**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MALINDI ELC CASE NO. 181 OF 2014**

**1. KITSAO KARISA**

**2. SAFARI KARISA**

**3. CHARO KARISA.....PLAINTIFFS**

**VERSUS**

**1. KAZUNGU MJUKU**

**2. SHUKURU KENGA**

**3. GARAMA KENGA**

**4. JOHNSON MLEKA**

**5. KAHINDI KENGA**

**6. EVERYINE CHOLA.....DEFENDANTS**

**RULING**

1. By their Notice of Motion application dated 14th October 2019, the six Defendants urge this Court to set aside the proceedings of 12th July 2017, 21st September 2017, and 31st October 2017 as well as the subsequent Judgment rendered herein on 25th May 2018.

2. The application which is supported by an affidavit sworn by the 5th Defendant Kahindi Kenga Burashi is premised on the grounds, inter alia;

**a. That the 3rd to 6th Defendants have never been served with the summons to enter appearance and the hearing notices;**

**b. That the Defendants entered appearance and filed a Statement of Defence through Messrs Omagwa Angima & Company Advocates who thereafter filed an application to cease acting;**

**c. That the Amended Plaint dated 17th July 2015 was not served upon the Defendants for the purpose of filing a proper and sufficient response;**

**d. That the Defendants were never served with the application to cease acting by their Advocates then on record;**

**e. That no notice of entry of Judgment has ever been served upon them even though the Plaintiffs have threatened to have them evicted from the suit property;**

**f. That the Defendants have a good defence to the amended Plaint and their eviction would amount to a miscarriage of justice as they have never been heard.**

3. The application is opposed. In a Replying Affidavit sworn on their behalf by the 2nd Plaintiff Safari Karisa and filed herein on 13th November 2019, the three Plaintiffs assert that the application by the Defendants lacks merit for a number of reasons.

4. The Plaintiffs assert that the 1st and 2nd Defendants entered appearance and filed a Statement of Defence through an Advocate who later withdrew when they failed to furnish him with instructions. The Plaint was subsequently amended to add the 3rd to 6th Defendants who were then served with summons to enter appearance but failed to do so.

5. The Plaintiffs further aver that the 3rd to 6th Defendants neither entered appearance nor filed a Defence, but all the Defendants were served with hearing notices as by law required but failed to attend Court on the date stipulated for hearing. Upon delivery of Judgment, the Defendants were again served with the Decree issued by the Court and they are therefore guilty of laches and do not merit the orders sought herein.

6. I have perused and considered the Defendants' application, the response thereto by the Plaintiffs as well as the record herein. I have also perused the oral submissions as canvassed before me by the Learned Advocates for the parties-Mr. Atiang for the Defendants and Mr. Shujaa for the Plaintiffs.

7. Order 10 Rule 11 of the Civil Procedure Rules provides as follows: -

> **"Where Judgment 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."**

8. In James **Kanyita Nderitu & Another –vs- Marios Philotas Ghika & Another (2016) eKLR,** the Court of Appeal opined as follows:

> **"From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgment that is regularly entered and one which is irregularly entered. In a regular default Judgment, the Defendant will have been duly served with summons to enter appearance or to file a 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 failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default Judgment, among others. See** Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- EA Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka (2004) 1 KLR 173.
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> **In an irregular default Judgment on the other hand; Judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default Judgment is set aside ex debitio justitiae, as a matter of right. The Court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular; it can set aside the default Judgment on its own motion. In addition, the Court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reason why such Judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."**

9. In the instant case, there are indeed two applications in one. On the one hand, the Applicants aver that the 1st and 2nd Defendants were not given an opportunity to respond to the Plaintiffs' amended Plaint dated 17th July 2015 on the basis that they were not served with the same and or the subsequent hearing notices in the course of the trial. On the other hand, the Applicants contend that the 3rd, 4th, 5th and 6th Defendants who were enjoined in the suit vide the said Amended Plaint were not served with Summons to Enter Appearance and were thus unaware of the proceedings herein and the resultant Judgment against themselves.

10. From the 5th Defendant/Applicant's affidavit in support of the application, the Defendants do not deny that the 1st and 2nd Defendants were served with summons to Enter Appearance at the commencement of this suit. Indeed they assert that following such services, the duo entered appearance and filed a Statement of defence through Messrs Omagwa Angima & Company Advocates on 23rd February 2015.

11. From the record, some five months down the line, the Plaintiffs having learnt of the involvement of the 3rd, 4th, 5th and 6th Defendants herein on the subject property sought leave to enjoin them in the proceedings. By a consent recorded in Court on 16th June 2015 between the 1st and 2nd Defendant's Counsel then on record and the Plaintiffs' Counsel, the Plaintiff was granted 14 days within which to file the amended Plaint with the Defendants being granted corresponding leave to file their respective defences within 14 days of service of the Amended Plaint.

12. That Amended Plaint was filed herein on 17th July 2015. While there was nothing placed before me to show that the Defendant's Counsel was served with the Amended Plaint, that fact can be deduced from the fact that the Plaintiffs' Counsel subsequently invited Messrs Omagwa Angima & Company Advocates then on record for the Defendants for the fixing of a hearing date herein vide their letter dated 6th October 2015 in which they requested the said Advocates to appear in Court on 15th October 2015 at 2.30 p.m. for purposes of fixing a date for pre-trial directions.

13. The Court record on the said 15th October 2015 indicates that Mr. Shujaa Advocate for the Plaintiffs appeared at the Court registry in the absence of any representative of the Defendants and fixed the matter for hearing on 8th March 2016. On this subsequent date, an Advocate holding brief for Mr. Angima Advocate for the Plaintiffs informed the Honourable Angote J then seized of the matter that Mr. Angima had no instructions on the matter and that he needed time to file an application to cease acting for the Defendants.

14. That request was granted and Counsel was granted 14 days within which to file the said application and the matter was fixed for mention on 13th April 2016. As it turned out, that application had already been filed by the Law Firm some one year earlier on 11th April 2015. Thus when the matter came up on the 13th April 2016, Mr. Angima sought time to serve that application upon his clients. That application would be adjourned for similar reasons on 11th May 2016, 23rd June 2016, on 21st July 2016 and on 3rd October 2016 as the Court was not satisfied that the Defendants had been served. It was eventually allowed on 3rd November 2016. At paragraph 3 of the Supporting Affidavit, the Defendants indeed confirm that the 1st and 2nd Defendants were served.

15. Arising from the foregoing, it could not be said that the 1st and 2nd Defendants who had an Advocate on record when the amendments were made were unaware of the same and/or that they were not granted an opportunity to respond to the same. At any rate other than the inclusion of the 3rd to 6th Defendants in the Amended Plaint, a perusal thereof does not reveal anything at all that would have required any further response from the Defendants.

16. It is also apparent that subsequent to the leave granted to Messrs Omagwa Angima Advocates to cease acting, the matter was fixed for hearing on 12th July 2017. On the said date, the Plaintiffs produced an Affidavit of Service filed herein one day before on 11th July 2017 indicating that the Defendants had been served at their homestead in Muyeye on 11th May 2017 with a hearing notice. The 1st and 2nd Defendants have not challenged the Affidavit sworn by Morris Mwavuo Ngonyo, a Process Server of this Court to that effect.

17. Accordingly, and arising from the foregoing, it was clear to me that the claim by the 1st and 2nd Defendants that they were unaware of the amendments and the subsequent hearing of this matter was without basis, far-fetched and nothing but an afterthought. Having filed their defence in February 2015, it was incumbent upon them to follow up with their Advocates to find out the position of these proceedings. They did not place anything before me to demonstrate any interest they placed in their case.

18. As regards the 3rd, 4th, 5th and 6th Defendants, the 5th Defendant avers on their behalf that they were not served with the summons to enter appearance and/or any hearing notice. On their part, the Plaintiffs assert that they were served on 25th July 2015 with copies of summons to Enter Appearance and the Amended Plaint. In support of this contention, the Plaintiffs rely on an Affidavit of Service sworn by the same Process Server Morris Mwavuo Ngonyo on 6th October 2015 wherein he indicates at paragraph 3 thereof that he served the Defendants including the 5th Defendant who received the documents on behalf of the 6th Defendant at their homestead in Muyeye village on the said date at 12.10 p.m.

19. In another Affidavit sworn by the same Process Server and filed herein on 11th July 2017, he again avers that he served each of the Defendants with hearing notices for the hearing scheduled for 12th July 2017 at their homestead in Muyeye Village. As it were, the Defendants have not made any reference whatsoever to the averments made on oath by the Process Server nor have they sought to cross-examine him on the contents of the affidavits sworn and filed herein. In that context, this Court did not find any basis to doubt the averments that the Defendants were not only served with the summons but also the hearing notice indicating when this matter came for trial.

20. At any rate, in circumstances such as this, the Defendants were required to demonstrate that they had an arguable Defence to the Plaintiffs' claim. Other than their claim that they have a good defence to the Plaintiffs' claim, the Defendants have not annexed any new defence or facts upon which they intend to rely.

21. As can be discerned from the impugned Judgment of this Court delivered on 25th May 2018, the Plaintiffs and the Defendants are cousins. The Plaintiffs told the Court at the trial that the land belonged to their father the late Karisa Burashi and that it was only sometime in 2009 when their uncle Kenga Iha Burashi, the father of the 2nd, 3rd and 5th Defendants herein laid a claim to a portion of the land.

22. From the material placed before the Court, that claim was dismissed by a decision of a Panel of Elders. Not being satisfied with that decision, the 2nd, 3rd and 5th Defendant's father instituted against the Plaintiffs herein ***Malindi CMCC No. 214 of 2009; Kenga Iha Mitsanze –vs- Kitsao Karisa & 2 Others***. That case was similarly dismissed by the Honourable L. Gicheha SPM on 11th March 2014.

23. It was also apparent that notwithstanding the Court's decision, the Plaintiff's uncle proceeded to sub-divide the suit property and to allocate the same to his children- the 2nd, 3rd and 5th Defendants who in turn sold their respective portions to the 1st, 4th and 6th Defendants.

24. Arising from the foregoing, I was neither satisfied that the Defendants had an arguable defence nor that their application before me had any merit. The same is dismissed with costs to the Plaintiffs.

**Dated, signed and delivered at Malindi this 25th day of September, 2020.**

**J.O. OLOLA**

**JUDGE**