REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 119 OF 2013

GEORGE NJERU……1ST

PLAINTIFF/RESPONDENT

NAHASON MUGO KIBEU……2ND

PLAINTIFF/RESPONDENT

JOSPHAT NGIRIGACHA……3RD

PLAINTIFF/RESPONDENT

ELIJA NJERU GACHOKI……4TH

PLAINTIFF/RESPONDENT

VERSUS

HON. ATTORNEY GENERAL……APPLICANT/DEFENDANT

RULING

1. The Plaintiffs/Respondents instituted the instant suit as a representative suit on behalf of Kirinyaga Mihiriga Kenda vide a Plaint dated 6th January 2012 which was subsequently Amended on 30th March 2012. The suit was against the Honourable the Attorney General sued on

behalf of the Government of Kenya. By the Plaint the Respondents prayed for:-

(a) That there be a declaration that the Government of Kenya holds LR. No. Mwea/Tebere/314 in trust for the Plaintiffs.

(b) That the aforesaid trust be determined and the land do revert to the Plaintiffs.

(c) That the Honourable Court be pleased to issue such further and/or better orders as the Court may deem fit and just.

(d) Cost of the suit.

2. The suit was heard exparte and on 31st July, 2014 the Court delivered an exparte Judgment in the absence of the Applicant allowing the prayers as per the Plaint.

3. The Attorney General, Applicant by a Notice of Motion application dated 1st August 2024 prays for orders that:-

1. Spent

2. Spent

3. That pending the hearing and determination of this application inter-parties, the Honourable

Court be pleased to set aside, vary and vacate the exparte proceedings, the exparte Judgment delivered on 31st July, 2014 and decree dated 20th August 2014.

4. **That upon hearing this application, the honourable Court be pleased to set aside, vary and vacate the exparte proceedings, the exparte Judgment delivered on 31st July, 2014 and any consequential orders issued thereto and order the hearing of this suit de novo and allow the parties an opportunity to tender and test the veracity of each other's evidence for fair and just determination.**

5. **That no prejudice will be suffered if the application is allowed and proceedings, the exparte Judgment delivered on 31st July, 2014 and any consequential orders issued thereto and order the hearing of this suit de novo and allow the parties and opportunity to tender and test the veracity of each other's evidence for fair and just determination.**

6. **That without knowledge of the exparte proceedings and the Judgment, this application could not be brought on time and hence the delay herein is not inordinate.**

7. That the cost of this application be in cause.

4. The application was supported on the grounds on the face of it and on the Supporting Affidavit of Dennis Maina Okinyi, the Scheme Manager Mwea Irrigation Scheme, under the Management of National Irrigation Authority (NIA). The Applicant vide the Supporting Affidavit averred that the Government was the first registered owner of the suit land Mwea/Tebere/1314 measuring 206 Hectares on 27th January, 1997. The Applicant averred that the hearing of the suit proceeded exparte without any notice to them and that they were denied the opportunity to tender evidence and/or challenge the evidence adduced by the Plaintiffs/Respondents. The Scheme Manager deponed that land parcel Mwea/Tebere/B/1314 formed part of the land set aside and gazetted vide Gazette Notice No. 3097 published on 5th July 1960 in the Kenya Gazette for an Irrigation Scheme – Mwea Irrigation Scheme and comprised a total area of 5657 acres. He asserted that the Mwea Irrigation Scheme was under the management

of the National Irrigation Authority and that the land the subject matter of the suit was under their custody and they were not afforded any opportunity to participate in the proceedings and had no notice of the proceedings as no service was effected upon them. The Scheme Manager deponed that the land the subject of the suit was public land and there were various public facilities on the land and unless the exparte Judgment was set aside and the suit heard denovo, public interest will be prejudiced.

5. The application by the Attorney General dated 1st August 2024, was opposed by the Plaintiffs/Respondents. The 2nd and 4th Plaintiffs swore individual Replying Affidavits in opposition. The 2nd Plaintiff/Respondent averred that the Defendant was served with all Court process but chose not to participate in the proceedings and/or file any response in the suit and/or attend Court when required to do so. The 2nd Respondent averred the Defendant lacked any basis to apply to set aside the Judgment that was regularly obtained. The 2nd Respondent further averred that since obtaining the Judgment, the Respondents have taken

various steps to implement, execute the Judgment. The Respondents were on 21st March 2017 registered as proprietors of LR Mwea/Tebere/B/1314 on behalf of Kirinyaga Mihiriga Kenda in accordance with the decree of the Court. The Attorney General was served with the Court decree on 3rd March 2020 which was duly received and acknowledged. The Respondents formally wrote to the Deputy Chief State Counsel, Ministry of Lands and Physical Planning on 15th March 2021 respecting the implementation of the Court decree. On 10th June 2021 the Attorney General was represented in Court by a State Counsel when the parties informed the Court that the implementation of the Decree was progressing well. On 9th May 2024 the Deputy State Counsel wrote to the Respondents inviting them to a consultative meeting on 22nd May 2024 which meeting took place and an update was given at the meeting respecting what the Government was doing towards the implementation of the Judgment.

6. On the basis of the foregoing the Respondents argue the delay on the part of the Defendant in bringing the present

application was unexplained, inordinate and in-excusable. Besides, the Applicant was involved in the process of executing/implementing the Court Decree and it was therefore absurd that the Applicant had brought an application to set aside the same very decree that they were party to having implemented.

7. The Replying Affidavit by the 4th Respondent, Elijah Njeru Gachoki carried the same content as that of the 2nd Respondent; that the Defendant was aware of the proceedings but chose not to participate; that after Judgment the Defendant was involved in efforts to implement the same; that there had been unexplained delay which was inordinate; and that the application was an afterthought as there was no explanation why it was being made after such a long time.

8. The application was argued by way of written submissions. The Attorney General filed their submissions dated 18th December 2024 and the Respondents filed their submissions dated 23rd July 2025. I affirm I have reviewed

the application and the Affidavit sworn in support and the Replying Affidavits sworn in opposition. I have also perused and considered the submissions filed on behalf of the parties. The singular issue for the Court to determine in this matter is whether the Applicant has sufficiently made out a case to warrant the Court to exercise its discretion in their favour and set aside the exparte Judgment delivered by the Court on 31st July, 2014.

9. In an application to set aside an exparte Judgment as in the instant matter, the Court is called upon to exercise its discretion to allow or to reject the same. That discretion must be exercised upon reasons and must be exercised judiciously. Where non service of summons is demonstrated and/or proved and there is a default and/or exparte Judgment an application to set aside such Judgment is granted as of right and no exercise of discretion is called for as the Judgment is deemed to have been irregularly obtained. However, where a Defendant is served and defaults in appearing and/or filing a Defence or files a defence but fails to attend at the hearing while

duly served, and an exparte Judgment is made, such Judgment is deemed to have been regularly obtained. Setting aside of a regular Judgment invites exercise of discretion by the Court and it behoves the Applicant to give satisfactory explanation for failure to file a defence and/or attend Court for hearing of the case.

10. The Court of Appeal in the case of **James Kanyiita Nderitu & Another –vs- Marios Philotas Ghikas & Another (2016) KECA 470 (KLR)** outlined the principles/factors that the Court should consider in exercising its discretion to set aside. The Court expressed itself as follows:-

> **"In a regular default Judgment; the Defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter 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 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 maybe; 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; whether on the whole it is in the interest of Justice to set aside the default Judgment among others. See Mbogo & Another –vs- Shah (supra), Patel –vs- E. A Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another –vs- Kubende (1986) KLR492 and CMC Holdings –vs- Nzioki (2004) 1 KLR 173)".

11. In the Affidavit sworn in support of the application, the Defendant does not depone that the summons to enter appearance were not served upon them. In deed

upon perusal of the Court record, I have come across an Affidavit of Service dated 11th July 2012 sworn by one Francis Kunga Mugi a Process Server, who depones that on 20th June, 2012 within Meru Town, he served the Defendant with an Amended Plaint and Summons to enter appearance at their Chambers which were duly received and acknowledged and signed for. A copy of the duly served summons to enter appearance embossed with the stamp of the Attorney General and signed at the back on 20th June 2012 is on the Court record. I am in the premises satisfied the Defendant was duly served with summons to enter appearance. The record shows the office of the Attorney General was equally served with a hearing notice dated 7th January 2014 for the hearing of the case on 11th February 2014 on 16th January, 2014. The Office stamp of the Attorney General's Office was embossed on the **"Hearing Notice"** on 16th January 2014. The Defendant therefore had notice of the hearing of the case that was scheduled for 11th February 2014. The suit was heard in the absence of the Defendant who did not attend notwithstanding that they had notice of hearing. An

exparte Judgment after formal proof hearing was delivered on 31st July, 2014. This was a regular Judgment as the Plaintiffs had followed due process to get the suit heard.

12. The Respondents in their Replying Affidavits and Submissions have contended that the Applicant has not explained why they never filed any Defence and/or failed to attend Court during the hearing and neither have they given any cogent explanation for the delay in bringing the instant application yet all the evidence points to their being aware of the entry of Judgment over a long period after the delivery of Judgment. The Respondents further point out that the Applicant has not demonstrated they have a viable or arguable defence, and have not even annexed a draft defence to enable the Court to evaluate and determine whether or not they have a defence that raises a triable issue. In the case of **CMC Holdings Ltd – vs- James Mumo Nzioki (2004) eKLR** cited and relied on by both parties in their submissions, the Court held thus:-

“The law is now settled that in an application for setting aside exparte Judgment, the Court must consider not only reasons why the Defence was not filed or for that matter why the Applicant failed to turn up for hearing on the hearing date but also whether the Applicant has a reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.”

13. In the instant application, the Applicant neither proffered any reasonable explanation for the failure to file a defence nor explain the delay in filing the application. The Applicant further never annexed a draft defence to the application to enable the Court to assess and consider whether the Applicant had a defence that raised any triable issue. It is not sufficient for an Applicant to aver, they have a good defence to the Plaintiff’s claim and leave it at that and hope the Court will somehow discover what defence the Applicant intends to raise. It is the obligation and duty of the Applicant to demonstrate they have a

plausible defence to the action. The Defence need not be one that must succeed but must be arguable and ought at least to disclose a triable issue even if, only one.

14. The Defendant, from the Affidavit in support of the application by Dennis Maina Okinyi takes the position that the suit land was public land and formed part of Mwea Irrigation Scheme land. In the suit before the Court the Plaintiffs claimed that the Government held the suit land in question in trust for the 9 clans (Mihiriga Kenda) after the lapse of the agreement dated 30th September 1962 where inter alia the Government agreed to revert the land to the clans and to issue titles to them after the period of 20 years which the Scheme Management was to lease the land. The Judge in his Judgment considered this agreement and inter alia stated:-

"The agreement in question is dated 30th September 1962 and it is headed – 'AGREEMENT OF RICE EXTENSION.' It is signed by nine clans following advice of Hon. J. J. Nyagah MLC, the District Commissioner and other parties including the ADC. From what I discern from it, the agreement sets aside some land for production of

rice in Mwea Scheme. The said agreement also has the following provision which maybe useful for the purpose of this Judgment ie:-

> **"Provided that the Government will issue title deeds to the clans for the rice blocks which will be leased for at least 20 years to the Scheme Management"**

Having heard the un-contested evidence of the Plaintiffs and having also looked at the documentary exhibits herein, I am satisfied on a balance of probability that indeed the suit land herein was property of the clans represented by the Plaintiffs and the same was given to the Government of Kenya for Research for Twenty years as per the agreement produced herein."

15. The Defendant has not made any comment on the agreement relied on by the Plaintiffs and in the absence of a draft defence, I am unable to find that the Defendant has a viable Defence to the Plaintiff's claim.

16. It is also noteworthy that the Defendant after the entry of Judgment, through various Government Agencies had engaged the Plaintiffs on the modalities of implementing the Judgment and parties had held several

meetings in that regard. It is not clear what precipitated the halting of the implementation of the Judgment. However, what is clear is that the Defendant must have been aware of the Judgment for no less than 8 years before they filed the instant application. In my view apart from the Defendant not laying a basis to warrant the exercise of discretion to set side the exparte Judgment in their favour, I find that the instant application was made as an afterthought. The same lacks merit and is dismissed.

17. I have noted in the course of considering the application that indeed the parties had engaged with each other to find ways and means of implementing the Judgment. I have further noted there are Government (public) facilities that may have been developed by the Government on the affected land. While I affirm the Judgment by my brother Justice B. N. Olao, I would vary the Judgment to the extent that where there are identifiable developed public facilities within the suit land these should during the process of implementation of the

Judgment, been identified and surveyed and titles issued in favour of the Government. For purposes of implementing the Judgment the parties should constitute a Committee comprising representatives of the Plaintiffs and the Government. As this appears to be one of those matters where the Court ought to oversee implementation of the Judgment, I direct that the matter be mentioned on 12th May, 2026 to ascertain the status of implementation of the Judgment and/or for further directions.

18. Save for the variations that I have made respecting the implementation of the exparte Judgment, the application by the Defendant dated 1st August, 2024 is dismissed with no orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 12TH DAY OF NOVEMBER 2025.

J. M. MUTUNGI

ELC - JUDGE