REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

CIVIL SUIT NO. 172 OF 2014

WILLIAM MACHARIA MAINA.....1ST PLAINTIFF

JOHN MUTHUI MAINA.....2ND PLAINTIFF

VERSUS

FRANCIS BARCHURO.....1ST DEFENDANT

CHEBUTIEI KOIN.....2ND DEFENDANT

JACKSON BARCHURO.....3RD DEFENDANT

DANIEL RUTO.....4TH DEFENDANT

AND

1. **KIBIWOTT YATOR KURYASES**
2. **KURYASES CHARLES KIMUTAI**
3. **JOSEPH MAIYO CHELIMO**
4. **ALEX KIROP KIPTOO**
5. **MUSA TOROITICH AYABA**
6. **ELIAS CHELANGA TOROITICH**
7. **TITUS BOWEN KISANG**
8. **FIONA JEMAIYO KIROP**
9. **MICAH KOSGEI KIROTICH.....INTERESTED PARTIES/APPLICANTS**

RULING

This ruling is in respect of an application dated 22nd March 2019 by the defendant/applicants seeking for the following orders:

a) Spent.

b) A stay of execution of the judgment, decree and all consequential orders thereof pending the inter-partes hearing;

c) The ex-parte judgment entered against the defendants/applicants be set aside at the inter partes hearing and the suit be set down for hearing on merits;

d) The costs be provided for.

Counsel agreed to canvass the application by way of written submissions which they filed. Counsel submitted that by a plaint dated the 29th May 2014, the plaintiffs/ respondents herein sued the defendants/applicants seeking for orders that;-

a) A declaration that the defendants/applicants are not entitled to enter, posses and or use the parcel of land No. CHERANGANY/KAPCHEROP/171 and that any entry, possession and or use thereof by the defendants/applicants amounts to trespass.

b) A permanent injunction restraining the defendants/applicants whether by themselves from entering upon, taking possession, using or otherwise interfering with land parcel No. CHERENGANY/KAPCHEROP/171.

c) A declaration that the Plaintiffs/respondents are entitled to possession of the suit land.

d) Eviction of the defendants/applicants from the suit land.

e) Damages for trespass.

f) Costs of the suit.

The defendants/applicants in their joint defence and Counter Claim dated 21st July 2014 raised the defence of limitation and that they had acquired the suit land by way of adverse possession. In their Counter Claim the defendants sought the following orders;-

a) A declaration that the Defendants, jointly and severally, have acquired Land Title No. CHERANGANY/KAPCHEROP/171 by way of adverse possession.

b) That the Registration of MAINA GICHUMBI and/or the plaintiffs as proprietor(s) of Title No. CHERANGANY/KAPCHEROP/171 be cancelled accordingly.

c) That the defendants be registered as proprietors of Land Title CHERANGANY/KAPCHEROP/171.

d) Any other appropriate relief.

The plaintiffs' suit was heard ex parte on and a judgment in favour of the plaintiffs/respondents was entered on 4th July, 2018 in the following terms;-

a) A declaration that the defendants/ applicants are not entitled to enter, possess and or use the parcel of land No. CHERANGANY/KAPCHEROP/171 and that any entry, possession and or use thereof by the defendants/applicants amounts to trespass.

b) A permanent injunction restraining the defendants/applicants whether by themselves from entering upon, taking possession, using or otherwise interfering with land parcel No. CHERANGANY/KAPCHEROP/171.

c) A declaration that the Plaintiffs/respondents are entitled to possession of the suit land and an order for the removal of the restriction on the suit land granted.

d) The defendants/applicants do vacate the land parcel No. CHERENGANY/KAPCHEROP/171 within 30 days from the date of the judgment failure to which eviction orders were to issue.

e) Defendants/applicants do pay the costs of the suit to the plaintiffs.

Counsel listed the following issues for determination by the court

a) WHETHER the Defendants/Applicants were properly served with the hearing notice dated 4th December, 2017?

b) WHETHER the judgment in favour of the plaintiffs/respondents was obtained irregularly?

c) WHETHER the defendants willfully and knowingly refused to prosecute their case?

d) WHETHER the applicants have a defence on the merits raising triable issues?

On the issue of service of a hearing notice Counsel submitted that the affidavit of service sworn on the 13th March 2017, sworn by Allan Mbugua Ngigi states that on 5th December 2017, a hearing notice was sent through registered post No. RD 121793762 KE to the firm of Katama Ngeywa & Advocates office. Counsel submits that the applicants and their advocates contend that the purported Hearing Notice was, neither received by the defendants' advocates nor the defendants themselves.

That the purported affidavit of service by the Plaintiffs' advocate is fatally defective on various grounds. Firstly that the affidavit was sworn on 13th March 2017 before the purported service was effected on 5th December 2017.

Secondly, that there was no order of the court authorizing service to be effected by substituted service and no reason was given as to why the plaintiffs' advocates opted for substituted service upon a firm of advocates who had provided a physical address in a town barely 60 kilometers from the court.

Thirdly, no copy of the Hearing Notice purportedly served was annexed to the fatal affidavit. Fourthly no evidence of postage was availed in the nature of a postage receipt. Further that the applicants contend that the purported courier through which the service was effected was not revealed in the affidavit. That the address to which the postage was directed was not revealed in the affidavit of service nor was the source address disclosed. In addition, Ngigi, advocate, never deponed that the hearing Notice was never received back, therefore, conclusively confirming receipt by the recipient. Neither did the deponent confirm that service was acknowledged by advocates for the defendants.

Counsel submitted that the defendants only learnt of the judgment entered in favour of the plaintiff/respondents upon them being served a letter dated the 1st March, 2019 by the Assistant County Commissioner Kapcherop on the 14th March, 2019. It was not until 18th March, 2019 that the defendants were served with an order issued on 1st March, 2019 for their eviction.

Mr. Ngeywa submitted that under Order 5 rule 5(1) (e) service could only have been delivered through a licensed courier service provider approved by the court and that the hearing hereof proceeded under Order 12 rule 2.1t is clear that the Notice of hearing was either not duly served or was not served at all therefore the consequential judgment was irregular and ought to be set aside. That the rules of natural justice require that one must not be condemned unheard. The defendants/applicants livelihoods and those of their families are at stake and hence this application.

Counsel cited the case of **James Kanyiita Nderitu & Another =Versus= Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015 eKlr (Msa)**,the learned Judges of Appeal had this to say;-

> *"We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. EA. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986/ KLR 492 and CMC Holdings v. Nzioki [2004/ 1 KLR 173).*
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> *In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango 0100 v. Attorney General [1986-19891 EA 456)'.*

The court went on to say;-

> *"The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in* ***Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:***
>
> *"There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.*

The approach of the courts where an irregular default judgment has been entered is demonstrated in the following cases. In Frigonken Ltd v. Value Pak Food Ltd, I-ICCC NO. 424 of 2010, the High Court expressed itself thus:

> *"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 a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process.*

Counsel submitted that the former Court of Appeal for Eastern Africa, in **Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others [1956/ 1 EA 195** expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order. Briggs, JA., with whom Worley P. and Sinclair, VP. Concurred, stated thus:

*"On the appeal before us Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before its can be made, the order is a nullity in the sense that it must be set aside ex debito nullity procedure is unimportant, since the Court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, MR. " (*Emphasis added).

Counsel submitted that even if this court were to find that the judgment herein is a regular one, it must consider whether or not the applicants have a defence on the merits raising triable issues. Glaringly the applicants have in their pleadings raised the defence of limitation under statute and a Counter Claim in adverse possession which raises serious issues.

Counsel relied on the case of **Muthaiga Road Trust Company limited =versus= Five Continents Stationers Limited & 2 others Civil appeal No. 298 of 2001(Nai-eKlr)** the Court of Appeal observed;-

> *"The principles to be followed in an application to set aside judgment were set out in Patel VEA Cargo Handling Services Ltd [1974/ EA 75 at p 76 where Duffus P said:-*
>
> *"I also agree with this broad statement of the principles to be followed. The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the Court will not usually set aside the judgment unless it is satisfied that there is a defene on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication. "*

Counsel therefore urged the court to allow the application for setting aside the judgment.

PLAINTIFF/RESPONDENT'S SUBMISSION

> **Counsel for the plaintiff respondent gave a chronology of the case and stated that vide a judgment dated and delivered on 4th July 2018, the Honourable court allowed the Plaintiffs/Respondents suit and restored the suit land known as L.R. NO. CHERANGAN1/KAPCHEROP/171 to them. That Plaintiff/Respondents moved the court vide an application dated 1st March 2019 seeking the assistance of the court to evict the Defendants whereby the court allowed the execution of the judgment on condition that the defendants are given 30 days' notice to vacate and that the ruling and direction was made with a formal order extracted in terms.**

Counsel submitted that when that order and notice to vacate were served on the defendants, they reacted by filing the applications dated 23 rd March 2019 and 5th April 2019. That the three applications seek several reliefs namely:

a) Stay of execution pending hearing and determination of the instant applications.

b) Setting aside and substitution of the 1st and 2nd defendants upon their death.

Counsel submitted that the Defendants/Applicants came to court and obtained orders of stay of execution pending hearing and determination of the motions whereby directions were taken and the court directed that the motions be disposed by way of written submissions. Counsel urged the court to note that the defendants and the parties seeking joinder are represented by the same Counsel who filed defence and counter claim.

Counsel filed the following issues for determination of the court:

a) Whether the 1st and 2nd Defendants can be substituted.

b) Whether the judgment delivered on 4th July 2018 can be set aside.

WHETHER THE 1ST AND 2ND DEFENDANTS CAN BE SUBSTITUTED

On the first issue as to whether the 1st and the 2nd Defendants can be substituted, Counsel submitted that it is the Applicants' case that the 1st and 2nd Defendants who died intestate on 4th March 2017 and 05th April 2019 respectively should be substituted.

Counsel relied on the provisions of Order 24, Rule 4 regarding the procedure to be followed in case of death of one or several defendants or of a sole defendant provides as follows;

> *"4. (1) where one of two or more defendants dies and the cause of action does not survive or continue as against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.*
>
> (2) *Any person so made a party may make any defence appropriate to his character as legal representative of the deceased*

defendant.

(3) *Where within one year no application is made Under Sub rule*

(1), the suit shall abate as against the deceased defendant"

Counsel therefore submitted that it follows that under Order 24 it is trite law that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown, and if an application is made in this regard That the suit against the 1st Defendant Francis Barchuro abated exactly one year after his death. The 1st Defendant died on 4th March 2017 and as such the suit against him had abated by 5th March 2018 as no application was made for his substitution within one year after his death.

Mr. Ngigi therefore submitted that the application dated 5th April 2019 regarding the substitution of the 1st Defendant is thus fatally and incurably defective as no application has been made to revive the suit in respect of the 1st Defendant or to extend the time for substitution beyond the statutory period being within one year after the death of the 1st Defendant. Counsel urged the court to strike out the application as an abuse of the court process.

Counsel cited the case of **Washington Namwaya Wasike —versus- Dixon Jowe & 6 others [20181e KLR** where the court held that ;

……..it is clear that the consequence of non-substitution of a deceased Defendant are the same as those of non-substitution of a deceased plaintiff In sum, it can be said that non-substitution of a deceased party within one year of death where the cause of action survives such party leads to automatic abatement of suit.

Such abatement does not require a court of law to declare it has materialized. All that is required is expiry of one year without substitution and the suit ceases to exist in the eyes of the law".

On the issue of the application dated 5/4/2019 seeking orders for substitution of the 2nd Defendant Chebutiei Koin who died on 16th June 2018, Counsel submitted that there has been unreasonable and unexplained delay on the part of the 2nd Defendant's legal representative in moving the court for the substitution of the 2nd Defendant and therefore it should be declined.

Whether the judgment delivered on 4th July 2018 can be set aside

On the second issue as to whether the judgment delivered on 4th July 2018 can be set aside, Counsel submitted that it is the Applicant's case that the above-mentioned judgment should be set aside as the Applicants were not served with a hearing notice for this suit. Counsel submitted that the Applicants were duly served with the hearing notice and as such the Applicants are estopped from claiming that the judgment of 4th July 2018 was made ex parte.

Counsel relied on the case of **Mungai —versus Gachuhi & another [20051e KLR** cited with approval in the case of **Signature Tours & Travel Limited —vs- National Bank of Kenya Limited;**

"a court's decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their presentations concluded unless they elect to forego the opportunity".

It was Counsel's submission that the Applicants chose to forego the opportunity to be heard by failing to attend court or offer any reasonable explanation for the same despite having been duly served with a hearing notice and even if the judgment of 4th July 2018 were to be regarded as ex parte, that the applicants do not meet the threshold for the setting aside of ex parte judgments.

Order 12 Rule 7 of the Civil Procedure Rules provides that;-

"*where under this order judgment has been entered or the suit has been dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just".*

Counsel cited the case of John Mukuha Mburu —versus- Charles Mwenga Mburu [20191e KLR the court held that:-

"it is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the court of appeal case of Mohammed & another —versus Shoka [19901KLR 463".

That with regard to whether the applicants have a defence on merits Counsel submitted that the Applicants' statement of defence and counterclaim dated 21st July 2014 and filed in court on 22nd July 2014 raises no friable issues and the same is fatally defective both in form and in substance as a claim in title by adverse possession by way of a counterclaim is misconceived in law. That the Respondents will be prejudiced if the judgment of 4th July is set aside, as execution proceedings have already been commenced and are at the completion stages.

Further that the Applicants have not offered any reasonable explanation for the delay in making the instant application for setting aside of the said judgment. The above mentioned judgment was delivered on 4th July 2018 yet the instant application for its setting aside has been filed

on the 22nd day of March 2019, more than eight (8) months and no reasonable explanation for this delay has been tendered. Counsel urged the court to dismiss the applications with costs to the plaintiff/respondents.

INTERESTED PARTIES'/RESPONDENTS' WRITTEN SUBMISSIONS

Counsel for the Interested parties opposed the applications and submitted that the provisions of the Civil Procedure are very clear on substitution of parties upon death. Counsel cited **Order 24 Rule** which has been cited above Counsel submitted that the order implies that the Rules do not call for setting aside Orders of dismissal or abatement once made by the Court. Counsel associated himself with the earlier submission of Counsel for the plaintiff/respondent on this issue of substitution. That there was inordinate delay in bringing the applications for substitution.

Counsel faulted the procedure followed by the applicants as they ought to have first applied to the Honourable Court to enlarge time within which such substitution be done since the suit automatically abated by operation of law as per the Provisions of Order 24 Rules 1,4 and 7 of the Civil Procedure Rules 2010. No such Order has been sought in the current Notices of Motion.

Counsel cited the case in the Court of Appeal at **Nairobi Civil Appeal No. 283 of 2015 Between Rebecca Mijinde Mungole Vs Kenya Power & Lighting Company ltd &2 others (at pg2**) where the Honourable Court upheld the position taken earlier in the case of Gachuhi Muthanii Vs Mary Wambui ,citing the requirement of extension of time under Order 24 Rule 3(2) ,prior to revival of the suit .

On the application seeking to set aside the Judgement and Decree dated 4th July 2018 Counsel submitted that there has been inordinate delay of about 10 months on the part of the Applicants since the said Judgement was delivered. Counsel relied on the High Court of Kenya at Nairobi Civil Appeal No.93 of 2013 between **Neeta Gohil Vs Fidelity Commercial Bank Limited, whereby it** was held that a period of 5 months after Judgement amounted to an inordinate delay. The Appellant could not also rely on mistake of an Advocate as a reason for setting aside Judgement. Counsel therefore urged the court to dismiss the applications with costs to the interested parties.

ANALYSIS AND DETERMINATION

These are two applications seeking for orders of substitution of parties, setting aside ex parte judgment and stay of execution of the decree. The background to this case is as enumerated above.

The issues for determination are as to whether there was proper service of a hearing notice, whether the judgment on record was regular or irregular, whether the defendant can be allowed to substitute deceased parties at this stage and whether the applicants are entitled to stay of execution of the decree and order of the court and whether the defence and counterclaim raise triable issues.

The first issue that the court must deal with is whether there was proper service of a hearing notice upon the defendants. The issue of contention is on the date of service and the mode of service. From the court record, this hearing date was given in court on 4th December 2017 in the presence of the plaintiff's Counsel but in the absence of Counsel for the defendants and the interested parties. The court ordered that a hearing notice to issue to the defendants and the interested parties.

The affidavit sworn by Allan Ngigi Mbugua indicates that he caused the hearing notice to be served upon M/S Komen Kipchirchir & Co Advocates on the same day and served Katama Ngeywa & Co Advocates vide registered post No. RD 121793762KE. The affidavit of service is sworn on 13th March 2017 but the same is court stamped 13th March 2018 and hand written by a court official assessing payment fees for the affidavit as 13th March 2018. Is this an error of the year 2017 instead of 2018? This would be the only explanation of the date of 2017 because there is no way a date that had been given on 4th December 2017 could have preceded the hearing.

Counsel faulted the mode of service and why the plaintiff decided to serve a hearing notice by way of registered post without the leave of the court. Service by registered post is one of the recognized modes of service under the Civil Procedure rules. It should be noted from the court record that the defendants' Counsel has not been appearing in court even though served with the notices.

On the day of the hearing Counsel for the plaintiff and the Interested parties were present in court together with their clients and were ready to proceed with the hearing. The court asked the plaintiff to show proof that the defendants had been served as ordered by the court before the matter proceeded.

The court is alive to the fact that where there is proof that there was no proper service then it would in its own motion set aside the irregular judgment without going into the issues of inordinate delay in filing the application for setting aside. But when it is satisfied that there was proper service then it would be an abuse of the court process to allow a person who was served with processes but chose not to attend court.

The court is guided by the case of **James Kanyiita Nderitu & Another =Versus= Marios Philotas Ghikas & Another, Civil Appeal No. 6 of 2015 eKlr (Msa)**,the learned Judges of Appeal had this to say;-

> *"We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. EA. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986/ KLR 492 and CMC Holdings v. Nzioki [2004/ 1 KLR 173).

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 justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango 0100 v. Attorney General [1986-19891 EA 456)'.

It should be noted that the duty of the court is to do justice and justice for all the parties involved. The parties must also not be indolent in the way they prosecute their cases. A party can be enjoying some interim orders of status quo which might necessitate the reluctance in prosecuting a case. On the issue of service I find that there was proper service and the defendants just woke up when the judgment and decree were up for execution.

I noticed that the applicants filed two similar applications seeking for the same orders with a variation of one. The applicant admitted that by the time the application was made the suit had abated as against the party he seeks to substitute. On issues of abatement of suits, if a party dies and no step is taken to substitute such party after one year the suit abates and is extinguished. You cannot file an application for substitution but an application to revive the suit before such application. The party so filing must explain why such action was not taken and satisfy the court that it would be in the interest of justice to revive the suit. This must also be done without delay and if there is any delay the same must be explained.

No explanation was given why the applicant did not file an application for revival of the suit and why substitution was not done expeditiously. I find that the application for revival of an abated suit against the defendant lacks merit and is therefore declined.

The applicant further urged the court to set aside the judgment. In an application of setting aside ex parte judgement, the applicant must establish that he or she has a defence with triable issues. Setting aside ex parte judgment is not automatic. When this matter came up for hearing the court had an opportunity to look at the defence and counterclaim and the documents that were filed and produced by the plaintiff of which there were admissions by the defendants in meetings requesting to be given time to move out of the suit land. This was incorporated in the judgment even though the defendant did not appear in court to prosecute their counterclaim. The court noted that it would be an uphill task for the defendants to prove their court claim of adverse possession having admitted that they would want to be given time to move out.

The court is guided by the constitutional principles of the right of a party to be heard but this right should not create injustice and prejudice to others. The applicant also prayed for stay of execution but the same was not addressed.

Having found that there was proper service and that there was inordinate delay in bring an application for revival of the suit that had abated and substitution of one of the defendants, I find that the applications lack merit and are therefore dismissed with costs to the plaintiffs.

Dated and delivered at Eldoret on this 8th day of August, 2019.

M.A. ODENY

JUDGE

RULING READ IN OPEN COURT in the presence of Mr.Kipkirui holding brief for Ngeywa for Defendants/Applicants and Miss. Khandambi holding brief for Komen for Interested parties and in the absence of Mr.Ngigi Mbugua for Plaintiffs/Respondents.

Mr.Koech - Court Assitant