**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: GATEMBU, MURGOR & NYAMWEYA, JJ.A.)**

**CIVIL APPEAL NO. 72 OF**

**2020 BETWEEN**

**TAITA TAVETA TEACHERS INVESTMENT LIMITED APPELLANT**

**AND**

**MBARO JOHNSON.....1ST RESPONDENT**

**KASUNGU GONA MASHA ..... 2ND RESPONDENT**

**SALIM WANJALA KILISWA ..... 3RD RESPONDENT**

**BAKARI HAMISI KATANA.....4TH RESPONDENT**

**CHARO KARISA JEFWA ..... 5TH RESPONDENT**

**ATHMAN SALIM ..... 6TH**

**RESPONDENT KARASU MWARANDU MUMBA .....**

**7TH RESPONDENT**

**KAJUMWA MWAMBOZE.....8TH RESPONDENT**

**KASIMU KHAMISI.....9TH RESPONDENT**

**JOYCE MADZO POLE.....10TH RESPONDENT**

***(Respondents suing on their own behalf and on behalf of the squatters/ residents of Junda Kasarani Ndogo residing upon property title no 771/MN numbering 430 appearing in the schedule of members of Bahati Junda Self Help Group attached to the Originating Summons)***

***(An appeal from the Ruling of the Environment and Land Court at Mombasa (C. Yano J.) dated and delivered on 29th July 2020***

***in***

***Mombasa ELC Case No. 318 of 2015 (OS))***

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## JUDGMENT OF THE COURT

The Respondents instituted the suit by Originating Summons against the appellant before the Environment and Land Court (ELC) at Mombasa on their own behalf and on behalf of approximately four hundred and thirty (430) other persons described as squatters, whose names appear in the Schedule of Members of Bahati Junda Self Help Group annexed to the pleadings. They claimed ownership of land known as Title No. 771/II/MN CR. 8594, *(the suit property)* measuring approximately 47.62 acres, on the basis of adverse possession.

In their suit, the Respondents sought for a determination of the following issues: whether they had been in uninterrupted, open and exclusive possession of the suit property for a period exceeding twelve (12) years; whether such possession entitled them to acquire title by adverse possession; and whether their occupation constituted an overriding interest within the meaning of the Land Act, 2012, or section 30 of the repealed Registered Land Act, Cap 300. The court was further called upon to determine whether the Respondents were entitled to be registered as proprietors of the suit property, whether a

permanent injunction ought to issue restraining the Appellant from demolishing or damaging their structures, interfering with their crops, or evicting them from the land, and whether damages or compensation would be an adequate remedy. The Respondents also sought costs of the suit. They further prayed for a permanent

injunction restraining the Appellant, whether by itself, its agents, servants, family members or other authorized persons, from entering the suit property, demolishing houses or structures thereon, damaging or harvesting crops, evicting them, or otherwise interfering with their occupation and use of the land. They also sought an award of costs.

In response, the Appellant filed a defence denying the Respondents' claim. The Appellant maintained that it is the registered proprietor of the suit property, as evidenced by certificates of official search, and contended that the Respondents had never occupied the suit property at any time. On that basis, the Appellant asserted that no claim for adverse possession could arise against it and that the alleged occupation could not constitute an overriding interest under the applicable land law.

The Appellant further contended that the Respondents failed to adduce any evidence to demonstrate uninterrupted occupation of the suit property for a period exceeding twelve (12) years. It was also pleaded that the Respondents had not sufficiently identified the parcel of land over which they were asserting adverse possession, having failed to produce a copy of the title to

the alleged suit property. Additionally, the Appellant faulted the Respondents for failing to produce a survey report to enable the court ascertain the size, extent and location

of the land claimed, thereby rendering the Respondents' claim uncertain and incapable of sustaining the reliefs sought.

Upon closure of the pleadings, the matter was set down for hearing. When the matter came up for hearing before the ELC on 3rd December 2018, the Respondents were present, while the Appellant and his counsel were absent. In their absence, the court allowed the matter to proceed with the hearing of the Respondents' case. Thereafter, the defence case was also closed.

Subsequently, the Appellant moved the court by way of a Notice of Motion dated 7th December 2018, seeking orders, inter alia, that the proceedings conducted on 3rd December 2018, together with all consequential orders made thereafter, be vacated and set aside, and that the defence case be reopened to enable the Appellant adduce evidence and fully defend the suit. The Appellant further sought a stay of delivery of Judgment pending the hearing and determination of the application, as well as costs thereof.

The application was supported by an affidavit sworn by counsel for the Appellant, who deponed that the Appellant was the registered proprietor of the suit property and had actively

participated in the proceedings prior to the hearing date. It was averred that although the Appellant had been served with a hearing notice indicating that the matter would be heard on 3rd December 2018, the notice did not specify the court before which the matter was fixed for hearing.

Counsel further explained that the matter had previously been handled by a Judge who was on annual leave at the material time, and that due to an inadvertent failure to diarise the hearing date, neither counsel nor the Appellant attended court on the scheduled date.

It was further deponed that the Appellant only became aware that the matter had proceeded *ex parte* and that the defence case had been closed upon being served with a mention notice dated 6th December 2018. The Appellant contended that the proceedings of 3rd December 2018 effectively denied it the opportunity to cross-examine the Respondents' witnesses and to present its own evidence, thereby occasioning them grave prejudice and infringing upon their right to a fair hearing.

The Appellant averred that the failure to attend court was neither deliberate nor intended to delay the proceedings, but was excusable and arose from an honest mistake on the part of counsel. It was further asserted that the Appellant had an arguable defence raising triable issues, and that no prejudice would be occasioned to the Respondents if the orders sought were granted, as any inconvenience could be adequately

compensated by an award of costs. On the contrary, it was contended that grave prejudice would be suffered by the Appellant if the *ex parte* proceedings were allowed to stand, as it would be condemned unheard.

The fate of the application dated 7th December 2018 is not expressly reflected in the record by way of a formal ruling. However, the court record shows that on 7th December 2018, when the matter came up for mention to confirm compliance with directions on the filing of submissions, counsel for the Appellant, Mr. Kenduyu, addressed the court and stated as follows:

> *"We were served but went to the wrong court. We would like to defend the matter. We were served yesterday at 4.00 p.m."*

In response, counsel for the Respondents opposed the request and maintained that the Appellant had been properly served with the hearing notice and was fully aware of the hearing date.

Upon considering the parties' respective positions, the court made a brief but definitive pronouncement, stating:

> *"Application rejected. Judgment to be on notice."*

The judgment was subsequently delivered in favour of the Respondents on 29th March 2019.

Undeterred, the Appellant returned to court by way of a Notice of Motion dated 9th May 2019, and lodged in court on 13th

May 2019, seeking a raft of substantive reliefs, firstly, that the application be certified urgent and that service be dispensed with in the first instance. They further sought an order for stay of

execution of the judgment delivered on 29th March 2019, together with all consequential orders, pending the hearing and determination of the application.

The Appellant also sought orders setting aside the *ex parte* judgment delivered on 29th March 2019, recalling the Respondents for cross-examination, and reopening the defence case to enable the Appellant adduce evidence in support of their case. The application was premised on the grounds that the Judgment emanated from proceedings conducted in the absence of the Appellant and its counsel, that the failure to attend court on the hearing date was excusable and not deliberate, and that unless the orders sought were granted, the Appellant would suffer prejudice by being condemned unheard, contrary to the principles of natural justice and the right to a fair hearing

Opposing the application, the Respondents filed a replying affidavit sworn by Mbaro Johnson on 5th July 2019, where it was deposed, *inter alia*, that the Appellants were at all material times aware of the hearing date of 3rd December 2018, which date had been taken in court and the matter duly appeared on the cause list for that day. It was further deponed that the Respondents'

advocates had served the Appellant with a hearing notice, which they deliberately ignored. The Respondents averred that upon the matter proceeding in the absence of the Appellant, an oral application was subsequently made to set aside the proceedings, which application was considered and dismissed by the court. It

was contended that no appeal was lodged against that decision, and consequently, the present application amounted to an abuse of the court process and was *res judicata*, the issues raised having already been conclusively determined. The Respondents urged the court to find that the Appellant had not demonstrated any sufficient cause to warrant the exercise of the court's discretion in its favour, and for the application to be dismissed with costs.

The trial Judge, upon considering the Notice of Motion dated 9th May 2019, the affidavits in support, the replying affidavit sworn by Mbaro Johnson, and the rival submissions of counsel, framed the principal issues for determination as whether the application was barred by the doctrine of *res judicata* and, if not, whether sufficient cause had been demonstrated to warrant the setting aside of the ex parte judgment delivered on 29th March 2019.

In analysing the record, the learned Judge observed that the suit had been fixed for hearing on 3rd December 2018 and that both parties' advocates had been duly served with hearing notices, which were received on 14th and 15th November 2018 respectively. The court stated that on the scheduled hearing date, only the Respondents and their advocate attended court, and in

the absence of the Appellant and its counsel, the matter proceeded *ex parte* and the Respondents' case was heard and closed; that thereafter on 7th December 2018, counsel for the Appellant appeared before the same court and made an oral

application seeking leave for the Appellant to defend the suit and effectively to set aside the proceedings conducted on 3rd December 2018. That application was heard *inter partes* and was declined. Judgment was thereafter delivered in favour of the Respondents on 29th March 2019.

In determining the Notice of Motion dated 9th May 2019, the learned Judge held that the application sought substantially the same reliefs as the oral application that had been heard and dismissed on 7th December 2018. The court emphasized that the parties in both applications were the same, the subject matter was identical, and the relief sought—namely the setting aside of the *ex parte* proceedings and judgment—had already been conclusively determined by a court of competent jurisdiction.

Relying on ***Section 7*** of the ***Civil Procedure Act*** and ***Section 28*** of the ***Environment and Land Court Act***, as well as established jurisprudence on the doctrine of *res judicata,* the court held that the principle applies with equal force to applications as it does to suits. The learned Judge reasoned that having failed to appeal or seek review of the ruling delivered on 7th December 2018, the Appellant could not properly re-introduce

the same issues through a fresh application before the same court. The court further observed that, in fact, the Appellant had already signified its intention to challenge the earlier decision by filing a Notice of Appeal dated 20th December 2018, thereby acknowledging that

the appropriate forum for ventilating its grievance lay before the appellate court rather than the trial court. On that basis, the learned Judge found that the Notice of Motion dated 9th May 2019 was not only barred by the doctrine of *res judicata* but also amounted to an abuse of the court process, and in so finding dismissed the Notice of Motion dated 9th May 2019.

Aggrieved the Appellant has filed an appeal to this Court on grounds that; the trial court was in error in holding that the Appellant's Notice of Motion dated 9th May 2019 seeking to set aside the *ex-parte* judgment delivered on the 29th March 2020 was *res judicata* and an abuse of the Court process; in failing to appreciate that on 7th December 2018, the *ex-parte* judgment had not been delivered and therefore the Appellant's Advocates would not have made any application to set aside the *ex-parte* judgment; in failing to appreciate that the learned Judge directed that judgment would be delivered on notice, and was delivered on 29th March 2019, which judgment is the subject matter of the Appellant's Notice of Motion dated 9th May 2019; in misdirecting himself that a similar application to set aside the *ex-parte* judgment had been made, in total disregard of the Court records

which clearly showed that the application made was for the Appellant to be allowed to defend the matter; in failing to analyse the annextures of the Appellant's Notice of Motion dated 9th May 2019; in failing to appreciate the facts laid before the court by the Appellant, and instead

proceeding to re-state his own version of facts in complete departure from the court record, which clearly showed no application to set aside the judgment was ever made; in failing to appreciate that dismissal of the Appellant's Notice of Motion dated 9th May 2019 and the *ex-parte* judgment were tantamount to denial of the Appellant's right to fair hearing and denial of its right to property guaranteed by ***Article 40*** of the ***Constitution***, and a right to fair hearing guaranteed by ***Article 48*** of the ***Constitution.***

When the appeal came up for hearing on a virtual platform, learned counsel ***Ms. Mulongo*** appeared for the Appellant while learned counsel ***Mr. Obonyo*** appeared for the Respondents. In their written submissions, counsel submitted that when the matter proceeded *ex parte* on 3rd December 2018, no Judgment had been delivered. It was therefore contended that no application to set aside a non-existent judgment could have been made on 7th December 2018; that what was made on that date was merely an oral request to be allowed to defend the suit, which request was declined, with the court directing that judgment would be delivered on notice. Counsel submitted that

the Notice of Motion dated 9th May 2019 was the first substantive application seeking to set aside the judgment after its delivery on 29th March 2019, and which application could not properly be termed as *res judicata*.

It was further submitted that the learned Judge misapprehended the proceedings by equating the oral request made on 7th December 2018 with an application to set aside the judgment, and by invoking ***Section 7*** of the ***Civil Procedure Act*** in circumstances where the essential elements of *res judicata* had not been satisfied. Counsel submitted that the prayers sought in the oral request and those sought in the Notice of Motion dated 9th May 2019 were materially different, and that the latter application raised distinct issues that had not been finally determined by any court of competent jurisdiction.

On the issue of non-attendance at the hearing, counsel submitted that the Appellant's failure to attend court on 3rd December 2018 was neither deliberate nor intended to obstruct justice, but was occasioned by an honest mistake on the part of counsel, who failed to diarise the matter while under the genuine impression that the presiding Judge was on annual leave and that the matter would not proceed, and further that the hearing took place during the court's service week, a fact that was not indicated in the hearing notice, thereby contributing to the inadvertence.

Counsel submitted that the learned Judge failed to properly exercise judicial discretion in declining to set aside the *ex parte* judgment, and instead adopted a technical approach that resulted in the Appellant being condemned unheard; that the Appellant had a triable defence to the Respondents' claim for

adverse possession, which defence raised serious issues that ought to have been tested through cross-examination and a full hearing on the merits.

In support of the submission that mistakes of counsel should not be visited upon an innocent litigant, counsel relied on _ ***Wilson Cheboi Yego vs Samuel Kipsang Cheboi [2019] eKLR***, where this Court held that the door of justice should not be closed merely because a mistake has been made by counsel, and that courts ought to do whatever is necessary to rectify such mistakes where the interests of justice so demand. Reliance was also placed on ***Philip Kiptoo Chemwolo & Another vs Augustine Kubende [1986] eKLR,*** where the Court held that blunders will continue to be made and that a party should not be denied a hearing on the merits solely on account of counsel's error.

In their written submissions, counsel for the Respondents submitted that the appeal is incompetent, misconceived, and an abuse of the court process, as it is not properly anchored on a valid Notice of Appeal. Counsel submitted that whereas the

Appellant ought to have appealed against the judgment of ***N. Matheka, J.*** delivered on 29th March 2019, it instead improperly mounted an appeal against the ruling of ***Yano J.*** delivered on 29th July 2020, thereby seeking to indirectly challenge a judgment against which no competent appeal lay. It was argued that the Appellant had been granted time by the court to regularise its position by filing an appropriate Notice of Appeal against the judgment of

29th March 2019 but failed to do so, rendering the present appeal fatally defective; that further, the Appellant was attempting to circumvent the Court of Appeal Rules, particularly ***Rule 59***, by inviting the Court to hear an appeal without a proper Notice of Appeal.

On the substantive issue of setting aside an ex parte judgment, counsel submitted that the discretion to do so is well settled in law and is not exercised as a matter of course. Reliance was placed on the case of ***Patel vs EA Cargo Handling Services Ltd [1974] EA 75***, for the proposition that although the discretion of the court is wide, it must be exercised judiciously and on terms that are just. Counsel also relied on ***Shanzu Investment Ltd vs Commissioner of Lands, Civil Appeal No. 100 of 1993***, where this Court set out the guiding principles, which are that an applicant must demonstrate a defence on the merits and that setting aside should not occasion injustice to the opposite party. It was submitted that in the present case, the Appellant had failed to demonstrate any meritorious defence.

Counsel further submitted that the explanation advanced by

the Appellant for non-attendance at the hearing on 3rd December 2018 was unconvincing and unsupported by evidence. It was argued that the Appellant had been served twice with hearing notices, once by the court and once by the Respondents' advocates, and that the claim that the presiding Judge was on annual leave was a mere

assertion that was unsupported by any affidavit from the court registry. Counsel submitted that the Appellant's advocate had in fact attended court on the material day, but went to the wrong court, a mistake that could not be excused in the circumstances.

On the plea of *res judicata,* counsel submitted that the issue of setting aside had already been canvassed and conclusively determined when an oral application was made and dismissed on 7th December 2018. The subsequent application by Notice of Motion dated 9th May 2019 therefore offended ***section 7*** of the ***Civil Procedure Act***. In support of this position, counsel relied on the case of ***Benson Ngugi vs Francis Kabui, Civil Appeal No. 9 of 1986***, where the Court held that litigation must come to an end and that once a matter has been determined by a court of competent jurisdiction, it cannot be reopened between the same parties. Further reliance was placed on ***Harbhajan Singh Sembi vs Lakeland Motors Ltd, HCCC No. 227 of 1997***, for the principle that a party cannot re-litigate issues that have already been determined. Counsel urged that the appeal be dismissed.

As a first appellate court, this Court is obliged to re-evaluate the evidence and draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses. The applicable principles are well-established in

the cases of ***Selle vs Associated Motor Boat Co.*** ***[1968] EA 123,*** and ***Peters vs Sunday Post*** ***[1958] EA 424.***

Having considered the record of appeal, the grounds of appeal, and the rival submissions of the parties, this Court is of the view that the appeal turns on two broad issues, namely: i) whether the Notice of Motion dated 9th May 2019 was *res judicata* the oral application of 7th December 2018; and ii) whether the learned Judge rightly dismissed the Notice of Motion dated 9th May 2019.

On first issue of whether the Notice of Motion dated 9th May 2019 was barred by the doctrine of *res judicata*, under the doctrine parties are barred from re-litigating disputes that have already been conclusively determined on their merits by a court of competent jurisdiction. The doctrine is statutorily underpinned by ***Section 7*** of the ***Civil Procedure Act,*** which provides:

> ***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue***

***has been subsequently raised, and has been heard and finally decided by such court.***

The Supreme Court, in the case of ***John Florence Maritime Services Limited (supra),*** clarified the legal threshold that must be satisfied before the doctrine of *res judicata* can be invoked in civil proceedings, in the following terms:

***"59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:***

***a. There is a former Judgment or order which was final;***

***b. The Judgment or order was on merit;***

***c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and***

***d. There must be between the first and the second action identical parties, subject matter and cause of action."***

The doctrine is not limited to barring identical suits that have been fully litigated and concluded. It also extends to precluding the re-litigation of issues that have previously been judicially considered and determined on their merits between the same parties or their privies and also filing similar applications.

The record shows that the Appellant made two separate applications before the trial court arising from the *ex parte* proceedings of 3rd December 2018. The first application was made orally on 7th December 2018, shortly after the Respondents' case had proceeded *ex parte* and thereafter, closed. In that application, the Appellant sought leave to participate in the proceedings despite its absence on the hearing date. In substance, the Appellant asked the court to reopen the defence

case and allow it to defend the suit. The court heard the parties on that application and declined to grant the orders sought.

The second application was brought by way of a formal Notice of Motion dated 9th May 2019, after judgment was delivered on 29th March 2019. In that

application, the Appellant sought an order of stay of execution of the judgment and all consequential orders, the setting aside of the *ex parte* judgment, the recall of the Respondents for purposes of cross-examination, and the reopening of the defence case to enable the Appellant to adduce evidence.

In discerning whether the application dated 7th December 2018 was *res judicata* the application of 9th May 2019, we find that various dissimilarities stand out. First, the temporal context within which the two applications were made was materially different. On 7th December 2018, when counsel for the Appellant made an oral request before the trial court, no judgment had been delivered. The hearing had merely proceeded *ex parte* on 3rd December 2018, and the Respondents' case had been closed. At that stage, there was no extant judgment capable of being set aside. Consequently, as a matter of both logic and law, the Appellant could not have applied to set aside a judgment that had not yet come into existence. What was sought on 7th December 2018 was limited and specific: leave to be allowed to defend the suit following non-attendance on the hearing date. The request was directed at reopening participation in the trial prior to

judgment and was confined to the procedural stage then obtaining. It did not invite the court to interrogate, review, or nullify any final determination, as none existed.

By contrast, the Notice of Motion dated 9th May 2019 was brought after delivery of judgment on 29th March 2019. The gravamen of that application was fundamentally different. It expressly sought, *inter alia*, the setting aside of a final judgment, stay of execution, recall of witnesses for cross-examination, and reopening of the defence case. These reliefs were directed at undoing the legal consequences of a concluded adjudication and invoked the court's post- judgment discretionary jurisdiction an issue that had not, and could not, have arisen on 7th December 2018.

Secondly, the nature and scope of the reliefs sought in the two applications were separate and distinct. The oral request of 7th December 2018 was informal, narrow in scope, and procedural in character. It did not raise issues relating to execution, finality of judgment, or the Appellant's constitutional rights post- judgment. Conversely, the application dated 9th May 2019 was substantive, formal, and invoked broader considerations, including alleged violation of the Appellant's right to a fair hearing and the drastic consequences flowing from an *ex parte* judgment affecting proprietary rights.

Thirdly, the cause of action and issues for determination in the two applications were not identical. The core issue on 7th December 2018 was whether the Appellant should be permitted to participate further in the trial before judgment. The core issue on 9th May 2019 was whether a final judgment,

obtained following *ex parte* proceedings, should be set aside in the interests of justice. These are legally distinct questions attracting different considerations, principles and consequences.

In the premises, the essential elements of *res judicata* being, the issues involved, the similar reliefs sought, and a prior final determination on the merits were not satisfied. We find that the learned Judge therefore misdirected himself in equating the oral request made on 7th December 2018 with the substantive Notice of Motion dated 9th May 2019, and thereafter holding that the latter was *res judicata* by virtue of ***Section 7*** of the ***Civil Procedure Act.*** In the result we consider it necessary to interfere with that decision.

Having found as we have that the learned Judge misdirected himself in holding that the Notice of Motion dated 9th May 2019 was barred by the doctrine of *res judicata*, it becomes necessary to consider whether the discretion to set aside the Judgment ought to have been exercised in favour of the Appellant, and whether the dismissal of that application resulted in a denial of the Appellant's right to be heard.

The law relating to the setting aside of ex parte proceedings

and judgments is well settled. The power is discretionary and must be exercised judicially, not capriciously, and always in furtherance of substantive justice. The court's primary concern is to do justice between the parties, and unless there is evidence

of deliberate obstruction or abuse of the court process, a litigant ought not to be driven from the seat of justice without being heard on merit. See ***Patriotic Guards Ltd vs James Kipchirchir Sambu [2018] eKLR*** and ***Shah vs Mbogo & Another [1967] EA 1116*.**

The record shows that the hearing proceeded on 3rd December 2018 in the absence of the Appellant and its counsel, notwithstanding that they had been served with a hearing notice. Counsel subsequently explained that although service had been effected, the matter was previously before a different Judge who was on leave, and due to inadvertence, the hearing date was not properly diarised. Counsel further stated on record that they had gone to the wrong court. It is not disputed that immediately upon learning that the matter had proceeded ex parte, counsel moved the court and sought to be allowed to defend the suit.

The question is whether that explanation constituted sufficient cause to warrant the exercise of discretion in favour of the Appellant. A consideration of the record shows that is nothing that pointed to a deliberate, and contumelious absence or that it was intended to delay the proceedings. The Appellant had

actively participated in the suit prior to the hearing date, and in addition, the application to reopen participation was made promptly and without delay.

Counsel has attributed the non-attendance to a mistake on their part. In this regard, courts have variously affirmed that blunders will inevitably occur in the course of litigation and that justice is not served by imposing the ultimate penalty of shutting out a party from being heard solely because of counsel's inadvertence. See ***Wilson Cheboi Yego vs Samuel Kipsang Cheboi [2019] KECA 638 (KLR)*** and ***Belinda Murai & Others vs Amos Wainaina [1979] eKLR.***

Furthermore, the right to be heard is not a mere procedural courtesy; it is a foundational element of the rule of law. ***Article 50(1)*** of ***the Constitution*** guarantees every person the right to have any dispute resolved in a fair and public hearing before a court. The right encompasses the opportunity to cross- examine opposing witnesses and to present one's own evidence. The proceedings of 3rd December 2018 resulted in the Respondents' case being heard, closed, and ultimately determined without the Appellant being afforded that opportunity. In effect, the resulting Judgment, delivered on 29th March 2019, effectively determined proprietary rights over approximately 47.62 acres of land on the basis of untested evidence. See ***Mbaki & others vs Macharia &***

***another [2005] 2 EA*** and ***Patriotic Guards Ltd vs James Kipchirchir Sambu [2018] eKLR***

where in allowing the appeal this Court concluded:

> ***"In the circumstances of this case, there was no reason grave enough that would warrant the locking out of the appellant from pursuing its defence***

***and counterclaim and allowing the trial to proceed to its logical conclusion. The interest of justice warrants this Court's intervention.''***

Clearly, the learned Judge, did not undertake a substantive evaluation of whether the explanation for non-attendance was excusable or whether the Appellant had demonstrated triable issues in its defence.

In balancing the competing interests, it is also material that any inconvenience to the Respondents occasioned by reopening the defence case could be compensated by an award of costs. On the other hand, the prejudice to the Appellant in being shut out from defending the claim was irreparable.

In the premises, the dismissal of the Notice of Motion dated 9th May 2019 had the effect of denying the Appellant its constitutional right to a fair hearing. The learned Judge misdirected himself in law and failed to properly exercise judicial discretion having regard to the surrounding circumstances. The appeal is therefore meritorious. As a consequence, it is necessary to interfere with the Ruling delivered on 29th July 2020 which we set aside, and in so doing set aside the Judgment delivered on 29th March 2019, thereby reopening the defence case so that the

dispute may be determined on its merits upon both parties having been fully heard.

In sum, the appeal is merited and is allowed with costs to the Appellant, and we make the following orders:

1. *The Ruling of the Environment and Land Court at Mombasa (Yano J.) dated and delivered on 29th July 2020 and the Judgment delivered on 29th March 2019 be and are hereby set aside. We substitute there for an order allowing of prayers 2, 3, 4, and 5 the Notice of Motion dated 9th May 2019.*

2. *The Mombasa ELC Case No. 318 of 2015 (OS)) be mentioned before the Presiding Judge Environment and Land Court at Mombasa within 30 days of delivery of this judgment for directions on the disposal of the matter and the conclusion of the hearing of the case before a Judge other than Yano, J.*

3. *Costs of the said application and of the appeal to the Appellant.*

***It is so ordered.***

***Dated and delivered at Mombasa this 13th day of March, 2026.***

.....

**JUDGE OF APPEAL**

*I certify that this is the*
*true copy of the original*

***signed***
***DEPUTY REGISTRAR***