REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 109 OF 2000 (O.S)

JAMES MAYEKU MAKITONI.....1ST PLAINTIFF

PAUL NAKHISA MAKITONI.....2ND PLAINTIFF

FRANCIS SIMIYU MAKITONI.....3RD PLAINTIFF

LUTUKAYI J. MASINDE (Suing as administrator of the estate of the late

MICHAEL WATAMBA).....4TH PLAINTIFF

VERSUS

WENSLAUS MUKHWANA (Suing as an administrator for the

estate of TERESINA MUSEMBE.....1ST DEFENDANT

TOM MACHABE.....2ND DEFENDANT

CHRISPINUS WEKESA.....3RD DEFENDANT

URBANUS M. WEKESA.....4TH DEFENDANT

RULING

1. The defendants' application dated **16/6/2019** seeks the following orders:

> **(1) That pending the hearing and determination of this application a status quo be maintained in respect of dealings in the suit property being EAST BUKUSU/NORTH NALONDO/658 by either the plaintiffs themselves and/or agents.**
>
> **(3) That an order be issued to review and set aside the judgment entered herein in default of defence and set the matter for hearing on merit.**
>
> **(4) That cost of this application be provided for.**

2. In the supporting affidavit sworn by the 1st defendant and dated **10/6/2019** he deponed that he is the administrator of the estate of Teresina Musebe; that **Teresina Musebe** and **Veronica Namweya** were wives to **Donsio Machabe**; that Veronica got a parcel of land from Donsio by way of transfer to her sons of three parcels land, that is, **East Bukusu/North Nalondo/353, 1659 and 1660**; that the suit land was gifted to Teresina by Donsio in **1993**; that it was registered in the name of Teresina Musebe and her minor children and it did not form part of the estate of Donsio for the purposes of succession and distribution; that the applicant has never known the 1st, 2nd and 3rd respondents since his birth and they are strangers who have conspired with the 4th respondent in order to defraud the applicants of land; that at the time of filing of the suit against Teresina and 4 others the defendants were disadvantaged by sickness as well as her senility and financial constraints on the part of Teresina and could not defend the matter on merits; that the respondents' choice of Kitale High Court over Bungoma High Court while the suit land was situated in Bungoma and while all parties hailed therefrom is suspect and was meant to deliberately disadvantage Teresina and her minor children; that in the first claim of **11** acres by the 1st 2nd and 3rd respondents, the 4th respondent appeared as witness for them; that no claim was lodged against Donsio Machabe by the 1st to 4th respondent during his lifetime yet the respondents were adults even then; that Donsio Machabe's administrator was not a party to this suit yet the respondents' claim as drawn is against him and raises no reasonable cause of action against the 1st applicant and the suit land is not jointly owned and any licensee interest alleged by respondents was extinguished when the transfer to Teresina was effected, thus giving her indefeasible title without fraud, misrepresentation or undue

influence; that the applicants, being Teresina's children have utilized the land an interruptedly; that the alleged service of court process on Teresina long after she had died vitiates the court process; that the evidence in possession of the applicants may lead to a different finding; that the trust, partnership and licensee's interest claimed in the suit were not proved sufficiently to warrant the court's finding; that strangers should not be allowed to fraudulently acquire ownership and occupation through the court process as that is a deprivation of rights and fundamental freedom and hence a review is necessary; that the respondents came to court with unclean hand having premised their suit on falsehoods and fraud; that the orders granted on the basis of one-sided evidence would infringe the rights of many parties; that the respondents filed concurrent or simultaneous cases which rendered Teresina confused and prejudiced such that she could not defend herself.

3. The 2nd defendant filed replying affidavit dated **24/7/2019** on his own behalf and on behalf of his co-plaintiffs. He depones that the application is an abuse of court process; that the suit was substantially heard for over ten years and the defendants were represented by an advocate; that the original ex-parte judgment entered on **21/12/2000** was set aside by consent on **6/5/2002** and thereafter the defendants actively participated in the proceedings; that the respondents did not file any claim against Donosio Machabe but the defendants who were the registered owners who allegedly held the land in trust for the respondents; that the respondents were pursuing a succession cause; that parcel No. **East Bukusu/North Nalondo/1658** does not exist and that there are no grounds warranting a review of the court's judgment.

4. The plaintiffs' submissions was filed on **14/8/2019** while the defendants' submissions was filed on **3/9/2019**. I have considered the contents of those submissions.

5. Numerous documents are attached to the application for review including the judgment of Nambuye J (as she then was) dated **21/12/2001**. The decree that was extracted from that judgment provides as follows:-

> **(1) That the defendants hold eleven (11) acres on land parcel No. East Bukusu/North Nalondo/1658 in trust for the plaintiffs herein.**
>
> **(2) That the trust be and is hereby ordered brought to an end.**
>
> **(3) The defendants are ordered to execute transfer forms within 30 days from the date of service of this order in default the Deputy Registrar to execute the same.**
>
> **(4) The defendants will pay the costs of this suit.**

6. I have examined the judgment and in my view the decree reflected the definitive orders of that judgment.

7. The parties to that suit as at time were the 1st to 3rd respondents herein and one Ali Awsike Wekesa as plaintiffs versus Teresina Musebe, Tom Machabe, Wenslaus Mukhwana, Chrispinus Wekesa and Abanas Wasafu Wekesa as defendants. It is therefore clear that only Teresina Musebe the then 1st defendant and Ali Awsike Wekesa the 4th plaintiff are absent in the current proceedings. In place of Teresina is Wenslaus Mukhwana now as administrator of her estate. In place of Ali Awsike Wekesa is Lutukayi J. Masinde as administrator of the estate of one Michael Watamba.

8. To understand the facts in this matter better for the purposes of determination of the instant application, I find it necessary to review the entire history of this suit.

9. The genesis of this suit is the claim contained in the Originating Summons filed by the plaintiffs under the then **Order 36** of the **Civil Procedure Rules** and **Section 28** and **30** of the **Registered Land Act** for the determination of the questions as to whether:

> **(a) The plaintiffs are the legal administrators of the estate of Makitoni Wekesa Wemela;**
>
> **(b) Whether the deceased had an interested in land parcel No. East Bukusu/North Nalondo/1658;**
>
> **(c) Whether the defendants are holding 11 acres on the above parcel in trust for the plaintiffs; and**
>
> **(d) Whether an order ought to be made for the transfer of 11 acres to the plaintiffs.**

10. The first judgment was *ex parte*, based on a formal proof. In the judgment the court observed that the respondents did not file any papers; in the court record there is an application dated **23/7/2001** seeking that the *ex-parte* judgment entered against the defendants be set aside and that the applicant be allowed to file a defence on the basis that the 1st applicant was not served with the process. There is also a letter dated **4/12/2001** indicating that the defendant's counsel would not be able to attend the court and asking the matter be put off. Subsequently Risper Arunga & Co. Advocates for the plaintiff applied vide a notice of motion dated **24/10/2005** to have the judgment entered by this court on **21/12/2000** be reinstated on the basis the defendants had failed to abide by the conditions agreed for setting aside of that judgment. Wanjiru Karanja J (as she then was) allowed that application on **29/3/2006** and gave liberty to execute.

11. Thereafter the plaintiffs filed an application dated **8/9/2008** seeking an order that the court do direct the Land Registrar Bungoma to restore title No. **East Bukusu/North Nalondo/1658.** That application was made on the basis that during the pendency of this suit the 1st defendant Teresina had effected subdivision on the suit land into two portions yet the decree obtained by the defendants also ordered subdivision to secure their claim of **11** acres.

12. On **24/3/2009** an application was filed by Wasilwa & Co. Advocates seeking to be allowed to cease acting for the defendants.

13. An application dated **29/11/2010** similar to the one dated **8/9/2008** was filed on **30/11/2010**. E. Obaga J heard the latter application and allowed it on **14/8/2013**.

14. On **20/2/2013** the defendants appointed Ateya & Co. Advocates to represent them in this matter.

15. An application dated **25/8/2018** was filed on the same date by one Lutukayi Joseph Masinde as an administrator of Michael Watamba seeking an order restricting transactions over East **Bukusu/North Nalondo/4932, 4933, 4934** and **4939,** a review of the orders of **14/8/2013** cancelling title to **East Bukusu/North Nalondo/2550** or in the alternative making a provision for **4** acres to be hived off East **Bukusu/North Nalondo/1658** for transfer to the applicant. The basis of that application was that the deceased had an interest in the **4** acres in East **Bukusu/North Nalondo/2550** and the magistrate's court in Bungoma had issued a vesting order in **Bungoma CM Misc. Appl. No. 51 of 1997** yet this court cancelled that title while the deceased or his estate had not been enjoined as a party to this suit. That application was replied to by the 2nd plaintiff vide an affidavit filed on **16/10/2018** in which he, swearing on behalf of the rest of the plaintiffs, opposed the application on the basis that the applicants' land and boundaries on the ground had not been affected by the cancellation and that the parcel numbers were merely rearranged with the effect that his parcel had now acquired parcel number **East Bukusu/North Nalondo/4939** and that he was at liberty to collect his title deed from the Lands Registry. This court delivered a ruling on that application on **6/2/2019** and found that the applicants still had land and the land was demarcated on the ground and the motion was allowed only to the extent that parcel No. **East Bukusu/North Nalondo/4939** should vest in the estate of the late Michael Watamba. Thereafter the instant application was filed. It later now occurs that the granting of that order was premised on a misapprehension that the applicant was one of the original parties to this suit.

16. In brief, the instant application is premised on the following grounds:

> **(a) That the judgment that had been entered against the applicants was set aside by consent of the parties but later reinstated because the lawyer on record never properly advised the defendants**
>
> **(b) The alleged service of court process on Teresina long after she had died vitiates the court process.**
>
> **(c) that the suit land was registered in the name of Teresina Musebe and her minor children and it did not form part of the estate of Donsio for the purposes of succession and distribution;**
>
> **(d) That the 1st, 2nd and 3rd respondents are strangers conspiring with the 4th respondent in order to defraud the applicants of land and that in the first claim of 11 acres by the 1st 2nd and 3rd respondents, the 4th respondent appeared as witness for them;**
>
> **(e) That at the time of filing of the suit against Teresina and 4 others she was disadvantaged by sickness, her senility and financial constraints, and that the respondents filed concurrent or simultaneous cases which rendered Teresina confused and prejudice such that she could not defend herself;**
>
> **(f) That Donsio Machabe's administrator was not a party to this suit yet the respondents' claim as drawn is against him;**
>
> **(g) That the applicants, being Teresina's children have utilized the land an interruptedly and that the suit land is not jointly owned and any licensee interest alleged by respondents was extinguished when the transfer to Teresina was effected, thus giving her indefeasible title without fraud misrepresentation or undue influence**
>
> **(h) That technicalities should not be allowed to occasion injustice to the defendant.**

17. These are numerous grounds indeed upon which to base an application. However the discretion of the court in a setting aside application is very wide. It must be borne in mind that the main concern of the court in setting aside application is whether there is a defence on record and whether it is possible to do justice to all the parties upon the setting aside of the orders or judgment already issued.

18. In **Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76,** the court held as follows:

> **"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 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 defence 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."**

19. In **Richard Ncharpi Leiyagu vs Independent Electoral and Boundaries Commission & 2 Others Civil Appeal No. 18 of 2013 [2013] eKLR** the Court of Appeal (Visram, Koome & Odek, JJ.A.) stated as follows:

> **"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."**

20. It is therefore apparent from the above decisions that a court has very wide discretion in an application for setting aside judgment. In respect of a regular judgment the court will consider whether there is a valid defence on the record before setting aside the judgment. A valid defence does not necessarily mean a defence that must succeed but a defence that raises a triable issue. It is also observable that in such

applications that as the main concern of the court is to do justice to the parties, the court will not impose conditions on itself to fetter the wide discretion given it by the rules.

21. Considering the above factors what decision should the court arrive at in this particular case?

22. First, was there a valid defence on the record?

23. At first the matter went to formal proof, judgment was entered against the applicant's mother and executed including by way of her being put into civil jail; she later successfully applied to have the judgment set aside. Her incarceration was terminated. Judgment was on the application of the plaintiffs restored. However in my view the record shows that judgment was not restored in the matter by reason of want of defence, but for want of satisfaction of an order of payment of costs amounting to **Kshs 45,000/-** by Teresina. It appears that Teresina, after being committed to civil jail for **30** days on **17/7/2001** for failure to pay the amount required was released upon a consent of the parties on **27/7/2001**, that is, after serving ten days or the equivalent of a third of her jail term. The above digression was necessary because the documents filed in search of her freedom and the setting aside of the judgment are vital in determining whether there is a defence on the record. The affidavits and their annextures thereto in support of the application for setting aside and the affidavits themselves must be examined.

24. This is an originating summons and the defence is normally raised by way of a replying affidavit and annextures.

25. The supporting affidavit of one Saul Simiyu Wasilwa, who was Teresina's advocate at the time, reads that the Bungoma High Court had on an application for judicial review by Teresina in **Misc Civil Application No. 44 of 1997** set aside a land disputes tribunal order that had awarded land to the 1st respondent on the basis that the applicants could not competently lodge a claim for beneficial interest in the tribunal as it was devoid of jurisdiction to determine the same.

26. The contents of a second document that was made an annexture to the counsel's supporting affidavit appears to have been meant to be the affidavit of Teresina Musebe, but which appears not to have been signed by her. It avers that the land was sold to her husband in **1967;** it is stated clearly in that document that Teresina denied the respondent's claim to any share of the land or that she held any land in trust for the respondents. The counsel's statement that makes it clear that that was meant to be her reply to the Originating summons is found at **paragraph 9** of his replying affidavit where it is stated as follows:

> **"In my view the applicants have a good defence to the respondent's claim as per the annexed model replying affidavit and it is only fair and just that they be allowed to defend the suit."**

27. Therefore, though at the moment there is no signed affidavit on the record the draft must be considered to have been an exhibit in the supporting affidavit of Saul Simiyu Wasilwa, advocate, which has been analysed above. Why there is no signed copy in the court file remains a matter of speculation. It must be noted that the application to set aside judgment also sought orders for her release from civil jail and it may be that her incarceration may have had a bearing on that matter.

28. In my view the above excerpt from counsel's affidavit confirms the contents of the applicant's intended defence at the time, and that she had given instructions to her counsel as to what her defence to the claim was.

29. However, no omission in respect of the filing of a defence detracts from the fact that a copy of a ruling in **Bungoma HC Misc. Appl. No. 44 of 1997** is annexed to the supporting affidavit to the setting aside application, and it seems to corroborate Teresina's advocate's position outlined at **paragraph 6** of his affidavit that:

> **"… I verily believe that she (*Teresina*) had a case at Bungoma High Court being Misc civil application no. 44 of 1997 in which the Land Disputes Tribunal purported to award the subject piece of land to the applicants. Through my firm the said decision was successfully challenged in the said case as per the ruling annexed hereto marked SW2"**

30. There is no doubt that the averments and the annextures were put forward to secure a setting aside of the judgment already entered ***ex parte***. It appears that the application never proceeded to hearing for the reason that on **6/5/2002** the respondent appears to have consented to the setting aside of judgment. I would find it odd that a respondent would accept any such consent to setting aside unless they knew that such a decision in **Bungoma HC Misc. Appl. 44 of 1997** existed. In my conclusion the decision is genuine and its effects were to grant Teresina, the registered owner of the land, orders against James Makitoni, who is apparently the 1st plaintiff herein. In my view, any subsequent decision of the court must take into consideration that decision which has not, so far as this record is concerned, been shown to have been successfully appealed against. However the judgment in this case is in sharp contrast with the judicial review decision.

31. In the case of **Ernest Tembi Watako V David Ogeto Moseti [2010] eKLR** the High Court observed that the Respondent's counsel had filed a defence in the lower court before filing a notice of appointment. The defence was void *ab initio* because it was improperly on record. The lower court had found *ex parte* judgment already entered, and set aside the judgment. On appeal, the High Court, (Muchemi, J), had this to say:

> **"This appeal was heard after the Civil Procedure Act section 1 was amended to include the overriding objective. The Appellate Jurisdiction Act was amended and a similar provision inserted in section 3 which reads:**
>
> **"(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

(2)The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).”

This provision empowers the court to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. This is a needy appeal for this court to invoke the provisions of the law to give effect to the overriding objective of facilitating the just and expeditions disposal of this appeal and the lower court case. For this reason, I overlook all the procedural defects of the various appearances by the Respondent’s counsel and the omission by the magistrate to address the issues before him in his ruling. The most important thing in the interests of justice is to have the suit heard between the parties.

I therefore order that the ex-parte judgment stands set aside together with all consequential orders.”

32. This is a second application for setting aside of judgment in this case. In the case of **Jairo Angote Okonda V Kenya Commercial Finance Company Ltd [2000]eKLR the court cited the case of Mburu Kinyua Vs. Gachini Tuti 1978 KAR 69,** as follows:

“In the case of Mburu Kinyua Vs. Gachini Tuti 1978 KAR 69, it was held by this Court, dismissing the appeal (Madan, J.A. dissenting) that the second application was *res judicata* since the facts on which it was based were known to the appellant at the time when he made his first application. Law, J.A. at page 81 expressed himself thus:-

"To sum up my views of this aspect of the case ..... he can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res judicata, as happened here. The position otherwise would be intolerable. A decree - holder could be deprived of the benefits of his judgment by a succession of applications to set aside the judgment, and judges would in effect be asked to sit on appeal over their previous decisions or those of other judges. As regards Madan J A's expressed feeling that justice can only be done by giving the appellant the right to defend, I would respectfully point out that there are always two aspects to the concept of justice. A successful litigant is convinced that justice has been done, the loser is unlikely to share that view... ".

33. In my view the fact that there were intervening factors such as the setting aside of judgment by consent and the subsequent reinstatement of judgment upon application by the respondents renders this to be a fresh application and it may not be considered *res judicata.*

34. In the case of **Sheikh T/A Hasa Hauliers v Highway Carriers Ltd[1988] eKLR** it was stated as follows by the court:

“The powers of the court in dealing with application under Order IX A rule 10, is to do justice to the parties. In Pithon Waweru Maina v Thuku Mugiria, Civil Appeal No 27 of 1982 (ibid) (Potter, Kneller JJA and Chesoni Ag JA) Potter JA in quoting Duffus P in Patel v EA Cargo Handling Services Ltd., [1974] EA 75 stated at page 1 of his judgment:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just” ……..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.”

In the same appeal Kneller JA quoting Harris J in Shah v Mbogo and Another [1967] EA 116 at 123 BC on the principles governing the exercise of the court’s discretion to set aside a judgment obtained ex-parte stated:

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice.”

Looking at this, the purpose of the whole object of the application is to get the defence on the record. Thereafter the suit to proceed to hearing on its merit. Whether the defendant will succeed on his defence to the claim or on his counter-claim cannot be adjudicated at the time of the hearing of the application. It will depend on the evidence. Of course the applicant must be penalized in costs for the delay caused by the extension of time.”

35. In the case **Pithon Waweru Maina V Thuku Mugiria [1983] eKLR** of it was stated as follows

“*The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered*; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court. (Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7)” (emphasis mine.)

36. My observation in this application is that there was a discernible defence on record, though not formally filed, which could be regularized without any considerable prejudice on the part of the respondents.

37. In the final analysis this court’s view that there was a defence in the matter though irregularly presented, but which raised a triable issue, is the main factor on which the instant application turns. The most important consideration for setting aside the judgment in this matter is satisfied.

38. I have considered the other numerous grounds raised by the applicants, both in support of the application and in pursuit of getting this court to believe that there is a good defence to the claim, and it may be possible that all or a number of them may be true or correct. The issues as to whether the proper person was sued in this matter, Donsio Machabe, the former owner of the land having passed on before the suit was filed, and the existence of the decision of the High court in **Bungoma HC Misc Appl 44 of 1997** are relevant and of great concern.

39. One main pillar of the response to the instant application filed by the 1st respondent on the **24/7/2019** is that all along the applicants were ably represented by an advocate, one Saul Wasilwa.

40. I do note from the record that indeed the applicants have been represented by several firms of advocates. However, I have noted that the issue of settlement of awarded costs at one time hindered the hearing of this matter so much to the extent that on **2/3/2005**, when the matter came up for hearing the record shows that the hearing was adjourned for non-payment though the then applicant's counsel on record had expressed readiness to proceed with the hearing. It is clear from the court record that the consent of **6/5/2002** never made the setting aside of the judgment conditional on the payment of costs. In my view, the application for reinstatement of judgment erroneously relied on non-settlement of the costs awarded as its sole ground.

41. I have no doubt that the court has a free discretion in case management. However, the reliance on the non-payment of costs in halting the hearing of the matter and subsequently in the reinstatement of the judgment against the defendants at the instance of the plaintiff's counsel had quite oppressive results as it denied the defendants an opportunity to have their defence heard on its merits. Besides, the court appears to have omitted from its consideration the fact that after the judgment was set aside, all the previous proceedings were also implicitly set aside, and that the setting aside order was not conditional on the payment of costs. A consent order can only bind parties only in so far as the terms therein state and no more. In my view, the only recourse the plaintiffs had was a second hearing.

42. Counsel for the applicant at the time of these events was a Mr. Kituyi, and he asked for leave to file a further affidavit, which I have not seen on the record. However that part of the record of proceedings leaves one wondering whether there was already a signed affidavit on the record by that time in addition to Teresina's unsigned draft annexed to her advocate's supporting affidavit as analysed earlier. Those documents intended to form annextures to that intended further affidavit were also said to need translation. It appears that if blame is to be properly apportioned, Mr. Wasilwa would receive only part of it.

43. In the past it has been said, and it still holds true that the courts exists for the purpose of deciding the rights of parties and not the purpose of imposing discipline. (See the decision in **Phillip Chemwolo & Another vs Augustine Kubende (1982-88) KAR 103 at 1040**). A litany of counsel's blunders may also be overlooked by the court in order to allow a litigant to present his case on the merits (See: **Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [Eklr]**.) Further, in the case **Nairobi Civil Case No. 1079 Of 1980 Sammy Maina Versus Stephen Muriuki [1984] eKLR** the court observed as follows:

> **"As I have already stated in this suit there was a valid defence and nobody has suggested that the defence filed was a sham. What happened was that the applicant did not turn up on the day of the hearing. His advocate also failed to turn up. He (the applicant) says that he was not aware that the suit was to proceed and that he was relying on his advocate. Hence the applicant/ defendant should not be penalized due to his advocate's faults (see Shabir Din v Ram Parkash Anand (1955) 22 EACA 48)."**

44. It is clear that the reinstatement of the judgment on the basis of failure to pay costs and the Teresina's treatment at the hands of her erstwhile counsel led to a failure of justice in this suit and an application for review is merited in the circumstances.

45. Another pillar of the respondent's defence is that Land Reference No **East Bukusu/North Nalondo 1658** does not exist, title thereto having been subdivided and the register closed. That subdivision may have occurred but the citation of that land reference number itself speaks a great deal as to the target of the applicant's application: all the land comprised in the original parcel and which is now in the form of smaller portions. This court was faced with a similar situation in the cases of **Paul Pkemoi Kide v Philip Kimutai Kibor & 2 others [2018] eKLR and Kitale ELC Land Case No. 140 of 2013. Mark Joseph Simiyu Kisembe and 2 Others Vs Michael Kimtai and 6 others.** The court held as follows in the first case, which position was adopted in the second case:

> **"13. However the application was not amended at any point in time to read the proper land reference numbers that exist at present. The effect of the subdivision of the land is that if the orders were granted as prayed there would be no order capable of being registered against the LR. 6125/10 as it does not exist. Though that is the case, the defendants acknowledge that LR. 6125/10 previously existed and the 3rd defendant's defence and counterclaim has linked it directly to some 6 subdivisions being LR 6125/11, LR 6125/12 LR 6125/13 LR 6125/14 LR 6125/15 and LR 6125/16.**
>
> **14. The plaintiff entered into an agreement for purchase of the land while it was not yet subdivided. He knew it as a single parcel. It is not yet known whether the subdivisions overlap the land he occupies. It is therefore safe to issue an order that covers all the subdivisions."**

46. In my view there is, based on this precedent, nothing to inhibit this court from issuing an order preserving the status quo regarding all the resultant subdivisions of Land Reference No East Bukusu/North Nalondo 1658 if it deems it to be in the interests of justice to do so.

47. Having stated as above I am content that the application dated **16/6/2019** has merit and I grant it and set aside the judgment entered in this matter and order that the matter do proceed expeditiously to a full hearing on the merits. For clarity, the status quo order sought in prayer no **(1)** of the instant application is granted and it shall extend to all the resultant parcels, howsoever named or described, that were carved out of Land Reference No **East Bukusu/North Nalondo 1658.**

48. Further, for the avoidance of doubt, the orders issued on **6/2/2019** in the application dated **25/9/2019** are hereby set aside *ex debito justitiae* and that application dismissed in that the applicant therein was not a principal party to the suit from the commencement thereof until

the filing of that application, and he did not therefore deserve the orders granted thereon; Besides, the suit now has to be readied afresh for hearing in the presence of all parties with expedition.

Dated, signed and **delivered** at **Kitale** on this **6th** day of **November, 2019.**

MWANGI NJOROGE

JUDGE

6/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Nyamu holding brief for Wanyonyi for the defendants/applicants

Mr. Ndarwa holding brief for Arunga for 1st, 2nd and 3rd plaintiffs

Mr. Anwar for 4th plaintiff

COURT

Ruling read in open court at 2.45 p.m.

MWANGI NJOROGE

JUDGE

6/11/2019