Salim & another v Ali & another (Civil Case 190 of 2014)
[2022] KEELC 14702 (KLR) (3 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14702 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE 190 OF 2014

LL NAIKUNI, J

OCTOBER 3, 2022

BETWEEN

SALMA SAID SALIM ..... 1ST PLAINTIFF

FAIZA MOHAMED SALIM ..... 2ND PLAINTIFF

AND

FEISAL MOHAMMED ALI ..... 1ST DEFENDANT

HADHI SWALE HADHIBUL ..... 2ND DEFENDANT

RULING

I. Introduction

1. Mr. Feisal Mohammed Ali, the 1st Defendant/Applicant herein moved this Honorable Court through filing a Notice of Motion application dated 3rd May, 2021 for its determination. The Application was brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* Cap. 21 of Laws of Kenya and Order 40 Rule 3 of the *Civil Procedure Rules 2010*.

II. The 1st Defendant's/Applicant's case

2. The 1st Defendant/Applicant sought for the following orders:-

    a. Spent.

    b. That pending hearing and determination of this application, the Plaintiffs be restrained from selling, transferring and/or interfering in any manner with all that parcel of land known as Plot No. 470/1/MN.

c. That pending hearing and determination of this Suit the Plaintiffs be restrained from selling, transferring and/or interfering in any manner with all that parcel of land known as Plot No. 470/1/MN.

d. That the Honorable Court be pleased to set aside the Judgement delivered on July 12, 2019 and the 1st Defendant be granted unconditional leave to defend this matter.

e. That cost of this application be provided for.

3. The said application is founded on the grounds, facts, inferences and averments made out under the fifteen (15) Paragraphed Supporting Affidavit of Feisal Mohamed Ali sworn and dated on May 3, 2021 and one (1) annexture marked as "FMA – 1" annexed thereto.

He deponed that he was the 1st Defendant herein and knew that on April 17, 2021 a Court Bailiff evicted one Mr. Omar Saleh Ahmed from all that premises known as Plot No. 470/1/MN (hereinafter known as "The Suit Property"). He informed Court that he proceeded to peruse the Court file and found out that the Plaintiffs had instituted this Suit against both the 1st and 2nd Defendants seeking eviction orders. He further found out that Judgment had been delivered on the July 12, 2019. He indicated that he also found out that the Law firm of Messrs. Angelo Owino & Co. Advocates had entered appearance and filed a joint Defence for both the 1st and 2nd Defendants yet he had not instructed such an Advocate to appear for him.

4. Indeed, the Deponent held that he had never participated in the proceedings leading to the delivery of the Judgment and subsequent eviction because he had never been served with Summons to enter appearance or any Suit document.

He averred that had he been served with these documents, he could have participated in the hearing where these issues could have been adjudicated.

He further informed Court that he knew that by the time the Suit was being filed the 2nd Defendant had sold the Suit Property to Mr. Omar Saleh Ahmed. He annexed a copy of a duly executed Agreement for that matter and marked as "FMA-1".

5. He further asserted that as the Land Lord he consented to the sale of the Suit Property by the 2nd Defendant to the said Mr. Omar Saleh Ahmed.

The fact that he was never served and hence never participated in the proceedings, he stood to suffer irreparable loss and damages if orders sought were not granted as the said Mr. Omar Saleh Ahmed had threatened to file recovery suit for sale price and also to have him charged with offence of obtaining money by false pretences.

6. He opined that this application had been timeously filed as eviction was only effected on April 17, 2021. He held that he had a Defence which raised triable issues and hence should be granted leave to defend the Suit.

He urged court to grant the orders sought and have the Suit Property be preserved pending the hearing and determination of the application and the Suit Property thereof.

III. The Replying Affidavit By The 1St & 2Nd Plaintiffs/respondents

7. On September 24, 2021, the 1st & 2nd Plaintiffs/Respondents herein while opposing the filed application filed a twelve (12) Paragraphed Replying Affidavit sworn by Salma Said Salim dated September 24, 2021 and two (2) annextures marked as "SSS - 1 to 2" annexed thereto. The Deponent

held that being the 1st Plaintiff herein and fully conversant with the matters on issue herein. She had the full authority of the 2nd Plaintiff to swear this affidavit on her behalf.

8. In response to the averments made out by the 1st Defendant vide his Supporting Affidavit and in particular the contents of Paragraphs 3, 4 & 5 – she stated as follows:-

   a. The 2nd Defendant/Applicant was duly served with Summons and he filed a Memorandum of Appearance through an Advocate.

   b. Throughout the proceedings the Defendant/Applicant was represented by an Advocate though he failed to appear in Court in most Court sittings without giving any proper reason.

   c. Prior to the execution of the Decree her Advocates on record sent a Draft Decree to the Advocates for the 1st Defendant/Applicant for his approval.

   d. Further to the foregoing the 1st Defendant/Applicant had come to Court three (3) years after the Judgment had been delivered and in the given circumstances this Honorable Court should disregard his application.

   She argued that the Applicant did not demonstrate that he had a good defence against the Respondents' case and although they had instructed an Advocate to come on record on his behalf he had not taken any action against the said Advocate for acting for him against his will. Besides, the person against whom the execution was effected – being the 2nd Defendant had not made any complain against the Judgment or the conduct of the entire Court proceedings.

9. She further deponed in response to the averments made out under Paragraphs 7 & 8 of the Supporting Affidavit that the 2nd Defendant filed a statement in this Suit but never mentioned anything with regard to the alleged sale to the said Omar Saleh Ahmed.

   Hence; it's her contention that the Sale Agreement was just manufactured. Further, she deponed that assuming the suit property had been sold by the 2nd Defendant as alleged they ought to have joined the Transferee as Parties to this Suit.

10. The deponent refuted that the application was made timeously taking that the judgment was delivered on July 12, 2019 and the execution of the Decree had already been finalized.

    She denied that the Applicant had a Defence with triable issues the same being based on hearsay evidence and she urged for the application and the Orders sought to be dismissed with costs.

VI.The 1st Defendant Further Affidavit

11. On October 18, 2021, upon obtaining the leave of Court, the 1st Defendant/Applicant filed an eleven (11) Paragraphed further Affidavit sworn by Feisal Mohammed Ali and dated October 18, 2021 in response to the issues raised by the 1st plaintiff in his replying affidavit dated September 24, 2021. He reiterated the contents of the Supporting Affidavit dated May 3, 2021 and the grounds of the application to the effect that he was never served with Summons to enter appearance and neither did he instruct any Advocate to Enter Appearance or file Defence on his behalf.

12. He held that from the filed 1st Plaintiff's Affidavit the Plaintiff only confirms having served the 2nd Defendant with the Summons to Enter Appearance but she has not mentioned whether the 1st Defendant was at any given time served with Summons to Enter Appearance. He asserted being a necessary party to the Suit and ought to have been served. He further stated that the fact that the 2nd Defendant had sold the Suit Property could have been clarified had the 1st Defendant been given an opportunity to be heard- as he was condemned unheard.

He argued that by looking at the proceedings it revealed that the matter proceeded without both the 1st & 2nd Defendants attendance and neither did the purported Advocate also attend Court. As a result, an innocent party- Mr. Omar Saleh Ahmed who was the owner of the suit property at the time of the eviction had suffered irreparably having been evicted together with his family members.

IV. Submissions

13. On diverse dates of September 29, 2021 and February 2, 2022 respectively, whilst present in Court, the parties were directed to have the Notice of Motion Application dated May 3, 2021 be canvassed by way of Written Submissions. Pursuant to that all the Parties fully complied. Thereof, the Honorable Court reserved a date to deliver its ruling accordingly.

A. The Written Submissions for the 1st Defendant/Applicant

14. On October 18, 2021, the Learned Counsel for the Defendant, the Law firm of Messrs. Otieno Otwere & Associates filed their Written Submissions dated even date. Mr. Otwere Advocate commenced his submission by recounting on the brief facts of the case. To begin with, he emphatically argued that the 1st & 2nd Defendants/Applicants herein were never served with Summons to Enter Appearance and other Suit documents. In this regard, his contention was that the 1st and 2nd Plaintiffs/Respondents herein ought to have at least annexed an affidavit of service in their pleading to exhibit service of summons on the 1st & 2nd Defendants/Applicants herein.

15. The Learned Counsel contended that although there was an Advocate on record allegedly for the 2nd Defendant/Applicant, he personally never attended Court proceedings. According to the Counsel therefore, the Honorable Court never had the benefit of getting all the facts surrounding the case herein.

    According to the Counsel this amounted to the 1st Defendants/Applicant being condemned unheard contrary to the principles of natural justice. He opined that while pressing for the orders for setting aside Judgment, the Honorable Court would be clothed with unfettered and unlimited discretion, so long as the same was exercised sparingly and judicially so that no party was prejudiced in the end. He held that in this case once it was established that the party were not served then Judgment should be set aside and the party granted unconditional leave to defend the Suit.

B. The Written Submissions for 1st and 2nd Plaintiffs'/Applicants'

16. On November 5, 2021 and February 8, 2022 respectively the Learned Counsel for the 1st and 2nd Defendants Law firm of Messrs. A.O Hamza & Co. Advocates filed their both Written and Further Submissions dated November 8, 2021 and February 7, 2022 respectively with the leave of this Honorable Court thereof. Mr. Hamza Advocate submitted that the 1st Defendant stated in his own affidavit that he only acted as a Land Lord who signed the alleged Sale Agreement to the 2nd Defendant meaning that the person who was directly affected by the Judgment of the Court was the 2nd Defendant.

    He held that it was clear that the 2nd Defendant never raised any issue with the Judgment or its execution. He argued that the 1st Defendant admitted that an Advocate acted on his behalf by entering appearance and filing a Defence on his behalf. He averred that the 1st Defendant never produced any communication to the Advocate who acted for him complaining and seeking an explanation why he acted for him without his authority. Indeed the Decree was already executed and there was nothing to warrant the issuance of the orders sought.

17. The Learned Counsel further argued that the 1st Defendant could not demand for proof of service yet there was ample evidence that the Advocate on record acknowledged receipt of service by filing a Memorandum of Appearance and Defence.

The Learned Counsel submitted that the Defendants/Applicants had failed to demonstrate good reason for setting aside the Judgment nor that they had a good Defence apart from stating that the 2nd Defendant was the person who consented to the Sale of the Suit land on the contrary the person - 2nd Defendant who was affected by the sale or on whose favour the alleged consent was given had never bothered to set aside the Judgment. He held that the 1st Defendant had no proprietary interest in the Suit Property.

18. Additionally, the Learned Counsel submitted that the Provisions of Order 9 Rule 9 of *Civil Procedure Rules 2010* which couched in mandatory terms was never adhered with as required by law for an Advocate to be allowed to come on record for/ on behalf of a party after Judgment had been entered. In this case judgment was delivered on July 12, 2019.

Order 9 Rule 9 of *Civil Procedure Rules 2010* provides:-

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

a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

The Learned Counsel argued that for this Provision to be adhered with a Party has to move Court formally for leave and notice to all Parties or Consent filed between the outgoing Advocate and the proposed incoming Advocate. To buttress on this point, he relied on the decisions of '*Lalji Bhimji Sanghani Builders & Contractors –versus- City Council Of Nairobi* (2012) eKLR; *Hunker Trading Co. Limited –versus- Elf Oil Kenya Limited* – Civil Appeal No. Nairobi 6 of 2010 and *Monica Moraa –versus- Kenindia Assurance Co. Limited* [2010]eKLR and *S.K. Tarwadi –versus- Veronica Muehlemann* [2019] eKLR as the legal reasoning behind this Provisions of the law where Court observed:-

"..... In my view, the essence or Order 9 of the *Civil Procedure Rules* was to protect Advocates from the mischievous clients who will not wait until a Judgment is delivered and then sack the Advocate and either replace him.....".

19. In the instant case, the Learned Counsel argued that the Provisions of Order 9 Rule 9 was applicable, yet no leave was sought or consent filed by either Defendants – the 1st Defendant to act in person or the 2nd Defendant's Advocate to come on record.

He argued that the 2nd Defendant's Advocate lacked authority to file any documents on behalf of the 1st Defendant. Thus, it was just that the 1st Defendant further Affidavit sworn on October 18, 2021 together with the Submissions pleaded on behalf of the 1st Defendant be expunged from the Honorable Court's record.

In the long run, the Counsel urged the Honorable Court to dismiss the application with costs.

V. Analysis And Determination

20. I have carefully assessed all the filed pleadings in this matter being the Notice of Motion Application dated May 3, 2021 by the 1st & 2nd defendants, affidavits, replies written submissions numerous cited authorities by the Parties and the relevant Provisions of the *Constitution* of Kenya and the Statutes thereof.

    For the Honorable Court to reach an informed, just, fair and reasonable decision, I have framed the following three (3) salient issues for its determination. These are:-

    a. Whether the Notice of Motion Application dated May 3, 2021 warrants for the granting of the orders sought by the 1st & 2nd Defendants/Applicants to restraining the Plaintiffs from selling, transferring and/or interfering in any manner with the Suit Property.

    b. Whether the 1st & 2nd Defendants are entitled to the orders of setting aside the Judgment of this Court delivered on July 12, 2019 or any other relief sought.

    c. Who will bear the costs of the Notice of Motion application?

    Issue No. (a) Whether the Notice of Motion Application dated 3rd May, 2021 warrants for the granting of the orders sought by the 1st & 2nd Defendants/Applicants to restraining the Plaintiffs from selling, transferring and/or interfering in any manner with the Suit Property.

Brief facts

21. Before embarking on the analysis of the issue under this sub-heading, it's significant that the Honorable Court extrapolates on the facts of this case first and foremost though briefly. From the filed pleadings, on September 25, 2012 the 1st & 2nd Plaintiffs acting in person instituted this Suit against the 1st & 2nd Defendants herein.

    The 1st Defendant was the Land Lord to all the Suit Property. The Plaintiff who had an agreement with the 1st Defendant had a matrimonial property constructed on the Suit land. However, without the Plaintiffs' family consent, the 1st Defendant sold the Suit Property to a third party- the 2nd Defendant herein. The Plaintiffs tried several times to resolve the matter through the Provisional Administration without success and hence necessitated the filing this Suit.

22. The Plaintiffs sought for the following orders:-

    a. An order to revoke the Sale Agreement of the dwelling matrimonial house situated on the Suit Property and then evicting the 2nd Defendant from the Land.

    b. Costs and interest of the Suit.

    On October 16, 2012, the Law firm of Messrs. Angelo Owino & Co. Advocates entered appearance dated October 12, 2012 for the 1st & 2nd Defendants. On October 29, 2012 the said Law firm filed a statement of Defence dated October 25, 2021, List of documents and the matter was listed for hearing. On July 12, 2019 Judgment was entered in favour of the 1st & 2nd plaintiffs.

23. Subsequently, this application was filed by the 1st Defendant acting in person on May 3, 2021 while on September 28, 2021 the Law firm of Messrs. Otieno Otwere & Associates Advocates filed a Notice of Appointment on behalf the 2nd Defendant on October 18, 2021 the 1st Defendant filed further Affidavit and Written Submissions. The 1st Defendant's case is that he was never served with Summons to Enter Appearance and the suit papers pertaining to this Suit. The 1st Defendant has held that he only

came to know of the existence of the case on April 17, 2021 when a Court Bailiff evicted one Omar Saleh Ahmed who had purchased the Suit Property from the 2nd Defendant, the 1st Defendant being the Land Lord and who signed the consent of Sale of the Suit Property.

According to him upon perusal of the Court file he came to learn that Judgment herein was delivered on July 12, 2019 and that there had been an Advocate on record whom he never instructed and that the said Advocate never attended any of the proceedings whatsoever.

The 1st Defendant held that he stood to suffer irreparable loss and damages as Mr. Omar Saleh Ahmed had threatened to sue him and report to the police for him to be charged with the offence of having obtained money by false pretence. It's for this reason that he urged Court to be accorded an opportunity to be heard and defend himself in the case. Further, the 2nd Defendant has also sworn an affidavit confirming that at the time the case was filed he had sold the Suit Property to Mr. Omar Saleh Ahmed and the sale was consented by the 1st Defendant as the Land Lord who ought to have been duly served with the Suit documents.

He too prayed to be accorded an opportunity to ventilate the case on its merit & not be condemned unheard. That is adequate on the facts.

24. Now turning to the issue under this Sub-heading, the 1st Defendant/Applicant has sought for the prayers of restraining the 1st & 2nd Plaintiffs from causing any transaction on the land. The orders have been couched on the semblance of seeking injunction orders ideally under Order 40 Rules 1&2 of the *Civil Procedure Rules 2010*. Notwithstanding, the Provisions of Article 159 (2) (d) of *Constitution of Kenya*, the 1st Defendant has instead moved Court under an erroneous Provision of law being Order 40 Rule 3 which provides "*inter alia*":-

> " In cases of disobedience or of breach of any such terms the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in prison for term not exceeding six month unless in the meantime the Court directs his release".

This Provisions presupposes that an injunction order restraining a party from interfering with a property has already been issued under Order 40 Rule 1& 2 of *Civil Procedure Code* and that there exists breach of the said Order. Thus, the Provision imposes a penalty for the precipitated disobedience. I reiterate this prayer is misplaced as there is no such order in place in this matter.

Be that as it may and assuming for the sake of argument, that the 1st & 2nd Defendants intended to seek for the preservation orders against the Suit Property, the granting of injunction orders are well set out in the now famous case of "*Giella –versus- Cassman Brown* (1973) 364 EA" which holds:-

1) An applicant must show a *prima facie* case with a probability of success at the trial.

2) An interlocutory injunction will not normally be granted unless an applicant can show that he would suffer irreparable loss if the injunction is not granted.

3) If the court is in doubt it should decide the application on a balance of convenience.

In dealing with the first condition of prima facie case, the Honorable Court guided by the definition of the term "*Prima facie*" in *Mrao Limited – Versus - First American Bank of Kenya Ltd & 2 others* (2003) KLR 125,

> " So what is a *prima facie* case, I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself would conclude that there exists a

right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"

In furtherance of this legal position, the Court of Appeal in the case of "*Nguruman Limited – versus - Jan Bonde Nielsen & 2 others* [2014] eKLR, it held that:- ,

> "These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Limited - versus - Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between".

25. From the given facts, the 1st & 2nd Defendants have not established that they have any "Prima facie case' in the Suit Property. Although the 1st Defendant claims to be the Land Lord to the Suit Property whereby he consented to it be sold by the 2nd Defendant to Mr. Omar Saleh Ahmed and that he would stand to suffer irreparable loss and damage as Mr. Ahmed had threatened to sue him for having obtained the money by false pretence. I fully concur with the Learned Counsel for the 1st & 2nd Plaintiffs that the 1st & 2nd Defendants have failed to demonstrate having any proprietary interest right and title to the Suit Property. For this very reason he does not satisfy the ingredient to be granted Injunction Orders, taking that the orders for Injunction are in sequential order. Furthermore, It's now trite law that the moment the first grounds fails then there would be no need to invoke the other grounds.

To support the Legal reasoning, I have relied on the decision of "*Kenya Commercial Finance Co. Limited – versus - Afraha Education Society & others*, Civil Application No. 142 of 1999 [2001] 1 EA 86.112" to that effect. In effect the application fails under this sub - heading. Thus, I dare say no more.

IssueNo. (b) Whether the 1st & 2nd Defendants are entitled to the orders of setting aside the Judgment of this Court delivered on July 12, 2019 or any other relief sought.

26. The grounds which govern the setting aside a Judgment, in this case the one delivered by this Court on July 12, 2019, are founded under the provision of Order 12 Rule 7 of the *Civil Procedure Rule 2010* which provides:-

> "Where under this order Judgment has been entered or the Suit has been dismissed, the Court, on application may set aside or vary the Judgment or order upon such terms as may be just".

27. Further, the Principles on setting aside or varying judgment delivered by Court are discretionary of the Court, have been well founded in the now famous cases of '*Patel – versus - EA Cargo Handling Services Limited* [1974] EA 75, 76 BC and "*Shah – versus - Mbogo* (1969) EA 116; 123 BC where Court held:-

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

Additionally, it's also settled practice of Court to require and consider the Defence on the merit which raises bona fide triable issues and hence Court would proceed to grant conditional or unconditional leave to file a Defence and the right to be heard after Judgment has been entered.

However, this right is not available when Court considers the Defence only raises a sham.

28. Having laid down the fundamental Principles herein for setting aside judgment the Provisions of Order 5 Rules 1, 7 & 8 of the *Civil Procedure Rules, 2010* come to play – these are on service of the Pleadings upon the Defendants by the Plaintiffs- by all means possible – upon service, the Plaintiffs proves it by filing an affidavit of service under Order 5 Rule 15. Summons may be served upon an Advocate who has instruments to accept service and hence enter appearance to the Summons and Judgment in default may be entered after such service.

29. In the instant case an Advocate was served with Summons to Enter Appearance and on October 16, 2012 the Law firm of Messrs. Angelo Owino & Co. Advocates entered appearance dated October 12, 2012 for 1st & 2nd Defendants. On October 29, 2012 the said law firm filed a Defence dated October 25, 2021, List of documents and the matter was listed for hearing.

Indeed on June 18, 2013, the said Advocate filed a Notice of Preliminary Objection dated June 14, 2013, seeking to have the Suit by the Plaintiffs dismissed on allegation that the Plaintiffs had no '*locus standi*' to institute it against the Defendants. On November 5, 2013 the Preliminary Objection was dismissed for lack of merit.

30. I have deliberately decided to go in-depth on these proceedings as the main gist of the Defence mounted by the 1st & 2nd Defendants is that they were particularly the 1st Defendant- served with Summons to have entered appearance and filed Defence and therefore it was a travesty of justice where they were condemned unheard and ought to be granted unconditional leave to file their Defence. In all fairness and based on the surrounding inferences and circumstances to this case I find this assertion baseless, unfounded and unmeritorious. One wonders how did the Advocate access all these relevant prerequisite documents on behalf of the Defendants, entered appearance and filed a Defence which raises such triable issues and filed a Preliminary Objection if he had no instructions from the Defendants. All said and done, assuming he may have accidentally trampled on the documents and as a very enthusiastic Advocate proceeded to defend the Defendants for whatever extension and holy Joe mission and I fully concur with the Plaintiffs' Advocates the Defendants to date have never Written a Complaint letter to the said Law firm nor instituted a formal complaint before the Advocates Complaint Committee a legal structure created for this purposes. I am left to strongly hold on the legal principles founded in the '*Shah –versus - Mbogo* (1969) EA 116; 123 BC (*Supra*) that in the discretion of the Court which is unfettered to set aside Judgment Should be exercised to avoid injustice or hardship meted against the Plaintiffs herein. Additionally, I have relied on these useful decisions:- "*National Bank of Kenya Limited – versus - Ndzao Katana Jonathan* Nairobi HCCC No. 775 of 2002 where Honorable Justice AG Ringera (retired) held in his ruling dated November 7, 2002 at page 6 in part that:- "in these circumstances it cannot be in the interest of justice to set aside the Judgment obtained by the Plaintiff on any view of the jurisprudence pertinent to setting aside default Judgment to acceded to the Defendants request would be to assist a person who is obviously bent on delaying the cause of justice that I refuse to do.

31. Further, I have cited the case of:- "*Reef Hotel (Management) Co. Limited – versus - Eagle Aviation Limited* Mombasa – HCCC No. 522 of 1998 where Honorable commission of Assize Joyce Khaminwa (as she then was) held in her ruling dated September 1, 1999 at page 3 that :- "it is not

designed to assist the person who has deliberately sought whether by evasion or otherwise to abstract or delay the cause of justice." And the case of "*Yusuf Kulmel King – versus - The Commissioner of Customs and Excise and The Kenya Revenue Authority* Nairobi Civil Appeal No. 245 of 1999 where the court of Appeal held in part at page 2 that:-

> " A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter as a result arrived at a wrong decision or unless it is manifested from the case as a whole that the judge was wrong in the exercise of this discretion and that as a /result there has been injustice."

32. I find that the reasoning advanced by the Defendants is all intended to instill hardship to the Plaintiffs from enjoying the fruits of the Judgment. Further to this I have taken cognizance to the Submissions advanced by the Learned Counsel for the Plaintiffs to the effect where the Provisions of Order 9 Rule 9 of *Civil Procedure Rule* after Judgment was entered was not invoked, undoubtedly Judgment was delivered on July 12, 2019 where there was a determination of the Court.

There is no evidence of any application filed seeking leave or consent filed by either the 1st Defendant to act in person or the Law firm of Messrs. Otieno Otwere & Associates Advocates to come on record in place of the Law firm of Messrs. Angelo Owino & Co Advocates who had extensively conducted the matter on behalf of the 1st & 2nd Defendants as per the decision of the Provisions of Order 9 Rule 9 of the *Civil Procedure Rules 2010*. Clearly all Parties are entitled to legal representation being a constitutional right. However, there are rules governing legal representation and they must be adhered with.

33. Under this sub heading, arising from the detailed surrounding facts of this case, the Honorable Court wishes to critically assess the provision of Order 9 Rule 9 of the *Civil Procedure Rules, 2010*. The said provisions of law provides for change of Advocates to be effected by order of Court or consent of parties to wit:

> " When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —
>
> a. Upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be

34. Clearly, on quick reference to the provisions of Order 9 Rule 9 of the *Civil Procedure Rules, 2010* it is evident that it is couched in mandatory terms to the effect that for there to be any change of Advocates after Judgment has been entered to be effected, then it is pre – conditional that there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. It is apparent that this provision of the law does not impede the right of a party to be represented by an Advocate of his choice, but only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. The reasoning behind this provision of the law was graphically and well articulated in the case of "*S. K. Tarwadi – versus - Veronica Muehlmann* [2019] eKLR where the Judge observed as follows:-

> " .....In my view, the essence of the Order 9 Rule 9 of the Civil Procedure Rules was to protect Advocates from the mischievous clients who will wait until a Judgment is delivered and then sack the Advocate and either replace him...."

35. The court went further to quote with approval the holding by Hon. Sitati Judge, in "*Monica Moraa – versus – Kenindia Assurance Co. Limited* [2010] eKLR where the court held as follows:

> " .....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant's Advocates intent to come on record after delivery of Judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached....."

I fully associate myself on the legal ratio founded in the cited authority of "S.K Tarwadi (Supra) cited by the Learned Counsel for the Plaintiffs on this issue.

36. This is not a case where the inherent powers based on the overriding objectives principles under Sections 3, 13 & 19 of the *Environment and Land Court Act* No. 19 of 2011 and Article 159 (2) (d) of the *Constitution* of Kenya may come in aid of the Defendants as the same should not be abused at will if improperly invoked in as far as administration of justice is concerned - while indeed the Principles would serve well here but it must be pointed out that it is not a panacea for all ills and in every situation. It's not applicable to all cases. Fundamentally, a foundation for its application must be properly laid and benefits of its application judicially ascertained for it to be applicable. For these reasons therefore the application must fails.

IssueNo. (c) Who will bear the costs of the Notice of Motion application?

37. The issue of costs is at the discretion of the Honorable Court. It means the award that a party is granted after the conclusion of any legal action, proceeding or litigation process. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events it means the result of the said legal action, proceeding or process in the litigation. In this case, as the application filed by the 1st Defendant herein has failed, thus the said 1st Defendant should bear the costs.

VI. Conclusion And Disposition

38. In conclusion, the Honorable Court critically having dealt with all framed issues herein in depth, on the principles of preponderance of probability, I do now proceed to make the following orders:-

    a. Thatthe Notice of Motion application dated May 3, 2019 be and is hereby dismissed for lack of merit.

    b. Thatthe costs to be borne by the 1st Defendant herein.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS 3RD DAY OF OCTOBER 2022

JUSTICE HON. (MR) L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the presence of:

a. M/s Yumna & Mr. Omar Court Assistants;

b. M/s. Hamid Advocate holding brief for M/s Hamza Advocate for 1st & 2nd Plaintiffs/Respondents;

c. No appearance for 1st Defendant/Applicant;

d. M/s. Essejee Advocate for 2nd Defendant/Applicant.