REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC LAND APPEAL NO. E010 (A) OF 2025

BRUNO GONZALEZ……APPELLANT

- VERSUS -

FRANCIS GITHINJI NGATIA……1ST DEFENDANT

KENNETH NDUMBI NJOROGE……2ND DEFENDANT

JUDGEMENT

I. Preliminaries

1. The Judgement of this Honourable Court pertains to an appeal preferred by the Appellant, *Bruno Gonzalez* against *Francis Githinji Ngatia and Kenneth Ndumbi Njoroge,* the 1st and 2nd Respondents herein. The appeal was brought vide a 269 pages Record of Appeal dated 17th June, 2025 and the Memorandum of Appeal dated 11th June, 2025 respectively (Hereinafter referred to as “The Appeal”).

2. Subsequently, upon service of the relevant documents in connection with the appeal, on 31st July, 2025, by consensus of the parties the appeal was admitted and directions were taken on how to dispose off it pursuant to the provision of Section 79B of the Civil Procedure Act, Cap. 21 and Order 42 Rules, 11, 13 and 16 of the Civil Procedure Rules, 2010 thereof. The Honourable Court directed that the appeal be canvassed by way of written submissions.
3. As a matter of background, the present appeal arose from the trial court's Judgement delivered on 5th October 2022 by the Honourable J. M Omido [Senior Principal Magistrate[as he then was] in the Civil case of "***Kwale Chief Magistrate's Court Environment and Land Case no E065 of 2011"***.
4. Pursuant to that, the Appellant being aggrieved by the said decision, decided to lodge the Appeal herein through the Law firm of Messrs. Sachdeva, Nabhan & Swaleh Advocates.

II. <u>The Appeal by the Appellant</u>

5. By a Memorandum of Appeal dated 11th June 2025, the Appellant anchored the appeal on five [5] grounds as set out on the face of the same and these include:

    a) ***The Appellant was never served with Summons to Enter Appearance and/or pleadings in the lower court matter and the affidavit of service in the lower court is false and a fabrication by the process server***

    b) ***The Lower Court in CM ELC No E065 of 2021 Francis Githinji Ngatia & Kenneth Ndumbi Njoroge - Versus - Bruno Gonzalez lacked pecuniary jurisdiction to deal with the matter as the suit property value at time of filing the suit was Kenya Shillings Twenty Million Five Hundred Thousand [Kshs 20,500,000/-]***

    c) ***The Appellant and Respondent are parties to an ongoing suit in ELC Court in Kwale ELC Civil suit no 68 of 2021 Francisca M. Kambe - Versus - Mariamu Suleiman Bati & 5 Others [Formerly ELC Mombasa Suit no 355 of 2017] where the Appellant is the 2nd Defendant and the Respondents have been enjoined as the 5th and 6th Defendants respectively. The said case is pending hearing and determination. The suit in the lower court i.e. CM ELC No E065 of 2021 was therefore Res – Sub – Judice.***

d) ***The Appellant was not accorded an opportunity to defend himself in the lower court matter in CM Case No E065 of 2021 and was thus condemned unheard contrary to the law and principles of natural justice***

e) ***The Learned Magistrate erred in both law and in fact in giving a very high award in quantum contrary to the evidence given in court.***

6. The Appellant sought for the following orders before this honourable court; -

    a) This appeal be allowed with costs and

    b) The default Judgement dated 5th October 2022 in "***CM ELC No E065 of 2021 Francis Githinji Ngatia & Kenneth Ndumbi Njoroge - Versus - Bruno Gonzalez'*** in the lower court be set aside and refer back the matter for a retrial.

III. Submissions

7. On 31st July 2025, the matter came up before court for directions on the appeal. Parties were directed to have the appeal heard by way of written Submissions on a given timeframe.

8. Unfortunately, at the time of preparing this Judgement, the Honourable Court was only able to access the

submission by the Appellant as none were available from neither the Judiciary CTS Portal nor the ELC Registry whatsoever. The court will nevertheless proceed to render the judgement accordingly on its own merit.

IV. The Written Submissions by the Appellant

9. Through the Law firm of Messrs. Sachdeva, Nabhan & Saleh Advocates LLP acting on behalf of the Appellant filed their written submissions dated 5th September 2025. Mr. Noor Advocate commenced the submission by providing the Court with a brief background of the matter. The Learned Counsel held that before the Court was the appeal which was against the Judgement of the Senior Principal magistrate dated 5th October, 2022 in the Magistrate's civil case of ***"CM ELC Case No. E065 of 2011, Kwale"***
10. The Learned Counsel proceeded to highlight five (5) main grounds stated in the appeal. As follows:-
11. **On Ground Number 1 of the Appeal:** - On this ground pertaining to fact that the Summons to Enter appearance and pleadings were never served. The Appellant submitted that he was never served with any pleadings. He refuted the fact the allegation that the pleadings and

summons were served upon the caretaker. This were not true. Further that the provisions of Order 5 Rule 8 [1] of the Civil Procedure Rules, 2010 were clear that service had to be effected in person. That the service rendered if any was thus not proper. On this issue, the Learned Counsel placed reliance on the holding of the case of:- "***Frikogen Limited - Versus - Value Pack Food Limited [2011] eKLR"*** where the court held as follows:-

"If there is no proper or any service of Summons to enter appearance to the suit, the resulting default Judgement is an irregular Judgement liable to be set aside by Court "ex - debito justiciae". Such a Judgement is not set aside in the exercise of discretion but as matter of judicial duty in order to uphold the integrity of the judicial process"

12. Thus, in instances where no service of summons to enter appearance upon a party was proved, then the resultant judgement was irregular and liable to be set aside by the court.
13. **<u>On Ground Number 2 of the Appeal</u>:-** It is on the pecuniary jurisdiction of the lower court to handle the dispute. The Learned Counsel submitted that the Magistrate in the Lower Court lacked pecuniary

jurisdiction to deal with the matter as the suit property's value at the time of filing the case was more than a Sum of Kenya Shillings Twenty Million Five Hundred Thousand (Kshs. 20, 500, 000.00/=) which was the pecuniary limit in the Chief Magistrate.

14. The Learned Counsel pointed out the provisions of Section 7[1] of the Magistrate's Court Act which outlines the pecuniary jurisdiction of the lower court from the Chief Magistrate's court to the Resident Magistrate's court.
15. The Learned Counsel submitted that the suit before the lower court was at the Senior Principal Magistrates court whose maximum pecuniary jurisdiction was upto a sum of Kenya Shillings Fifteen Million (Kshs. 15,000,000/=) Only. That the value of the suit property at the time of instituting the suit was a sum of Kenya Shillings Twenty Million Five Hundred Thousand (Kshs. 20,500,000/-) that for the said reason the proceedings, rulings and judgement arising therefrom was a nullity.
16. To buttress on this point, the Learned Counsel made reference to the holding in the case of:- ***MacFoy Versus***

United Africa Co Ltd [1961] 3 All ER 1169 where the court stated as follows:-

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and except it to stay there. It will collapse…"

17. Further reference was made to the case of ***Phoenix E.A Assurance Company Limited - Versus - S. M Thiga T/A Newspaper Service Civil Appeal No 244 of 2010*** on the issue of jurisdiction where the court stated that a suit filed devoid of jurisdiction was dead on arrival and could not be remedied. The Court held thus:-

"We are not persuaded that proposition by the Respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the Court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The Subordinate

Court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction"

18. Therefore, the Appellant maintained that the lower court had no jurisdiction in handling the dispute before it in the civil case: "***CM ELC No E065 of 2021 Francis Githinji Ngatia & Kenneth Ndumbi Njoroge - Versus - Bruno Gonzalez"*** and thus the judgement delivered therein was a nullity.
19. **<u>On Ground No. 3 of the appeal:-</u>** It was on whether the suit was in breach of the doctrine of ***"Res – Subjudice"***. It was submitted that there was another suit namely "***Kwale ELC Civil suit no. 68 of 2021 - Francisca M. Kambe - Versus - Mariamu Suleiman Bati & 5 Others [Formerly ELC Mombasa Suit no 355 of 2017]*** where the Appellant was the 2nd Defendant and the Respondents are the 5th and 6th Defendants respectively.
20. That despite having this knowledge the Respondents herein proceeded to file a similar suit before the lower court and obtained an Ex - Parte Judgement. Reference was made to an excerpt from a ruling in the ELC Case 68 of 2021 by Hon Lady Justice Dena and whose contents confirmed that the Respondents were well aware of the

suit and from the Ruling by this Court delivered on 10th October, 2024 in the ELC No. 68 of 2021. The Appellant asserted that from this information it could be implied that the suit before the Lower Court was "***Res - Subjudice"***.

21. All in all, the Appellant withdrew Ground Number 5 of the Memorandum of Appeal. The court was urged to allow the appeal as prayed.

V. Analysis and Determination

22. The Honourable Court has keenly assessed the appeal by the Appellant herein, the written submissions and the cited numerous authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

23. In order to reach an informed, reasonable and just decision in the subject matter and in light of the above, the issues for determination herein are as contained in the grounds of appeal and condensed into three (3) salient issues as follows: -

a). Whether the preferred appeal by the Appellant vide the Records of appeal dated 17th June, 2025 and the Memorandum of Appeal dated 11th June, 2025 is tenable?

a) Whether the orders sought and to be made by the Court in this appeal do meet the best ends of justice.

b) Who bears the costs of the appeal?

ISSUE No. a). Whether the preferred appeal by the Appellant vide the Records of appeal dated 17th June, 2025 and the Memorandum of Appeal dated 11th June, 2025 is tenable?

24. It must be remembered that the instant appeal is the first one from the trial court in the matter. Therefore, this court is obliged to review the record of the trial court, evaluate it afresh and arrive at its own findings herein; See the case of "***Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212"*** wherein the Court of Appeal held inter alia that:-

"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

25. I will proceed with determination of the first issue by addressing the grounds separately and in succession. On the first ground as to whether the Appellant herein was

properly served with the pleadings and summons to enter appearance in the lower court, the purpose of the requirement for effective service of summons cannot be disputed. This was aptly put by the Court of Appeal in the case of:- "***Giro Commercial Bank Limited – Versus - Ali Swaleh Mwangula [2016] eKLR"***: Court held:-

"Summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend. Under order 10 Rules 4, 5, 6 & 7, where a party fails to enter appearance after being served with summons, an interlocutory judgment may be entered against the party, provided the claim is for pecuniary damages or for detention of goods. In all other instances, where there is default of appearance, the plaintiff, is under Order 10 Rule 9 required to set the suit down for hearing by formal proof of the plaintiff's claim." See also the case of:- "***Gemstaviv Limited – Versus - Kamakei Ole Karia & 5 others [2015] eKLR".***

26. The law relating to issuance and service of summons to enter appearance is Order 5 Rule (1) of the Civil Procedure Rules which provides that:

1. **Issue of summons [Order 5, Rule 1]**

1. When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

2. Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

3. Every summons shall be accompanied by a copy of the plaint.

4. The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days.

5. Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.

6. Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.

Subrule (2) concerns the validity of summons.

27. From the pleadings filed in the Lower Court pleadings, and on Page 30 of the Record of Appeal, the court has come across a filed a four (4) Paragraphed Affidavit of Service sworn by one Musyoka Samuel, designated as a Licenced Court Process Server of the High Court as indicated therein. The affidavit was filed before court on 7th October 2021 and states at Paragraph 3 that:-

"That upon making the intention of my visit known to the Defendant (the Appellant herein) that I wanted to serve him the Order issued on 23rd September, 2021 , Summons to Enter Appearance dated 24th September, 2021, Certificate of Urgency, Notice of Motion (sic), Supporting Affidavit with the accompanying annextures, Plaint, Verifying Affidavit, Plaintiffs' List of witnesses, Plaintiff's List of Documents with accompanying annextures, Plaintiff's written statement all dated 23rd September, 2021, he refused service…"

28. Other than the above affidavit of service, upon perusal of the Record of Appeal on Page 42 and come across a four (4) Paragraphed Affidavit of Service sworn by the Counsel for the Respondents, Mr. Raphael Chimera Mwinzangu, in particular Paragraph 2 where he indicated therein that on 4th August, 2022, he served the Appellant

with an application at Darad Area in Diani location within Kwale County where the Appellant resided. Upon introducing himself and making te purpose of the visit he served him with the mention Notice but he refused to sign it. The affidavit was filed before court on 12th August 2022.

29. The Appellant has denied the above mentioned services and terms the affidavit of service by Samuel Musyoka as being fabricated. He stated in the affidavit in support of his application dated 3rd March 2023 seeking to set aside the default judgement subject of this appeal, that the pleadings and summons were served upon his caretaker and not him in person. He denied having ever had any knowledge of the suit.

30. I have perused the affidavit in response to the Notice of Motion application dated 3rd March 2023, it was sworn by one Kenneth Ndumbi Njoroge the 2nd Respondent in this appeal. At paragraph 7 of the affidavit, he intimated that he had served the decree dated 19th October 2022 upon the Appellant’s caretaker and further that his counsel on

record had previously served the caretaker to the Appellant all the pleadings.

31. There exists a rebuttable presumption that the contents of an affidavit of service are accurate and genuine as to the circumstances of service. The Court of Appeal in the case of:- "***Shadrack Arap Baiywo – Versus - Bodi Bach [1987] eKLR"*** stated in that regard that: "There is a qualified presumption in favour of the process server recognized in "***M B Automobile – Versus - Kampala Bus Service, [1966] EA 480"*** at page 484 as having been the view taken by the Indian Courts in construing similar legislation. In the case of:- "***Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670"***, the learned commentators say:

> ***"3. Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box***

and opportunity of cross examination given to those who deny the service."

32. The Respondents have through the Replying Affidavit of Kenneth Ndumbi Njoroge filed before court on 15th March 2023 confirmed that service was never effected upon the appellant herein but on his caretaker. For that reason, the averments as stated in the affidavit of service by Samuel Musyoka are therefore distorted as the same are not entirely true. He stated that he had served the Appellant in person but as confirmed by the 2nd Respondent, service was upon the caretaker. For this reason, the court finds that service of the summons to enter appearance was not properly effected and the interlocutory judgement is therefore irregular.

33. Having established that the service was faulty, the court is now tasked with determining whether this aspect informs the prayer that the default Judgement entered on 5th October 2022 should be set aside. The provision of Order10, Rule 11 of the Civil Procedure Rules, 2010 is the applicable provision regarding the setting aside of interlocutory judgments, states that:

“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.”

34. The power of the court to grant or refuse an application to set aside or vary such judgment or any consequential decree or order, is discretionary and which discretion is wide and unfettered. The objective of the discretion conferred upon the court was spelt out in the case of “***Shah – Versus - Mbogo & Another [1967] EA 116”*** as hereunder:-

“The 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

35. At the same time in the case of:- “***Stephen Wanyee Roki – Versus – K - Rep Bank Limited & 2 Others [2018] eKLR”*** the Court of Appeal in addressing itself to this issue stated: “It is trite that setting aside of a default judgment is not a right of a party but an equitable remedy that is only available to a party at the discretion of the Court.

36. The court has already established that the judgement against the Appellant herein was irregularly entered. There is a distinction between a default Judgment, that is regularly entered and the one that is irregularly entered as was set out by the Court of Appeal in the case of "***James Kanyita Nderitu – Versus - Marios Philotas Ghikas (2016) eKLR***, where the Court held as follows:

> ***"In a regular default judgement, the defendant will have been duly served with summons 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 judgement 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 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 – Versus - Shah (1968) EA 98, Patel – Versus - E.A. Cargo Handling Services Ltd (1975) E.A. 75, Chemwolo & Another –Versus - Kubende (1986) KLR 492 and CMC Holdings – Verus - Nzioka [2004] I KLR 173.

However, in an irregular Judgement, the considerations are different. The Court further stated:-

"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 debito justiae, 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 issue 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."

37. From the record of appeal before court, it is noted that the suit proceeded for hearing without service being effected upon the Appellant. The judgement notice was not served either.

38. The right to be heard is among the rules of natural justice and the same cannot be wished away by failure to effect proper service. Even in the event that service was effected, the court if not satisfied with the same can out of its own motion set aside the proceedings ex debito justitiae. I am guided by the Court of Appeal case of "***Patrick Omondi Opiyo T/A Dallas Pub – Versus - Shaban Keah & Another [2018] eKLR*** where their Lordships stated as follows:

"Service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal systems applaud. Where therefore judgment is entered against a party who has

not been served and hence not been heard, such judgment will be set aside ex debito justitiae."

39. This was the similar holding in "***James Kanyita Nderitu and Another – Versus - Marios Philotas Ghikas & Another [2016] eKLR*** where the Court stated as follows:

"If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justitiae. Such a Judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."

40. In the instant suit, the court is not convinced that proper service was effected. It will be in the interest of justice to have the Appellant given a chance to ventilate his case for a just finding.

41. On the second ground and which was on the pecuniary jurisdiction of the court. The Appellant states that the value of the suit property is well over a sum of Kenya Shillings Twenty Million Five Hundred Thousand (Kshs. 20, 500, 000.00/=). Thus, based on the provision of Section 7 of the Magistrate Court Act, it is way over and above the pecuniary jurisdiction of the Senior Principal Magistrate's Court.

42. A cursory review of the Plaint (See on Page.....of the Record of Appeal) instituting the suit and which was filed before court on 24th September 2021 indicated at paragraph 4 that the suit property was purchased by the respondents at a consideration of a sum of Kenya Shillings Two Million Nine Hundred Thousand (Kshs. 2,900,000/-). This information is confirmed from the sale agreement dated 19th January 2021 which the court has had the opportunity to peruse.

43. The issue on jurisdiction was discussed at length in the celebrated case of ***Owners of the Motor Vehicle M.V. Lillian S versus Caltex Oil (Kenya) Limited (1989) KLR1***. At page 14 line 29-43 Nyarangi JA (as he then was) had this to say:

- "By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular

court has cognizance of or as to the area over which the jurisdiction shall extend; or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exists where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision a merit to nothing. Jurisdiction must be acquired before judgment. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Facts constitute the evidence before the court…The moment a court determines that it has no jurisdiction it has to down its tools and proceed no further"

44. As already indicated, the pecuniary jurisdiction of a Senior Resident Magistrate's jurisdiction is spelt out in Article 169 of the Constitution and Section 7(1) of the Magistrates' Courts Act. Section 7(1) of the Magistrates' Courts Act which provides that:

-'**7. Civil jurisdiction of a magistrate's court**

A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed-

Twenty million shillings, where the court is presided over by a chief magistrate;

Fifteen million shillings, where the court is presided over by a senior principal magistrate;

Ten million shillings, where the court is presided over by a principal magistrate;

Seven million shillings, where the court is presided over by a senior resident magistrate; or

Five million shillings, where the court is presided over by a resident magistrate.

45. Despite the Appellant’s allegation that the Magistrates Court does not have the requisite jurisdiction to determine the instant dispute as the amount is way beyond its pecuniary jurisdiction, I have not come across any evidence to cement the Appellants claim that the suit property is way over Kenya Shillings Twenty Million (Kshs. 20, 000, 000.00/=) in value. I would at least expect a valuation report to back up these assertions but the

same has not been availed. Bearing this in mind, the issue of pecuniary jurisdiction is thus not fully supported by any tangible evidence and the court finds that no prove as to the value of the property has been placed before it save for the agreement purchasing the property. However, while critically assessing the records for the two (2) suits – "***CM ELC No E065 of 2021 Francis Githinji Ngatia & Kenneth Ndumbi Njoroge - Versus - Bruno Gonzalez" and ELC Court in Kwale ELC Civil suit no 68 of 2021 Francisca M. Kambe - Versus - Mariamu Suleiman Bati & 5 Others [Formerly ELC Mombasa Suit no 355 of 2017]*** the Court observes a few peculiar similarities. These are:

a). Both have almost similar parties;

b). Both deal with the same subject matter.

c). Both have similar cause of action.

46. Suffice it to say, the only distinction is the Court where the matters are instituted – one being at the Lower Court while the other is at the High Court. In order to ameliorate the situation and to avoid causing any confusion and subsequent embarrassment to the Court while making the final

decision, the Honourable Court proceeds to invoke the provisions of Article 159 (1) & (2) of the Constitution of Kenya, 2010; Sections 3 and 13 of the Environment & Land Court Act, No. 19 of 2011, Sections 101 of the Land Registration Act, No. 3 of 2012 and Section 150 of the Land Act, No. 6 of 2012 and directed that these two suits be consolidated to be heard and finally determined by this Honourable Court henceforth.

47. While carefully making this noble decision, I reiterate that the main issue here is on whether the two suits should be considered for consideration per excellence. Accordingly, the jurisdiction to consolidate suits is donated by the provision of Section 81 (2) (h) of the Civil Procedure Act, Cap. 21 and Order 11 Rule 3 of the Civil Procedure Rules, 2010. In the case of: ***"Prem Lala Nahata & Anor – Versus - Chandi Prasad Sikaria [2007] 2 Supreme Court Cases 551"***, the India Supreme Court held:-

> ***"It cannot be disputed that the Court has power to consolidate suits in appropriate cases…. The main purposes of consolidation is therefore to save costs, time and effort and to make the***

conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit."

48. The Civil Procedure Rules, 2010 mandates courts are to consider consolidations of suit. In so doing, courts to be guided by the following three (3) legal parameters. These are:-

a) Do the same question of law or fact arise in both cases?

b) Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transactions?

c) Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?

49. Likewise, in the case of ***"Law Society of Kenya – Versus – The Centre for Human Rights & Democracy,*** Supreme Court of Kenya Petition No. 14 of 2013 the SOK held that:-

"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation

was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it"

50. While Maraga J, as he then was, held in **the case of:-** ***"Municipal Council of Mombasa – Versus - Municipal Council of Mombasa [2004] eKLR that:-***

'Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.

The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

1. ***some common question of law or fact arises in both or all of them; or***
2. ***the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or***

for some other reason it is desirable to make an order for consolidating them.

51. On the third ground of appeal and which was in relation to the lower court suit being "Res – Sub Judice". The doctrines of sub judice is provided for in the provision of Sections 6 of the Civil Procedure Act, as follows:

"Section 6 - Stay of suit. No court shall proceed with the trial of any suit or proceeding in which the matter in issue

is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed…"

52. The doctrine of sub - judice, it is codified in Section 6 of the Civil Procedure Act, Cap. 21 and bars the courts from entertaining a suit where there is an earlier suit pending for hearing and determination before a court of competent jurisdiction and involving the same parties and substantially the same dispute. Where there is an earlier pending suit, the court is required to stay the hearing of the latter suit to await determination of the first suit in time. The rationale behind the sub judice rule is simply that a party cannot be allowed to file a multiplicity of suits on the same issue which is yet to be determined. In the case of:- ***Speaker of the National Assembly & Another – Versus - Senate & 12 others [2021] KECA 282 (KLR)***, the Court held that: "Sub judice is a Latin word meaning "under Judgment". It denotes that a matter is being

considered by a court or judge. The doctrine is codified in section 6 of the Civil Procedure Act."

53. In the case of:- "***Kenya National Commission on Human Rights – Versus - Attorney General & 17 Others [2020] eKLR"*** the Supreme Court expressed itself as follows on the doctrine: The term 'sub judice 'is defined in Black's Law Dictionary 9th Edition as: "Before the court or judge for determination." The purpose of the sub judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before

courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.’”

54. I have had the chance to peruse the application dated 18th July 2023 and which forms part of the record of appeal in this matter. The application was by one Fransisca Kambe who sought to be enjoined as a party in the suit before the lower court. At paragraph 2 of the affidavit in support of the application and which was sworn by the said Fransisca Kambe, she avers that she is the registered owner of the suit property KWALE/DIANI COMPLEX/205 and has attached a copy of the title deed affirming this assertion. The title deed was issued on 1st April 1996. I have also had the opportunity to peruse the Appellants title over the same suit property and which was issued to him jointly with one ILARIA MANINZA on 8th May 2009.

55. I further confirm that indeed there exists “***Kwale ELC Civil suit no 68 of 2021 Francisca Kambe - Versus - Mariamu Suleiman Bati & 5 Others [Formerly ELC Mombasa Suit no. 355 of 2017]”*** where the Appellant is the 2nd Defendant and the Respondents are the 5th and 6th Defendants respectively. The file is even coming up for mention before this court on 3rd February 2026. With this

information in mind, I think the aspect of a similar suit over the same subject matter being before the court is confirmed. The doctrine of sub - judice comes into play at this point as it is evident that "***CM ELC No E065 of 2021 Francis Githinji Ngatia & Kenneth Ndumbi Njoroge Versus Bruno Gonzalez*** was actively in court at the same time as "***Kwale ELC Civil suit no 68 of 2021 Francisca Kambe Versus Mariamu Suleiman Bati & 5 Others [Formerly ELC Mombasa Suit no 355 of 2017].***

ISSUE No. b). The orders to be made in this appeal to meet the best ends of justice

56. This court has established that indeed no proper service of pleadings was effected upon the appellant. As such the suit before the lower court proceeded without his knowledge and Judgement entered in his absence. The Appellant has however failed to prove the value of the suit property and as such the issue of the pecuniary jurisdiction of the lower court to handle the suit has not been properly argued or backed up with sufficient evidence and/or demonstration. It is also clear that the doctrine of sub judice was abused by the parties instituting the lower court matter. Thus, the appeal partly

succeeds. Luckily, all these issues have been adequately above in this Judgement.

ISSUE No. c). Who bears the costs of the appeal?

57. It is trite law that the issue of Costs is at the discretion of Court. Costs means the award that a party is granted at the conclusion of the legal action or proceedings in any litigation. The provision of Section 27 of the Civil Procedure Act, Cap. 21 provides: -

> **"(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."**

58. By event it means the result or outcome of the legal action. In the Case of:- ***"Republic – Versus - Rosemary Wairimu Munene (Ex parte Applicant) – Versus - Ihururu Dairy Farmers Co-operative Society Ltd*** **Judicial Review Application** ***No. 6 of 2004"*** Mativo J***.*** held that the issue of costs is the discretion of the Court and is used to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party.

59. In the instant Appeal, by all means, the Appellant has in my view successfully argued his appeal and is entitled to the costs thereto.

VI. Conclusion and Final Disposition

60. In the circumstances, the Honourable Court is persuaded that this is a proper case for the exercise of its discretion in favour of the Appellant.

a) THAT Judgement by the Appellant through the Memorandum of Appeal dated 11th June, 2025 be and is hereby allowed with costs and

b) THAT an order that the default Judgement delivered and dated 5th October 2022 in

the Civil Case of "*CM ELC No E065 of 2021 Francis Githinji Ngatia & Kenneth Ndumbi Njoroge – Versus - Bruno Gonzalez*" in the lower court be and is hereby set aside.

c) **<u>THAT</u> arising from the issue of Pecuniary Jurisdiction of the Lower Court rather than referring back the matter to the Chief Magistrate Court for Re – Trial thereof preferably he said matter before the Lower Court being "*Kwale CM - ELC Civil suit no. 65 of 2021 – Francis Githinji Ngatia & Kenneth Ndumbi Njoroge - Versus – Bruno Gonzalez*" being the same subject matter, to be consolidated with Civil case "*Kwale ELC Civil suit no. 68 of 2021 - Francisca M. Kambe - Versus - Mariamu Suleiman Bati & 5 Others [Formerly ELC Mombasa Suit no 355 of 2017"]*.**

d) The lead file to be "*Kwale ELC Civil suit no 68 of 2021 Francisca M. Kambe - Versus - Mariamu Suleiman Bati & 5 Others* – where all the filing of pleadings and recording of proceedings will take place.

e) **<u>THAT</u> there be a mention on 27th April, 2026 for conducting Pre – Trial conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 and taking further direction including a hearing date.**

f) **<u>THAT</u> an order be and is hereby made to forthwith release to the Appellant the sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00/=) being held in a Joint Escrow interest earning account of both Law firms of Messrs. Sachdeva, Nabhan & Company Advocates and Messrs. Chimera, Kamotho & Company Advocates as Security for the performance of the Decree pursuant to an order made by this Court in it's Ruling delivered on 28th May, 2025.**

g) **<u>THAT</u> the costs of the appeal to be borne by the 1st & 2nd Respondents be awarded to the Appellant.**

<u>IT IS ORDERED ACCORDINGLY.</u>

JUDGEMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS……4TH …. DAY OF ……FEBRUARY ……2026

……

HON. MR. JUSTICE L.L NAIKUNI,

ENVIRONMENT & LAND COURT

AT

KWALE.

Ruling delivered in the presence of: -

a) Mr. Daniel Disii, the Court Assistant.

b) Mr. Noor Advocate for the Appellant.

c) M/s. Kimaita Advocate holding brief for M/s. Kimani Advocate for the 1st & 2nd Respondents