Okoiti v Cabinet Secretary, Ministry of Health & 3 others; Kimani & 5 others (Interested Parties) (Petition 562 of 2017) [2025] KEHC 8876 (KLR) (Constitutional and Human Rights) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8876 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 562 OF 2017

AB MWAMUYE, J

JUNE 12, 2025

RULING

IN THE MATTER OF ARTICLES 1,2,3,4(2),10,12(1)(A),19,20,21,22,23,24,27,41(1),47,48,50(1),73, 75,156,159,165,232,234,258 AND 259 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF THE ALLEGED VIOLATION OF ARTICLES 2,10,27,41(1), 47,73,232,234 AND 259(1) OF THE CONSTITUTION; THE PUBLIC HEALTH OFFICERS (TRAINING, REGISTRATION AND LICENCING) ACT (NO 12 OF 2013); THE STATUTORY INSTRUMENT ACT

IN THE MATTER OF THE ALLEGED MISMANAGEMENT OF THE AFFAIRS OF THE PUBLIC HEALTH OFFICERS AND TECHNICIANS COUNCIL (PHOTC) OF KENYA, INCLUDING THE IRREGULAR APPOINTMENT OF INDEPENDENT MEMBERS OF THE COUNCIL

IN THE MATTER OF THE ALLEGED INVALIDITY LEGAL NOTICE NO.61 OF 23RD MARCH 2015 (THE PUBLIC HEALTH OFFICERS (FEE & RATES) REGULATION, 2015); AND THE ALLEGED INVALIDITY OF THE KENYA GAZETTE NOTICE NOS 11295,11296, AND 11297 OF 21ST SEPTEMBER 2017

BETWEEN

OKIYA OMTATAH OKOITI ..... PETITIONER

AND

CABINET SECRETARY, MINISTRY OF HEALTH ..... 1ST RESPONDENT

PUBLIC HEALTH OFFICERS AND TECHNICIANS COUNCIL .... 2ND RESPONDENT

DR KEPHA MOGERE OMBACHO ..... 3RD RESPONDENT

THE HON ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

SIMON KIMANI & 5 OTHERS & 5 OTHERS & 5 OTHERS ..... INTERESTED PARTY

RULING

INTRODUCTION.

1. Before this Court is an application dated 20th November,2020 filed by the 2nd and 3rd Respondents together with the 1st to 6th Interested Parties seeking to set aside the judgment delivered on 22nd October 2020 by Hon. Justice A. Makau.

2. A similar application dated 27th January 2021 was filed by the 1st and 4th Respondents, which seeks, among other orders, the review and annulment of the aforementioned judgment.

3. The Applications were supported by the grounds on the face of it, and by the grounds in the Supporting Affidavits dated 20th November, 2020 and 27th January, 2021 deponed by Dr. Kepha Mogere Ombacho, Simon Kungu Kimani and Betty Mwasao respectively.

4. The crux of the applications is that the judgment was rendered without providing the Applicants with an opportunity to present their case, thereby breaching the audi alteram partem principle.

5. In the sworn affidavit of Betty Mwasao, it is the 1st and 4th Respondents/Applicants case that the ex parte judgment was issued in their absence. They claim that the court granted the Respondents time on 24th February 2020 to submit their responses and scheduled a mention for 20th April 2020 to verify compliance. However, they assert that the COVID-19 pandemic significantly hindered their ability to adhere to court directives, particularly concerning the filing of submissions. They argue that the court closures from March 2020 to 22nd April 2020 disrupted procedural timelines, making it unfeasible to meet the established deadlines. Therefore, they assert that the pandemic is responsible for lapses beyond their control and that they should not be penalized for delays resulting from such extraordinary circumstances.

6. Further, they claim not to have been served with a hearing notice or the judgment notice, hence they had no chance to submit their responses as required. They further contend that they had already filed a replying affidavit on 11th January 2018 sworn by Cleopha Mailu, which the Court apparently failed to consider in making its final decision. They argue that had the Court taken into account the existing evidence, the outcome would likely have differed.

7. It is further asserted that the application was filed within a reasonable time frame after receiving the court order on 5th January 2021 from the 2nd and 3rd Respondents' and Interested Parties' counsel, which stayed the judgment. They stress that they acted diligently after becoming aware of the judgment, and there has been no undue delay. They claim that justice would best be served if the matter is reviewed promptly, allowing them to file their responses and submissions within the timelines designated by the Court. They further assert that the application is made in good faith and is not intended to delay proceedings, but rather is a sincere attempt to ensure all parties are heard.

8. The 2nd and 3rd Respondents, along with the six Interested Parties, submitted a comprehensive Application supported by affidavits of Dr. Kepha Mogere Ombacho and Dr. Simon Kungu Kimani,

seeking to set aside the judgment rendered on 22nd October 2020. Their main argument is that the judgment was issued without them being given an opportunity to file their submissions, thus they were condemned unheard. They argue that this is a serious violation of Article 50(1) of *the Constitution*, which guarantees the right to a fair hearing. Dr. Kepha Mogere asserts that their exclusion was unintentional and the result of the Petitioner's failure to extract and serve the order dated 26th September 2019, which mandated that all Respondents and Interested Parties submit their responses within 21 days. The Applicants contend that the Petitioner's failure to comply with that order led to their procedural exclusion. They maintain that the repercussions of this exclusion have been severe and unfair.

9. He claims that they were not informed about court mentions on 26th November 2019, 24th February 2020, 20th April 2020, and 7th July 2020. During this period, Kenya was experiencing the full effects of the COVID-19 pandemic, which led to restrictions on physical court attendances. This situation, along with the absence of formal notifications, rendered participation nearly impossible. He argues that justice requires that litigants be afforded a fair and substantial opportunity to present their cases. His view is that the records show numerous court mentions took place without their presence, through no fault of their own. He insists that the procedural history supports a conclusion that they were unfairly excluded from the proceedings.

10. He further argued that the judgment rendered has severely hindered the 2nd Respondent's operations, including its revenue collection, registration and licensing of public health professionals, accreditation of training institutions, and evaluation of public health graduates. He stresses that, within the context of the COVID-19 pandemic, these responsibilities are crucial for the national health response. The inability to conduct Continuing Professional Development (CPD) and internship programs disrupts the stream of qualified public health workers, he asserts. This, he contends, endangers public health and shows that the consequences of the judgment extend beyond mere legal inconvenience into matters of significant public interest.

11. The Interested Parties, represented by Dr. Simon Kungu averred that they were appointed under the Public Health Officers (Training Registration and Licensing) Act, 2012, to serve on the Council in different roles. They are concerned that the judgment impacts not just the functions of the institution but also their individual rights to employment and engagement in governance. They argue they are constitutionally entitled to a hearing before any decisions affecting their appointments and responsibilities are made. Their argument is that their inclusion as Interested Parties necessitated a substantive hearing, and procedural fairness required timely notifications about court activities. They claim that the lack of such notice denied them the right to be heard on issues that directly impact their livelihoods and public service roles. As a result, they seek the Court's intervention to rectify the injustice by setting aside the judgment and allowing them the opportunity to file their responses and submissions.

12. In response, the Petitioner filed his replying affidavit, asserting that the supporting affidavits of the respondents/applicants are filled with intentional falsehoods aimed at swaying the court to overturn a legitimately issued judgment.

13. He argues that the Applicants were properly served along with their advocates/agents receiving court documents, and their advocates were actively involved in the case. Despite this, they failed to take any action to challenge the Petition or adhere to the Court's directions. The Petitioner claims that the Respondents not only received service but were also given ample opportunity to file submissions. He contends that their inaction was intentional and persistent, ultimately leading the Court to conclude on 7th July 2020 that it could no longer await the submissions. This remark from the Court is presented as clear evidence of judicial patience that was finally exhausted by the Applicants' lack of action.

14. The Petitioner asserts that he notified the Applicants' Advocates of the court order issued on 13th March 2019, informing them of the Mention date of 13th May 2019 to ascertain whether the Respondents had filed their submissions. He also details numerous instances of participation from the Applicants' Advocates in the court processes. He notes that on 12th June 2018, the law firm of Mwendwa Mwinzi & Associates submitted a Notice of Withdrawal of a Preliminary Objection, on 10th April 2019, they filed a Notice of Appointment dated 9th April 2019 designating them to represent the Interested Parties, and on 23rd July 2018, they filed their answer to the Petition.

15. It is the Petitioner's case that the Application is procedurally flawed, devoid of triable matters, and intended solely to have the Court sit on appeal over its own decision. He argues that no valid legal basis or factual intricacies have been introduced that would justify interfering with the judgment.

16. He further stresses that the Affidavit sworn by Kepha Mogere Ombacho effectively illustrates that the Respondents/Applicants exhibited lack of diligence, as they had access to all relevant documents since the suit began in 2017 and their failure to prepare should not create urgency for him.

17. The Petitioner also criticized the Applicants for not sufficiently clarifying how and when they became aware of the judgment while asserting they were ignorant of the procedures leading to it. He views this gap as critical, suggesting it is an effort to misrepresent facts in their favor.

18. The Petitioner argues that the Applicants' assertion of being unheard is irregular, as the court provided them several opportunities from 2017 to 2020 to file their submissions, yet they chose not to do so. He further stated that the application fails to present any reasonable grounds or justifications to set aside the judgment. He thus urges this court to dismiss the Application with costs.

19. The Appliaction was canvassed by way of written submissions and incompliance, all parties filed their respective submissions.

1ST AND 4TH RESPONDENTS' SUBMISSIONS.

20. In their submissions, the primary issue for consideration is whether the application to set aside the impugned judgment is merited. The Applicants contend that the judgment is flawed as the court neglected to take into account the Replying Affidavit filed by the 1st and 4th Respondents of 11th January 2018, which served as their formal defence. Relying on Purshotam Ramji Kotecha & Another v Narandas Ranchoddas Pau & another [2006] eKLR, they argue that the failure to consider a party's evidence violates the rules of natural justice. They maintain that a party should not be condemned without being heard, and such an oversight makes the judgment invalid.

21. Further reliance was placed in Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 Others [2006] eKLR and James Kanyita Nderitu v Maries Philotas Ghika & Another [2016] eKLR, in which courts ruled that judgments rendered without granting a party the opportunity to present their case must be overturned as a matter of right. The Applicants assert that the impugned judgment violates the principles of a fair hearing and natural justice. They claim that since their evidence was disregarded, the judgment is not only irregular but also unfair. Consequently, the application is founded on established legal principles and the constitutional rights to a fair trial.

22. Additionally, it was argued that there are valid reasons to warrant the setting aside of the judgment. They cited Columbus Opio Adeti v Alexander Oyiolo Ondongo [2019] eKLR. They further argued that their inability to file submissions stemmed from disruptions brought about by the COVID-19 pandemic, which impacted court functions and office logistics.

23. The Applicants also submitted that they were not served with a hearing notice or judgment notice, which further infringed upon their right to be heard. They call upon the Court to utilize its discretion considering the extraordinary circumstances, including public health restrictions and communication failures. Relying on Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal [2014] eKLR, they argue that the Court's discretion should be exercised to prevent injustice rather than to condone delays. They therefore request that this Court allow their application as prayed.

THE 2ND AND 3RD RESPONDENTS' AND INTERESTED PARTIES'/ APPLICANTS' SUBMISSIONS

24. In their written submissions, the Applicants have raised three key issues for the Court's consideration: whether the current application is competent, whether the High Court has the jurisdiction to address it, and whether the reliefs sought can be granted. The Petitioner contends that the application is invalid, claiming that the Applicants did not pursue their case despite having been properly served. In contrast, the Applicants argue that service was not properly executed and that the Petitioner failed to demonstrate compliance with court orders regarding the service of documents and notifications. They relied on the case of Efil Enterprises Limited v Air Travel & Related Studies Centre Ltd [2018] eKLR, highlighting the importance of access to justice as outlined in Articles 48, 59, and 159 of *the Constitution*. The Applicants thus maintain that fairness necessitates that they be allowed to present their case based on its merits. Moreover, the issue of ineffective service is tied to the lack of mention notices on several crucial dates.

25. The Applicants also assert that they were oblivious to the proceedings due to improper service, citing Wachira Karani v Bildad Wachira [2016] eKLR to support their assertion that preventing a party from being heard leads to a miscarriage of justice. Furthermore, they argue that the effects of the COVID-19 pandemic complicated their ability to participate in court proceedings and impeded their access to these proceedings, which they claim is a valid reason for their lack of involvement. The Applicants thus request that the Court use its discretion considering these factors, emphasizing that inadequate cause is context-specific and does not adhere to a singular criterion.

26. Relying on the decision in Nixon Murathi Kiratu v Director of Criminal Investigations & 2 Others [2019] eKLR, where it was deemed inappropriate to uphold orders made in a party's absence without proper joinder, the Applicants argue that their current application satisfies the requirements for setting aside the ex parte judgment. They maintain that they were never given a fair opportunity to respond or put forth their case. They contend that their Notice of Motion and the accompanying affidavit sufficiently articulate their reasons for not engaging in the proceedings. The relief they seek aligns with the precedents allowing re-opening of cases to preserve the right to be heard. Therefore, they urge the Court to set aside the ex parte judgment and allow them to file their submissions.

27. Regarding jurisdiction, the Applicants challenge the Petitioner's assertion that the Court is functus officio. They claim that a court retains the power to set aside its own ex parte judgment, particularly when a party has not had the opportunity to be heard. They relied in Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR and Jersey Evening Post Ltd v Al Thani (2002) JLRR 542 at 550, arguing that the functus officio principle does not prevent the correction of errors or the hearing of previously excluded parties. They believe that their application falls within the exceptions to this principle. Given that the judgment was made without their contribution, they assert that they deserve a chance to be heard. Thus, they believe the Court retains the authority to evaluate the application and issue suitable orders.

28. The Applicants further submitted that the reliefs sought are just and should be granted. They seek to set aside the ex parte judgment delivered on 22nd October 2020, and leave to respond to the petition. They argue that granting these orders would not prejudice the Petitioner and would promote a fair trial. Reliance was placed in Wachira Karani (supra). Additionally, the Applicants pointed out that as a result of the judgment, the 2nd Respondent is unable to fulfill their statutory functions such as revenue collection and professional regulation. Thus, they urged this Honourable Court to allow the application as prayed with costs.

THE PETITIONER/ RESPONDENT'S SUBMISSIONS.

29. In his written submissions, the Petitioner highlights four main issues: whether the application is competent, whether the Court has jurisdiction, whether the prayers can be granted, and who should bear the costs. He contends that the application is fatally flawed and cannot be corrected through amendments, as the Applicants had already filed their responses and were fully informed about the proceedings. They were given sufficient time to prepare and file their submissions but failed to do so for unjustifiable reasons. The Court even acknowledged their consistent non-compliance, which resulted in the delivery of the judgment on 22nd October 2020.

30. The Petitioner claims that the Court is functus officio following the issuance of its judgment and therefore lacks jurisdiction to consider the application. Since neither a review nor an appeal was initiated, and the Applicants are now requesting a reconsideration of the same judgment, the Court cannot function as an appellate body over its own decisions and allowing the current application would compromise the finality of litigation.

31. Moreover, it is argued that the requests put forth by the Applicants lack merit and constitute an abuse of court proceedings. Despite being properly notified and aware of the active proceedings, the Applicants failed to engage meaningfully until after the judgment was delivered, and it would constitute an abuse of process to allow their application. Reliance was placed in James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another [2016] eKLR and Yamko Yadpaz Industries Limited v Kalka Flowers Limited Nairobi HCCC No 591 of 2012, asserting that the discretion to set aside judgments should be exercised judiciously. It was argued that the Applicants' delay from 2017 to 2020, along with their inaction post-judgment, indicates sharp practice, a basis on which the court cannot exercise discretion to set aside its judgment.

32. The Petitioner also submitted that the request for a stay of orders lacks both factual and legal basis. The Applicants failed to show evidence of substantial loss or meet the necessary legal criteria for such relief. The court records reveal that they delayed in filing their application after the judgment without a valid reason. The Petitioner relied in Machira T/A Machira & Co. Advocates v East African Standard (No.2) [2002] 2 KLR.

33. Regarding costs, the Petitioner argues that the Applicants should be liable due to their frivolous and vexatious conduct. Citing ORIX Oil (Kenya) Limited v Paul Kabeu & 2 Others [2014] eKLR, it is asserted that costs typically follow the event unless there are reasons to justify otherwise, which is not applicable in this case. The Applicants' conduct has caused unnecessary costs and delays, and they should not gain from their inaction. Their pattern of behavior suggests an intention to obstruct justice rather than pursue it.

34. Additionally, it was submitted that the Applicants have been evasive and have abused the court's process, making them undeserving of the court's discretion. The judgment issued on 22nd October 2020 remains valid and conclusive, and no reasons have been provided to warrant it being set aside.

Thus, the application is fundamentally flawed, unjustifiable, and should be dismissed with costs. The Court is urged to maintain the integrity of its process by dismissing the Applicants' application.

ANALYSIS AND ISSUES FOR DETERMIATION.

35. I have considered the application, the response and arguments by parties. I have also considered the decisions relied on in support of the parties' respective positions. The following issues arise for determination: -

    i. Whether the judgment is irregular and this court has jurisdiction to entertain the applications

    ii. Whether this court should set aside the judgment

    iii. Whether the Applicants were denied a fair hearing in violation of Article 50(1) of *the Constitution*

Whether the judgment is irregular and this Honourable Court has jurisdiction to entertain the applications

36. The applicants' argument is that the judgment entered against them is irregular and should be set aside ex debito justitiae: as a matter of right.

37. Whether a judgment is regular or irregular is a matter of fact to be determined from the circumstances of the case. The Court of Appeal has addressed the distinction between a regular and irregular judgment in several decisions.

38. In James Kanyita Nderitu v Maries Philotas Ghika & Another [2016] eKLR, the Court stated that: -

> " 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 defend 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 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 such party is likely to suffer.
>
> The court then stated regarding an irregular judgment that:- "[J]udgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

39. In Bouchard International (Services) Ltd V M'mwereria [1987] KLR 193, the Court of Appeal held that: -

> " The basis of approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgement by default) is that if service of summons to enter appearance has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance has been served, then the court will have before it a regular judgement which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty and the exercise must be judicial...
>
> The Court went on to state that: -
>
> "A judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed."

40. The decisions are clear that in a regular judgment, a respondent will have been properly served but for some reason, he failed to enter appearance of file a response. In such a case, the court still has wide discretion to set aside the judgment on terms that are just.

41. I have perused the record in this matter. The suit was filed on November 2017. The Respondents were duly served; they entered appearance and filed their responses. The matter proceeded and directions were given each party to file their submissions however, the Respondents failed to adhere to the Court's directions by failing to file and serve their submissions despite being given several chances to do so. Additionally, the Respondents' advocate was present from the onset of the suit since they entered appearance until the moment they failed to attend court. Mere assertion on the disruption of the court process due to Covid-19 pandemic is unpersuasive since the Respondents were given humble time to file their submissions prior to the pandemic which they failed to do so. They also chose not to follow up with the court or seek clarifications of the matter when the court's resumed operating virtually. Failure to attend court, though served, did not make the judgment irregular.

42. The functus officio principle is a well-established legal doctrine that prevents a court from revisiting its decision once it has been made, unless specific statutory provisions allow for it. This principle is essential for ensuring the finality of legal proceedings and provides certainty and enforceability for judicial rulings. When a court has resolved an issue and issued a judgment, it becomes functus officio, unless there is an obvious error in the record or statute allows for correction. The Applicants argue that the Court has the jurisdiction to reassess its ruling under the pretense of addressing procedural injustices; however, the situation presented does not meet the limited exceptions recognized by law. There is no indication of a clerical error, fraudulent actions, or the emergence of new and compelling evidence. In the absence of these legal bases, the Court is functus officio and thus lacks the authority to consider the current application.

43. The assertion that the Court can invoke Article 159(2)(d) to rectify procedural issues cannot supersede the established statutory framework concerning the finality of judgments. While Article 159(2)(d) mandates that courts administer justice without overly focusing on technicalities, it does not confer a general power to reopen completed judgments in the absence of strong legal justification.

44. The record indicates that the Court provided sufficient guidance for all parties to file their submissions, yet none of the Respondents or Interested Parties complied. Their failure to act cannot be justified by calling upon jurisdictional discretion after a judgment has been made. A party that chooses to

remain inactive cannot subsequently seek the Court's assistance to reverse the consequences of their intentional decision not to engage in the proceedings.

45. In Parliamentary Service Commission v Wambora & 36 others [2018] KESC 74 (KLR) the Supreme Court underscored that: -

> " Further, the Applicant also invoked Article 159(2)(d) of *the Constitution* and urges that ordinary rules of equity ought not to be a bar to the determination of weighty constitutional matters and on that basis we should grant the review. We are not at all persuaded by the Applicant's invocation of Article 159(2)(d) in urging a review application like this one. We do not think that that provision is applicable in the instant case. This Court has earlier cautioned against the indiscriminate invocation of Article 159(2)(d) by litigants even where it is not applicable. In Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR thus:"Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis (Raila Odinga and 5 Others v. IEBC and 3 Others; Petition No. 5 of 2013. [2013] e KLR)."...We note that the decision of the Two Judge Bench was in a summarized form. This might have erroneously informed the Applicant's assertion that some of its issues were not considered. However, that cannot be the case. In their Ruling, the Learned Judges categorically state that they had: "perused the application dated 24th May 2016; read the affidavit of Anthony Njoroge sworn on 24th May, 2016, and considered the Written submissions of both the Applicant and the Respondents." In the ultimate the application was dismissed for the reasons that: "no compelling reasons have been presented to the Court as a justification for the inordinate delay." We find nothing irregular with this decision to warrant review."

46. The Applicants' invocation for residual discretion must be reviewed alongside their overall behavior. They actively participated in previous stages of the petition and had the ability to file responses and submissions but opted not to take action. It is not within the Court's role to serve as a safety net for parties who neglect to diligently pursue their interests.

47. The Petition was determined based on its merits, and a judgment was rendered following appropriate legal procedures. Allowing this application would not only compromise the principle of finality but also diminish the authority of court orders and encourage dilatory conduct in litigation. Judicial discretion is not intended to provide litigants a second bite at the cherry without lawful justification.

48. The record indicates that the Applicants entered appearance appeared and filed their responses, which the Court took into account when issuing the ex parte judgment. Additionally, the Court provided the Applicants with multiple opportunities to file their submissions, which they ultimately declined to do. Their failure to file and serve their submissions, despite having several opportunities, did not render the judgment irregular. This court finds that the judgment rendered against the defendants was a valid judgment, and it lacks jurisdiction to revisit its ruling without the presence of error, fraud, or new evidence as outlined under the relevant legal standards.

Whether to set aside the exparte judgment.

49. The next issue is whether to set aside the exparte judgment. The court having determined that the judgment was regular, whether or not to set aside the judgment is an exercise of discretion which

should be done on terms that are just. That is; this discretion like all other discretions, must be exercised judiciously.

50. In Shanzu Investments Ltd V Commissioner of Lands [1993] eKLR, the court delivered itself thus: -

> " The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party's favour, depends, on a large measure, on the facts of each particular case. The tests for the exercise of this discretion are these: - First, was there a defense on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay."

51. In Shabir Din v Ram Parkash Anand (1955) 22 EACA 48 Briggs JA stated at page 51: -

> " I consider that under Order IX rule 20, the discretion of the court is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."

52. In Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7 July 2023) (Judgment), the Court of Appeal reiterated that: -

> " [E]ven where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgement, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant."

53. The decisions affirm that the discretion of the court to set aside a regular exparte judgment is wide but the discretion must be exercised judicious and any conditions to be imposed must be just to both parties, the plaintiff and the defendant.

54. The discretion to set aside an ex-parte judgment should not be exercised arbitrarily but must be based on substantial reasons backed by reliable evidence. The guidelines that govern this authority are well-established in legal precedent and consider factors such as the cause of the default, the promptness of the application, the type of defense or response, and the possible detriment to either party. In this instance, the Applicants argue that their inability to adhere to court directives and deadlines was due to the impacts of the COVID-19 pandemic and non-service of court orders. However, the Court determines that the Applicants' rationale does not meet the necessary threshold to warrant the annulment of a final judgment. They had previously acknowledged the proceedings and were cognizant of the court's directives yet made no effort to comply or to inquire as the case unfolded.

55. The discretion to set aside an ex parte judgment must not be exercised solely out of sympathy or leniency; the party requesting relief needs to demonstrate diligence and accountability in managing their case. The Applicants' lack of follow-up on the case for several months cannot simply be justified by citing the pandemic, especially considering that courts continued to operate through online platforms and electronic communication.

56. While the Applicants assert that they took swift action upon discovering the judgment, this claim is not convincing given that the judgment was issued in October 2020, and no application was made until months later. A party that has entered appearance and filed a response has the responsibility to track the developments of their case. Passive behavior cannot be rewarded with judicial leniency. In Lucy Bosire v Nyankoni Manga Robi [2016] KEHC 5460 (KLR), the court held that: -

> " The conduct by the defendant in this matter does not in my view depict the conduct of a person who was keen in the pursuit of his case otherwise he would have made follow up with his advocate to ascertain the status of the case. Once a party appoints an advocate he still remains the principal and he has the duty and obligation of ensuring the agent acts as per instructions given and keeps him updated on the progress of the matter. The defendant/ applicant has argued that the court should set aside the ex parte judgment to afford the defendant an opportunity to be heard and so that the case may substantively be determined on merits. Justice is a two way traffic, the plaintiff and the defendant each crave for justice. The plaintiff states she has a valid and regular judgment obtained after due process and argues the defendant is bent on frustrating her in enjoying the fruits of her judgment. The court after hearing the plaintiff gave a reasoned judgment upholding the plaintiff's claim and dismissing the defendant's defence and counter claim. I find no basis upon which I can set aside the judgment having held that the defendant has not demonstrated any sufficient and/or reasonable cause to warrant me to exercise my discretion to set aside the judgment in his favour."

57. The Applicants' reliance on disruptions brought about by the pandemic must be viewed in context. Many litigants and organizations continued participating in court proceedings during that time. The judiciary provided practice directions that enabled virtual appearences and electronic filings. There is no convincing reason provided for why the Applicants could not utilize these options. Procedural directives were issued well before the peak of the pandemic, and any failure to comply cannot be blamed on COVID-19 interruptions.

58. In its judgment, the Court took into account the responses from the Applicants, their affidavits, and all pertinent constitutional provisions mentioned in the petition. Simple claims of regulatory mandate or institutional authority are insufficient to counter findings of constitutional or statutory infractions unless backed by evidence and clearly articulated legal arguments.

59. Moreover, the Petitioner would experience considerable prejudice if the judgment is set aside. The Petition was filed in November 2017, and the judgment rendered on 22nd October, 2020. Reopening the proceedings would hinder justice, extend uncertainty, and violate the Petitioner's right to have their matter resolved in a timely manner as guaranteed by Article 159(2)(b) of *the Constitution*. The principle of finality in litigation is a core tenet of justice.

60. Invocation of Article 159(2)(d) of *the Constitution* does not allow a party to disregard procedural responsibilities. Litigants are required to act promptly and adhere to court orders and directives; failing to do so without a valid reason undermines the integrity of judicial processes.

61. The judgment of 22nd October, 2020, was issued after the Court allowed sufficient time for all parties to comply with its directives. The Applicants were aware of the orders and proceedings but opted not to engage or pursue the matter. Reopening the proceedings at this point would weaken the Court's authority and encourage laxity in litigation.

62. Therefore, on this issue, the Court concludes that the Applicants have not provided adequate grounds to justify setting aside the judgment. Their actions lack the urgency, diligence, and substantial foundation that are essential for the judicial discretion to be exercised in their favor.

Whether the Applicants were denied a fair hearing in violation of Article 50(1) of *the Constitution*

63. The right to a fair hearing outlined in Article 50(1) of *the Constitution* is fundamental to justice, yet it is not without limits when considering procedural defaults due to the negligence of the litigants. A party that is legitimately before the Court and is permitted to file responses and submissions must actively engage in exercising those rights. In this case, the Applicants were aware of the Petition beforehand and participated in its early stages, including submitting affidavits. They were present when the Court provided instructions on compliance timelines and cannot reasonably claim ignorance regarding subsequent proceedings.

64. The Court observes that although the Applicants were granted permission to respond, they did not submit any documents, attend later proceedings, or ask for clarification regarding the Court's directives. Their failure cannot be attributed to procedural ambush or a denial of their right to be heard. The concept of procedural fairness places an equal responsibility on parties to be alert and proactive in defending their rights.

65. Procedural fairness includes both being notified and the opportunity to present a case, but it also necessitates that parties take timely action in managing their claims or defenses. The Applicants' inaction regarding the granted leave and the issued directions equates to a forfeiture of their right to further engagement.

66. The records indicate that the Applicants were not intentionally excluded from the proceedings. On the contrary, the Court provided them with sufficient opportunities to present their case, which they chose not to pursue. There is no indication that the Court actively prevented the Applicants from submitting their responses or attending hearings.

67. While all parties deserve a fair hearing, it is the responsibility of the parties to proceed once notice is given and directions are established. Inactivity cannot be construed as a denial of the right to be heard.

68. The Applicants' claim that the COVID-19 pandemic justified their lack of action is unconvincing. Although the pandemic was disruptive, it did not halt judicial functions. Practice directions were implemented for virtual hearings, and litigants were encouraged to remain proactive via digital channels. The judicial system continued to operate, and the Applicants did not seek an extension or clarification during the relevant time frame.

69. Furthermore, there is no sworn testimony from counsel or parties indicating attempts to contact the registry or inquire about the status of the Petition. Simple claims of systemic disruption are insufficient without evidence of efforts to address those obstacles. A right that is not actively pursued is considered forfeited.

70. The Court must also take into account the Respondents' interests, who have diligently moved the matter towards resolution. Reopening the case at this point would lead to significant prejudice and uncertainty, which contradicts the principles of swift and proportionate justice.

71. Therefore, the Court finds that the Applicants' right to a fair hearing under Article 50(1) has not been infringed upon. The Applicants were given sufficient opportunity, and their lack of participation is solely due to their own inaction.

72. Taking into account all the circumstances surrounding this case, I find this application unmeritorious. Consequently, the application is declined and dismissed with no orders as to costs.

Orders accordingly, file closed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JUNE 2025.

BAHATI MWAMUYE

JUDGE

In the presence of:

Counsel for the 2nd, 3rd Respondents and 1st to 6th Interested Parties - Mr Michael Nguma

Court Assistant – Ms Neema