REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 83 OF 2015

MOSES WENANI ZAKARIA.....PLAINTIFF

VERSUS

METRINE NEKESA WAMALWA.....DEFENDANT

AND

JULIUS MUNYANGE WAFULA.....1ST INTERESTED PARTY

JOSEPH WAFULA WALIKHE.....2ND INTERESTED PARTY

EMMANUEL WAFULA WERE.....3RD INTERESTED PARTY

DAVID WAFULA MASINDE.....4TH INTERESTED PARTY

R U L I N G

1. MOSES WENANI ZAKARIA (the plaintiff herein) moved to this Court vide his plaint dated 20th June 2015 and filed herein on 30th June 2015 seeking against **METRINE NEKESA MATUMBAI** (the defendant herein) the main order that the sub – division of the land parcel **NO BOKOLI/BOKOLI/1970** to create land parcels **NO BOKOLI/BOKOLI/2348**, **2349**, **2412**, **2414** and **2415** be declared null and void, cancelled and the said titles to revert back to the original title **NO BOKOLI/BOKOLI/1970** in the name of the plaintiff. The plaintiff also sought an order for costs and interest.

2. The record shows that the defendant was served with the Summons to Enter Appearance on 8th July 2015 by one **MOSES KULOBA KEYA** a process server of this Court. An affidavit of service dated 8th July 2015 was duly filed in this Court on 1st October 2015. The defendant did not enter any appearance or file any defence and on 29th September 2015, the plaintiff made a request to the Deputy Registrar to enter interlocutory Judgment. That was complied with on 1st October 2015.

3. The matter then came up for formal proof before **MUKUNYA J** on 29th May 2017 and in a reserved Judgment delivered on 10th January 2018 with notice to the parties, the Judge entered Judgment for the plaintiff as prayed in the plaint. A Decree followed and the plaintiff's bill of costs was taxed in the sum of Kshs. 80,075/=.

4. I now have before me for my determination, two Notices of Motion both filed by the defendant.

5. The first application is dated 3rd September 2021 and is drawn by the defendant herself. It is not premised under any provision of the law and the defendant seeks the following orders: -

> **1. The ex – parte Judgment dated 10th January 2018 be and is hereby set aside plus all subsequent orders thereon.**
>
> **2. The defendant be and is hereby granted leave to file her defence and serve within a specified period and this suit be set down for hearing on priority basis.**
>
> **3. The Court process server KEYA who allegedly served Summons to Enter Appearance in this suit be and is hereby summoned to this Court for cross – examination.**

4. Costs of this application be borne by the plaintiff.

The application is premised on the grounds set out therein and is supported by the defendant's lengthy 23 paragraph affidavits contents of which appear to be a prosecution of the main suit.

6. The gravamen of the application is that the defendant was not served with the Summons to Enter Appearance **(SET)** nor any Notice of Entry of Judgment. That service was allegedly served through postal address and never reached the defendant. That the plaintiff has no locus to file this suit and wrongly sued the defendant as a legal representative of the Estate of her late father **ZACHARIA MATUMBAI MAKWARA** yet she was not the legal representative. That the plaintiff has never occupied the land subject of this suit which is where the defendants were buried. That the defendant wishes to be heard in defence of this suit. Much of what is contained in the supporting affidavit is really not relevant for purposes of this application. However, that is not surprising bearing in mind that the defendant was acting in person when she filed it.

7. Annexed to the supporting affidavit are several documents most of which, again, are not of much help in this application. They include: -

1. Certificate of Death of one TOM WAMUKOTA SITATI.

2. Green Card for the land parcel NO BOKOLI/BOKOLI/110.

3. Certificate of Death of one ZACHARIA MATUMBAI MAKWARA.

4. Certificate of Confirmation of Grant of the Estate of TOM WAMUKOTA SITATI issued to JAMES WANYAMA WAMUKOTA & JOSEPH NYONGESA WAMUKOTA on 14th November 2001.

5. Order issued by RIECHI J on 2nd July 2019 in BUNGOMA HIGH COURT SUCCESSION CAUSE No 58 of 2000.

6. Limited Grant of Letters of Administration Ad Litem issued by WEBUYE SRM COURT to BEATRICE NASAMBU WAFULA and METRINE NEKESA WAMALWA on 5th September 2020. In SUCCESSION CAUSE No 13 of 2020.

7. Plaint in WEBUYE SENIOR PRINCIPAL MAGISTRATE'S COURT ELC CASE No 24 of 2020 METRINE NEKESA WAMALWA & BEATRICE NASAMBU WAFULA .V. MOSES WENANI ZAKARIA & 4 others.

8. Proceedings in LAND DISPUTE TRIBUNAL CASE No 5 of 2004 METRINE NEKESA MATUMBAI .V. MOSES WENANI ZACHARIA in respect of land parcel NO BOKOLI/BOKOLI/110.

9. Statement of defence and Counter – Claim in BUNGOMA ELC CASE No 83 of 2015 MOSES WENANI ZAKARIA (plaintiff) .V. METRINE WEKESA MATUMBAI (defendant).

10. Letter from CHIEF BOKOLI LOCATION dated 26th October 1999 addressed to the RESIDENT MAGISTRATE WEBUYE COURT in reference to TOM WAMUKOTA SITATI.

11.Letter from the Assistant CHIEF BOKOLI dated 26th September 2019 addressed to the RESIDENT MAGISTRATE'S COURT WEBUYE in reference to TOM WAMUKOTA SITATI.

On 20th September 2021, the firm of **EMMANUEL WANYONYI & COMPANY ADVOCATES** filed a Notice of Appointment to act for the defendant.

8. Before that, however, the defendant, still acting in person, had filed yet another Notice of Motion under Certificate of Urgency dated 17th September 2021 and filed on the same day. This time, the defendant cited the provisions of **Sections 3** and **3A** of the **Civil Procedure Act**, **Order 1 Rules 1** and **10**, **Order 12 Rule 1**, **Order 40 Rule 1**, **2** and **10** of the **Civil Procedure Rules** and **Section 7** of the **Limitation of Actions Act**.

9. In this application, the defendant seeks the following orders: -

1. Spent.

2. That the status quo be and is hereby issued on land parcel title NO BOKOLI/BOKOLI/1970 plus on all subsequent new title numbers originating from same title of land pending inter parte hearing of this application and further orders of this Honourable Court.

3. That the plaintiff and/or Interested Parties be and are hereby restrained from forcefully evicting the Applicant/Defendant under private means from the original land parcel NO BOKOLI/BOKOLI/1970 plus subsequent new title numbers originating form it until inter – parte hearing of this application and/or further orders from this Honourable Court.

4. That this Honourable Court be pleased to enjoin the interested persons names herein above as plaintiffs in this suit upon hearing and determination of the Notice of Motion dated 3rd September 2021.

5. That in the alternative, this Honourable Court be pleased to recall WEBUYE ELC CASE No 24 of 2020 and consolidate it with this suit upon hearing and determination of the Notice of Motion dated 3rd September 2021.

6. That the officer Commanding Station (OCS) MATISI POLICE STATION do ensure compliance of the orders herein.

The application is based on the grounds set out therein and is also supported by the defendant's affidavit dated 17th September 2021.

10. Again the grounds upon which the application is based as well as the averments in the supporting affidavit appear to be canvassing the main suit. In brief, however, the defendant has also repeated that she was not served with Summons to Enter Appearance **(SET)** and has by her application dated 3rd September 2021, sought to have the ex – parte Judgment dated 10th January 2018 set aside. That it is important to enjoin the Interested parties in this suit to enable the Court reach a fair determination of this matter. That the Interested parties demolished the defendant's toilet on 17th September 2021 and also up – rooted her crops yet the defendant has lived on the land subject of this suit since 1989. That the plaintiff fraudulently acquired the land parcel **NO BOKOLI/BOKOLI/1970** and has hired a tractor **NO KTC B 284 Z** to demolish her homestead. That there is need to consolidate this case and **WEBUYE COURT ELC CASE No 24 of 2020** as was ordered by the **SUCCESSION COURT** and unless this matter is heard expeditiously, the defendant stands to suffer irreparably.

Annexed to the supporting affidavit are the following documents: -

1. **Certificate of Search for land parcel NO BOKOLI/BOKOLI/3509 in the name of JULIUS MUNYANGE WAFULA.**

2. **Certificate of Search for land parcel NO BOKOLI/BOKOLI/3510 in the name of JOSEPH WAFULA WELIKHE.**

3. **Certificate of Search for land parcel NO BOKOLI/BOKOLI/3511 in the name of EMMANUEL WAFULA WERE.**

4. **Title deed for the land parcel NO BOKOLI/BOKOLI/1970 in the name of MOSES WENANI ZAKARIA.**

5. **Limited Grant of Letters of Administration Ad Litem issued to BEATRICE NASAMBU WAFULA and METRINE NEKESA WAMALWA on 5th September 2020 in respect to the Estate of ZACHARIA MATUMBI MAKWARA.**

6. **Order issued by RIECHI J in BUNGOMA HIGH COURT SUCCESSION CAUSE No 58 of 2000.**

When the two applications were placed before me on 21st September 2021, I directed that they be canvassed simultaneously by way of written submissions. The defendant was required to serve the plaintiff and Interested Parties with the applications and submissions within 14 days and the plaintiff and Interested Parties would then have 14 days within which to file his responses and submissions. The matter would then be mentioned on 18th October 2021 to confirm compliance.

11. However, only the plaintiff filed a replying affidavit dated 21st October 2021 and which only responded to the defendant's application dated 3rd September 2021. There was no response to the application dated 17th September 2021.

12. In the replying affidavit, the plaintiff deponed, inter alia, that the defendant was duly served with the plaint and summons by the process server as per the annexed affidavit of service but failed to enter appearance or file defence. That this suit was filed following the cancellation of the titles number **BOKOLI/ BOKOLI/2348**, **2349**, **2341**, **2413**, **2414** and **2415** by the **WEBUYE LAND DISPUTES TRIBUNAL CASE No 4 of 2005** which decision was quashed by the **HIGH COURT** in **BUNGOMA MISCELLANEOUS APPLICATION No 165 of 2005** against which no appeal was filed. That instead, the defendant proceeded to file **BUNGOMA HIGH COURT CASE No 141 of 2015** which was dismissed for want of prosecution after the plaintiff had filed a defence and annexed copies of the plaint in **BUNGOMA ELC CASE No 83 of 2015**.

13. That following the Judgment delivered herein on 10th January 2018, all the titles were cancelled and reverted to **BOKOLI/BOKOLI/1970** which title the plaintiff sub – divided and sold to 3rd parties as per annexed copies of title deeds. That the defendant has been hoping from one Court to another on matters that are purely res – judicta. That in 2018, the defendant filed **BUNGOMA ELC CASE No 7 of 2018** which suit she then abandoned. She then filed **BUNGOMA ELC CASE No 252 of 2013** against one **JULIUS WAFULA** which she also abandoned. She again filed **WEBUYE ELC CASE No 24 of 2000** touching on the same matter. That the defendant wants to involve parties whom the plaintiff never intended to sue and against whom he has no cause of action. That there is no valid defence raising any triable issues and this application should be dismissed with costs.

The plaintiff annexed the following documents to his replying affidavit: -

1. **The affidavit of service by one MOSES KULOBA KEYA dated 8th July 2015.**

2. **The Decree issued herein on 10th January 2018.**

3. **The plaint and defence filed in BUNGOMA ELC CASE No 141 of 2015 METRINE NEKESA WAMALWA .V. MOSES WENANI ZAKARIA & JULIUS WAFULA.**

4. **Copy of title deed to land parcel NO BOKOLI/BOKOLI/3509 in the names of JULIUS MUNYANGE WAFULA.**

5. Copy of a title deed for a land parcel whose details are not visible.

6. Copy of a title deed to land parcel NO BOKOLI/BOKOLI/3654 in the names of DAVID WAFULA MASINDE.

7. PLAINT and DEFENCE in BUNGOMA CHIEF MAGISTRATE ELC CASE No 7 of 2018. METRINE NEKESA WAMALWA .V. JULIUS WAFULA & WERE EMMANUEL.

8. PLAINT in BUNGOMA ELC CASE No 252 of 2015 METRINE NEKESA WAMALWA .V. JULIUS WAFULA.

9. PLAINT and DEFENCE IN WEBUYE COURT ELC CASE No 24 of 2020 METRINE NEKESA WAMALWA & BEATRICE NASAMBU WAFULA .V. MOSES WENANI ZAKARIA, JULIUS MUNYANGE ZAKARIA, JOSEPH WAFULA WELIKHE, EMMANUEL WAFULA WERE, DAVID WAFULA MASINDE.

Submissions have been filed both by **MR WANYONYI** instructed by the firm of **EMMANUEL WANYONYI & COMPANY ADVOCATES** for the defendant and by **MR KITUYI** instructed by the firm of **A. W. KITUYI & COMPANY ADVOCATES** for the plaintiff.

14. I have considered the two applications, the response by the plaintiff and the submissions by Counsel.

15. As indicated at the commencement of this ruling, the defendant seeks a determination of two applications. The first application is dated 3rd September 2021 while the second application is dated 17th September 2021. I shall start with the application dated 3rd September 2021 because if it is dismissed, then a consideration of the application dated 17th September 2021 will be rendered superfluous.

16. The application dated 3rd September 2021 seeks the main orders that the ex – parte Judgment dated 10th January 2018 and all consequential orders flowing therefrom be set aside and the defendant be granted leave to file and serve her defence so that the case can be heard on priority basis. Further, that the Court process server one **MOSES KULOBA KEYA** who allegedly served the summons be summoned for cross – examination. What is sought herein therefore is the exercise of my discretion to set aside a Judgment obtained in the absence of the other party. Such discretion, as was held in **SHAH .V. MBOGO 1967 E.A 116**: -

> ***"…… 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 has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice."***

The following often cited passage by **DUFFUS P.** in **PATEL .V. E.A CARGO HANDLING SERVICES LTD 1974 E.A 75** on the discretion of the Court is relevant. He said: -

> ***"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 by the rules. I agree that where it is a regular Judgment as is the case here, the Court will not usually set aside the Judgment unless it is satisfied 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."***

In **SEBEI DISTRICT ADMINISTRATION .V. GASYALI 1968 E.A 300** the Court said: -

> ***"The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, it should always be remembered that to deny the subject a hearing should be the last resort of a Court."***

In **JAMES KANYIITA NDERITU & ANOTHER .V. MARIOS PHILOTAS GHIKAS & ANOTHER 2016 eKLR**, the Court of Appeal said: -

> ***"From the outset, it cannot be gainsaid that a distinction has always existed between the default Judgment that is regularly entered and one which is irregularly entered. 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 appearances 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 defence the suit. In such a scenario, the Court has unfettered discretion in determining whether or not to set aside the default Judgment and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence as the case may be, the length of time that has elapsed since the default Judgment was entered, whether the intended defence raises triable issues, the respective prejudice each party is likely to suffer ……***
>
> ***In an irregular 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 justiciae , as a matter of right. The Court does not even have to be moved by a party once it comes to it's notice that the Judgment is irregular, it can set aside the default Judgment on it's 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 any opportunity to be heard in response to those allegations." Emphasis added.

Clearly therefore, even where the default Judgment is a regular one, the Court still retains the discretion to set it aside. That discretion, however, like all other discretions, must be exercised judicially on the basis of evidence and sound plausible reasons. A regular ex – parte Judgment will not therefore be set aside simply as a matter of cause, nor arbitrarily, whimsically or capriciously since it is a judicious discretion. Whereas the Constitution guarantees a right to a fair hearing under **Article 50**, it is also the law that under **Orders 10** and **12** of the **Civil Procedure Rules**, the Court is entitled, in appropriate case, to enter a Judgment in the absence of the defendant. The law really is that an opportunity to be heard must be granted before any adverse decision is made against a party. But once that opportunity is made available, it must not be squandered. This was aptly captured by the Court of Appeal in the case of **UNION INSURANCE COMPANY OF KENYA LTD .V. RAMZAN ABDUL DHANJI C.A CIVIL APPLICATION No 179 of 1998 (NBI)** where it said: -

"The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."

Guided by the above, is the defendant deserving of the exercise of this Court's discretion in her favour bearing in mind that it is an equitable remedy which must also be sought with clean hands? The evidence herein does not suggest so. With regard to service of the plaint, it is clear from paragraphs 2 and 3 of the affidavit of service by **MOSES KULOBA KEYA**, a process server of this Court, that on 8th July 2015 while in the company of the plaintiff, he served the defendant with the Summons to Enter Appearance, Plaint and other documents while she was walking along the road towards **TONGAREN MARKET** at 11:12 am. It is not therefore proper for the defendant to simply deny service or for her Counsel to submit, as he has done at page 2 of his submissions, that ***"the return of service for summons to enter appearance does not show where and time exactly she was served and a process server failed to show in his return how he knew defendant just at the road TONGAREN and serves her and this led to the Court proceed with this suit ex – parte and gave Judgment on 10/1/2016 without defendant properly served as required by the law."*** As is clear from the affidavit of service, the process server was accompanied by the plaintiff during the service and has described the time and place where he served the defendant. I did not hear the defendant claim that she was not on the road heading to **TONGAREN MARKET** at 11.12 am on the day of service. That is a matter that is within her knowledge and if she was not on the road heading to **TONGAREN MARKET** on that particular day and time, nothing would have been easier than to say so. It must be remembered that there is a presumption of service as stated in the affidavit of the process server and the burden was on the defendant to demonstrate to the contrary. A mere denial is not enough and it is on that basis that I find it unnecessary to summon the process server for cross – examination as sought by the defendant.

17. The defendant has similarly pleaded that she was never served with a Notice of Entry of Judgment as required by law. There is an affidavit of service by one **SERAPHINE MUKONYI** a **SENIOR COURT BAILIFF** dated 9th January 2018 in which she has deponed in paragraph 2 that on 2nd January 2018, she received from the **DEPUTY REGISTRAR BUNGOMA COURT** a notice for delivery of Judgment coming up on 10th January 2018 and which was dispatched to the defendant at her postal address being **25 TONGAREN**. A copy of the Notice of Judgment is annexed to the said affidavit. Again, I did not hear the defendant deny that her address is not **P. O. Box 25 TONGAREN** as contained in the said notice. In any case, it is clear from the provisal to **Order 22 Rule 6** of the **Civil Procedure Rules** that: -

"Provided that, where Judgment in default of appearance or defence has been entered against the defendant, no execution by payment attachment or eviction shall issue unless not less than ten days' notice of the entry of Judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution." Emphasis added.

It is clear from the above that such notice is only required where the execution sought is for **payment, attachment or eviction**. The decree issued herein on 16th March 2018 is neither for **payment, attachment or eviction**. It is simply for cancellation of titles **NO BOKOLI/BOKOLI/2348**, **2349**, **2412**, **2413**, **2414** and **2415** and for these titles to revert to the original title **NO BOKOLI/BOKOLI /1970** in the names of **MOSES WENANI ZAKARIA**. It is also instructive to note that the defendant has not bothered to inform this Court when she finally became aware about the Judgment herein and by what means.

18. The defendant cannot genuinely claim ignorance about the existence of this suit and the subsequent Judgment delivered on 10th January 2018. This is because, by her own plaint filed against the plaintiff and another in **BUNGOMA ELC CASE No 141 of 2015**, the plaintiff (as 1st defendant) filed a joint statement of defence dated 29th April 2016 with one **JULIUS WAFULA** (as 2nd defendant) in which they pleaded at paragraph 8 thereof as follows: -

8 "The defendant further aver that the plaintiff is fully aware that there is a pending suit before the Court cancelling the illegal titles created by herself in which case no BUNGOMA HIGH COURT CASE No 83 of 2015 and BUNGOMA HIGH COURT CASE No 252 of 2013 remaining undetermined hence the plaintiff is put to strict proof thereof."

The plaintiff being referred to above is a of course the plaintiff in this case and the defence in **BUNGOMA ELC CASE No 141 of 2015** was filed, according to the date stamp thereon, on 17th May 2016. That means that the plaintiff herein knew about the filing of this case some twenty (20) months before the Judgment sought to be set aside was delivered on 10th January 2018. Therefore, even assuming that she had not been served with the summons and plaint as alleged, which this Court has already found not to be the correct position, she certainly was made aware about this case when she was served with the defence in **BUNGOMA ELC CASE No 141 of 2015**. All that she needed to do was to peruse this file to find out the position. She has however elected not to disclose to this Court when she eventually became aware about the Judgment herein.

19. The Judgment sought to be set aside was delivered on 10th January 2018 and this application was filed on 3rd September 2021 some three years and eight months (3 years 8 months) later. The length of time that has elapsed since delivery of the default Judgment is clearly long and no explanation has been offered for that delay which is no doubt inordinate and disentitles the defendant to the orders sought herein.

20. In determining this application, this Court is also required to consider any prejudice that may be caused to the parties including other third parties should the Judgment be set aside. The plaintiff has deponed in paragraph 9 of his replying affidavit that following the said Judgment, he sub – divided the land parcel **NO BOKOLI/BOKOLI/1970** and sold the resultant sub – divisions to third parties after which he moved out. The resultant sub – divisions include parcels **NO BOKOLI/BOKOLI/3509**, **3511** and **3054** which are registered in the names of **JULIUS MUNYANGE WAFULA**, **EMMANUEL WAFULA** and **DAVID WAFULA MASINDE** respectively. They are not parties to this suit and would clearly be prejudiced if the disputed title would revert to **BOKOLI/BOKOLI/ 1970** without their involvement in this trial.

21. I have also perused the annexed draft defence and Counter – Claim (annexture **MNW – 9**) to see if it raises triable issues that ought to go for consideration by this Court. What I understand the defendant to be pleading in paragraphs 5, 6, 7 and 9 of the annexed draft defence is that she and her sisters **ZIPPORAH MAKOKHA WEPUKHULU** and **BEATRICE NASAMBU WAFULA** being the only daughters of their late father **ZACHARIA MATUMBAI MAKWARA** who died in 1983 after purchasing four (4) acres out of the land parcel **NO BOKOLI/BOKOLI/110** from one **TOM WAMUKOTA SITATI** who died in 1975, were also entitled to a portion of that land as beneficiaries in **BUNGOMA HIGH COURT SUCCESSION CAUSE No 58 of 2000** of which they were not made aware. This is how the defendant has pleaded in paragraphs 6 and 7 of the annexed draft defence: -

> ***6: "The defendant further avers the purchaser ZACHARIA MATUMBAI MAKWARA died in 1983 leaving behind only (3) daughters namely: -***
>
> ***i. ZIPPORAH MAKOKHA WEPUKHULU.***
>
> ***ii. METRINE NEKESA WAMALWA***
>
> ***iii. BEATRICE NASAMBU WAFULA***
>
> ***and were entitled to receive this suit subject parcel of land in succession of the Estate of the Landlord/Vendor TOM WAMUKOTA SITATI."***
>
> ***7: "The defendant and her sisters were never made aware of the succession process of the late TOM WAMUKOTA SITATI and their portion of land purchased by their late father ZACHARIA MATUMBAI MAKWARA was fraudulently received by the plaintiff in BUNGOMA SUCCESSION CAUSE No 58 of 2000."***

I have seen the confirmed Grant issued on 14th November 2001 **in BUNGOMA SUCCESSION CAUSE No 58 of 2000** and the plaintiff herein is among the beneficiaries to the Estate of **TOM WAMUKOTA SITATI** and his share of the land parcel **NO BOKOLI/BOKOLI/110** is indicated as four (4) acres. If I understand the defendant well, and I think I have, she is laying claim to the four (4) acres which she claims the plaintiff fraudulently acquired as a beneficiary in **BUNGOMA HIGH COURT SUCCESSION CAUSE No 58 of 2000** yet he was not among the heirs to the Estate subject of that **SUCCESSION CAUSE**. That is really a matter to be determined in **BUNGOMA HIGH COURT SUCCESSION CAUSE No 58 of 2000**.

The defendant's Counter – Claim seeks the eviction of the plaintiff from the land parcel **NO BOKOLI/BOKOLI/1970**. This is how she has pleaded in paragraph 11 of the annexed draft defence and Counter – Claim: -

> ***11 "Eviction be issued against the defendant by himself, his family members, servants, agents and anyone else directly and indirectly acting through him from land parcel title number BOKOLI/BOKOLI/1970."***

The land parcel **NO BOKOLI/BOKOLI/1970**, as I have already indicated above, no longer exists. It has since been sub – divided to give rise to the land parcels **NO BOKOLI/BOKOLI/3054**, **3059** and **3511** registered in the names of persons who are not parties herein as well as the parcels **NO BOKOLI/BOKOLI/2348**, **2349**, **2412**, **2413**, **2414** and **2415** whose registered owners are un – known. Even if the Judgment herein is set aside, there can be no useful trial that can be held without enjoining the registered proprietors of the sub – divisions arising out of the land parcel **NO BOKOLI/BOKOLI/1970** and the draft defence and Counter – Claim does not implead those persons.

22. In her Counter – Claim, the defendant seeks the eviction of the plaintiff, his family servants, agents and anyone else acting through him directly and indirectly from the land parcel **NO BOKOLI/BOKOLI/1970**. The basis of her Counter – Claim, as is clear from paragraph 4 of her defence, is that in 1964 her late father **ZACHARIA MATUMBAI MAKWARA** purchased from **TOM WAMUKOTA SITATI** four (4) acres of land comprised in the land parcel **NO BOKOLI/BOKOLI/1970**. That claim is however caught up by the provisions of **Section 7** of the **Limitation of Actions Act** having occurred over fifty (50) years before the filing of this suit. The defendant has also pleaded fraud on the part of the plaintiff in the manner in which he acquired ownership of the land parcel **NO BOKOLI/BOKOLI/1970**. It is clear from the copy of the title deed to the land parcel **NO BOKOLI/BOKOLI/1970** that it was registered in the names of the plaintiff on 10th July 2003. This suit was filed on 30th June 2015 and is caught up by the provisions of **Section 4(2)** of the **Limitation of Actions Act** as it is founded on the tort of fraud for which the limitation period is three (3) years from the date on which the cause of action arose. And there is nothing in the defence and Counter – Claim to suggest that the defendant only became aware of the fraud later in which case a window would be available to her through **Section 26** of the **Limitation of Actions Act**.

23. As is clear from the ratio decided, in **SHAH .V. MBOGO** (supra), the discretion to set aside an ex - parte Judgment is meant to rectify an ***"injustice or hardship resulting from accident, inadvertence or excusable mistake or error."*** It is not meant ***"to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."*** And being an exercise in judicial discretion,

the power to set aside an ex - parte Judgment must be exercised on sound and plausible reasons. In this case, there is congent evidence that the defendant was personally served with summons to enter appearance on 8th July 2015 at 11:12 am in the presence of the plaintiff. Further, as far back as 17th May 2016, the defendant was aware about the existence of this case through a defence filed in **BUNGOMA ELC CASE No 141 of 2015** by the plaintiff herein who was the 1st defendant in that case filed by the plaintiff. That was some two (2) years before the Judgment sought to be set aside was delivered. She made no efforts to file any defence in this case and that could not surely have been due to any ***"accident inadvertence or excusable mistake or error."*** It could only have been a deliberate attempt ***"to obstruct or delay the course of justice."*** And even now, the defendant has not bothered to inform the Court when she became aware about the Judgment which she now seeks to set aside. That is not the person whom this Court's exercise of discretionary power was meant to assist. In the absence of a plausible explanation, there can be no basis upon which this Court can exercise it's discretion. Discretion is exercised on the basis of evidence. Not in a vacuum.

24. The up – shot of all the above is that the Notice of Motion dated 3rd September 2021 is devoid of any merit. It is for dismissal.

25. I have stated above that if the Notice of Motion dated 3rd September 2021 is dismissed, then it would be superfluous to consider the Notice of Motion dated 17th September 2021. I shall however, for purposes of completeness, consider that application nonetheless.

26. The Notice of Motion dated 17th September 2021 seeks the following substantive remedies: -

> **(a) Maintenance of the status quo on the land parcel NO BOKOLI/ BOKOLI/1970.**
>
> **(b)The Interested Parties be enjoined in these proceedings as plaintiffs and be restrained from forcefully evicting the defendant from the original land parcel NO BOKOLI/BOKOLI/1970.**
>
> **(c) In the alternative, WEBUYE ELC CASE No 24 of 2020 be called for consolidation with this case.**

With regard to the prayer that the status quo on the land parcel **NO BOKOLI/BOKOLI/1970** be maintained, the term ***"status quo"*** is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

> ***"The situation that currently exists."***

The situation that currently exists is that the land parcel **NO BOKOLI/BOKOLI/ 1970** no longer exists. It was sub – divided way back in 2018 to create land parcels **NO BOKOLI/BOKOLI/3509**, **3511** and **3654** now registered in names of persons in who are not parties to this suit. If by ***"status quo"*** the defendant meant that the land parcel **NO BOKOLI/BOKOLI/1970** be reinstated to the position in which it was prior to the sub – divisions of 2018, the correct term would be ***"status quo ante"*** which is defined in the same **DICTIONARY** as: -

> ***"The situation that existed before something else (being discussed) occurred."***

But that cannot be done without the involvement of the new owners of the resultant sub – divisions arising out of the land parcel **NO BOKOLI/BOKOLI/1970**.

27. The defendant similarly seeks an order that the Interested Parties i.e. **JULIUS MUNYANGE WAFULA**, **JOSEPH WAFULA WELIKHE**, **EMMANUEL WAFULA WERE** and **DAVID WAFULA MASINDE** (the 1st to 4th Interested Parties) be joined in these proceedings as plaintiffs. This is how she has pleaded in paragraph 4 of the Notice of Motion: -

> ***4: "That this Honourable Court be pleased to enjoin the interested persons named herein above as plaintiffs in this suit upon hearing and determination of Notice of Motion dated 3.9.2021."***
> To begin with, on 1st November 2021 when this matter was mentioned before me in the presence of both **MR KITUYI** Counsel for the plaintiff and **MR BWONCHIRI** Counsel holding brief for **MR WANYONYI** for the defendant, I directed that the Interested Parties who had not been served with the Notice of Motion dated 17th September 2021be served. For reasons which are un – known, the said Interested Parties were never served.

28. Secondly, and most important, a plaintiff in any suit is usually the **dominus litis** i.e. the party who makes the decision in a law suit – see **BLACK'S LAW DICTIONARY 10TH EDITION**. He cannot therefore be compelled to sue any party against his wish – see **SANTANA FERNANDES .V. KARA ARJAN 1961 E.A 693**. In the circumstances, this Court cannot order that the Interested Parties be enjoined in this suit as plaintiffs as sought by the defendant in prayer 4 of the Notice of Motion dated 17th September 2021. They cannot be made to pursue a claim against the defendant as doing so would be acting in vain. It follows therefore that no orders can also be made against the said Interested Parties restraining them from evicting the defendant from the land parcel **NO BOKOLI/ BOKOLI/1970** as that land no longer exists and the said Interested Parties are not parties in this suit.

29. Finally, the defendant has urged this Court to call for **WEBUYE MAGISTRATE'S COURT ELC CASE No 24 of 2020** for purposes of consolidating it with this case. Under **Order 11 Rule 3(1)** of the **Civil Procedure Rules**, consolidation of suits may be considered for purposes of ***"furthering expeditious disposal of cases and case management."*** In the case of **STUMBERG & ANOTHER .V. POTGEITER 1970 E.A 323 KNELLER J** after citing several English decisions on consolidation of suits said:-

> ***"Where there are common questions of law or fact in actions having sufficient important in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered."***

Emphasis added.

And in **LAW SOCIETY OF KENYA .V. CENTER FOR HUMAN RIGHTS & DEMOCRACY & OTHERS PETITION No 14 of 2013 [2014 eKLR]** the **SUPREME COURT** stated as follows: -

> ***"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties."*** Emphasis added.

My understanding of all the above is that the consolidation of suits can only be done where two or more suits are pending and cannot be done where one of those suits has infact already been heard and determined. This suit has already been heard and determined, a decree executed and the subject matter being land parcel **NO BOKOLI/BOKOLI/1970** sub – divided and transferred to third parties. An application to set aside the Judgment has already been declined and therefore there is really nothing remaining in this matter for which consolidation with **WEBUYE ELC CASE No 24 of 2020** can achieve any meaningful purpose towards ***"the efficient and expeditious disposal"*** of any dispute.

30. The order for consolidation is also not available to the defendant.

31. The Notice of Motion dated 17th September 2021 is also for dismissal.

32. On the issue of costs, the parties are siblings. The order that commends itself to make is that each shall bear their own costs of the two applications.

33. Ultimately therefore, the Notices of Motion dated 3rd September 2021 and 17th September 2021 are both dismissed. Each party to meet their own costs.

Boaz N. Olao.

J U D G E

3rd February 2022.

Ruling dated, signed and delivered at **BUNGOMA** this 3rd day of February 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines and with notice to the parties.

Boaz N. Olao.

J U D G E

3rd February 2022.