REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HIGH COURT CIVIL SUIT NO. 63 OF 2017

KENNEDY WAINAINA NGENGA.....PLAINTIFF/RESPONDENT

-VERSUS-

COUNTY GOVERNMENT OF NAIROBI.....DEFENDANT/APPLICANT

CO-OPERATIVE BANK OF KENYA.....GARNISHEE

RULING

The Defendant (herein **"the Applicant")** by a Certificate of Urgency Application dated 9th May 2018, filed together with Notice of Motion and a Supporting Affidavit urged the Court to be heard on priority basis on grounds**;**

a) That the Defendant had unearthed a disturbing streak of collusion to defraud it of public funds close to Ksh 100 million by means of these proceedings as there was no lawful process served on the Defendant. The person who was allegedly served with process as person purporting to act for the Defendant herein had no instruction from the Defendant to so act, the Court is enjoined to intervene urgently to stem this tide.

b) That the Defendant had demonstrated by the annexed deposition of its County Secretary of the fraud so perpetrated and collusion between the Plaintiff and the person purporting to represent the Defendant, W. S. Ogola, and hence, the purported "consent" to have the Garnishee Order dated 19th July 2017 and filed in Court on 20th July 2017.

c) Clearly, there was need to stop execution through unlawful means as sought to be levied against the Defendant, as to do so this Court will have aided and abetted the unlawful haemorrage of public funds.

d) That the Decree Nisi issued on 2nd May 2018 would be made absolute absent this Court's intervention as herein sought.

e) That all efforts to track and trace the said W. S. Wesonga Advocate to ensure he explains the circumstances of filing a purported Memorandum of Appearance herein have failed, necessitating the Defendant to appoint its advocates now on record and to seek the relief envisaged under **Order 10 Rule 9(10) of the Civil Procedure Rules.**

In the Supporting Affidavit sworn by Peter Kariuki the County Secretary of the Defendant/Applicant named herein, Nairobi City County Government, he averred that as a legal Practitioner, he was aware that pursuant to **Article 6 (2) of the Constitution of Kenya**, the Government is structured into the National and County Governments. In the circumstances, the Nairobi City County Government insulated against execution processes envisaged pursuant to **Order 23 Civil Procedure Act 2010.**

He stated that when he assumed the office of the Nairobi City County Government County Secretary, one of his obligations was to liaise with the office of His Excellency the Governor to ensure that service delivery is backed by revenue generation and prudent fiscal management as envisaged under **Article 175 (b) as read with Article 201 (d) and (e) of the Constitution.**

He asserted that he was aware that His Excellency the Nairobi City County Governor Hon. Mike Sonko formed a Committee headed by Prof. Patrick L. O. Lumumba to investigate the veracity of over Ksh 65 Billion pending bills claims which included this particular claim. This was intended to sieve out falsified and ghost claims that lead to financial attrition of County revenue.

He stated that against this background, should execution of the cited order of 2nd May 2018 proceed as now envisaged, it is manifest that

such a Garnishee order will be *prima facie* unlawful and a violation of the provisions of **Article 175(b) as read with Article 201(d) of COK 2010**.

That the Plaint herein filed in this court on 9th February 2017 the Plaintiff claimed the sum of Ksh 90,000,000/-from the Defendant allegedly on account of a property in **Eastleigh L.R. 36/VII/260** (Original Number 36/VII/36/8) whose title in favour of the Plaintiff had been cancelled vide a judgment in **ELC 110 of 2011**.

That the Defendant's Counsel on record had informed him that the Plaintiff herein obtained interlocutory judgment against the Defendant on 10th April 2017, and it was surprising that no notice of such entry of judgment was ever served on the County Government.

That Peter Kariuki had not seen a copy of the Decree to have ever been served upon the Defendant from the records that he held at the County offices and in the circumstances, he believed that ***ex debito justitiae*** the interlocutory judgment herein entered ought to be set aside.

Further that he had not seen any instructions from the Nairobi City County to W. S. Ogola Advocate on 22nd February 2017 or indeed on 23rd February 2017 when he purported to lodge his Memorandum of Appearance.

That he was consternated that on 23rd March 2017 a request for Interlocutory Judgment was made by the Plaintiff and no formal proof was ever made yet the claim was for unsubstantiated allegations of a loss that had no basis in law.

Perter Kariuki was dismayed and shocked to learn that the said W. S. Ogola Advocate never filed a Defence for the Defendant; instead allegedly and purportedly entered into a "consent" order with the Plaintiff on 20th July 2017 allegedly to remit Ksh 20,000,000/- to the Plaintiff as 'part payment' of the dubious claim without any written instruction from the Defendant.

That the basis of the Garnishee order herein being so fatally defective the Defendant is entitled to set aside the said interlocutory Judgment, as the purported "Consent" and default of defence was on account of a purported Counsel who had no instructions to so act for the Defendant.

REPLYING AFFIDAVIT

The Application is opposed vide an affidavit dated 15th May 2018 sworn by Kennedy Wainaina Ngenga, the Plaintiff/Decree holder herein. He stated that the County Government is a legal entity with perpetual succession and transactions done by the County Government of Nairobi binds successive regimes.

That the orders issued on 2nd May 2018 attaching the Judgment Debtor's accounts was based on a consent of the County Government dated 18th July 2018 which at **Clause (d)** thereof provides as follows;

> ***"in default on any one instalment, the Garnishee Order Nisi given herein on 12th July 2017 to stand restored for the total sum then due and owing on the Decretal sum together with interest thereon until payment in full and the Decree Holder to be at liberty to apply and/or seek directions as to hearing of the same".***

He averred that on 18th July 2017, the Defendant called a meeting chaired by the County Chief of staff and attended by the County Attorney, County Executive Committee Member for Finance, Chief Officer Finance and the Plaintiff's advocates in which parties agreed to enter a consent for the payment of the decretal sum on instalments; copy of the minutes of the meeting are annexed and marked as **KWN 2.**

That the consent in this case was arrived at after the following salient series of events;

a) The Plaintiff acquired the property known as L.R. No. 36/VII/260 (Original Number 36/VII/36/8) from the Nairobi City Council by way of an indenture of conveyance dated 17th August 2007 from the Nairobi City Council and duly made payments;

b) Thereafter, Mr. David Mutisya Mukumbi sued him claiming ownership of the same property;

c) In a judgment delivered on 4th April 2014, by Hon. Justice Onesmus Mutungi who made a finding at page 22 thereof that Assumpcao De Souza did not have any proprietary interest which he could have conveyed to the City Council of Nairobi so it followed that no interest on the suit property could pass to the City Council of Nairobi and equally, the City Council did not have any interest which they could have passed to the Plaintiff by the conveyance dated 17th August 2007. A copy of the Judgment is marked **KWN 3**.

d) Through his advocates the Plaintiff wrote a demand to Nairobi City County seeking compensation in light of the finding that the Council sold to the Plaintiff land that it did not own. A copy of the letter is marked as **KWN 4.**

e) The Defendant then wrote back asking for negotiations towards settling the matter.

f) It is on this backdrop that the Nairobi City County called for meetings to negotiate suitable compensation. Minutes of the meeting held on 14th April 2016 marked as **KWN5.**

g) The County Attorney then instructed the Assistant Director of Legal affairs to prepare an opinion on the validity of the claim for compensation. A copy of the Memo dated 8th March 2016 is marked as **KWN 6.**

h) The County Government then appointed the firm of Were Oonge and Co. Advocates to prepare an advisory opinion on the validity of the claim. The firm advised the County Government to compensate the Plaintiff in light of the court findings. A copy of the opinion dated 9th November 2016 is marked as **KWN 7**.

i) In a meeting held on 14th April 2016 at the County Government's offices and attended by: Deputy Director- Legal Affairs, Assistant Director - Legal Affairs, Chief Administrative Officer – Legal Affairs, parties agreed on the payment of Ksh 90,000,000.00 to the Plaintiff based on a valuation report from the Chief County Valuer. A copy of the minutes marked as **KWN 8** and the valuation report from the Chief Valuer marked as **KWN 9.**

That the allegation that Mr. W. S. Ogolla was not instructed by the Defendant is spurious and amounts to an attempt to mislead the court. I confirm that summons were served upon the County Legal Office and Mr. W. S. Ogola who was an employee of the County Government entered appearance for the Defendant. A Copy of a print out from the LSK Advocates search engine indicating Mr. W. S. Ogola's work place is marked as **KWN 10**.

That the amount sought in the suit was a liquidated claim and judgment was entered pursuant to the provisions of **Order 10 Rule 4 of the Civil Procedure Rules.** The late Justice J.L.O Onguto entered Judgment in favour of the Plaintiff/Decree Holder on 10th April 2017. A copy of the Decree is marked as **KWN 11.**

That the act of calling for negotiation and execution of the Consent on settlement of the judgment and Decree constitutes an effective waiver by the Defendant of its right to apply for setting aside of the very judgment. There is a functional estoppel that by entering into a Consent, the Defendant conceded to the legality of the judgment.

He stated that on 20th July 2017, the parties entered into a consent for the payment of Ksh 20,000,000.00 on 18th July 2017, Ksh 20,000,000.00 on or before 31st July 2017 and thereafter, the balance of Ksh 63,594,143.80 to be paid in three equal monthly instalments of Ksh 21,198,047.00 beginning 31st August 2017 and thereafter on or before the end of each succeeding month until payment in full. This consent was entered into pursuant to the resolutions passed in a meeting attended by authorized County Government officers on 18th July 2017 and should not be set aside due to the Judgment Debtor's mischievous scheme aimed at disowning its liabilities.

That in any event the Defendant has partly paid, partially honoured the judgment and cannot now turn around and seek to reopen the case.

DEFENDANT/APPLICANT'S SUBMISSIONS

The Defendant submitted that the entire suit stood and stands barred, vitiated, and rendered a nullity by operation of the Doctrine of *Res Judicata* in that the issue of the proprietorship of the suit property for which the Plaintiff claims "compensation" was directly dismissed in ***ELC 110 of 2011 – David Mutisya Mukumbi vs Kennedy Wainaina Ngenga***, ***City Council of Nairobi & 2 Others***, and which was conclusively decided by the Hon. Mr. Justice Mutungi on 4th April 2014. A copy of this judgment was produced by the Plaintiff in his Replying Affidavit sworn on 15th May 2018 and filed on 18th May 2018 at page 6 to 30 of his exhibits.

The Defendant/Applicant relied on the case of ***Muturi Mwaniki & Wamiti Advocates vs Edward Mukundi Karanja & 2 Others (2017)eKLR***, where on the issue of illegality barring a consent order this Court held;

> ***"I am inclined to agree the Consent cannot validate breach of statutory obligation".***

It was the Applicants submission that no Appeal was preferred or lodged by the Plaintiff herein against the said decision. No appeal subsists or is pending against the said Judgement to date, and this is not refuted by the Plaintiff. The said judgment by Mr. Justice Mutungi is final, and binding on the parties.

Further that, through the Supporting affidavit of Peter Kariuki sworn on 9th May 2018, it clearly indicates that upon scrutiny of documents with the Defendant County Government, it was established that some transactions were being engaged in contrary to public policy and to the detriment and loss of public funds.

It further submitted that the employees of the County Government that had acted in collusion with such parties and had perpetrated illegalities were not only sacked but also prosecuted. The Defendant relied on exhibit **"SLM 5"** annexed to the Supplementary Affidavit of Simon Leboo Morintat sworn on 9th November 2019 in that respect.

In setting aside a consent order, the defendant relied on the case of ***Munikah & Company Advocates vs Wedubeh Estates Limited (2007) eKLR***, where the court of Appeal held;

> ***"having considered the background to this matter and especially the long Affidavit of Mr. Munika, together with its annexures we are unable to say that the consent was freely entered into. Indeed, we find that the consent was tainted with illegality, undue influence and the whole transaction as against public policy as the Respondent and its legal advisers wanted to use the court process to achieve what was illegal. We are of the view that had the learned judge considered all these other aspects of the consent judgment he would have reached a different decision.***

For the foregoing reasons, we allow this appeal, set aside the order of the learned Judge and in its place substitute an order setting aside the consent judgment of the superior Court together with all consequential orders" [emphasis added].

Further that the doctrine of *Res Judicata* exists in statute anchoring the fundamental principle that litigation must come to an end. To permit the *ex parte* Judgment and the *ex parte* Decree herein to remain inforce after attention has been brought to the court of the previous suit ***ELC 110 OF 2011 – David Mutisya Mukumbi vs Kennedy Wainaina Ngenga***, ***City Council of Nairobi & 2 Others***, would be in express violation of **Article 159 (1) of the Constitution of Kenya.**

That the Plaintiff expressly admits in paragraph 8(ii) of his Replying Affidavit sworn on May 15th 2018 that Mr. David Mutisya Mukumbi sued him claiming ownership of the same property in the above cited suit. Therefore, the Plaintiff admits being bound by the doctrine of *Res Judicata* and he does not explain why he did not file a cross claim against the Nairobi City County Government (at that time being Nairobi City Council), for loss of alleged interest as a purchaser for value, as envisaged under and in this suit.

Defendant submitted that the Plaintiff admits in paragraph 8 (iii) of his said Replying Affidavit of May 15th 2018 that the Hon. Mr. Justice Mutungi found for a fact in the judgment delivered on 4th April 2014, that the alleged conveyance of the property by one Assumpcao De Souza was null and void.

That the Advisory Opinion of Were Oonge Advocate which the Plaintiff cited and sought to rely upon in paragraph 8(viii) of his Replying Affidavit sworn on 15th May 2018, could not in any manner override, vitiate, or otherwise cancel the force of the law as espoused in **Section 7 of the Civil Procedure Act**. ***HCC 110 of 2011 – David Mutisya Mukumbi vs Kennedy Wainaina Ngenga, City Council of Nairobi & 2 others,*** could not and cannot be wished away.

In the Court of Appeal case of ***Hosea Sitienei vs University of Eldoret & 2 Others (2018)eKLR,*** it was thus held on the doctrine of Res Judicate:-

"in our view, ….the doctrine of Res Judicata seeks to ensure conclusiveness in legal proceedings, in that it bars further legal proceedings based on the same issue(s) based on the same subject matter between the same parties or their proxies. In bringing an end to litigation, the doctrine ensures that a party need not be vexed twice or forced to fight the same battle twice over the same cause."

That this is the expressed public policy captured in **Section 7 of the Civil Procedure Act**. It would therefore be against such public policy to entertain and allow a suit such as herein lodged, to violate the set and established principle of law in **Article 10 (2)(a) of the Constitution of Kenya** of Rule of Law as a Principle of governance and judicial policy.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submitted that with regard to **Article 207 of the Constitution and section 109 of the Public Finance Management Act**, submitted that both provisions are superseded by provisions of **Article 48 of the Constitution** –access to justice.

The Plaintiff cited High Court case ***Republic vs Principal Secretary, Ministry of Health ex-parte Equip Agencies Limited & Another [2017]eKLR,*** by Hon. Aburili L.J where she explained **Article 48 Constitution of Kenya** as follows;

"…People who come to court seeking for justice and in whose favour decrees and judgments are made must be allowed to enforce those judgments for that is the only way justice can be seen to be done. Illusory justice is no justice at all and therefore the provisions of Article 48 of the Constitution on access to justice for all, the principles and values espoused in Articles 10 and 159 of the Constitution on the respect for the rule of law, equity, social justice, human rights, equality, expeditions justice shall be but a mirage if a party who obtains a judgment from a court of competent jurisdiction in proceedings which are conducted openly and transparently can be kept waiting for decades to enforce the decree."

The Plaintiff/Respondent submitted that out of the judgment in **ELC 110 of 2011,** under **Section 81 and 82 of Land Registration Act** the Plaintiff established the claim of indemnity of the Registrar on cancellation of the title. The Plaintiff being the holder of the title of the suit property, he was a proprietor and had a right to claim indemnity that only arose after cancellation of the title.

The commercial & Tax Division lacks jurisdiction to adjudicate validity of the title.

The inception, negotiation and conclusion of the Agreement for indemnity with the Defendant was conducted within the confines of the law.

The Plaintiff deposed that no Official of the Defendant was prosecuted and/or convicted with regard to this transaction.

The Plaintiff cited **Article 20(3) of the Constitution of Kenya** which provides;

"(3) In applying a provision of the Bill of Rights, a court shall-

a) Develop the law to the extent that it does give effect to a right or fundamental freedom; and

b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

The Plaintiff submitted that it shall be in violation of the Court's duty if the Court shall interpret **Order 29(2) of the Civil Procedure Rules**, **Article 207 of the Constitution** and Se**ction 109 of the Public Finance Management Act**, to defeat execution of Decree of the High Court herein, it shall violate **Article 48 of the Constitution of Kenya**.

It is the Plaintiff's submission that the meeting dated 18th July 2017 held at the Defendant's office and attended by;

a) The Chief of staff of the Defendant;

b) The County Attorney;

c) Chief Executive of the County;

d) Chief Officer;

e) Head of County Treasury;

f) Senior Legal Counsel of the County;

g) Legal Counsel of the County;

Also in attendance were the Plaintiff's representatives:

h) Plaintiff's advocates

i) The Plaintiff.

In that meeting, Interlocutory Judgment of Court was acknowledged, and it was agreed as per the Minutes of the meeting, letter to Deputy Registrar of 18th July 2017 and consent filed and adopted as an order of the Court on the meeting held; then parties discussed on how to settle it, as follows;

> ***"The meeting deliberated on issues surrounding the settlement of the decretal amount and agreed as follows after considering the respective proposals by the two sides:***
>
> ***1. That a total sum of Ksh Shillings Twenty Million (Ksh 20,000,000.00) only be paid to the decree holder's Advocates on 18th July 2017 in partial satisfaction of the decretal sum.***
>
> ***2. A further payment of Kenya Shillings Twenty Million (Ksh 20,000,000.00) only be paid to the said advocates on or before 31st July 2017 in further partial satisfaction of the decretal sum.***
>
> ***3. Thereafter, the balance of the Decretal sum of Kenya Shillings Sixty Three Million Five Hundred and Ninety Four Thousand One Hundred and Forty Three and Cents Eighty (Ksh 63,594,143.80) only to be liquidated by the judgment Debtor by way of three(3) equal monthly instalments of Kenya Shillings Twenty One Million One Hundred and Ninety Eight Thousand and Forty Seven (Ksh 21, 198,047.00) only to the Decree Holder's Advocates herein beginning 31st August 2017 and thereafter on or before the end of each succeeding month until payment in full the last such instalment being for the amount then due and owing in October 2017.***
>
> ***4. Thereafter the parties to sign a consent upon receipt of the first instalment to pave way for the lifting of the Garnishee orders…"***

The Plaintiff further submitted that the law on setting aside Consents had been long settled in Kenya by the Court of Appeal in ***Flora N. Wasike vs Destino Wamboko (1988) eKLR,*** thus;

> ***"…if a consent order is to be set aside, it can only be set aside on grounds which would justify setting of a contract entered into with knowledge of the material matters by legally competent persons…"***

The Plaintiff submitted that there was nothing placed before court that could vitiate the consent, further that it was naïve and ignorant of the facts to argue that the consent in Court was filed by a stranger not employed by the Defendant. Firstly, the Plaintiff had led evidence that Mr. W. S. Ogola was an Advocate of the Defendant. Secondly and more importantly, the Consent that Mr. W. S. Ogola executed for and on behalf of the Defendant was the very consent that the Defendant had entered into with the Plaintiff on 18th July 2017 meeting.

On setting aside the Plaintiff relied on the case of; ***Mohamed & Another vs Shoka [1990] KLR 463;***

> ***"The test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merit; secondly whether there would be any prejudice and thirdly what is the explanation for any delay."***

The Plaintiff submitted that the enterprise of calling for negotiations and execution of the consent on settlement of the judgment and Decree, constitute an effective waiver by the Defendant of its right to apply for setting aside of the very judgment. There is a functional estoppel. That by entering into a consent, the Defendant conceded to the legality of the Judgment.

The Plaintiff submitted that setting aside the judgment shall be egregiously prejudicial to the Plaintiff. How shall the already settled money be treated?

The Plaintiff cited the Court of Appeal case ***Shah vs Mbogo [1967] EA 166 at page 123 B,*** where the court expressed itself as follows;

> ***"…this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."***

Also in ***Kenya Pipeline Company Limited vs Mafuta Products Limited [2014] eKLR,*** the court held as follows in the issue of setting aside;

> ***"Ordinarily the court will not set aside or vary interlocutory judgment because it would essentially be setting back the Plaintiff's progress in prosecuting its case causing it to suffer prejudice. The court must therefore be satisfied that a defendant has offered a very plausible explanation as to why he failed to file his Memorandum of Appearance and Defence within the prescribed period under the Civil Procedure Rules, 2010 before it can set aside and/or vary any interlocutory judgment."***

DETERMINATION

The Court considered the pleadings oral and written submissions of Counsel for parties and the issues that emerge for determination are;

a) Was the defendant duly served with the Plaint and Summons of the suit?

b) Does the Defendant's Draft Defence raise triable issues?

ANALYSIS

The Defendant /Applicant stated that the Defendant was not served with process. Although in Court there is a Memorandum of Appearance by W.S.Ogolla for the defendant whose physical address is City Hall Annexe 6th Floor Room 5 P.0.Box 30075-00100 Nairobi, it is alleged that he was not authorized to accept service on behalf of the Defendant and it is no surprise that no Defense was not filed on behalf or by the Defendant.

The Defendant claims that this is a disturbing collusion to defraud the Defendant of public funds by means of these proceedings by service being accepted by one who had no instructions to do so.

For the Memorandum of appearance to be filed within the requisite period it means the Plaintiff discharged its lawful duty to serve the Defendant and did serve the Defendant hence the filing of memorandum of appearance for and on behalf of the Defendant by the Defendant's agent.

The Defendant claimed that efforts to trace the said Mr W. S. Wesonga have failed and there were no instructions for him to accept service on behalf of the Defendant. Yet it is interesting to note, if Mr W.S Wesonga was not an employee/official of the Defendant and was not known or authorized to accept service by the Defendant, how come various other Affidavits of Service in this Court file confirm service accepted by W. S .Wesonga at City Hall Annexe yet the same were not contested at all by the Defendant? There is an Affidavit of Service filed by one Arthur Imbuga on 22nd May 2017 serving Notice of Taxation to the Defendant. There is an Affidavit of Service filed by one Allan Nguri Njenga on 25th August 2017, who served the order of decree nisi to the Defendant through M/s W.S. Wesonga on behalf of the Defendant.

The Court record also confirms Court proceedings of 25th May 2017, 8th June 2017, 12th July 2017,24th July 2017 and 28th August 2017, where Mr W.S. Wesonga appeared in Court on behalf of the Defendant in all those sessions. At no time did the Defendant raise any objection/ lack of instructions until now.

Thirdly, the Respondent confirmed service of process to the Defendant through Mr.W.S.Ogolla who was an employee of the Defendant. The said Advocate's details from Law Society of Kenya(LSK)were annexed at Pg 50-51 of the Replying affidavit by the Plaintiff. There is his photograph, details of his place of Work as **Nairobi City Council** and Physical Address **City Hall Annexe Mama Ngina 5th Floor Rm 1**.

This Court's attention is drawn to the affidavit sworn by the County Secretary Mr. Peter Kariuki who having recently assumed office then, he embarked of establishing the exact circumstances of service of process, status of filing defence and he had not been shown any notice of entry of judgment nor a decree. He was further perplexed that the said Advocate Mr W.S Wesonga had entered appearance and failed to file Defence and also entered a Consent which facilitated part payment of the decretal amount.

In the Supplementary Affidavit by Acting County Secretary, Mr Leboo Ole Morintat, he deposed that all the advocates employed as internal advocates by the Defendant involved in the purported consent were dismissed from employment of the Defendant and some are facing criminal prosecution. The Defendant did not specifically disclose the propriety of Mr. W.S Wesonga Advocate who was served, whether he

was employed by the Defendant or not, whether he was one of the internal advocates summarily dismissed and/or handed over to **Law Enforcement Agencies** for investigations and prosecution. The Annexed cases marked **LM3** & **LM4** ***Joshua Owuor vs DPP CM Court Petition 351 of 2019 & Manasseh Karanja Kepha & 8 Others ACEC No 14 of 2019*** do not include, mention or refer to Mr W.S Wesonga Advocate who received Court process on behalf of the Defendant in this matter.

Let me mention at this juncture that the Deponent's assertion in the Supplementary Affidavit that the Court's Ruling of 7th June 2019 referred to a valid decree that was unchallenged and could be executed in any other legal proper manner is adverse to the Defendant, I beg to differ. The applications at hand at the time were Preliminary Objections, matters of law only that did not include merits of the decree or the suit filed by the Plaintiff. Although the present application was filed, it was not prosecuted and therefore at the time when this court dealt with the Preliminary Objections only, there remains on record a valid decree until set aside, reviewed or successfully appealed against.

From the totality of the above factors. I find that the Defendant was duly served with Court process through the Defendants employee/officer and hence he filed memorandum of appearance, failed to file Defence and Default/Interlocutory judgment was entered on 10th April 2017 upon request for judgment by Plaintiff's advocate on 21st March 2017.

In ***James Kanyiita Nderitu & Anor vs Marios Philotas Ghikas & Anor [2016] eKLR*** it was held ;

> ***"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 appearance 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 factors 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 raised triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.*** *See* ***Mbogo & Another vs Sha (supra), Patel vs E. A Cargo Hnalding Services Ltd (1975) E.A 75."***

The Court is satisfied that service of process was according to **Order 5 CPR** it is a regular judgment entered in default of filing Defence.

Does The Defendant's Draft Defence raise triable issues?

The Defendant's draft defence under Protest annexed to the application raises the following issues;

> **a) The Defendant denied being served with process or ever having instructed or appointed Mr W.S.Ogolla to act for it.**

I have considered the issue above; this Court takes judicial notice that following **General Elections of 2017**, the leadership and management of Nairobi County changed and the New team took over from the other team that left office. The Default judgment was entered on 10th April 2017, clearly the present team was not in office and could not therefore have instructed Mr W.S Ogolla or otherwise. The Defendant is bound by the activities of its predecessors in office.

> **b) The defendant denies in *toto* ever having transacted with the Plaintiff in respect of Eastleigh LR 36/VII/260 as alleged at paragraph 3 of the Plaint and puts the Plaintiff to strict proof thereof.**

The Plaintiff alluded to proceedings and judgment of **ELC No 110 of 2011** and submitted that in the cited case one David Mutisya Mukumbi sued him, the City Council of Nairobi, Commissioner of Lands and Attorney General. The Defendant's witnesses **PW2 & PW 3** Surveyor and Valuer respectively testified that the disputed land belonged to the Defendant herein and was lawfully transferred to the Plaintiff. To the extent that the Defendant transacted with the Plaintiff over the suit property as was established in the said Judgment which is not yet successfully appealed against or set aside then it confirms as true that the Plaintiff and Defendant who were parties in the said matter, transacted with respect to the suit property.

> **c) With regard to the defendant's further Defence is that it did not receive any consideration directly or through an agent any alleged consideration for the suit property Eastleigh LR 36/VII/260**

That is an issue that was not canvassed or proved at the hearing of HCC 110 of 2011**.** It is a triable issue.

> **d) The Defendant claims no knowledge of ELC110 of 2011.** That is true as, the team in office now in Nairobi City County Government was not in office in 2011. The Nairobi City County Government is successor of the City Council of Nairobi which allotted the land to the Plaintiff. The team that held meetings and dealt with the Plaintiff's claim left office end of 2017. The County Government is bound by omissions/commissions of their predecessors.

The proceedings and judgment are a record of the dispute and its determination that involved the Defendant. The team in office is the successor and are held accountable to handle the matter as the predecessor City Council of Nairobi transacted with the Plaintiff.

> **e) The Defendant claims that the Plaintiff ought to have sued the alleged trespassers and not the Defendant.**

The Proceedings and Judgment of **ELC 110 of 2011** confirm the Defendant was sued with the Plaintiff as Defendants by the Plaintiff in the case and did not plead being non suited. The Defendant participated fully in those proceedings and did not raise any issue of trespassers being joined to the suit.

The Defendant deposed in the draft defence that this suit is a gross abuse of Court process and the matters are and the *forum convieniens* ought to be in **ELC 110 of 2011.**

Section 7 of CPA and in the case of ***Kenya Commercial Bank Ltd vs Benjoh Amal gamated Ltd [2017]*** it was held res judicata involves;

a) The suit or issue was directly and substantially in issue in the former suit

b) That the former suit was between the same parties

c) Those parties were litigating under the same title

d) The issue was heard and determined in the former suit

e) That the Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.

In the instant matter **ELC 110 of 2011** the parties were/are ***David Mutisya Mukumbi vs Kennedy Wanaina Njenga City Council of Nairobi Commissioner of Lands & the Attorney General*** where it was observed by the Court in part;

"The registration of the 1st Defendant as Proprietor was in view unlawful and irregularly obtained as was the purported registration of the City Council of Nairobi as proprietor of the suit property in 1967."

This is a judgment of the Court with similar, equal and competent jurisdiction and this Court lacks appellate jurisdiction. So until an appeal is successful on the Court's Judgment, the Court observed that the 1st Defendant, the Plaintiff herein had a defective title to the suit property of the property allocated to him by the 2nd Defendant, the City Council of Nairobi, predecessor of the County of Nairobi. Similarly, the City Council of Nairobi as registered owner of the suit property had a defective title and could not pass to the 1st Defendant/Plaintiff herein a better title. Therefore, the dispute in that matter was about ownership of the suit property LR 36/VII/260 between the Plaintiff David Mutisya Mukumbi and Kennedy Wainaina Ngenga.

In the instant matter is the Plaintiff's claim against the Defendant arises from the judgment **ELC 110 of 2011**. The Plaintiff formerly jointly sued with the Defendant in the former suit are now in dispute as to the Plaintiff's compensation for the suit property irregularly allotted to him by the Defendant's predecessor City Council of Nairobi. Clearly, the parties are different, the dispute is not land but compensation and this dispute was not heard and determined in **ELC 110 of 2011** and it is still a live issue. In line with **Section 7 Civil Procedure Act** *res judicata* does not apply as it is a different dispute between different parties but arising from judgment of **ELC 110 of 2011** a valid, regular and legal order of the Court until successfully reviewed or appealed against.

The Defendant pleaded *res judicata* and at the same time *forum conviens* the proper forum to have the matter heard. The Defendant cannot logically plead both *res judicata* that there is nothing to be heard as it was finally determined in **ELC 110 of 2011** and at the same time plead that the proper forum is ELC Court not Commercial Court, it means there is a dispute to be heard and determined. I find no triable issue.

The Defendant pleaded that it was not in any way liable to the Plaintiff and denied ever having entered into negotiations with the Plaintiff over an invalid claim.

The Plaintiff as shown by the Court record dealt with City Council of Nairobi and County Government of Nairobi at different times and with different teams in office. Whereas that is true, the Plaintiff cannot be held responsible for internal crises and /or disputes as to who had instructions to receive legal process on behalf of the Defendant, who was an employee of the Defendant and who entered into negotiations with the Plaintiff and who received process and filed memorandum of appearance. He is a victim of circumstances.

After Interlocutory judgment was entered on 10th April 2017, on 18th July 2017 the Defendant through its officers called the Plaintiff and his advocate for a meeting at City Hall Room 102 as shown by Minutes of the Meeting of 18th July 2017 annexed to Replying Affidavit of the Plaintiff. Before that, the Plaintiff on 2nd July 2015, through his advocate wrote to the Defendant seeking compensation of Ksh 95 000,000/- for unlawful allotment of the suit property. A prior meeting was held on 14th April 2016 with defendant's officials and vide their own valuation reduced the compensation to Ksh 90,000,000/-. The Defendant commissioned Legal opinions arising from the Judgment in **ELC 110 of 2011** which recommended compensation.

Thereafter, a Consent was filed in Court vide letter dated 18th July 2017 addressed to Deputy Registrar signed by Advocates for the Plaintiff and advocates for the Defendant. It is also annexed to Plaintiff's Replying Affidavit. On 25th August 2017, the parties through respective advocates appeared in Court, addressed the Court on the Consent and that it was adopted as an order of the Court. All these processes were undertaken by and with the knowledge and approval of the Defendant (the team in office then). From 10th April 2017 when Interlocutory judgment was entered and the Defendant was made aware, instead of filing an application to set aside the judgment it acknowledged the Interlocutory Judgment; proceeded to negotiate and filed consent and made part payment to the Plaintiff. So the Defendant cannot deny negotiations with the Plaintiff in light of the Minutes of the meeting and Consent agreed upon in the meeting and subsequent filing the consent in Court. There is a triable issue; on whether this was a transparent and legal process undertaken by the Defendant at the time.

The Defendant raised a Counterclaim against the Plaintiff and an intended 3rd Party S. W. Wesonga on the alleged purported payments claimed by the Plaintiff/Respondent which claim, the Defendant asserts that this is a falsified claim aimed at defrauding the Defendant of public funds. The Defendant alleges and enumerates the particulars of fraud and collusion. These particulars raise triable issues to be

determined in an *inter partes* hearing.

This Court notes from the pleadings that Defendant was served with Court process and memorandum of appearance was filed on its behalf. When the Defendant was notified of entry of Interlocutory judgment in default of filing defence, instead of filing an application to set aside the default judgment and to apply for leave to file Defence out of time then, the Defendant filed Consent in Court, requested the Court to adopt it as an order of the Court. Execution commenced against the Defendant.

Although it is noted that in 2017 there was a transition in County Government of Nairobi and the instant claim is from 2011 to date, still despite proper service of process to the Defendant by the Plaintiff failed to file defence, there are triable issues raised by the Draft defence and circumstances of the case, that justice demands formal hearing of the suit *inter partes*.

The Interlocutory judgment was the basis of negotiations between the Plaintiff and Defendant that culminated to the Consent filed in Court to settle the Plaintiff's claim.

The Plaintiff lawfully filed suit and claimed compensation arising out of judgment **ELC110 of 2011** and served the Defendant. The Defendant filed the memorandum of appearance and failed to file the Defence, no explanation was/is given for this anomaly. It is also not explained why instead of pursuing setting aside the judgement and seeking to file a defence out of time then it was not undertaken. The record confirms the same officer who was served with legal process filed memorandum of appearance and failed to file Defence on behalf of the Defendant. The same officer then moved full throttle before Court and filed consent and requested the court to adopt the consent as an order of the Court. Thereafter, execution of the decree commenced.

The Consent arose from the impugned default judgment. The Defendant through its officer/employee despite service opted not set aside judgment or explain to Court reason for not filing the defence but instead it misled the Court to adopt the consent to settle the Plaintiff's claim. By virtue of the case of ***Hirani vs Kassam (1952) 19 EACA 131*** where it was held;

> ***"Prima facie, any order made in the presence and with consent of Counsel is binding on all parties to the proceedings or action and on those claiming under them…. And cannot be varied or discharged unless obtained by fraud or collusion or consent was given without sufficient facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside the Court to set aside an agreement."***

A consent contrary to public policy of the Court can be set aside.

In ***Kenya Commercial Bank vs Specialized Engineering Company Limited [1982] KLR, 485*** the Court held;

> ***"a consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set*** aside an agreement."

In ***Mapis Investment (K) Ltd vs Kenya Railways Corporation [2005]*** it was held;

> ***"ex turpi causa non oritur action. This old and well-known legal maxim is founded in good sense, and express a clear and well recognized legal principle, which is not confined to indictable offenses. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, If the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."***

The Consent was signed and filed in Court by the Defendant's officer who failed to file defence or apply to set aside default judgment to file defence out of time. Instead the Court was misled to enter a Consent by parties as an order of the Court pursuant unexplained failure to file Defence or application to set aside the judgment at the time. This action was/is an abuse of Court process. The same officer who received legal process on behalf of the Defendant filed only the Memorandum of Appearance and filed to file Defence. After the Interlocutory Judgment was entered pursuant to a meeting held by the Defendant filed consent on mode of payment of the claim. The Defendant as constituted pre 2017 acquiesced to the entry of Interlocutory Judgment failed by design/default to file Defence entered negotiation on settling the claim and entered consent. The service of process, negotiations and consent are tainted with irregularity and cannot in good conscience and in interest of justice cannot be enforced or upheld by the Court.

DISPOSITION

1. The application by the Defendant/Applicant of 10th May 2018 is granted as follows;

2. The regular default /interlocutory judgment of 10th April 2017 is set aside and all consequential orders as the Draft Defence raises triable issues.

3. The Defendant shall deposit Ksh 5,000,000/- within 60 days from date of delivery of Ruling; in Court or in a joint account held by advocates for the parties now on record pending hearing and determination of the suit.

4. The Defendant shall file and serve the draft Defence

5. The Defendant may file 3rd Party application to join intended 3rd Party.

6. The parties through respective advocates shall attend/ undertake Case Management Conference (CMC) before DR Commercial & Tax Division within 60 days from date of delivery of Ruling.

7. Thereafter, the matter be listed on priority basis for hearing before any Court within Commercial & Tax Division.

8. Each party to bear own costs.

DELVERED SIGNED & DATED IN OPEN COURT ON 13TH JULY 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. BWIRE FOR THE PLAINTIFF

J. HARRISON KINYANJUI & CO ADVOCATES- DEFENDANT – N/A

WAWERU GATONYE & CO ADVOCATES-GARNISHEE- N/A

COURT ASSISTANT- TUPET