**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**JR (Misc Application) NO.7 OF 2017**

***(formerly miscellaneous civil application no.162 of 2016 -machakos)***

**IN THE MATTER OF AN APPLICATION BY SALIM MOHAMMED SALIM & 6 OTHERS BY WAY OF JUDICIAL REVIEW FOR ORDERS OF PROHIBITION AND MANDAMUS**

**BETWEEN**

**REPUBLIC**

**VERSUS**

**1. THE DEPUTY COMMISSIONER**

**KIBWEZI SUB-COUNTY.....1ST RESPONDENT/APPLICANT**

**2. THE ATTORNEY GENERAL.....2ND RESPONDENT/APPLICANT**

**AND**

**GOVERNMENT OF MAKUENI COUNTY …… INTERESTED PARTY**

**EX-PARTE**

**1. SALIM MOHAMMED SALIM**

**2. RAMADHAN HAMISI**

**3. KIMWELI MUTIE**

**4. JOEL MUEMA NYAMAI.....APPLICANTS/RESPONDENTS**

**5. PETER MBITHI MWOLOLO**

**6. MOHAMED ABUD SAID**

**7. TITUS K. MUTEMI**

**R U L I N G**

1. What is before this court for ruling is the 1st and 2nd Respondent's/Applicant's Notice of Motion application dated 12th July, 2019 and filed in court on 15th July, 2019 for orders: -

**1) Spent.**

**2) THAT this Honourable Court be pleased to review/set aside the judgement entered against the 1st and 2nd Respondent on 16th Day of July 2018 and all other consequential orders.**

**3) Spent.**

**4) THAT upon the grant of prayer 2 above, the Honorable Court be pleased to factor in the Respondent's replying affidavit and submissions which were filed on 10th October 2017 & 6th December 2017 respectively.**

**5) THAT cost of this application be provided for.**

2. The application is predicated on the grounds on its face and is supported by the supporting and further affidavits of the Respondents/Applicants sworn by Judith Chimau on 12th July, 2019 and 07th October, 2019 respectively.

3. The Ex-parte Applicants/Respondents have opposed the application vide the replying affidavit of Ramadhan Hamisi, the 2nd Ex-parte Applicant/Respondent herein, sworn at Machakos on 11th September, 2019 and filed in Court on 13th September, 2019 and filed in court on 13th September, 2019.

4. By consent of the parties herein, the Respondents/Applicants were allowed on 29th September, 2019 to amend their Notice of Motion Application so as to read "Environment and Land Court" instead of Employment and Labour Relations Court while the Ex-parte Applicants would be Salim and 6 others.

5. The application is expressed to be brought under Sections 80, 1A, 1B and 3A of the Civil Procedure Act as well as Order 10 Rules 11, 53 of the Civil Procedure Rules, 2010.

6. In their grounds, the Respondents/Applicants have stated that the Court proceeded to pronounce judgement despite the fact that the Respondent's response and submissions were on record, that the Court erroneously failed to consider in its judgement the evidence of the Respondents, that the Court mistakenly failed to appreciate the fact that the Respondents participated in the proceedings of this case all through as it is well evidenced in the documents filed, that the 2nd Respondent only became aware of the judgement in this matter sometime on 23rd May, 2019 when the judgement was forwarded by the Deputy County Commissioner and that the application has been filed within time and that the delay in bringing this application is excusable.

7. Ms. Judith Chimau, the Counsel for the Respondents/Applicants has deposed in paragraphs 3, 4, 5, 6, 9, 11 and 12 of her supporting affidavit that the Attorney General filed a replying affidavit dated 10th October, 2017 which was duly served upon the Applicant and received by the Environment and Land Court at Makueni on 11th October, 2017 as per the copy of the Replying affidavit marked JC-1 in this matter which was previously Machakos Miscellaneous Civil application JR No.162 of 2016, that the Respondents/Applicants filed their submissions dated 06th December, 2017 which were duly served upon the Applicant and received by the ELC Makueni on 14th December, 2017 as per the copy of the said submissions marked JC-2, that at the time when the matter was referred to ELC Makueni and assigned number 7 of 2017 for hearing and disposal, she endeavoured to file their replying affidavit and submissions and duly participated by attending court, that from the said judgement, it would appear that the Respondents/Applicants replying affidavit and submissions were erroneously missing from the court file despite having filed them, that the Respondents will be highly prejudiced if the judgement is not set aside and the matter heard on merit, since the land in issue was set apart for government offices as can be seen/indicated in their replying affidavit and that the delay in filing the application is excusable in light of the highlighted irregularities and misplacement of their office file which has taken time to locate.

8. On the other hand, the 2nd Ex-parte Applicant/Respondent has deposed in paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 15, 17, 19, 20, and 21 of his replying affidavit that he and his co-Respondents filed a judicial review case on 20th July, 2016 and the final judgement was delivered by this Court on 16th day of July, 2018, that it is not in dispute that the Applicants herein were served with the requisite court papers and pleadings when this matter was filed in Machakos High Court as Misc. Civil Application No.162/16, that subsequently this matter was transferred from Machakos to Makueni Law Courts and was assigned a new number JR 7 of 2017, parties herein were informed by court vide a mention notice for 10th July, 2017 and again parties were served with a notice for dismissal for 12th October, 2017 as can be seen from copies of the mention notice and notice of dismissal marked as RH-2, that their advocate on record was vigilant enough and he again reminded other parties (including the Applicant herein) to attend court on 12th October, 2017 by sending them a hearing notice for the said date as can be seen from copies of the hearing notice and affidavit of service marked as RH-3, that the Applicant's action of filing a replying affidavit on 11th October, 2017 which was on the eve of the hearing date and clearly indicating the matter as No.JR.7 of 2017 is a clear indication that he had received the previous notices from the court and from the Ex-parte Applicants'/Respondents' advocate, that as further demonstrated by the Applicant herein, he went ahead to file his submissions on 14th December, 2017 when the file was already before the Judge's chambers pending for judgement on 07th February, 2017, that although the Applicant has demonstrated that he filed his pleadings, he has not demonstrated that he placed them on time in the court file nor did he serve any to the Ex-parte Applicants/Respondents and their Advocate on record, that had the Applicant placed his pleadings in the court file on time and had he served them on the Ex-parte Applicants'/Respondents' Advocate on record before 12th October, 2017 when directions were taken and before 27th November, 2017 when submissions came for highlighting, the Court and their advocate would have seen them and the Court would have considered them in writing the judgement on record, that since the Applicant's submissions were not traced in the court file as at the time of writing the judgement on record, this is a clear indication that the Applicant just sneaked his pleadings in the court file after judgement had long been delivered, that in any case, the Applicant herein having been properly served and having demonstrated that he was fully aware that this matter was in court on 12th October, 2017 and on 27th November, 2018 has not explained why/nor have they given any plausible and/or excusable reason why they failed to attend court on the said dates or at all, that in any case, the Applicant's action of filing his submission on 14th December, 2017 is a clear indication that he knew and/or ought to have known that the matter had a judgement date, that in any case, since 14th December, 2017 when the Applicants filed their submissions, they went into slumber for a period of more than 20 months and have now resurfaced with the present application, that this is a clear demonstration that there is inordinate delay in bringing the present application which reason has not been given to account for the inordinate delay, that it would be an exercise in futility to set aside the judgement properly on record since the replying affidavit and the submissions filed by the Applicant do not constitute a plausible defence to warrant a reversal of the Court's

decision and that this being an application for review, the same is fatally defective in that the Applicant has not specifically pleaded or alleged any error apparent on the face of the record, nor does he disclose any sufficient cause/reason to justify a review.

9. In reply to the Ex-parte Applicants'/Respondents' replying affidavit, the Respondents have deposed in paragraphs 4, 5, 6, 7, 8 and 9 of their further affidavit that their replying affidavit and submissions were duly filed on 11th October, 2017 and 14th December, 2017 respectively and thus the allegations in paragraph 12 of the Ex-parte Applicants'/Respondents' replying affidavit are meant to taint the image of the Applicant and more particularly the Judiciary who are the custodians of the court file and thus the allegations are malicious, frivolous and meant to mislead the Court, that upon perusal of the court proceedings of 12th October, 2019, the Respondent/Applicant misled the Court that the Applicant/Respondent had not filed any responses to their application dated 20th July, 2016 which fact was meant to take advantage of the Respondents/Applicants, that in response to paragraph 17 of the replying affidavit, the deponent reiterated paragraph 11 of their supporting affidavit where it is stated that they were not informed of the judgement date and only got to know of the same when it was forwarded to their office by their client on 23rd May, 2019, that the application has been brought within three (3) months after being notified of the judgement and thus the delay is excusable, that no prejudice will be suffered by the Ex-parte Applicant/Respondent which cannot be compensated by costs if the judgement herein is set aside, and the pleadings by the Respondents/Applicants are considered and that the Court has wide discretion to set aside the judgement and allow itself to consider the evidence of the Respondent/Applicant in order to come up with a just determination.

10. This application was disposed off by way of written submissions. In her submissions, the Counsel for the Respondents/Applicants framed two issues for determination namely: -

> ***(a) Whether this court has jurisdiction to determine the application?***
>
> ***(b) Whether a case has been made to warrant the setting aside of the judgement delivered on 16th July, 2018*** *(emphasis are mine).*

The Counsel for the Applicants/Respondents did not frame any issues for determination.

11. It was submitted on behalf of the Respondents/Applicants that the Court has jurisdiction to hear the application. In support of her submissions, the Respondents'/Applicants' Counsel cited **Section 3A of the Civil Procedure Act** which provides as follows: -

> *"Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."*

12. She further cited **Order 10 Rule 11 of the Civil Procedure Rules** which deals with setting aside of judgement. The aforementioned rule provides as follows: -

> *"Where judgement has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."*

13. Arising from the above, the Counsel added that setting aside of ex-parte judgement is a matter of the discretion of the court as was held in the case of **Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR** where the Court while citing relevant cases on the issue held inter alia: -

> *"The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs. Gasyali). It also goes without saying that the reason for failure to attend should be considered."*
>
> *"Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit…"*

14. The Counsel went on to submit that the discretion of the Court to set aside exparte judgement is perfectly free. She added that the Court has unfettered, unlimited and unrestricted jurisdiction to set aside an Ex-Parte judgement. The Counsel was of the view that it is in the interest of justice to allow the Respondents/Applicants to defend the suit and the matter be determined on merit. The Counsel relied on Article 159 of the Constitution which requires substantive justice. The Counsel further cited the case of **Patel vs. EA Cargo Handling Services Ltd [1974] EA 75** at page 76C and E where the Court held as follows: -

> *"There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, 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 conditions on itself to fetter the wide discretion given it by the rules."*

She also cited the case of **Sebei District Administration vs. Gasyali & Others [1968] EA 300** where the Court stated thus: -

> *"in my view the court should not solely concentrate on the poverty of the applicant's excuse for not entering appearance or filing a*

*defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the Plaintiff for any delay occasioned by the setting aside and be permitted to defend."*

The Counsel was of the view that the Ex-parte Applicants/Respondents will suffer no prejudice if the orders sought are granted and asked the court to look at the Respondents'/Applicants' replying affidavit filed on 11th October, 2017 as a clear evidence that they have a defence which the Court ought to consider in coming up with a just determination.

15. As to whether a case has been made to warrant the setting aside, the Counsel cited **Mulla, The Code of Civil Procedure** on the grounds of setting aside an exparte decree and what constitutes sufficient cause for setting aside an exparte judgement/decree. The Counsel further cited **Esther Wamaitha Njihia & 2 Others vs. Safaricom Ltd** (supra) where the Court held thus: -

*"However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose the granting such an order, necessarily depend on the circumstances of each case.*

*Although it is an elementary principle of our legal system that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions."*

Further, the Counsel cited **Patel vs. East Africa Cargo Handling Service [1974] EA 75** where Duffus, V.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 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 defence on 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."*

16. Arising from the foregoing, the Counsel urged the Court to bear in mind that the object of doing substantive justice to all the parties concerned and that technicalities of the law should not prevent the court from doing substantive justice. The Counsel further submitted that the replying affidavit and submissions had been filed and the same were placed on court record, save that the Respondent misled the Court that the same had not been filed.

17. On the other hand, the Counsel for the Ex-Parte Applicants submitted that the principles governing the setting aside of ex-parte judgements are well settled in pertinent caselaw namely, there must be an ex-parte judgement on record, the Applicant must show sufficient cause and exhibit grounds as to why the discretion to set aside should be exercised in his favour. The Counsel pointed out that the prerequisite factors governing the exercise of judicial discretion to set aside ex-parte judgement on either party's failure to attend court are well laid out in the case of **Madison Insurance Co. vs. Samwel Ndemo Makori [2004] eKLR** where Mohamed A. Warsame acting judge (as he then was) inter alia relied on the Court of Appeal case of **Mbogo vs. Shah [1968] EA 93** where Sir Clement DC Lestang, V.P at pages 93-94 noted inter alia: -

*"while court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to obstruct or delay the course of justice."*

18. Arising from the above, the Ex-parte Applicants/Respondent's Counsel submitted that the Respondents'/Applicants' action of filing a replying affidavit on 11th October, 2017 which was on the eve of hearing date and showing the matter as JR No.7 of 2017 is a clear indication that he had been served with the pleadings, had received the previous notices from court and from the Ex-parte Applicant's/Respondent's advocate. That as further demonstrated by the Respondents/Applicants, they went to file their submissions on 14th December, 2017 when the file was already in Judge's chambers pending for judgement on 17th February, 2019. That the above is a clear manifestation that the Respondents/Applicants were keenly following the court proceedings herein, and had even perused the court file before 27th November, 2017 when it came for submissions and was taken to the Judge's chambers.

19. The Counsel was of the view that although the Respondents/Applicants have demonstrated that they filed their pleadings, they have not demonstrated that they placed them in time in the court file nor did they serve any to the advocate for the Exparte Applicants/Respondents. The Counsel added that filing of pleadings does not simply entail having the documents stamped in that it goes all the way to ensure that the same are placed in the court file and service is done to all the other parties involved in the matter. The Counsel went on to submit that the Respondents/Applicants have never served the Advocate for the Ex-parte Applicants/Respondent with their pleadings adding that they never served the memorandum of appearance casting doubt as to whether the same was filed.

20. It was further submitted that since the Respondents'/Applicants' submissions were not served and were not placed in court file as at the time of writing the judgement on record thus being a clear indication that the Respondents/Applicants just sneaked their pleadings in the court file after the judgement had long been delivered and they do not deserve the orders sought. That in any case, the Respondents/Applicants having been properly served and having demonstrated that they were fully aware that this matter was in court on 12th October, 2017 and on 27th November, 2018 they have not explained why and have not given any plausible and/or excusable reason on why they failed to serve pleadings and attend court on the said dates or at all.

21. It was further submitted that it was worth noting that the Respondents/Applicants filed their pleadings and never appeared in court at any given time despite knowing the dates when the matter was in court. The Counsel relied on the case of **Stephen Gachau Githaiga & Another vs. Attorney General [2015]** in support of his submissions. In the aforementioned case, the Court quoted with approval the case of **Trust Bank Ltd vs. Paramount Universal Bank Ltd & 2 others** where the Learned Judge while citing the same decision stated that: -

> *"it is trite that where a party fails to call evidence in support of its case, the party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged. In the present case, the second Respondent did not file any pleadings at all, hence as far as the first Respondents case is concerned, the case was uncontested."*

22. It was also submitted that after serving the Applicant with the judgement date, the advocate for the Ex-parte Applicants/Respondents duly took directions on 12th October, 2017 to proceed with this matter as undefended and thus he was not under any obligation to serve the Respondent/Applicant herein. That his duty was limited to informing the other parties after the judgement had been delivered and serving the other parties with a copy of the judgement and decree therein. The Counsel added that in any case, the Respondents/Applicants herein went on to slumber for 20 months after filing their submissions and thus it is clear demonstration there was inordinate delay in filing this application and that no reasons have been given to account for the delay.

23. On the issue of whether or not the reply and submissions filed by the Respondents/Applicants raise triable issues, the Counsel cited the case of **Sameer Africa Ltd vs. Aggarwal & Sons Ltd [2013] eKLR** where the Court was tasked in determining an application similar to the one at hand. The Court relied on the Court of Appeal decision in **Shanzu Investments** and dismissed the application by stating thus: -

> *"Now, in this instance, the judgement was regularly obtained and in such circumstances the court will not interfere unless satisfied that there is a defence on the merits. This means there must be a "triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication ……."*
>
> *In our view, no useful purpose could be served by setting aside the judgement as there was no possible defence to the action. We agree with Mr. Kariuki that the learned judge acted in error in setting aside the said judgement."*

The Counsel was of the view that a copy of the replying affidavit and submissions annexed by the Respondents/Applicants do not raise a plausible defence to the issues raised in the notice of motion and the statement. The Counsel concluded by urging the court to dismiss the application.

24. Having read the application, the supporting and further affidavits as well as the replying affidavit and the submissions, the only issue for this Court to determine is whether or not it should exercise its discretion and set aside its judgement on 16th July, 2018. The Ex-parte Applicants concede that the Respondents/Applicants filed their pleadings in this judicial review proceedings even though they contend that they were not served by the Respondents/Applicants. I have looked at the replying affidavit and submissions filed by the Respondents/Applicants on 11th October, 2017 and 14th December, 2017 respectively. Both bear the receiving stamp of this court. It is imprudent of the Ex-parte Applicants to accuse the Respondents/Applicants of sneaking the aforementioned pleadings in court taking into consideration this ELC at this station was still in transition after having been establishment earlier that year. The attendant challenges that this court faced soon after its establishment are well known by all. I therefore hold that indeed the Respondents/Applicants did file their pleadings even though by the time of writing the judgement sought to be set aside, those pleadings were not in the court file. Owing to the fact that the said pleadings bear the stamp of this court, the interest of justice demand that the Court ought to have given regard to them in arriving at its judgement. I would agree with the Counsel for the Respondents/Applicants that this Court ought to dispense justice without undue regard to procedural technicalities as dictated by Article 159(2)(d) of the Constitution. Being satisfied that this is a suitable case for the Court to exercise its discretion, I hereby proceed to set aside the judgement delivered on 16th July, 2018 in terms of prayer 2. Since all the parties are not entirely blameless for the predicament they find themselves in, I do order that each one of them to bear their own costs.

**Signed, dated and delivered at Makueni via email this 29th day of April, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Mr. G. Kwemboi

**MBOGO C.G, JUDGE,**

**29/04/2020.**