REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 77 OF 2004

LOIS HOLDINGS LIMITED.....PLAINTIFF

VERSUS

NDIWA TAMBOI & 184 OTHERS.....DEFENDANT

CHESITIA MARKETING CO-OPERATIVE SOCIETY.....PROPOSED 2ND DEFENDANT

RULING

The Background

1. The judgment in the instant suit was issued on **29/9/2014** by which the defendants were ordered to vacate two portions of the land that comprised the suit land and in default they be evicted without further recourse to the court. They were also condemned to pay the plaintiff damages for trespass. However they were allowed to remain on one portion on certain terms set out by the court, and in the absence of realization of which the plaintiff was directed to move the court for appropriate orders.

2. The current applicant now claims not to have been involved in the proceedings in this suit leading to the judgment delivered on **29/9/2014** though the suit touched on **LR No. 6416/6** which they claim to have occupied since the **1980s**. It states that its members were not served with process and they were not aware of the proceedings in the instant suit as they were not enjoined in the suit. It claims to have been availed by one of their members an eviction order and notice against all the occupants of **LR No. 6416/6** and **LR No. 6485** giving them **21 days** from **9/2/2021**; the members of the applicant have become apprehensive that the plaintiff will execute the eviction order and leave them homeless and their right to a fair hearing is likely to be violated. They now pray for a setting aside of the judgment and claim that there is new evidence and information that was not availed to the court before the issuance of the judgment. It is claimed that the joinder of the applicant is necessary for the effectual and complete adjudication and settlement of all the questions in the suit and that the application has been brought without unreasonable delay.

The Application

3. The Notice of Motion dated **3/3/2021** and filed in court on the same date by the applicant who is the proposed 2nd defendant is brought under **Article 50** and **159** and **Rules 5(d)** of the **Constitution, Order 42 Rule 6, Order 45 Rules 1, 2** and **3** of the **Civil Procedure Rules.** The proposed 2nd defendant sought for the following orders:

> **(1) …spent**
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> **(2) …spent**
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> **(3) That the honourable court be pleased to set aside the judgment and orders of the Hon. Justice E. Obaga delivered on 29/9/2014.**
>
> **(4) That the proposed 2nd defendant herein be enjoined as a party to the suit.**
>
> **(5) That the court do make any other or further orders in the interest of justice**
>
> **(6) That the costs of this application be provided for**

4. The application is supported by the affidavit sworn on **3/3/2021** by one **William Sackton Saikwa** who describes himself as the proposed

2nd defendant's chairman. It amplifies the grounds set out hereinbefore.

The Response

5. The replying affidavit was filed by **Loise Nyegera Kimbui**, the Director of the plaintiff company, on **21/4/2021**. She depones that after the execution of the agreement dated **24/2/1997** and payment of **Kshs. 400,000/=** deposit which events the applicants have relied on in their application, the applicants failed to pay the entire balance of the consideration for the land; further the consent of the land control board was not sought and the agreement became void and the applicant's members became trespassers on the suit land and were obliged to move out; that specific performance can not be issued over a void agreement; that by leave of court granted on **8/3/2006** in an advertisement issued in the press informing all and sundry that the suit existed and numerous persons then residing on the land applied to be enjoined, and from the original **152** defendants named by the plaintiff the number swelled to **185** and the suit was thus heard and determined; that the claim by the applicants that they were not aware of the suit is not tenable; that the applicants are guilty of laches, six and a half years having passed since the date of judgment; that in any event the applicants have utilized the suit land free of charge since **1997** and that there is no justifiable ground upon which a review of the judgment may issue.

Reply to the Replying Affidavit

6. The proposed 2nd defendant through **William Sackton Saikwa** filed a supplementary affidavit sworn on **4/5/2021**. He stated that the subject agreement never gave timelines for the payment of the balance of the consideration; that the proposed defendants in good faith kept the plaintiff updated on the applicant's efforts to collect the balance; that the plaintiff's director upon inquiry by the applicant declined to accept the balance in instalments and demanded a lump sum but set no timelines for payment thereof; that **Section 6** of the **Land Control Act** is only applicable where the parties have completed the sale transaction and in that case the sale agreement is still valid; that the plaintiff was aware of the agreement and should have sued the applicant, who is a body corporate, and served it suit papers directly without resorting to a public advertisement which in the applicant's view is reserved for service of unknown parties; that the applicant was in constant consultation with the plaintiff and the latter misled the court by failing to disclose the agreement when it made the application for leave to serve by substituted service and the advertisement of service never came to the notice of the applicant's officials and that the plaintiff's actions are merely malicious, calculated at catching the applicant unawares.

Reply to the Supplementary Affidavit

7. In respect to the supplementary affidavit of the proposed 2nd defendant, the plaintiff filed a further affidavit sworn on **17/5/2021.** Her response is that the deponent was not signatory to the agreement and does not state when he became a member or ascended to position of chairman; that the agreement was subject to the LSK conditions of sale and provided for obtainance of an LCB consent and that the applicants have through their Member of Parliament written a letter stating they were unable to pay for the land and asking the government to pay for them and that there is no evidence of negotiations as alleged by the applicant.

Submissions

8. The proposed defendant filed its submissions on **21/5/2021** while the plaintiff filed its submissions on **24/5/2021**.

Analysis and Determination

9. I have perused the application, the supporting affidavits, the replying affidavits and the submissions filed by the parties herein and the issues for determination are:

(a) Has the applicant satisfied the court that the judgment in this suit should be set aside?

(b) What orders should issue?

10. The issues are discussed as hereinbelow:

(a) Has the applicant satisfied the court that the judgment in this suit be set aside?

11. In this court's view, the main sub-issues that arise in the instant application are as follows:

(i) Was the applicant enjoined or given a chance to enjoin itself in the instant suit before judgment?

(ii) Does the applicant have a good defence to the claim that raises triable issues?

(iii) Has the application been made without undue delay?

(i) Was the applicant enjoined or given a chance to enjoin itself in the instant suit before judgment?

12. The applicant's main ground for seeking setting aside is that it was not enjoined in the suit and thus it was not heard before the judgment was issued. It cites the case of **Elisha Kare Busienei & 3 Others vs Japheth Kipyego Chepkwony & 2 Others [2020] eKLR** and states that an application for setting aside judgment in which the applicant seeks joinder is legally competent. I agree that seeking a setting aside order forms the first hurdle in seeking joinder in a concluded suit and the application is therefore properly before the court for consideration.

13. The court has unfettered discretion to set aside judgment on such conditions as it may deem just. Though the applicants were not named as parties in the suit and the judgment may not be construed as interlocutory or *ex parte* judgment with all the technicalities that those kinds of judgments present in contrast to a regular judgment as was given in this case, this court, aware of the breadth of discretion it has in the matter finds succour in the decision in **Shah v Mbogo & Another [1967] E.A.** where it was held that:

> **"The court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should therefore be refused."**

14. Also, in the Court of Appeal case of **Stephen Wanyee Roki v K-Rep Bank Limited & 2 Others [2018] eKLR** it was stated as follows:

> **"It is trite that setting aside of a default judgment is not a right of a party but an equitable remedy that is only available to a party at the discretion of the Court. Ordinarily, when an application to set aside a default judgment and extend time for filing a defence is filed before a court, there are several factors that the court ought to take into account.**

In PATEL v E.A. CARGO HANDLING SERVICES LIMITED (1974) E.A. 75, this Court held as follows:

> **"There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."**
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> **23. The courts should also endeavor to ensure that the factors considered are in tandem with the overriding objective of civil litigation, that is, the just, expeditious, proportionate and affordable resolution of disputes before the court…"**

15. This court also has power to order either *suo motu* or upon application at any stage in the proceedings that any party who has not been enjoined in a suit be enjoined either as plaintiff or defendant. **Order 1 Rule 10(2)** of the **Civil Procedure Rules** provides as follows:

> **"10.(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."**

16. In the **Elisha Kare Busienei case (supra)** this court was of the view that the applicants who were not enjoined in the litigation were entitled to setting aside and joinder. However in that case the noteworthy factor is that there was no application for substituted service as in the instant suit, or other proven mode of service.

17. The distinction between regular and irregular judgments is clear. In the Court of Appeal case **CA No. 6 of 2015 James Kanyita Nderitu V Maries Philotas Ghika & Another [2016] eKLR** it was observed as follows:

> **"We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, 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 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 each party is likely to suffer (see Mbogo & Another V Shah (supra); Patel V EA Cargo Handling Services Ltd [1975] EA 75, Chemwolo & Another V Kubende [1986] KLR 492 and CMC Holdings Vs Nzioki [2004]1 KLR 173).**
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> **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 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. (See Onyango Oloo V Attorney General [1986 - 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in Sangram Singh V Election Tribunal, Kotch, AIR 1955 SC 664, at 711:**
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> **"There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that**

proceedings that affect their lives and property should not continue in their absence and that they should not precluded from participating in them.".

18. In the instant case, the order issued by the court on **8/3/2006** stated as follows:

> **"That all the interested parties be notified by way of placing a notice similar to the draft annexed to the said application and also through the posting of handbills which should be posted in strategic places on the suit premises."**

19. I have perused the press advertisement by which the persons interested in the land were given notice of the institution of this suit. Contrary to the applicant's assertion I find that that the same lists the parcel number which they claim to have bought **(LR No. 6416/6 in the Endebess area of Trans Nzoia District)**. The notice stated that **Ndiwa Tamboi** and **153** others were sued *"on their own behalf and on behalf of all those persons claiming an interest in or now occupying **LR Nos. 6416/6, 5335/2** and **LR No. 6485."*** The notice states on its face that it is addressed to all such persons in occupation of the mentioned land parcels. It invites all persons claiming an interest in the land on behalf of whom the defendants were sued to apply to be made parties to the suit.

20. In this court's view, the mode of substituted service adopted in the instant suit at the plaintiff's instance is a notice to all having an interest in the subject matter of the suit. The applicant's members were in occupation of the suit land as at the time of the issuance of a notice indicating that there was a suit for their eviction pending in court. They were interested parties even at that time.

21. In the case of **Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR** it was stated as follows:

> **"It will be a mockery of justice for the court to subject the Plaintiff to another rigour of litigation as against the Intended Interested Party and prove fraud as against the said party.**
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> **Everyman, as quoted in the proceeding paragraphs, is presumed to be aware of the pending suits, especially litigation involving land governed by the ITPA, 1882. Therefore, purchase made of a property actually in litigation *pendente lite* for valuable consideration affects the purchaser in the same manner as if he had notice and will be accordingly be bound by the judgment or decree in the suit."**
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> **The Intended Interested Party's argument that the Plaintiff should file a distinct suit as against it flies in the face of the very mischief that the principle of *lis pendens* is supposed to address."**

22. In the case of **Boaz Kipchumba Kaino v G.H. Tanna & Sons Ltd, Abdu Mukhwana & 3 Others (Interested Parties) [2019] eKLR** this court after analyzing several decisions stated as follows:

> **"16. The proper construction of Order 1 rule 10 (2) is that there must be a suit in existence for the court to subsequently adjudicate on once the application for joinder is successful. In my view that means a suit that is not concluded, which is still active."**

23. In the same case of **Boaz Kipchumba Kaino** this court also observed as follows:

> **"22. In the J M K -vs- M W M & Another [2015] eKLR Case (supra) the Court of Appeal set aside an order of the Employment and Labour Relations Court dismissing an application filed after judgment seeking to enjoin the applicant as a party in the matter, and allowed joinder. However the court in that case considered two factors:**
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> > **1. The applicant's reputation was at stake in that the employment and labour relations court had found the applicant guilty of sexual harassment without granting the applicant an opportunity to be heard.**
> >
> > **2. The application had alongside the order of joinder sought the setting aside of the judgment."**

24. The reasoning of this court in the above quoted case was that an application for joinder, when made alongside an application for setting aside, is proper and none of those orders can be competently sought independently of the other by a non-party to the suit once a judgment is in place.

25. The applicant's members knew that they had not paid for the land and they have confirmed in their affidavit evidence that they have never paid in full for the land. The assertion that the applicant's members and officials' attention was not drawn to the press advertisement is not of any value in the instant application. They are deemed to have been effectively served by way of such a notice and they can not be heard to complain that they were not involved in the suit. If they were aggrieved by the institution of the suit the two remedies available were that they should have applied to be enjoined, or merely kept silent and allowed the named defendants to continue being sued on their behalf.

26. In this court's view the applicants were accorded an opportunity to enjoin themselves to the instant suit in order to defend their interest and they can not be heard to state otherwise. In the face of the press advertisement, to hold otherwise would be to render useless the provisions of **Order 1 Rule 8** of the **Civil Procedure Rules** which authorize such service. It may also open a pandora's box for every person who has an interest to arise and claim non-service. That would be not only against the spirit of the law and the rules on substituted service, but also militate against the public policy engendered in the principle *interest reipublicae ut sit litium finis*.

27. The applicants failed to enjoin themselves to the suit with the predictable result that the judgment, which condemned all the persons on

the land to eviction, was rendered without their input; they are the sole authors of their own misfortune. In such circumstances this court can not afford to exercise its discretion in their favour at all to set aside the judgment.

28. By way of extrapolation, the ordinary logic dictates that where one of those orders has been rejected, the other must also be declined. Consequently the order of setting aside having been found to be incapable of being granted, the prayer for joinder can also not be granted for it would be futile in the face of that judgment.

(ii) Does the Applicant have a good defence to the claim that raises triable issues?

29. It is customary for any party seeking a setting aside order of the nature the applicants are now seeking to demonstrate that they have a defence that raises triable issues.

30. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75** the Court of Appeal stated as follows:

> **"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular 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, the 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." (Emphasis mine)**

31. The issue has arisen in litigation before this court before. In a setting aside application in the case of **Flora Cherono v Mary Njihia & 7 Others; Daniel Nyaga Munyambo & 7 Others (Applicants) [2021] eKLR** the court dealt with a situation where the suit was withdrawn against some purchasers and retained as against the sellers. The purchasers who bought the subtitles from the sued sellers having failed to re-enjoin themselves to the suit in their capacity as purchasers, were served with eviction orders and applied for a review and setting aside of the judgment. In a ruling in that application the court stated as follows:

> **"25. This is a court of justice and must consider whether there are other grounds upon which the judgment may be set aside. The presence of a defence on the merits on is essential and the applicants have not exhibited what they deem as their appropriate defence to the suit. They did not file any draft defence at all. Their main ground is non-service which they have failed to prove. The applicants have failed to demonstrate that they intend to be enjoined in the suit for purposes of being parties to the suit to enable them file their defence if any.**
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> **26. In the case of Patel v EA Cargo Handling Services Ltd [1974] EA 75 the Court observed that the defence on the merits does not mean defence that must succeed, but one that in my understanding raises a triable issue.**
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> **27. From the judgment, the applicant's titles were a product of an illegality involving irregular subdivisions which have for a long time denied the Respondent her constitutional right to enjoy her rightful property. The mother titles having been cancelled on the basis of illegality as held by the court ultimately affects all other resultant titles including that of the applicants herein. This court finds no defence upon which the applicants may rely even if the judgment were set aside as prayed. It would be an exercise in futility. It follows therefore that there is no sufficient reason to warrant this court to review its judgment. The defence of the applicants being non-service does not raise any triable issue; their titles go to the substratum of the mother titles which were obtained illegally and were declared so." (Emphasis mine)**

32. The requirement of presence of a *prima facie* defence is a common feature in applications to set aside both regular and irregular judgments. In the case of **Gulf Fabricators v County Government of Siaya [2020] eKLR** the court, referring to an irregular judgment, stated as follows:

> **"Even if there was regular judgment on record which I find nonexistent, the power to set aside ex parte judgment entered in default is discretionary. The principles upon which such discretion is to be exercise were set out by the Court of Appeal in Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd Vs Augustine Kubende (1982-1988) KAR 1036 where it was held inter alia, citing with approval the English case of Evans V Bartam [1993] AC 473: -**
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> **"The discretion is in terms unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has prima facie defence." (emphasis mine)**

33. The judgment in this case was a regular one arrived at after notice to parties and a proper hearing. The applicants have not exhibited any defence to their application. This court is left to deduce whether they have a good defence from the contents of the affidavits they have filed.

34. In this court's view the main pillar on which their defence to the suit may lie is that the agreement made on **24/2/2014** is still valid. I am aware that what is being determined here is an application and not a main suit and consequently, while steering clear of a final determination on the merits of the applicant's claim that the agreement is valid, I must observe that it is admitted by both parties that only a deposit of **Ksh 400,000/=** was paid by the applicants long ago and no further payment followed.

35. Though it is stated by the applicant that there were no timelines for the payment of the balance of the purchase price this court notes that there is such a thing as "*reasonable time*" where timelines are not set. For the applicants the period of **24 years** which has lapsed since the agreement appears to be reasonable time, and to them the agreement is valid and enforceable, a position that appears to appall the plaintiff; on the other hand the plaintiff avers that the agreement was subject to the **LSK Conditions of Sale.**

36. However, even without addressing the said conditions of sale, the agreement has clauses providing for the eventuality of non-completion occasioned by either party and it is not impossible to obtain a remedy on that basis even if the judgment herein is not set aside.

37. But going back to the **LSK Conditions of Sale**, the applicant's submission is that they allow a **3 month** completion period after which seller should issue a notice before rescinding the agreement, yet no such notice was served upon the applicant. The applicant citing the case of **Ayub Ndungu V Marion Waithera Gacheru Civil Case No. 1496 of 2002** stated that notice of default is necessary in rescission of land sale contracts to give the purchaser an opportunity to rectify the same. The court in the **Ayub case (supra)** cited the following passage in the CA of **Njamumu Vs Nyaga [1983] KLR 282** case:

> **"Before an agreement such as this can be rescinded by the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given failure to rectify will result in the rescission of the contract."**

38. The court in the **Ayub case** in its own words stated as follows:

> **"The law requires is that in the case of a rescission of a contract for the sale of land the vendor returns the deposit to the purchaser in order to escape liability to pay damages for breach of contract. The plaintiff has not given any evidence of such notice having been issued. He says he cannot even remember when he rescinded the contract which clearly shows that no rescission can be inferred. It is important to point out here that rescission will only be allowed where restitution is possible, which cannot be the case where possession has been given to the purchaser who has thereafter developed the land."**

39. However, the plaintiff states that the subject agreement was already void by the time the suit was filed; that it is by reason of the applicant's failure to pay the balance of consideration that the agreement became void. Citing **Section 6(1) (e)** of the **Limitation of Actions Act** and **Reliable Electrical Engineers Ltd Vs Mantrac Kenya Ltd 2006 eKLR** the plaintiff avers that a contract can not be enforced after **6 years** or if no consent of the land control board has been obtained within **6 months** from the date of the contract, as it becomes void, and that specific performance can not issue the contract being so void. The plaintiff also averred that **Section 22** of the **Land Control Act** required the applicant's members to vacate the land after the transaction became null and void for want of a land control board consent; it further avers that **condition 6** of the **LSK Conditions of Sale (1989 Edition)** provide for instances where the purchaser takes possession as in the current case and they describe the purchaser as a licensee, and that they gave the plaintiff an avenue to seek redress against the applicant and all other interested parties.

40. The applicant's view which I hereby disagree with is that the timelines in **Section 6** of the **Land Control Act** operate to render an agreement void only when the parties to a sale agreement have completed the transaction. How that can be the case while the obtainance of a land control board consent is part of the completion process and that consent has not been so obtained has not been elucidated upon by the applicant.

41. It therefore follows that whether or not the plaintiff served the defendant any notice of default with a view to rescission, or whether such notice was necessary or not, this court has to contend with the issue of whether the admitted lack of a land control board consent for the subject contract would render it void.

42. When the provisions of **Section 6** of the **Land Control Act** are applied to the facts of this case, it would appear that the agreement became void. I agree with the plaintiff that such a void contract cannot be the subject of a positive grant of orders of specific performance and that in the face of the **Land Control Act** provisions and in the circumstances of this case, the applicants lack a defence with triable issues and so it would be futile to set aside the judgment.

43. Consequently, I hardly think that the allegation by the applicant that there were no timelines set, that there was no notice and so the agreement could not have been rescinded and that the agreement could be still completed even after orders of eviction have already been issued at the instance of the seller in a suit where substituted service had been effected afford the applicant a triable issue.

(iii) Has the application been made without undue delay?

44. This issue must be addressed with the knowledge that notification of the institution of the instant suit was published in accordance with the rules.

45. Citing the case of **Mohamed Shally Sese V Fulson Company Limited & Another [2006] eKLR** the plaintiff objects to the application on the basis that it is now in excess of **6 years** from the date of judgment which it terms as excessive and inordinate and unexplained delay not condonable by the eye of equity.

46. This court views the delay as lengthy and apparently inordinate. However even where delay is inordinate an adequate explanation may still invoke the court's discretion to set aside judgment. In the instant case the applicant has not sought to explain the delay in any terms independent of the claim that they were not served and did not know of the case. Also, in view of what I have stated concerning the universality of substituted service, that explanation can not hold.

47. It is also inconceivable to that archetypal legal entity, the reasonable man, that a purchaser of land can remain thereon for **24 years** without paying a substantial part of or the full purchase price and at the same time not know that a suit is pending against all the occupants of that land for being trespassers; unless there is an overriding intent to defraud the seller of land or otherwise retain it without payment of consideration a defaulting purchaser is likely to live with considerable anxiety as to what the seller may do either to recover the land or compel payment of full consideration.

48. The applicants' awareness of their explicitly confessed inability to pay the consideration stated in the agreement in full has been proved to a reasonable degree; this court is also alive to the fact that the letter (plaintiff's exhibit **"LN2"** in the further affidavit) as showing that the applicants at one time apparently expressed themselves as not being able to purchase the suit land, and that they resulted to political persuasion through their Member of Parliament to secure the national government's help to purchase the land for them which effort appears to have been fruitful.

49. This court finds that the applicant was accorded an opportunity to enjoin itself to the suit but failed so to do, that the applicant lacks a triable defence to the suit, and that it is guilty of *laches* in that the inordinate delay in lodging the instant application has not been adequately explained.

50. The upshot of the foregoing is that this court finds the application dated **3/3/2021** to be lacking in merit and the same is dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 14TH DAY OF JULY, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.