



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC SUIT NO. 292 OF 2017

ANJELI LIMITED.....PLAINTIFF

-VERSUS-

KENGA SIMBA & 12 OTHERS..... DEFENDANTS

-AND-

CHENGO OMAR & 19 OTHER..... INTENDED INTERESTED PARTIES

RULING

(Application to set aside an ex parte judgment; matter having proceeded for hearing and judgment entered after defendants did not enter appearance in the suit; defendants claiming that they were never served with summons; record showing that the defendants were duly served through a newspaper advertisement with the summons, and in addition, were personally served with the hearing notice; no reason to set aside the judgment ex debito justitiae; whether judgment should be set aside for reason that the defendants have a good defence; defendants raising issue that the court has no jurisdiction, that the matter is sub judice, that they have been in long occupation of the disputed land, and that some persons need to be enjoined as interested parties to the suit; applicants arguing that the subject matter was in a different county from where the court is located; jurisdiction of the court not limited to a county or a particular geographical area but is countrywide; directions only prescribe that a matter be filed in the nearest court; court therefore properly seized with jurisdiction; issue that matter is sub judice interrogated and dismissed; the other matter concerning subject matter that is not the one in this case; even if it were, that case already decided and not in favour of the applicants thus would not constitute a reason to set aside the judgment herein; no claim by defendants for the land; interested parties claiming to be in possession of a different parcel of land so not affected by the judgment; no merit in the application; application dismissed with costs)

1. This application was filed on 16 December 2020 by the 13 defendants and 33 other people who wish to be enjoined in this suit as interested parties. The applicants seek the following orders:-

a) Spent (Certification of urgency)

b) This honorable court be pleased to stay of execution of the judgment delivered on 17 September 2020, the decree endorsed on 9 October 2020 and all other consequential orders.

c) The honorable court be pleased to review, vary and/or set aside judgment entered on 17 September 2020, the decree endorsed on 9 October 2020, the proceedings thereto and all consequential orders.

d) This honorable court be pleased to:-

i. Grant the 1st-13th defendants herein leave to file defence out of time and that the draft defence annexed hereto be deemed as duly filed and served upon payment of the requisite court fees,

ii. Enjoin the 14th – 33rd applicants herein as the interested parties in these proceedings.

e) That this honorable court be pleased to direct that a survey be conducted to establish the beacons and boundaries on property subdivision Number 10271 (original No. 269/54) Section III Mainland North to ascertain the extent of encroachment if at all.

f) That cost of this application be provided.

2. To understand where this application is coming from, I need to give the background thereof. This suit was commenced by way of a plaint filed on 14 August 2017. The plaintiff/respondent averred that she is the legal and registered owner of the land parcel subdivision number 10271 (original No. 269/54) Section III Mainland North measuring 4.06 Hectares (hereinafter, 'the suit land'). The respondent pleaded that she purchased the suit land from one Abdalla Hassan in the year 2014, and when she purchased the suit land, there were squatters in it, who are the defendants. The respondent averred that it was a precondition of the purchase that the vendor would remove the squatters. It was pleaded that the vendor did remove the squatters and settled them on an adjacent land which also belonged to the vendor. The respondent pleaded that she fenced a substantial portion of the suit land, but she encountered threats of violence from the defendants, when fencing the portion bordering the land they were settled in.

3. The respondent further pleaded that on 26 April 2017, she learnt that a family member of the 1st defendant had died and that his family wanted to bury him on the suit land the following day. To stop this burial, the respondent filed the suit Mombasa ELC No. 151 of 2017 against the 1st defendant to stop the intended burial on the suit land. The respondent obtained *ex parte* orders, but the burial had already taken place. The suit was overtaken by events and was withdrawn. The respondent pleaded that since the date of the burial, the defendants have gathered belief and unlawfully invaded other portions of the suit land, and even constructed some structures.

4. It was pleaded that the defendants have become violent towards the respondent's employees, and that it had become completely impossible for the respondent to have meaningful use of the suit land or even inspect it. Through this suit, the respondent sought orders *inter alia* for a permanent mandatory injunction requiring the defendants to vacate the suit land; a permanent prohibitory order of injunction to restrain the defendants from entering into or remaining on the suit land; orders of eviction, and costs.

5. On 4 October 2017, the respondent was granted leave to serve the defendants by way of substituted service in the Daily Nation or Standard newspaper. Through the Daily Nation of 15 January 2018, service of summons was effected upon the defendants. The defendants did not enter appearance and did not file defence. The respondent proceeded to file a request for interlocutory judgment, which was allowed on 7 July 2019. However, when the matter came before me on 5 February 2020 for formal proof hearing, I was of opinion that this is not the kind of suit where interlocutory judgment can be entered. I therefore set aside the interlocutory judgment and directed the suit to be heard in the normal way, with the defendants being served with a hearing notice. On that day, Mr. K'Ongere, learned counsel for the respondent, mentioned from the bar that the defendants were violent and sought police protection to effect service. I ordered the OCS Kijipwa to provide security to the process server while serving the hearing notice and directed the matter to be heard on 9 March 2020. On 9 March 2020, having been satisfied that the defendants had been duly served, the matter proceeded for hearing when the respondent presented her witnesses and closed her case. I then directed counsel to file written submissions and gave 30 April 2020 for mention. That was just about the time that Covid-19 hit the country and the matter did not proceed on that day. The next mention was on 7 July 2020 and later 15 July 2020 when I gave 17 September 2020 for delivery of judgment. On that day, I duly delivered the judgment. A decree was extracted soon thereafter, and before it could be executed, this application was filed.

6. The applicants based the application on the grounds that the judgment was issued without jurisdiction under the principle of *sub judice* and under the doctrine of *forum non conveniens*; that this suit is *sub judice* the suit *Malindi ELC No. 23 of 2017 Omari Hassan Haji vs Safari Kazungu & 49 Others*; that the said suit is pending judgment; that this court has no jurisdiction because the suit land is in Kilifi and thus the case ought to have been filed in the ELC Malindi; that service was improper since majority of the defendants are illiterate; that prior to delivery of the judgment, the defendants were not aware of the proceedings hence were never given a fair hearing; that the intended interested parties who only occupy the Plots Nos. 276 and 277 have been served with the decree and warned of imminent eviction despite not being parties; that the intended eviction fails to comply with the provisions of Section 152F of the Land Act, 2012 and fails to recognize that the applicants are a special interest group comprising of young and vulnerable children, women and people living with disabilities. The applicants have also given some history of the land. According to them, their forefathers have been occupants of the land parcels Numbers 268, 269, 276, 299 and 300 Section III Mainland North (hereinafter 'the parcels') since time immemorial. That sometimes in 1947, one Hassan Bin Haji came to the land from Takaungu. That upon the death of Bin Haji in 1954, his heirs started disposing off the parcels of land including the area occupied by the defendants which led to a boundary dispute towards the beginning of 2014 and 2015. The applicants state that the boundary dispute culminated into several complaints before the area administration most notably to the area chief, National Land Commission, and regional directorate of criminal investigations.

7. The application is supported by the affidavit by Thomas Katana the 3rd defendant. He has more or less repeated what I have set out above. He has annexed a copy of a survey report; a copy of the plaint in Malindi ELC No. 23 of 2017; the judgment and decree herein; and Sections of the Land Act said to have been infringed.

8. The respondent has opposed the application through the replying affidavit of Warui Gitari Kinya, one of the directors of the plaintiff. On the claim that the defendants were not served, Mr. Kinya has referred to the Daily Nation advertisement of 4 October 2017. He has also referred to the affidavit of service indicating that the defendants were served with the hearing notice. He has averred that there is no substance in the allegation that the defendants were not served. On the issue of this matter being *sub judice* the case *Malindi ELC No. 23 of 2017*, he has deposed that the plaintiff is not party to the said suit. He has also deposed that the subject properties in Malindi ELC No. 23 of 2017 are plots No. 268, 269, 276, 299 and 300, Section III Mainland North, and not the suit land. He has explained that the suit land, which is subdivision No. 10271, is a subdivision of plot. No. 269 but is in no way one of the properties in ELC No. 23 of 2017. Mr. Kinya deposed that the two suits do not determine similar issues. On the claim by the applicants that the Malindi suit is still pending, he has refuted this and annexed the judgment which was delivered on 22 January 2021. On the question of the jurisdiction of this court, he has referred to the ELC Practice Directions and pointed out that the direction is for a suit to be filed in the nearest Environment and Land Court. He has deposed that the suit land is located in Shariani, about 30 kilometres from this court, and "a whooping" 80 kilometres from the ELC in Malindi. On the claim that the eviction violates Section 152 (F) of the Land Act, he deposed that the intended eviction is not by the plaintiff but by a court bailiff, and in any event, no eviction is yet to take place. On the allegation that the intended interested parties also seek to be removed, he has deposed that the persons who will conduct the eviction are capable of restricting themselves to the suit land. He has deposed that the respondent is not interested in the Plots Nos. 276 and 277 claimed by the intended interested parties. He was of opinion that the proposed defence raises no triable issues as it proposes a similar defence which was rejected by Olola J, in his judgment in *Malindi ELC No. 23 of 2017*.

9. The applicants filed a supplementary affidavit, again sworn by Thomas Katana. He deposed that the substituted service did not satisfy the

court and that is why the plaintiff was ordered to serve the defendants personally. He deposed that the service was not proper on all the defendants. He further deposed that the alleged service on him and other defendants was to their wives. He deposed that no summons to enter appearance were served on them and what was allegedly served was hearing notices. He added that the respondent conveniently did not serve the intended interested parties. On the case in Malindi, he has averred that the suit land is a subdivision of plot No. 269 which is one of the parcels of land in dispute in that case. He deposed that the judgment in Malindi ELC 23 of 2017 has been stayed and an injunction issued restraining any eviction of the defendants and the interested parties. He agrees that the suit land is in Shariani but has still contested jurisdiction of this court. Lastly he deposed on the intended interested parties being denied a fair hearing. He repeated that the intended interested parties were never part of the suit but were served with the decree.

10. I directed that the application be canvassed by way of written submissions and I have taken note of the submissions of counsel for the applicants and respondent.

11. Mr. Bwire, learned counsel for the applicants submitted on four issues. The first was whether there was a regular judgment; secondly, whether there is a defence on merit; thirdly, whether there was a reasonable explanation for the delay; and finally whether there would be any prejudice to the respondent. On the issue whether the judgment was regular, counsel referred me to the case of *Mwalia vs. Kenya Bureau of Standards EA LR (2001) 1 EA 148* which explained the distinction between a regular and an irregular ex parte judgment. He submitted that when the matter came up on 11 February 2020, the court set aside the default judgment and directed the defendants to be personally served. He continued to submit that the plaintiff's affidavit of service sworn by Arbonus Kioko deposed that the defendants were served with the hearing notice and not summons to enter appearance. He submitted that after the interlocutory judgment was set aside fresh service ought to have been done and not just service of the hearing notices. He referred to the affidavit of service of the hearing notice and pointed out to sections of it where service was effected upon the wives of some of the defendants. He submitted that under Order 8 Rule 5, the service was defective. On the question whether the applicants have a defence on merit, counsel referred me to two cases, the case of *Thayu Kamau Mukigi vs. Francis Kibaru Karanja (2013) eKLR* and the case of *Rayat Trading Co. Limited vs. Bank of Baroda & Tetezi House Ltd (2018) eKLR* to urge the point that where a party has a good defence, then the court should exercise its discretion to set aside the judgment. He referred me to the draft defence annexed to the application. He submitted that the applicants claim continuous and uninterrupted occupation and that they have confirmed to have filed a suit for adverse possession in Malindi. He submitted that the applicants have a good defence which raises three issues, being; whether the respondent has encroached on the defendants' land; whether the defendants are entitled to the suit land by virtue of continuous and uninterrupted occupation; and whether the court has jurisdiction. Counsel referred to *Sebei District Administration vs. Gasyali & others (1968) EA 300* on the question of consideration of the defence raised. On whether there was inordinate delay, counsel submitted that judgment was delivered on 17 September 2020 and on 11 December 2020, the defendants filed their application, and therefore, the delay is only of two months. Counsel submitted that due to Covid-19 in the year 2020, and the confusion relating to virtual hearing, and access to courts, the defendants could not quickly access the court file. Counsel submitted that despite this, two months is not inordinate delay. On whether there would be any prejudice, counsel referred me to the case of *Patel vs. EA Cargo Handling Services Ltd (1974) EA 75*. He then submitted that the defendants are on the verge of being evicted without being heard on merit, and if the judgment is not set aside, the defendants and their family will be evicted and suffer great injustice. He submitted that the respondent can be compensated by way of thrown away costs. Lastly, Mr. Bwire submitted on joinder of intended interested parties. Counsel referred me to Order 1 Rule 10(2) of the Civil Procedure Rules. He submitted that the intended interested parties were served with the decree and are lined up for eviction and therefore, they will be affected by the decision of the court in this suit. He finally asked that the judgment be set aside and the matter be transferred to Malindi ELC for determination.

12. For the respondent, Mr. K'Ongere, learned counsel, submitted on five issues. The first was whether the defendants were properly served. He submitted that they were served twice; first by substituted service on 4 October 2017, and later, personally on 5 February 2020. Counsel referred me to the case of *George Arab Muli Mwalabu vs. Senior Resident Magistrate Kangundo & 2 Others (2019) eKLR* where Madan J, gave a dictum, lamenting on the lies that parties present to court. He submitted that the defendants' averments that they were not served are absurd and unbelievable lies. He wondered how the defendants are capable of reading pleadings in English but are so incapable when it comes to newspapers. He submitted that a party who sets out to twist the facts is not deserving of the exercise of discretion in his favour. Counsel submitted that the affidavit of service gives a complete account on how personal service was effected. He submitted that the process server was accompanied by two of the plaintiff's employees and the deputy OCS Kijipwa and another police officer. Counsel submitted that each defendant was served, some defendants acknowledged service by signing, and others declined to sign. He referred to *Frigoken Limited vs. Value Pak Food Limited (2011) eKLR* on the presumption that the process server's report is correct. Counsel further submitted that the draft defence does not raise triable issues as they only allege rights over plot No. 269 which gave birth to the suit land. Counsel submitted that the alleged rights over the larger Plot No. 269 have already been adjudicated upon in Malindi ELC No. 23 of 2017, and it would be a judicial comedy to dismiss the defendants' claim over the mother title yet allow their claim over a subdivision from the mother title. He found in confounding that the defendants admit to occupying neighbouring land, and wondered what their issue is, if they are not in occupation of the suit property. On the question of this matter being *sub judice* Malindi ELC No. 23 of 2017, counsel submitted that there is lack of commonalities of parties in both suits. He submitted that the plaintiffs therein are not suing on behalf of the plaintiff herein or vice versa. He submitted that in Malindi ELC 23 of 2017, there are fifty defendants, and in this suit there are only 13 defendants. Counsel submitted that this suit is concerned with subdivision No. 10271 while Malindi ELC No. 23 of 2017 relates to plot no. 268, 269, 276, 299, and 300, therefore the commonality of issues is lacking in the two suits. Counsel further submitted that judgment in Malindi ELC No. 23 of 2017 was delivered and therefore there is nothing pending. On the issue whether the ELC in Mombasa has jurisdiction, counsel referred me to Practice Note 14 of the Practice directions on the proceedings before the Environment and Land Court and pointed out that it directs the filing of a suit in the nearest ELC. He submitted that the mere fact that we have counties does not restrict the jurisdiction of the ELC according to counties. He submitted that Mombasa is the nearest court and the case properly filed in this court. On Section 152F of the Land Act, counsel doubted that it applies to decrees of the court. He added that a violation can only be after the eviction process has been completed. On the proposed joinder of the intended interested parties, counsel submitted that the intended interested parties occupy plot No. 276 and 277, and if enjoined, will be introducing new issues. He referred to the case of *Francis Kariuki Muruatetu & Another vs. Republic and 5 others (2016) Eklr* on this issue.

13. I have taken note of all the above. I think five issues are subject for determination being :-

- a) Whether this court has jurisdiction to hear and determine this suit.
- b) Whether the defendants were duly and properly served and whether the judgment should be set aside *ex debito justitiae*.

- c) Whether the court should exercise its discretion to set aside the judgment;
- d) Whether the court should enjoin the intended interested parties.
- e) Whether the court should order a survey.

Whether this court has jurisdiction to hear and determine this suit

14. Jurisdiction is everything. Without jurisdiction, the court cannot make any step. It is the case of the applicants that since the suit land and the parties reside in Shariani within Kilifi County, the suit should have been filed in Malindi ELC instead of Mombasa ELC. It is thus the argument of the applicants that this court had no jurisdiction.

15. I will start with referring the parties herein to the provisions of Section 4 of the Environment and Land Court Act, Act No. 19 of 2011. It states as follows :-

4. Establishment of the Court

- (1) There is established the Environment and Land Court*
- (2) The Court shall be a superior court of record with the status of the High Court.*
- (3) The Court shall have and exercise jurisdiction throughout Kenya (emphasis mine).*

16. As far as I can discern from Section 4 (3) above, the ELC can exercise jurisdiction throughout Kenya. There is no limitation to only hearing cases within a particular county or region. However, so that not everybody files a case in one station, there is direction for parties to file their cases in the nearest ELC. This is found in Paragraph 14 of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Use and Occupation of, and Title to Land and Proceedings in Other Courts, Gazette Notice No. 5178 of 25 July 2014. It provides as follows :-

14. All new cases relating to the environment and the use and occupation of, and title to land not falling under paragraph 8 above shall be filed in the nearest Environment and Land Court for hearing and determination by the said court and must be within the purview of the jurisdiction conferred upon the Environment and Land Court with particular regard to the jurisdictional limitations set under Article 162(2) (b) of the Constitution and Section 13 of the Environment and Land Court Act No. 19, 2011 (emphasis mine).

17. It is agreed by all parties herein that the suit land is located in Shariani. The applicants do not dispute the claim by the respondent that Shariani is located approximately 30Km from Mombasa Law courts and approximately 80Km from Malindi Law Courts. It is apparent to me, following this position, that there was nothing wrong with the respondent filing this case before this Court.

18. In as much as the applicants have been loud in their claim that this court lacks jurisdiction, they have not presented to me any law or any authority to support their claim that this court has no jurisdiction. There is certainly no law that says that the ELC located in one county cannot hear a dispute emanating from another county. Even where a court is of the view that it would be best that a case filed in one ELC be heard in another ELC station, that would not be an issue of lack of jurisdiction, but an issue of administrative convenience, or convenience to the parties.

19. As I have pointed out, following Section 4 (3) of the Environment and Land Court Act, and the Practice Directions above, this Court has jurisdiction to determine this matter.

20. There is thus no substance in the argument of the applicants that this court has no jurisdiction. Being properly seized of the matter, I proceed to determine the other issues arising out of the application.

Whether the defendants were duly served

21. The record shows that 4 October 2017, Komingoi J, made an order that the defendants be served with summons through an advertisement in the Daily Nation or Standard Newspaper. I mentioned at the beginning of this ruling that the advertisement was duly placed in the Daily Nation newspaper of 15 January 2018. It follows that the defendants were properly served with summons to enter appearance. I see nothing wrong with this mode of service. A court has discretion to order service through advertisement, and once a party complies with the directions of the court, the defendants must be deemed to have been served. To hold the contrary would be nothing but absurd. There is a presumption that once an advertisement is placed, then the person is duly served, and the law does not question the recipient's level of literacy. In any event, I have gone through the affidavit of Mr. Katana. He says that "majority of us are illiterate." He certainly does not state that all of the parties are illiterate. It follows that they could read the advertisement, and if they did not enter appearance, they can only have themselves to blame.

22. A lot has been said in Mr. Bwire's submissions that service needed to be made afresh because I set aside the interlocutory judgment. That is not the position. To set the record straight, the interlocutory judgment was not set aside because this court was not convinced that service was not proper. The interlocutory judgment was set aside for reason that this court was of opinion that this is not the kind of suit where interlocutory judgment can be entered. It was neither a liquidated demand nor a claim for pecuniary damages so that interlocutory judgment could be entered in terms of Order 10 Rule 4 and 6. Interlocutory judgment could not be entered for the suit to proceed by way of formal proof. In such case, what the plaintiff needs to do is simply set down the suit for hearing as provided for in Order 10 Rule 9 drawn as

follows :-

9. Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.

23. It is because of the above, that I set aside the interlocutory judgment and directed the matter to be set down for hearing. Since it was an ordinary hearing, the defendants had to be notified of the hearing date. That is why I directed that the defendants be served with hearing notice. Never did I hold that the service of summons by advertisement was improper and never did I direct that fresh service of summons be effected.

24. I have seen from the record that the defendants were served with the hearing notice for the hearing of 9 March 2020. The affidavit of service is that sworn on 28 February 2020 by Urbanus Kioko Musyoki. In that affidavit, he deposes that on 26 February 2020, he received the hearing notice to serve upon the defendants. He proceeded to the homesteads of the defendants in Shariani, in the company of two employees of the respondent, identified as Mr. Abushiri and Mr. Mohamed, and the Deputy OCS, Kijipwa Police Station, Inspector Mapeya and another police officer. He continues to depose how each defendant was served. Some were served personally, and for those who were not present, service was effected upon members of the family residing with the particular defendant who was not in. There is nothing wrong with this kind of service. It is indeed an acceptable form of service under Order 5 Rule 12, which inter alia provides for service upon an adult member of the family who resides with the defendant. There is no explanation coming from Mr. Katana as to why even those personally served, did not deem it fit to attend court to defend the suit. Assuming that they had not seen the advertisement where summons were served, here was the perfect opportunity to now attend court, and either defend the case at the hearing, or seek time to file defence. The defendants however took the option of keeping away from the hearing of the case. They cannot, after service of the hearing notice, feign to have been ignorant of the fact that there was a case against them. They cannot therefore be heard to say that the first time they heard about the case was after judgment had been delivered.

25. My finding is that the defendants were duly and properly served with summons and were also duly and properly served with the hearing notice. The judgment entered into was therefore regular. It is not the sort of judgment that can be set aside *ex debito justitiae*. It can only be set aside following the discretion of this court.

Whether the court should exercise its discretion to set aside the judgment

26. A court has wide discretion to set aside an *ex parte* judgment. The principles for the setting aside of an *ex parte* judgment were considered in *Patel v East Africa Cargo Handling Services Ltd [1974] E.A. 75* where William Duffus, P. stated; -

“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 it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication”

27. I am in agreement with the above dictum. I could thus use my discretion to set aside the judgement if I am convinced that the defendants have a defence that raises triable issues. The applicants have attached a draft defence in their application. I have gone through it. In his submissions, Mr. Bwire, for the applicants did submit that the applicants have a good defence in that they wish to raise the issue of long continuous occupation of the suit land, whether the plaintiff has encroached on the defendants' land, and jurisdiction. I have already discussed the issue of jurisdiction and I am not persuaded that it raises any triable defence. The other ground is that the plaintiff has encroached on land of the defendants. The defendants have not demonstrated that they have title to any land so that we can say that they can claim that the respondent has encroached into their land. No triable defence is raised here. The final defence is based on long occupation. The draft defence states that the applicants have been on the land for a long time and that their forefathers also used to occupy the land. The mere fact that one's forefather occupied land, by itself, does not mean that a descendant has a right to that land. There is no proposed counterclaim or a claim to the suit land by adverse possession in the draft defence. The other issue raised in the draft defence is that this suit is *sub judice* the suit Malindi ELC No. 23 of 2017 which was said to be pending judgment. We already know that this is no longer the case for judgment was delivered in the Malindi case on 22 January 2020. The defendants in that case were sued for trespass over the land parcels Nos. 268, 269, 276, 299 and 300 Section III, Mainland North. Judgment was entered for the plaintiff. It means that there is nothing for the applicants which is in their favour in that judgment. The argument that the suit land is a subdivision of Plot No. 269 which was also in issue in the Malindi case, does not help the applicants. However, my view is that the suit land herein was not the subject matter of the Malindi case. There was no case over Subdivision No. 10271 (Original NO. 269/54) Section III Mainland North. This case cannot therefore be argued to be *sub judice* the case Malindi ELC No. 23 of 2017. There is really no other defence that is raised.

28. My view, after assessing the draft defence is that it does not raise any triable issue that would enable me exercise my discretion to set aside the judgment herein.

29. There is the other issue that the execution of the decree is not in tandem with Section 152F of the Land Act. I am not persuaded. Section 152 of the Land Act deals with a situation where a party seeks to have removed persons who are in occupation of his/her land. It is not eviction in pursuance to the decree of court. Even if it were, that would not be an issue relating to setting aside the judgment but only restricted to the execution process. But I am not persuaded that the applicants have convinced me to stop the execution by them citing Section 152 of the Land Act.

Whether the intended interested parties should be enjoined

30. The next issue is whether the judgment should be set aside so that the intended interested parties are enjoined to this proceeding. I am not persuaded that the intended interested parties are necessary parties. They claim to occupy the neighbouring Plots Nos. 276 and/or 277. Those plots are not in issue in this case. If the intended interested parties occupy them, it doesn't matter, for the respondent can only execute over

the suit land and not other parcels of land.

Whether a survey should be conducted

31. I am not very sure why the applicants want a survey of the suit land. If it is the fear that the respondent will execute beyond its borders, that is unfounded. Execution will be restricted to the suit land and not to any other area.

32. Whichever way I look at it, there is no substance in this application. The defendants were properly served and opted not to come to court. If a party is properly served and opts not to come to court, he can have nobody but himself to blame when judgment is entered against him. Nobody should shun a court proceeding thinking that they will automatically get an order for setting aside the judgment. Once a party is served, that party has been given an opportunity to be heard, and if he spurns it, he cannot start claiming that the constitutional right to a fair hearing has been violated. I am not persuaded that there is anything that will be gained in setting aside the judgment for no claim is being lodged by the applicants over the suit land.

33. The conclusion is that I find no merit in this application and it is hereby dismissed with costs. The result is that the respondent is free to proceed with execution of the decree.

34. Orders accordingly.

DATED AND DELIVERED THIS 7TH DAY OF OCTOBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA