



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 142 OF 2017**

**JAMES GICHUHI MUTERO .....1<sup>ST</sup> PLAINTIFF**

**JOAN WAIRIMU MUTERO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**LOLLDAIGA COUNTRY HOMES & GOLF RESORT LTD AND**

**THE DIRECTORS OF LOLLDAIGA COUNTRY HOMES &**

**GOLF RESORT LIMITED.....DEFENDANTS**

**AND**

**AMOS GICHUKU NGONJO .....1<sup>ST</sup> INTERESTED PARTY/APPLICANT**

**SIMON MATARA GICHUHI .....2<sup>ND</sup> INTERESTED PARTY/APPLICANT**

**RAMADHAN MAULID JUMA .....3<sup>RD</sup> INTERESTED PARTY/APPLICANT**

**RULING**

1. The application before this court for determination is the Notice of Motion dated 26<sup>th</sup> March, 2021. By the said application, Amos Gichuki Ngonjo, Simon Matara Gichuhi and Ramadhan Maulid Juma (*the Interested Parties/Applicants*) prays for orders:

(i) *Spent.*

(ii) *Spent.*

(iii) *Spent.*

(iv) *That this Honourable Court be pleased to set aside the notice to show cause against the Applicants herein and any consequential orders following therefrom and set down this matter for hearing inter parties;*

(v) *That this Honourable Court be pleased to set aside the Judgement and decree herein and any consequential orders flowing therefrom against the Interested Parties/Applicants and set down this matter for hearing inter parties; and*

(vi) *That the costs of this application be borne by the Respondents/Plaintiffs.*

2. The application which is supported by an affidavit sworn by the 3<sup>rd</sup> Applicant Ramadhan Maulid Juma is based on the grounds:

(i) *That the Applicants are not parties to the suit;*

(ii) *That the decree is distinctly against the 1<sup>st</sup> Defendant and therefore the notice to show cause and the warrants of arrest are*

unlawful;

(iii) That the Applicants are not named in the body of the suit;

(iv) That leave was not sought and obtained per **Order 22 rule 44 (2) of the Civil Procedure Act and Rules 2010**; and

(v) That the suit against the Interested Parties/Applicants is unlawful and grossly defective.

3. The application is however opposed by the Plaintiffs. In a Replying Affidavit sworn by the 1<sup>st</sup> Plaintiff James Gichuhi Mutero and filed herein on 13<sup>th</sup> May, 2021, the two Plaintiffs who are husband and wife aver that they instituted this suit against Lolldaiga Country Homes and Golf Resort Limited together with the Directors of the said Lolldaiga Country Homes and Golf Resort.

4. The Plaintiffs assert that the Interested Parties herein being the directors mentioned in the pleadings and having admitted this fact at paragraph 3 of their supporting affidavit cannot thereafter deny having been sued personally as they purport to do. The Plaintiffs further aver that the Judgment was delivered herein on 24<sup>th</sup> October, 2019 against all the Defendants who comprise both the company and its directors in their personal capacity.

5. The Plaintiffs aver that no appeal has ever been brought against the Judgment and/or consequential decree to-date despite the Defendants being aware of the same. They assert that the Defendants are jointly and severally liable for the Judgment and hence the issuance of the notice to show cause and the warrants of arrest issued herein against the Interested Parties. Accordingly the Plaintiffs urge this court to dismiss the Interested Parties' application with costs.

6. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities places before me by the Learned Advocates acting for the parties.

7. **Order 10 rule 11 of the Civil Procedure Rules** empowers the court to set aside an *ex-parte* Judgment for default of appearance and defence. The discretion of the court to set aside an *ex-parte* Judgment has been the subject of numerous Judicial pronouncements. Commenting on the exercise of such discretion in **Python Waweru Maina –vs- Thuka Mugiria 91983) eKLR**, Kneller JA observed as follows:

“The former relevant order and rules were Order IX Rules 10 and 24. The court has no discretion where it appears there has been no proper service; Kanji Naran –vs- Velji Ramji (1954) 21 EACA 20; and the power to set aside the Judgment does not cease to apply because a decree has been extracted: Fort Hall Bakery Supply Company -vs- Fredrick Muigon Wargoe (1958) EA 118.

The court has a very wide discretion under the order and the rule and there are no limits or restrictions on the discretion of the Judge except that if the Judgment is varied it must be done on terms that are just: Patel -vs- EA Cargo Handling Services Limited (1974) EA 75, 76, BC.

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: Shah -vs- Mbogo (1969) EA 116, 123 BC Harris J.

The matters which should be considered when an application is made, were set out by Harris J in Jesse Kimani -vs- Mc Connel (1966) EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into passing of the Judgment, which would not or might not have been present had the Judgment not been *ex-parte* and whether or not it would be just and reasonable to set aside or vary the Judgment, upon terms to be imposed ...”

8. Quite clearly, the object of the discretion to set aside is to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. It is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

9. In the matter before me, the Interested Parties urge the court to set aside the Judgment delivered herein by the Honourable Lady Justice M. C. Oundo on 24<sup>th</sup> October, 2019 on the grounds that while they were not parties to the suit, the Plaintiffs have since the entry of the Judgment sought and obtained warrants against themselves as directors of the 1<sup>st</sup> Defendant company in their personal capacities.

10. The Applicants contend that the process of execution culminating into execution against themselves as directors is unlawful in that none of them were sued in their personal capacities and further that no leave was sought and obtained to lift the veil of incorporation prior to the commencement of the execution process.

11. A perusal of the record herein reveals that the Plaintiffs commenced this suit on 7<sup>th</sup> September, 2017 against two Defendants named in their plaint dated 29<sup>th</sup> August, 2017 as follows:

**“Lolldaiga Country Homes and Golf Resort Limited – 1<sup>st</sup> Defendant.**

**The Directors of Lolldaiga Country Homes and Golf Resort Limited – 2<sup>nd</sup> Defendants”**

12. At paragraphs 3 and 4 of the plaint, the Plaintiffs described the two Defendants as follows:

*“3. The 1<sup>st</sup> Defendant is a company incorporated under the Companies Act 2015 Laws of Kenya carrying on business of real estate within the Republic of Kenya.*

*4. The 2<sup>nd</sup> Defendant(s) are the owners, employees, agents and/or beneficiaries of the 1<sup>st</sup> Defendant.”*

13. Subsequent to the institution of the suit and service of summons, Messrs Kamotho Njomo & Company Advocates filed a Notice of Appointment of Advocates for the two Defendants dated 14<sup>th</sup> January, 2019 stating as follows:

**“Take notice that Lolldaiga Country Homes and Golf Resort Limited 1<sup>st</sup> Defendant and the Directors of Lolldaiga Country Homes and Golf Resort Limited, the 2<sup>nd</sup> Defendants herein has (sic) appointed Kamotho Njomo & Company Advocates, View Park Towers, 1<sup>st</sup> Floor, Uhuru Highway/Utalii Lane, P.O. Box 7182 – 00100 Nairobi, to act for them in this suit.**

**Further Take Notice that all the future correspondence in relation to this suit shall henceforth be addressed to the said advocates.”**

14. That being the case, I find it curious that the Applicants herein now claim not to have been parties to the suit. At paragraphs 3 and 4 of the Supporting Affidavit of Ramadhan Maulid Juma sworn in support of the extant application, the Plaintiffs concede to be the very directors sued herein as the 2<sup>nd</sup> Defendants as follows:

*“3. That the said Amos Gichuki Ngonjo, Simon Matara Gichohi and I are directors of Lolldaiga Country Homes and Golf Resort Limited.*

*4. That by a suit herein, the Plaintiff sued the said “Lolldaiga Country Homes and Golf Resort Limited and Directors of Lolldaiga Country Homes and Golf Resort Limited.*

15. By their submissions herein, the Applicants appear to be suggesting that, considering that the Plaintiffs only instituted the suit against the Directors of the 1<sup>st</sup> Defendant company and that the suit did not capture their individual names, then they were not parties to the suit. The argument is as self-serving as it is confounding. I say so because **Section 3 of the Companies Act, 2015** defines the term “director”, in relation to a body corporate such as the 1<sup>st</sup> Defendant, to include any person occupying the position of director by whatever name they are called. As we have seen herein above, the Applicants concede at Paragraph 3 of this supporting affidavit that they were the directors of the 1<sup>st</sup> Defendant company.

16. Again from the record, it is apparent that the two Defendants herein fully participated in the proceedings leading to the impugned Judgment. Having filed their Notice of Appointment of Advocates on 16<sup>th</sup> January 2019, the Defendants’ duly appointed counsel was in court on 14<sup>th</sup> February, 2019 when they applied for an adjournment of the hearing to enable them make an order of a settlement out of court.

17. On their own request the court granted the Defendants 30 days to try and reach a settlement with the Plaintiffs and adjourned the matter to 26<sup>th</sup> March, 2019 for hearing. No agreement was reached within that time and the matter was once again adjourned for hearing on 18<sup>th</sup> July, 2019. On that date, neither the Defendants nor their counsel appeared in court and the matter proceeded by way of formal proof as the Defendants had not filed any pleadings.

18. As to whether the Defendants were properly joined herein as the 2<sup>nd</sup> Defendants, a perusal of paragraphs 43 – 49 of the Judgment of my Learned Sister reveals that she had applied her mind and adequately addressed the same and I decline any invitation to revisit the same as there is no basis upon which I can do so.

19. In the premises, it was clear to me that this application brought more than a year after the Judgment is nothing but an attempt to evade, obstruct and/or delay the cause of justice. On that account I decline to exercise my discretion in favour of the Applicants to set aside the Judgment.

20 Accordingly the Motion dated 26<sup>th</sup> March, 2021 fails and is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF NOVEMBER, 2021.**

In the presence of:

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**J. O. OLOLA**

**JUDGE**