue during the trial of the Petition. As could be seen from the Application, the historical background and records of the disputed property was well within the knowledge of the Applicant and could only be canvassed fairly if all the parties were heard.

16. Secondly, as to whether the presence of the Attorney General during the trial of the Petition ousted the capacity of the Applicant to bring this application, the Counsel wished to state that the Applicant, despite being a government parastatal dependent on the Government for funding, is a body Corporate with perpetual succession and a common seal capable of suing and being sued inits own. The provision of Section 30 (2) of the *Water Act* 2016 that establishes the Applicant provides thus:

> " The Water Storage Authority established under this section shall be a body corporate with perpetual succession and a common seal, capable of suing ad being sued in its own name and doing all things that a corporation may lawfully do."

17. The provision above pointed to the fact that the Applicant could be sued in its own name and was also capable of holding properties in its own name. The Applicant had outlined its interests in the disputed property and as such, it was only fair and just that the Applicant was given opportunity to defend and protect the said interests.

18. The Learned Counsel submitted that even though unrelated, the celebrated rule in "Foss – Versus – Harbottle" on who was a proper Plaintiff to find that the Applicant was the proper Respondent in this suit and ought to have been sued, served and given an opportunity to defend the suit. The foregoing circumstances, the authorities and provisions of the law cited was a call to this Honorable Court to find that the decree entered on 29th June 2021 was irregularly passed and as such should be set aside as a matter of right and without prejudice to the discretion of this Honorable Court to set aside decrees of such nature.

19. Thirdly, as to whether this Court should review its decree of 29th June, 2021, the Learned Counsel submitted that right for review was guaranteed by the law. The provision of Order 45, rule 1 of the *Civil Procedure Rules, 2010* provides thus;

Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the lime when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

20. The Learned Counsel submitted that, a reading of Order 45 above left no doubts as to the grounds of seeking review of the decree based on any other sufficient reason. To buttress her point, the Counsel relied on the case of "*Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR Court held as follows:-

> " I also find useful guidance in Tokesi Mambili and others v Simion Litsanga where they held as follows:-
>
> i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)
>
> ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
>
> The Court went ahead thus:-
>
> > I am not persuaded that the reasons offered by the applicant amounts to 'sufficient reason' within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. My finding is fortified by the holding in the case of Evan Bwire v Andrew Nginda where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.

21. The Learned Counsel contended that there were sufficient reasons that were capable of re-opening the application or case a fresh. These were the quest made out by the Applicant to have the decree reviewed. Even though it would suffice to seek review on the ground ofdiscovery of new evidence, it would not be in order to do so in our view since the Applicant was not a party to the proceedings culminating to the decree of 29th June 2021. From the Grounds upon which the Applicant was seeking the orders, it was clear that the Applicant had interests in the disputed property. Further, the Applicant was not a party to the proceedings that gave rise to the impugned decree. Given an opportunity to defend the suit based on the grounds contained in the Application, it was without doubt that this Honorable Court would arrive at the same decision. Be that as it may, it matters not that the same decision would have been arrived at as denial of the right to be heard rendered any decisions made null and void ab initio.

22. For reasons of not being sued and joined in the suit to ventilate its case despite having interests in the disputed property, and for failure by the 1st Respondent to disclose to this Honorable Court material facts surrounding the ownership of the disputed property, the Applicant submitted that these amount to sufficient reasons to have the decree reviewed.

23. Fourthly, on whether this Honorable Court should join the Applicant in this suit and granted it leave to file its pleadings and if so, whether the Petition should be heard "de novo'. The Learned Counsel asserted that the Applicant had outlined its interests in the disputed property which was part of the larger Shanzu FR. 286/112 which it had been occupying since the year 1989. And as already stated above, the Applicant was a body corporate that could sue and be sued in its name. It would therefore be proper to join the Applicant in this suit to be able to defend its interests. With this in place the Learned Counsel urged the Honourable Court to find that the Petition be and hereby heard a fresh.

24. In conclusion, the Learned Counsel urged the Court to find merit in their application and allow the same as prayed. In any event, the orders sought were geared towards helping this Court determine the true substantive merit of the case.

B. The Written Submission By The Petitioner

25. On 24th October, 2022, the Learned Counsel for the Petitioner through the Law firm of Messrs. Musa, Boaz and Thomas Advocates filed his written submissions dated the same date. Mr. Adala Advocate commenced by informing Court that the submissions were in opposition to the Application dated 29th September 2021 filed by the Applicants herein. According to the Counsel, the said application was supported by the affidavit of one C.S. Sharon Obonyo. As a rejoinder, the Petitioner being now the Respondent in the application of instance filed his Replying Affidavit in reply to the said application on 29th October 2021.

26. To begin with, the Learned Counsel submitted that the Application was unmeritorious, devoid of backing in law and decided authorities. To him, the same was misguided and ought to be dismissed by this Honorable Court for being fatally defective.

27. For ease of reference, the Counsel provided a background of the suit. He held that the Petitioner filed the Petition currently on record on 14th October 2020 against the Registrar of Lands, Mombasa for what was termed as illegal and unprocedural restriction having been placed on the Petitioner's parcel of land known as land Reference Numbers 10121/1/MN within Shanzu area of Mombasa. The Petitioner sought specific orders against the Registrar of Land, namely:

    a. Declaration that the action of the Respondent, Registrar of entering a Restriction upon the Petitioner's Land Reference Number 101:21/I/MN without any notice to the petitioner and or according him ä right to respond thereto is contrary to the provisions of Section 77 of the *Land Registration Act*, 2012, Section 4 (1) of the *Fair Administrative Action Act*, No. 4 of 2015 and invariably amounts to a violation of the Petitioners' fundamental rights protected by Articles 40 and 48 of the *Constitution*.

    b. An order of Mandamus be and is hereby issued Compelling the Respondent, the Registrar of Lands to remove/lift the Restriction placed against Land Reference Number 10121/I/MN.

    c. A Prohibitory order be and is hereby issued prohibiting the Respondent, the Registrar of Lands from taking any adverse action and/ or interfering in any way whatsoever with the Applicant's ownership, occupation enjoyment and exercise of his legal rights over Land Reference Number 10121/I/MN.

    d. General and exemplary damages for violation of the Petitioner's fundamental rights and freedoms.

    e. Other/further orders this Honourable court shall deem fit to grant for theends of justice.

f. Costs of this Petition.

28. The Learned Counsel submitted that the matter proceeded to full hearing and the Attorney General appeared on behalf of the Registrar of Lands. The response by the Attorney general through affidavit was of importance to note. He quoted the contents of Paragraphs 4 and 5 thereof in *verbatim* below:

> " The Land Registrar on 2nd December 2019 received a letter dated same day from Coast Water Works Development Agency containing a list of various land situated within Mombasa county. The letter requested the Land Registrar to place restrictions and or caveats on the listed parcels of land which included the suit property herein.

29. Paragraphs 5 and 8 of the affidavit, the Respondent applied that the court do grant a joinder for the said Coast Water Works Development Authority. Thus, it was notable that the restrictions were placed at the behest of Coast Water Works Development Authority and that the issue of any joinder was directly and substantially before court.The Court, Hon Justice Yano in his wisdom and in a detailed Judgment delivered on 24th May 2021 found and held as follows:

a. A declaration is hereby issued that the restriction imposed on Land Reference Number 10121/1/MN is oppressive, unjustified and unlawful and the same is hereby removed.

b. A prohibitory order is hereby issued prohibiting the Respondent from taking any adverse action and/or interfering in any way whatsoever with the Petitioner's ownership, occupation, enjoyment and exercise of his legal rights over the said parcel of land without due process of law.

c. Kshs.1,000,000.00 general damages.

d. The Petitioner shall also have the costs of this petition against the Respondent.

30. The Learned Counsel argued that the court therein was determining the issues before it, namely the legality,- and procedure for placing of the restriction. The court was not called upon to, and was not enquiring as to the ownership of the title number 10121/1/MN. The same was not in dispute. The parcel of land belonged to the Petitioner. The cause of action was thus not about ownership of the subject title.

31. The Learned Counsel averred that in the Application before this court was for stay of execution of the decree arising from the Judgment indicated above. The Applicant sought injunction restraining the Petitioner from dealing in the subject property.The Applicant sought orders to be enjoined as a Respondent in the matter. Lastly, the Respondent sought for the review of the decree of the court and setting aside. They also sought for orders for leave to file pleadings to support its claim over the suit premises'. The Applicant further sought that the Petition be heard "de novo".

32. The Learned Counsel argued that the grounds by the Applicant were "*inter alia*" allegations though not supported that the Applicant was the registered owner of the subject property (no title attached) and that the Applicant was not aware of the proceedings and thus alleges denial of fair hearing.

33. The Petitioner's response through an affidavit and further affidavit contending '*inter alia*' that:

a. That his prayers were specific and directed against the Registrar of Land for his actions and the functions performed by that office under section 77 of the *Land Registration Act* and were not and cannot be against any other party.

b. That the Land Registrar being the proper party was served and was represented at the hearing and the court. In deed after hearing both parties found that the restriction imposed on the

subject suit land was oppressive, unjustified and unlawful thereby removing it. Such an order could not be issued against any other party as the same was directed against the registrar specifically.

c. That the Court was aware that there could be any claims by a party and that was why the second order of the court was to the effect that a prohibitory order was issued against the Registrar from taking any adverse action and/ or interfering in any way whatsoever with the petitioner's ownership, occupation enjoyment and exercise of his legal rights over the said parcel of land without due process of the law.

d. That the suit was not about determination of ownership as the Petitioner's ownership to the suit land was not in question. It was not brought into question in the suit which was about the Registrar's exercise of his functions. As per the above paragraph if the Registrar and or the Applicant herein felt they had any right/interest in the subject property they were called upon to follow the due procedure of the law. His title had never been revoked. The suit was never about revocation of his title. The same could not be brought in the subject suit. The Applicant thus needed to be well guided in the procedure to follow appropriately.

34. Further the Petitioner stated that the applicant lacked 'the *locus standi*' as the person that placed the restriction was Coast Water Works Development Authority which was alleged to have been the one the assets were transferred to. In a further affidavit and since in their affidavit, the Applicant herein had relied in a different folio. The Petitioner stated that the Applicant herein was a busy body as their claim referred to a different land.Even so it was the crux of the Petitioner's response that the Petition was limited in nature and that the issue of anyone claiming interest in the subject property could not bring the same in the subject Petition but the remedy lied in filing a separate suit and bringing their own evidence in support thereof. It should be noted that it was a 'Petition for removal of a restriction wrongly placed and which the court found to have been so wrongly placed.

35. All said and done, the Learned Counsel based his submissions on the following four (4) issues for the determination by the Honorable Court:

a. Whether the issues raised by the Applicant could be raised in a Petition for removal of restriction

b. Whether the application by the Applicant had met the required conditions for joinder into Petition herein.

c. Whether the Applicant had satisfied the conditions for setting aside Judgment in the Petition.

d. Whether the Applicant moved the court accordingly/ what was the status of the Applicant in the subject proceedings?

36. Firstly, on the issue of Joinder of the Applicant to the Petition. The law of joinder is founded under the provision of Order 1 Rule 10 (2) of the *Civil Procedure Rules* provides that:-

> " The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

37. The Counsel referred Court to a similar case as the instant one, in the decision of *Stephen Mbugua Gituthi & 2 others (Suing on their own behalf and on behalf of 57 others) v National Land Commission & another; Attorney General (Interested Party)* [2021] eKLR the Court stated that:

> The Court in its judgment determined the matter in favour of the Petitioners on the 31/7/2019 and declared that the acquisition of the 'suit properties and improvements undertaken by the Respondents was carried ultra vires the *Constitution*, and statutory law, thus infringing and violating the Petitioner's rights to property. In addition, the Court prohibited the Respondents, their servants, agents in any manner whatsoever from vesting the right of way (wayleave) in favour of the 2nd Respondents unless due process is followed and prompt payment of just compensation is made to the Applicants.
>
> Saving other procedural processes envisaged under section 34 of the *Civil Procedure Act*, the Court on delivery of judgment became functus officio.

38. The Learned Counsel held that in the given circumstances, the Court declined the invite by the Applicant to re-engage with the dispute in a way that was likely to introduce new issues and parties to a case that stood adjudicated.

39. Further, and rightfully so, the Learned Counsel referred the Honourable Court to a suit dealt by myself where I pronounced myself on the issue of review and setting aside (*Lydia Kaguna Japeth 2 others v Mbesa Investment Limited 2 others* [2022] eKLR) in the following extensive words:

> From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.
>
> a) There should be a person who considers himself aggrieved by a Decree or order;
>
> b) The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
>
> c) A decree or order from which no appeal is allowed by this Act;
>
> d) There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
>
> e) On account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order.
>
> f) The review is by the Court which passed the decree or made the order without unreasonable delay.
>
> 47. The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re - appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible

40. The Learned Counsel concluded by stating that upon the above background, their submissions were that the orders sought in the Petition were strictly against the Registrar of Land and in the functions of that office. The same could not have been issued against any other party. For that reason, therefore, the Applicant herein was not a party whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle questions involved in the Petition as to whether the Registrar by entering a Restriction upon the Petitioner's Land Reference Number 10121/I/MN without any notice to the Petitioner and or according him a right to respond thereto was contrary to the provisions of Section 77 of the *Land Registration Act*, 2012, Section 4 (1) of the *Fair Administrative Action Act*, No. 4 of 2015. Invariably, it amounted to a violation of the Petitioners' fundamental rights protected under the provision of Articles 40 and 48 of the *Constitution*.

41. The Learned Counsel wondered aloud. If the Applicant herein was enjoined as a Petitioner in the subject suit, what were they coming to tell the court? That the suit parcel belonged to them. Was that the process of moving the court? The same was not directly in issue in the main Petition. Could the court be called upon to litigate on issues that were not properly litigated before the main Petition? The Learned Counsel did not think so.

42. The Learned Counsel submitted that issues of ownership could only be litigated in a proper suit filed by any party laying claim to move the court accordingly. This Court could not in these proceedings determine ownership. It had not been called to do so. That was not the process in issue before this court. Further and as has been noted this court was "functus officio'. The Court make a determination as to the process that was before it and the Respondent in the main petition even filed an appeal. The instant case, the Applicant should not be used to reinvent the wheel. The humbly submitted that the conditions for review and setting aside as the application by the Applicant had not been met in the circumstances of this case.

V. Analysis and Determination

43. Upon keen perusal of the pleadings, being the application dated 29th September, 2021 by the Applicant herein and the responses, the written submissions filed, the myriad authorities cited, the relevant provisions of the *Constitution* of 2010 and statures, I will now turn to the substantive issue at hand. From that, there are three (3) pertinent issues that arise for my determination. These are:

    a. Whether the Notice of Motion application dated 29th September, 2021 by the Applicant herein has any merit.

    b. Whether the parties herein are entitled to the reliefs sought.

    c. Who will bear the costs of the Application

Issue No. A). Whether The Notice Of Motion Application Dated 21St September, 2021 By The Applicant Herein Has Any Merit.

44. Under this sub heading, primarily the main substratum from the application dated 21st September, 2021 by the Applicant herein are threefold namely:- a). on the joinder of parties b). the review of this Court's orders and c). causing the proceedings to commence de no vo. The Honorable Court will be dealing with each of these issues independently for ease of reference and flow of thought.

45. Firstly, on the issue of joinder. The law on joinder of parties for Constitutional petitions is set forth in the *Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules,*

2013 referred to as the Mutunga Rules. This is provided under Rule 5 of the Rules which is also similar to Order 1, Rule 10 of the *Civil Procedure Rules, 2010*. Rule 5 provides as follows:

> " The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—
>
> (a) Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.
>
> (b) A petition shall not be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every proceeding deal with the matter in dispute.
>
> (d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
>
> (i) order that the name of any party improperly joined, be struck out; and
>
> (ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
>
> e) Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents."

46. In making a determination of who is the appropriate respondent the Mutunga Rules provide as follows under Rule 2:

> " Respondent" means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom;

47. The Court of Appeal in the case of "*JMK v MWM & another* [2015] eKLR while speaking to the principle of joinder of a party in a proceeding noted as follows:

> " This Court adopted the same approach in Central Kenya Ltd v Trust Bank & 4 Others, Ca No. 222 Of 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:
>
> "all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."
>
> We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court..."

48. The Court of Appeal in the case of "*EG v Attorney General; David Kuria Mbote & 10 others (Interested Parties)* [2021] eKLR shedding more light on the application of this principle held as follows:

> " (1) The core of the court's power to join a party to any proceedings including at the appellate stage, as aptly discussed in Hamisi Yawa & 36,000 others v Tsangwa Ngala Chome & 19 others [2018] eKLR, is to bring on board a necessary party for purposes of determining the

real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. Nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -

a) The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.

b) The intended party's presence would enable court to resolve all the matters in the dispute.

c) The intended party would suffer prejudice in case of non-joinder.

d) The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings."

49. Although joinder as a party is not an automatic right, a party who is desirous to have a party enjoined in the suit can do so at any time in an ongoing proceeding through an application. The Court will then consider it and in its discretion make a determination on the suitability of such an addition. In making this determination the Court is accordingly guided by the principles set out in the cited authorities.

50. Applying these principles to the instant case, the Applicant through its application seeks to be enjoined as a Respondent in this Petition. This is because, the Applicant claims that the suit property that the Petitioner had build in belongs to it. Further, that it was only through being enjoined as a party to this suit that they would be able to defend their rights. The Applicant contended that on the ground, the said premises are situated off the Mombasa-Malindi Highway stretching from the end of Shanzu Teachers' Training College, which is adjacent to Applicant's Shanzu Ward Station, and rolls all the way down to past Pride Inn Paradise Beach Resort, Serena Road to the Beach front of the Indian Ocean.

51. The Petitioner on the other hand argued that the Applicant lacked *locus standi* as the person that placed the restriction was coast water Works development Authority which was alleged to have been the one the assets were transferred to. In a further affidavit and since in their affidavit, the Applicant herein had relied in a different folio, the petitioner stated that the Applicant herein is a busy body as their claim referred to a different land.

52. The Application may have been made late, but the position is that the proceedings as much as have been concluded the Intended Respondent contends the ownership of the suit property. The intended 2nd Respondent National Water Harvesting & Storage Authority (formerly national water conservation & pipeline corporation) is hereby enjoined as the 2nd Respondent in these proceedings.

53. Secondly, it is on Whether the decree issued on 29th June, 2021 and orders issued therein can be reviewed and set aside all together. This court has carefully considered the grounds in support of and against the application herewith as well as the submissions by both parties, the relevant law and authorities and the peculiar /facts of this Petition. In our considered opinion the key issue that emerges for determination is whether the Applicant has satisfied the conditions set down for review of the court's decree issued on 29th June, 2021 as herein prayed.

54. As already submitted by the two Counsels, the law governing review are founded under the provisions of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 Rule 1 of the Civil Procedure Rules, 2010. The provision of Section 80 of the *Civil Procedure Act* provides as follows: -

Any person who considers himself aggrieved-

a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

55. Order 45 provides the circumstance under which an application for review of decree or Order may be brought and provides as follows: -

> " Any person considering himself aggrieved-
>
> a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

56. The provision of Order 45 Rule 2 of the *Civil Procedure Rules*, under which the application is brought is clear as to whom the applications for review may be made to, and provides as follows;

(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other Judge who is attached to that court at the time the application comes for hearing.

(3) If the Judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other Judge as the Chief Justice may designate.

57. From the above provisions, it is clear that whereas Section 80 of the *Civil Procedure Act* gives the court the power to review its orders. The provision of Order 45 Rule 1 of the *Civil Procedure Rules, 2010* sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;

i. . discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or;

ii. on account of some mistake or error apparent on the face of the record, or

iii. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

58. In order to appreciate the Provisions of Order 45 of the *Civil Procedure Rules* and the reason given by the 2nd Respondent to the effect that the Court in its decree issued on 29th June, 2021 stated as follows:-

> " The upshot is that the Court finds that the Petition dated 13.10.2020 is merited and grants the following prayers:
>
> a. A declaration is hereby issued that the restriction imposed on Land Reference Number 10121/1/MN is oppressive, unjustified and unlawful and the same is hereby removed.
>
> b. A prohibitory order is hereby issued prohibiting the Respondent from taking any adverse action and/or interfering in any way whatsoever with the Petitioner's ownership, occupation, enjoyment and exercise of his legal rights over the said parcel of land without due process of law.
>
> c. Kshs.1,000,000.00 general damages.
>
> d. The Petitioner shall also have the costs of this Petition against the Respondent.

59. From the surrounding facts and inferences placed before this Court, unless otherwise stated, it is not in dispute that Land Reference Number 10121/1/MN CR 32130 is registered in the name of Hezekiah Omondi Adala, the Petitioner herein. Essentially, what is before the Court through the filed Petition is the claim by the Petitioner on the wrongful action by the Land Registrar, the Respondent herein in placing a restriction on the land without notifying the Petitioner and without inviting him for a hearing. On his part, the Respondent avers that the restriction was placed pursuant to a letter dated 2nd December, 2019 from Coast Water Development Agency. It is not denied that the Petitioner was not notified or given an opportunity to be heard before the restriction was placed. The 1st Respondent has merely stated that it is not clear whether the Petitioner herein has officially made an application to remove the restriction. The Petitioner has however stated under oath that he wrote to the Respondent but his letter did not receive any response nor was the restriction lifted, hence this suit. Of course upon adjudication, this Honorable Court delivered its Judgement in favour of the Petitioner. It is this decision that the Applicant now seeks to set aside and/or reviewed with the justification already adduced herein.

60. The Court of Appeal had the following to say in an application for review in the case of *National Bank of Kenya Limited v Ndungu Njau.* [1996] KLR 469

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

61. Having keenly looked at the reason herein advanced by the Applicant and seeing that the same is merited I will proceed to set aside the consequential orders as prescribed by the law. Were the 2nd

Respondents served and it is clear that they were not served with the Petition nor were they considered a Party to this suit.

62. The issue of service of Court pleadings or documents is paramount. Based on the principle of natural Justice being on the right to be heard and not to be condemned unheard, service places all the concerned parties on the correct pedestal of knowledge of the happenings of the Court proceedings. From that viewpoint, the parties may opt to participate in the proceedings if they feel adversely affected in form of defending themselves or prosecuting their specific issues from the already instated legal action before Court. There are numerous methods to effect service as founded under Order 5 of the *Civil Procedure Rules, 2010*. For instance, through substituted means where a court has discretion to order service through advertisement in any of the local dailies of wide national circulation and readership, under Order 5 Rule 17 of the *Civil Procedure Rules, 2010*. Once a party is granted leave and complies with the directions of the court, the Defendants is deemed to have been served. To hold the contrary would be nothing but absurd. There is a presumption that once an advertisement is published, then the person is duly served, and the law does not question the recipient's level of literacy. Indeed, the Applicants were never served in any of these forms and hence could not know of nor participate in the Court proceedings.

63. The principles of setting aside ex parte Judgments are well established. The 2nd Respondent herein has contended that Order 10 Rule 11 of the *Civil Procedure Rules 2010* stipulates thus:

> " 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."

64. To set the record straight, the interlocutory Judgment was not set aside because this court was not convinced that service was not proper. The interlocutory Judgment was set aside for reason that this court was of opinion that this is not the kind of suit where interlocutory judgment can be entered. It was neither a liquidated demand nor a claim for pecuniary damages so that interlocutory judgment could be entered in terms of Order 10 Rule 4 and 6. Interlocutory judgment could not be entered for the suit to proceed by way of formal proof. In such case, what the Plaintiff needs to do is simply set down the suit for hearing as provided for in Order 10 Rule 9 drawn as follows :-

> 9. Subject to Rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.

65. Under Rule 16 which bears the short title failure to respond within stipulated time provides as follows: -

> 16.
>
> (1) If the Respondent does not respond within the time stipulated in Rule 15, the Court may hear and determine the petition in the Respondent's absence.
>
> (2) The Court may set aside an order made under Sub - Rule (1) on its own motion or upon the application of the Respondent or a party affected by the order

66. I am compelled to cite case of *Patel v East Africa Cargo Handling Services Ltd* [1974] E.A. 75 William Duffus, P. stated; -

> " 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 it by the rules. I agree that where it is a regular Judgement as is the case here the court will not usually set aside the Judgement unless it is satisfied that there is a defence on the merits. In this respect defence on the 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"

67. Additionally, in the case of "*Esther Wamaitha Njihia & two others v Safaricom Ltd* the court citing relevant cases on the issue held *inter alia*:-

> " the discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd*.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah v Mbogo. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration v Gasyali. It also goes without saying that the reason for failure to attend should be considered."

68. It is because of the above legal reasoning, that I am fully satisfied and proceed to set aside the interlocutory Judgment and directed the matter to be set down for hearing. There is no evidence that the Petitioner at any point considered the 2nd Respondent as a party to this suit. The Judgment entered into was therefore irregular.It is the sort of Judgment that can be set aside "*ex debito justitiae*".

69. The next issue would be whether the Applicant has a response to the Petition with triable issues. The grounds given by the Applicant for the setting aside are grounds that have convinced this Court to setting aside of the decree. I take note that the application was filed without unreasonable delay having been filed 4 months after the decree was issued and having put out a ground that they were unaware of the Petition.

70. On this aspect, allow me to refer to the case of "*James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another*, Civil Appeal No. 6 of 2015 eKLR (Msa), the Learned Judges of Appeal had this to say:-

> " In an irregular default Judgment, on the other hand, Judgment will have been entered against a Defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default Judgment is set aside ex debito justitiae, as a matter of right. The Court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reason why such Judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango 0100 v. Attorney General [1986-19891 EA 456)".

71. Once again under the same breath and based on the sound legal justification adduced herein, I categorically proceed to set aside the decree issued on 29th June, 2021 as a right to the Applicant herein.

72. Thirdly, on whether the Petition can be heard 'de no vo". Persuaded by the principles of natural Justice, Equity and Conscience, fair hearing and natural Justice under the provisions of Articles 25 (c), 47, 48, 50 (1) & (2) and 159 (1) and (2) of the *Constitution* of Kenya, 2010 and Sections 3 13 and 19 of the *Environment and Land Court Act*, No. 19 of 2011 entitles the Applicants to a fair hearing before the properties they lay claim on could be taken away. That Article states as follows: -

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or, if appropriate, another independent and impartial tribunal or body."

73. Considering the above provisions of the said Constitution, the Court in the case of "*Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* (2018) eKLR, observed that:-

> " While the wording of Article 50 of the *Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials, it is not lost that fair trial in civil cases includes: the right of access to court, the right to be heard by a competent independent and impartial tribunal; the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing and the right to be heard within a reasonable time."
>
> 29. The Court went on to state that: -
>
> ".....it is important that in any Judicial process of adjudication, parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective Judge or Magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system."
>
> 30. In this respect it was not lost on this Court that the Courts of this land have been consistent on the importance of observing the rules of natural justice and in particular the need to hear a person who is likely to be adversely affected by a decision before that decision is made. In Onyango –vs- Attorney General (1986-1989) EA 456, Nyarangi, J asserted thus: -
>
> "I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly....
>
> A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

74. With regard to this case, the Applicant seeks for an order setting aside the said Judgement delivered in favour of the Petitioner and for hearing of that case de novo. According to the Applicant/ 2nd Respondent, they had not participated in the said petition and its hearing and yet they were the owner the suit property among other sound justification.

75. The principle of "ex debito justiciae' is founded on a recognition of a debt that the justice delivery system owes to a litigant to correct an error in a judicial dispensation. Accordingly, and having carefully considered the unique circumstances, the surrounding facts and the inferences of this case herein, I am fully satisfied that the Applicants ought to be afforded an opportunity to be heard before a proper decision is arrived at in respect of the ownership of the subject properties.

Issue No. C). Who Will Bear The Costs Of The Application?

76. It is now well established that and from the provisions of Rule 26 (1) and (2) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013*, the award of costs is at the discretion of the Cost. Costs is the award that a party is granted at the conclusion of any legal action or proceedings in any litigation.

77. In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to court to determine their rights and fundamental freedoms. The Proviso of the Provisions of Section 27(1) of the *Civil Procedure Act* Cap 21 holds that costs follow the event. By event it means the results of the legal action or process in any litigation (see the Supreme Court Case of *Jasbir Rai Singh Rai – Versus- Tarhochan Singh* (2014) eKLR and Mary Wambui Munene –Versus-Ihururu Dairy Co - operative Societies eKLR (2014).

78. In the instant proceeding, although the Applicant has fully succeeded in prosecuting its application, but taking that the Petition is to commence 'De No Vo" for the reasonings already adduced herein and hence the proceedings to be still on course, it is just, fair, reasonable and equitable that the Costs for the applications to bear their own costs.

VI. Conclusion and Findings

79. In the premises, having conducted such an elaborate analysis to the framed issues herein, the Honorable Court on preponderance of probabilities holds that the Applicant has succeeded in making its case from the filed application. For avoidance of doubt, the Court proceeds to specifically make the following orders. These are:

    a. That the Notice of Motion Application dated 29th September, 2021 be and is hereby allowed.

    b. That the Decree of this Court granted on 29th June, 2021 be and is hereby set aside in so far as the same relates to the Applicant.

    c. That an order be and is hereby made that the Respondent/ Petitioner's claim be heard de novo with the Applicants being afforded an opportunity to be heard.

    d. That the Petitioner granted 14 days from this date hereof to file and serve an Amended Petition accordingly.

    e. That Both the Petitioner, the Respondents and the Interested Parties herein are hereby granted leave of 21 days to file and exchange any Replies to the Amended Petition and any further documents in support of their cases of the main Petition the main accordingly.

    f. That for expediency sake, this matter to be heard within the next One Hundred and Eighty (180) days from the date of the delivery of this Ruling being 6th February, 2014. There be a mention on 2nd October, 2023 for purposes of taking proper directions on how to dispose off the filed Petition herein.

    g. That each party shall bear their own costs.

    It is so ordered accordingly.

RULING DELIVERED THROUGH MOCROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 6TH DAY OF JULY 2023.

.....

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

a. M/s. Yumna, the Court Assistant.

b. Mr. Mugambi Advocate holding brief for Mr. Adala Advocate for the Petitioner.

c. No appearance for the 1st & 2nd Respondents.

d. M/s. Mwangi Advocate for the Applicant.