**Shah v Mbugua & 32 others (Environment & Land Case 215B of 2018)**
**[2023] KEELC 19836 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19836 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND CASE 215B OF 2018**

**SM KIBUNJA, J**

**SEPTEMBER 20, 2023**

**[FORMERLY HCCC NO. 622 OF 2011]**

**BETWEEN**

**NAINESH KANTILAL SHAH ..... PLAINTIFF**

**AND**

**BIDAN MBUGUA & 32 OTHERS ..... DEFENDANT**

**RULING**

1. The defendants filed the application dated the October 21, 2022 seeking for among others;

    a. Leave be granted for Ms Mwaniki Gitau & Company Advocates to come on record for the defendants in place of Ms Gikandi & Company Advocates.

    b. Setting aside of the judgement entered by the Deputy Registrar against the defendants dated the April 11, 2012.

    c. The final judgement delivered on the March 28, 2019, the ensuring decree, taxation and all consequential orders be set aside, varied and or vacated.

    d. There be a stay of execution of the judgement and decree thereof pending the hearing and determination of this application or until further orders.

    The application is supported by the affidavit of Bedan Nganga Mbugua, the 1st defendant, sworn on the October 12, 2022 in which he *inter alia* indicated he resides at Karen, Nairobi and not Kiwambale village, Shimoni. He also denied being served with demand letter and summons at Kiwambale village. He deposed that Ms Gikandi & Company advocates were wrongly served with hearing notices as the defendants had not instructed them; that the request for judgement was wrongly made and entered as the suit was not for a liquidated claim; that each of the defendants having stayed on the suit land for more than 12 years have a claim under

adverse possession and would have defended the suit, and raised a counterclaim against the plaintiff if properly served; that he has occupied and developed 66 acres of the suit land for over 20 years without interruption; that the 3rd, 4th , 12th, 14th, 17th, 19th, and 33rd defendants are all deceased; that plaintiff has served the firm of Ms Gikandi & Company Advocates with eviction notice; that the plaintiff is trying to place beacons on the suit land he allegedly bought 27 years ago, making his title suspect as no physical survey has been done on the land and that the defendants were not parties in the Constitutional Petition filed by one Hemed Seif Abdala against Nainesh Kantilal Shah, Commissioner of Lands, Registrar of Titles, Coast Province, Ministry of Lands and Attorney General.

2. The application is opposed by the plaintiff through the replying affidavit sworn on December 6, 2021 *inter alia* deposing that the defendants had filed a similar application dated the August 27, 2022 that was dismissed vide a ruling dated the July 21, 2022 in which the court made a finding that they had been served with summons and had appointed Ms Gikandi & Company Advocates; that the issues of service of summons and appointment of the said counsel are now res judicata; that the adverse claim being put forward by the defendants is an afterthought; that the defendants had been served with demand letters and summons after which they appointed Ms Gikandi & Company Advocates who filed and served upon his counsel a memorandum of appearance; that no defence was filed within the stipulated time and his advocate applied for interlocutory judgement by way of Request for Judgement dated the April 11, 2012 that was endorsed by the Deputy Registrar on the April 12, 2012 pending formal proof; that as Mombasa HC Petition No 42B of 2011 was pending and was over the same suit properties and parties in that petition and this suit were represented by the same firm of advocates, a consent dated the October 12, 2012 was entered that the petition be heard and decided first; that the petition was heard and determined through the ruling delivered by Emukule J, on the March 18, 2015 which at paragraph 26 directed this suit to be heard on priority basis; that his advocates notified the defendants advocates that the matter would be listed for formal proof; that on the June 13, 2018, Ogola J, transferred the suit to this court; that the defendants' advocates were represented by Ms Kiptum during the mention of the July 27, 2018 when the suit was fixed for formal proof on the October 17, 2018; that he was heard in formal proof but neither the defendants nor their counsel attended the court; that judgement was delivered on the August 28, 2019 in the absence of defendants and their counsel; that his bill of costs was taxed and certificate of costs dated the February 21, 2020 issued; that the extracted decree dated the March 28, 2019 was issued on the February 5, 2020; that he commenced the eviction process in accordance with section 152 of the *Land Act* No 6 of 2012 by serving eviction notices dated the September 15, 2021 upon the defendants and their advocates; that the eviction notices took effect on the December 31, 2021 but the defendants have not vacated; that he hold valid titles with deed plans for the suit properties and it is not true to claim his land is not surveyed.

3. The defendants responded to the plaintiff's replying affidavit through the further affidavit sworn by Bedan Nganga Mbugua on the February 1, 2023 in which he inter alia deposed that the ruling by Munyao J, has gaps and his reading of the same does not make the issues in their application res judicata; that they had filed the earlier application dated September 22, 2021 after the initial notice to vacate that had been served upon Ms Gikandi & Company Advocates. The further affidavit contains several new matters/depositions contrary to the leave granted on the December 8, 2022 that had restricted the affidavit to be filed to only new matters in the replying affidavit.

4. The court issued directions after hearing counsel for the parties on filing and exchanging submissions within the given timelines on the April 18, 2023. The learned counsel for the plaintiff and defendants filed their submissions dated the June 19, 2023 and July 12, 2023 respectively that the court has considered.

5. The learned counsel for the plaintiff inter alia submitted that the defendants had entered unconditional appearance and cannot be heard to turn around and say mea culpa, we were not served with summons. That the purpose of summons is to notify the party sued of the suit, so that they can appear or make or enter an appearance thereof. The counsel referred to the cases of *Nanjibhai Prabhudas & Co Ltd v The Stardard Bank Ltd* [1968] EA 670, *Harjinder Kaur Schmi v Standard Chartered Bank Ltd & Another* [2015] eKLR, Environment and Land Court decision in *Faulata Ramadhani & 2 Others v Lars Ehrhadt & Another* [2022] eKLR, in support of their submissions that where the defendant gets notice of a suit through other means than summons and participates in subsequent proceedings, the party is taken to have waived any irregularty and there is no prejudice occassioned to such a defendant. The counsel submitted that the defendants herein had entered unconditional appearance through Ms Gikandi & Company Advocates through a memorandum of appearance dated the February 28, 2012 that was served on the plaintiff's advocate on the March 2, 2012. That the fact that the court copies of the summons and memorandum of appearance are missing from the record, does not change the fact of their existence as the record confirms the Honourable Lady Justice Anne Omollo had in the judgement delivered on the August 28, 2019 noted that the said firm of advocates had entered appearance. That the defendants did not file and serve their defence within the timeframe set under order 7 Rule 1 of the *Civil Procedure Rules* and the interlocutory judgement entered by the Deputy Registrar upon the plaitiff request was procedural. That the draft defence and counterclaim does not raise triable issues because though they have a claim of adverse possesion against the plaintiff, they dispute his title to the suit land. The counsel cited the cases of *Haro Yoda Juaje v Sadaka Dzengo Mbauro& Another* [2014] eKLR, and *David Kuria Njoroge versus Shabir Hamisi & Another* [2019] eKLR, where the court held that a claimant for adverse possession must profess that the registered proprietor was the true owner of the land subject matter of their claim.

6. On their part, the learned counsel for the defendants submitted *inter alia* that the defendants were not properly served with summons to enter appearance. The counsel referred to order 5 rule 7 of the *Civil Procedure Rules* which provides that:

> "Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant."

And submitted that the alleged memorandum of appearance is defective and urged the court to set it aside. The counsel referred to the case of *Meshack Riaga Ogalo & 7 Others vs Henry Micheal Ochieng & 4 Others* [2007] eKLR in which emphasis was put in the provision of order 6 rule 5 of the *Civil Procedure Rules* which provides that;

> "Where more than one Defendant appear in the same advocate and at the same suit by the same advocate and at the same time the names of all the defendants so appearing shall be inserted in the same Memorandum of Appearance."

And pointed out that the 1st Defendant had in the supporting affidavit deposed that he was not served with any of the documents by the process server whose misleading statements are captured in paragraph 4, 5 to 14 of his affidavit. That upon inquiry from his neighbours, he found out that none of them had been served. The counsel went on to submit that upon perusal of the court file it was discovered that the firm of Gikandi & Co Advocates were wrongly served with hearing notices and other process as they were not appointed to act by any of the Defendants and urged the court to find that entry of appearance is not a casual matter to be determined on a balance of probability or appearance of a stranger to fix a case for formal proof. That the court is under obligation by the overriding objectives to facilitate the just expeditious, proportionate and affordable resolutions of Civil disputes with the

efficient use of the available judicial and administrative resources. The counsel pointed out that the defendants had asked the Deputy Registrar to confirm whether the memorandum of appearance was ever filed and paid for, and their fears have been confirmed when the perusal of the file did not yield such a document. The counsel referred to the case of *Mombasa Cement Limited vs Speaker of National Assembly & another* Petition no 177 of 2015 in which the court held as follows:

> " Payment of court filing fees is a jurisdictional perquisite to the commencement of an action .....The filling of a civil case requires the payment of filling fees. It follows that failure to pay court fees, renders the suit incompetent because there is no competent suit filed before the court..... If the party remedies the situation, by making payment of the requisite court filing fees, the court will treat the situation as if the fee had been paid in the first instance...."

The court emphasized that the legal requirement that court filing fees be paid unless expressly exempted by an order of the court is not a legal technicality and proceeded to dismiss an appeal where the plaint was struck out there being no fees paid. Reference was also made to the case of *Ohaga vs Akiba Bank* [2008] 1 EA, in which the court held that;

> " it is the position of the law that if there is no evidence of a retainer except oral statements of the advocate as having acted without authority or permission...the burden of proof to stablish the retainer is always the shoulder of the advocates. And more weight will be given to the fact that the client did not instruct the advocate to act for him. I hasten to add that the yardstick for such proof is not beyond reasonable doubt. In fact, it is the normal parameters of balance of probability."

The counsel submitted that the court should also consider the provision of rule 8(1) which provides that:

> " Whenever it is practicable, service shall be made on the Defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient."

And urged the court to call the process server, Mr Micheal Otieno, for cross-examination, to explain how he served for instance Bedan Mbugua the 1st Defendant, a prominent personality working for Radio Citizen or the other deceased persons namely; 3rd Defendant, Jabu Salimu who died in the year 1991, the 4th Defendant, Jane Odoyo who died on June 21, 1985, the 9th Defendant, Omari Kidevu, the 14th Defendant and the 33rd Defendant, Hassan Gambigwa. Counsel submitted that the first two had died before commencement of the suit and urged the court to find that the summons to enter appearance were not served upon the defendants. That the affidavit of service that is meant to prove that the defendants were served, does not contain enough evidence to prove whether they were served personally or collectively. That order 5 rule 15(1) of the *Civil Procedure Rules* provides the format for the preparation of an affidavit of service as follows:

> " The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No. 4 of Appendix A with such variations as circumstances may require."

On the issue of whether the interlocutory judgement entered was regular or irregular counsel referred to order 10 rule 11 of the *Civil Procedure Rules* that provides:

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

Counsel cited the case of *James Kanyiita Nderitu v Marios Philotas Ghikas & Anor* [2016] eKLR where the Court of Appeal sitting at Malindi stated thus:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one, which is irregularly entered. In a regular default judgement, 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 judgement. Such a Defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement 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 judgement, 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 judgement 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 judgement, among other. See Mbogo & Another v Shah, Patel v EA Cargo Handling Services Ltd [1975] EA 75, Chemwolo & Another v Kubende [1986] KLR 492 and CMC Holdings v Nzioki [2004] 1 KLR 173).
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> In an irregular default judgement, on the other hand, judgement 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 judgement 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 judgement 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 judgement. The reason why such judgement 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 Oloo v Attorney General [1986-1989] EA 456."

And submitted that since the Defendants were not served, the default judgement entered herein was irregular and ought to be set aside as a matter of right. Counsel also referred to the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75 in which the court held that:

> " 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 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 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."

And the case of *Shah vs Mbogo & Another* [1966] EA 166 in which the court held as follows on the courts' discretion to set aside judgements:

> " I have carefully considered the principles governing the exercise of courts discretion to set aside a judgement obtained ex-parte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately either by evasion or otherwise to obstruct or delay the cause of justice."

And submitted that the firm of Gikandi & Co Advocates were dully served with the application on November 28, 2022 and an affidavit of service upon the said firm had been filed as was the case in the first application dated August 27, 2021, but there has been no response from their side. That where a party refuses to reply to the weighty allegations raised against him, he is deemed to have accepted the version of events in toto. That Justice Munyao's Ruling of July 21, 2022 was emphatic on the need to comply with Order 9 Rule 9 of the *Civil Procedure Rules*. That the striking out of the first application meant res judicata does not arise and that is why this court found no difficulty in having the law firm substituted as prayed in the first instance. That in the draft defence and counter-claim the Defendants have not denied the Plaintiff's right to title but have put forward a formidable case for adverse possession as set out in paragraphs 5, 6, 7, 8, 9, 10, 11 and the reliefs emanating from the averments thereof. That Article 47 of the *Constitution* codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action. The counsel therefore urged the court to set aside the judgement entered by the Deputy Registrar dated April 11, 2012 against the Defendants and the final judgement delivered on March 28, 2019, the ensuring decree, the taxation undertaken and all consequential orders be set aside varied and/or vacated upon such terms as are just. The Defendants contend that their right of access of justice as enshrined under Article 48 of *the Constitution* has been infringed by the Plaintiff's action of not properly serving the Defendants with summons to enter appearance and later obtaining a default judgement and a decree whose execution will infringe on the defendants right to own property and access to justice. The learned counsel referred to Article 48 of the *Constitution* that provides:

> " The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

The Defendants placed reliance in the case of *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* High Court Constitutional Petition No 328 of 2011 [2012] eKLR, where the court stated as follows:

> " Access to justice is a broad concept that defines easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay."

And submitted that the evidence and the draft defence by the Defendants presents triable issues before the court which is enough to seek for stay of the execution of the abovementioned judgements subject to the provision of Article 50 of the *Constitution* for the right to fair hearing. The defendants urged the court to allow the application dated the October 21, 2022 and award the costs of the application to the Defendants.

7. The following are the issues for the court's determinations;

    a. Whether the defendants had been served with summons.

    b. Whether the defendants have made a reasonable case for setting aside of the judgement and consequential orders.

    c. Whether the defendants should be granted leave to defend the suit and if so on what terms.

    d. Who pays the costs of the application.

8. The court has carefully considered the grounds on the notice of motion, affidavit evidence, the record, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations;

    a. The main contention between the defendants and the plaintiff is whether there was a proper service of the summons upon the defendants. Put differently, whether there was a proper memorandum of appearance formally filed by the defendants in this suit. The plaintiff contends that the defendants were properly served as detailed in the affidavit of service sworn by Michael Otieno on the February 11, 2012 and filed on the February 12, 2012. That the defendants entered appearance through Ms Gikandi and Company Advocates vide a memorandum of appearance dated the February 28, 2012 and served upon his advocates on the March 2, 2012. The defendants have disputed the service of summons and denied having instructed Ms Gikandi and Company Advocates to represent them and to enter appearance on their behalf. They have pointed out that there is no evidence of a formally filed copy of the memorandum of appearance on the court record.

    b. That I have perused the contested affidavit of service and noted the deponent had deposed that the defendants had been identified by the Area Chief and two village elders on the three dates of service, but that all the defendants had turned rowdy and declined to acknowledge receipt of service. The defendants have in addition to challenging service proposed to the court through their written submissions that the court do consider to summon the process server for cross examination. There is however no explanation tendered why the defendants counsel failed to move the court during the hearing of the application to have the process server summoned for cross examination. It is unfair for the counsel, who having conceded that the application be canvassed through written submissions, to later turn around and place that responsibility to the court when the matter is reserved for ruling.

    c. The court has also perused the record and noted the only copy of the memorandum of appearance dated the February 28, 2012 is the one attached to the letter dated the November 11, 2021 by the plaintiff's counsel addressed to the court's Deputy Registrar. The letter at paragraph 2 seeks of the Deputy Registrar to;

        " Kindly establish for [sic] the court file whether the document was filed, paid for and do furnish us with a copy of the official receipt for payment."

On that letter is a handwritten note of December 3, 2021 that I take to be by the Deputy Registrar to the officer in-charge Registry, directing him/her to "inform author to peruse the file." That though the copy of the memorandum of appearance appear to have been drawn and signed by Ms Gikandi & Company Advocates and evidently received on March 2, 2012 by Ms Njoroge & Katisya Advocates on record for the plaintiff, it does not carry any court stamp or mark to confirm it had been formally filed before service. I have also not seen any copy of the filing receipt to show the requisite filing fees for the memorandum of appearance had been received by the court. That issue could easily have been resolved had Ms Gikandi & Company Advocates participated in the hearing of the application, but they did not. The plaintiff has referred to the court's judgement delivered by Lady Justice Anne Omollo on the March 28, 2019 and the ruling by Mr Justice Munyao Sila of July 21, 2022 and urged the court to find that the memorandum of appearance had been formally filed. I have perused the said judgement and at paragraph 3, the learned honourable judge among others observed that;

> "The defendants entered appearance through Gikandi & Co advocates on the February 28, 2012 filed on the March 1, 2012 but never filed a defence."

It is safe to conclude that the above observation was made in the absence of any contestation on whether the said Ms Gikandi & Company Advocates had been formally instructed to represent the defendants before. In the ruling of July 21, 2022, the learned judge had made the following observation at paragraph 3 about the said memorandum of appearance;

> "In replying to this aspect of the matter, the applicants contend that they never appointed M//s Gikandi & Company Advocates. In response, the plaintiff has annexed a Memorandum of Appearance dated 28 February 2012. I also note that in the judgement sought to be set aside, there is recorded that there is a Memorandum of Appearance that is dated 28 February 2012 and filed on 1 March 2012. My perusal of the file has not revealed to me this Memorandum of Appearance, but Omollo J must have seen it, for she did make a record of it as I have demonstrated above."

Now that the status of the said firm is contested, the mere presence of a copy of a memorandum of appearance on the record without more would not suffice for me to make a finding that it was formally filed. The plaintiff, as the party urging the court to find that the memorandum of appearance was formally filed, had the obligation under section 106 of the Evidence Act chapter 80 of Laws of Kenya to tender proof and has not done so. The observation or finding by the learned judge of concurrent jurisdiction to this court in the judgement rendered on the March 28, 2019 on the matter is not binding to this court that is to make a determination on the contested issue."

d. It would appear the learned counsel for the plaintiff did not seek to find out whether the memorandum of appearance reportedly served upon them on the March 2, 2012 by Ms Gikandi & Company Advocates had been formally filed, before December 3, 2021 when they wrote the letter detailed above to the Deputy Registrar. That letter was written months after the defendants filed the application dated the August 21, 2021 that was struck out vide the ruling of July 21, 2022 for the counsel's failure to comply with order 9 rule 9 of the *Civil Procedure Rules*. The court has perused the court proceedings especially of the February 13,

2018, June 27, 2018, and October 17, 2018 that were before Ogola and Omollo JJ and noted there was no representative of Ms Gikandi & Company Advocates for the defendants. The only time during that period that the said advocates had representation was on the July 27, 2018 before the Deputy Registrar when one Kiptum was indicated present h/b for Gikandi for the defendants. The record shows that the said counsel informed the court that "I have just been informed it's in the cause list. Mr Gikandi wasn't aware." The matter was then set down for formal proof on the October 17, 2018. The earlier proceedings of June 13, 2018 indicates that Mr Njoroge was present for 1st Respondent, Mr Mkok for 2nd to 5th Respondents while Mr Gikandi for Applicant was absent. The submissions by the counsel and the orders made leaves no doubt that the above coram was not in respect of this suit, then HCCC No 622 of 2011, but a related petition that has since been concluded. The plaintiff has in the replying affidavit deposed about the petition between Hamed Seif Abdalla versus Nainesh Kantilal Shah and 4 Others High Court Petition No 42B of 2011 that was decided on the March 18, 2015. That Ms Gikandi & Company Advocates had represented the petitioner. The defendants position that they were not parties in the said petition has not been rebutted.

e. The plaintiff has further deposed in the replying affidavit that they had agreed this suit do await the outcome of the petition through a consent letter signed by all parties dated October 12, 2012. I have perused the consent letter signed by Ms Gikandi & Company Advocates for the petitioner, Njoroge & Katisya Advocates for the 1st respondent and the Attorney General for the 2nd to the 5th respondents that is at page 91 of the replying affidavit. It is referenced HCC Petition No 42B of 2011 and its body is as reproduced herein below;

> " We would be grateful if you record the following orders by consent;
>
> 1. The parties herein do dispense with the hearing of the petitioner's chamber summons dated July 26, 2011 and the costs thereof do abide the outcome of the petition dated July 26, 2011.
>
> 2. The matter do proceed for hearing of the petition dated the July 26, 2011 after the honourable court issues directions thereof.
>
> 3. In the meantime, the parties do maintain the status quo at the suit premises and the 1st respondent undertakes not to evict the petitioner pending the outcome of the petition and any other orders issued by the honourable court."

It is evident to all and sundry that the said consent did not make any reference to this suit, then HCCC No 622 of 2011, or direct that it would be stayed awaiting the outcome of the petition. The absence of a formally filed memorandum of appearance by Ms Gikandi & Company Advocates coming on record for the defendants in this suit leaves the court with doubts as the genuineness of the plaintiff's claim that all defendants had been duly served with summons and entered unconditional appearances. There could have been some confusion on the parties' representation due to the parallel prosecution of the petition which evidently did not concern the defendants herein, and assumptions were made that the counsel for the petitioner was also representing the defendants herein. Now that the defendants have come to court and sought for their day in court in defending the suit, I am of the view that their application is reasonable and meritorious.

f. That though section 27 of the *Civil Procedure Act* chapter 21 of laws of Kenya provides *inter alia* that costs should follow the events, I am of the view that in this matter, the costs to abide the outcome of the suit.

1. The foregoing determinations commends the court to find and order as follows;

a. That the interlocutory judgement entered by the Deputy Registrar on the April 12, 2012 be and is hereby set aside.

b. That the exparte judgement delivered on the March 28, 2019, and all consequential orders including the taxation, be and is hereby set aside.

c. That to avoid unnecessary delay in this matter, the defendants, who are already before the court and aware of the suit against them, do file and serve their defence with or without counterclaim within the next thirty [30] days from today and in default orders (a) and (b) above to remain vacated.

d. That the costs of the application to abide the outcome of the suit.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 20th DAY OF SEPTEMBER 2023.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

**IN THE PRESENCE OF;**

**PLAINTIFF : Mr. Njoroge Advocate.**

**DEFENDANTS : Mr. Mwaniki Advocate**

**WILSON – COURT ASSISTANT.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**