



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**HIGH COURT CIVIL SUIT NO. 6695 OF 1992**

**SILVESTER OKUMU.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**EDWARD OSALO.....2<sup>ND</sup> DEFENDANT**

**ERYA HAGONDI.....3<sup>RD</sup> DEFENDANT**

**JUMA OGALE.....4<sup>TH</sup> DEFENDANT**

**BENJAMIN OGALE being the personal**

**Representative of DONATI OGALE).....5<sup>TH</sup> DEFENDANT**

**JONAY ODHIAMBO.....6<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

There are three applications before the court for determination, which have been filed by the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. These applications all emanate from an ex parte Judgment of this court delivered by Mbogholi-Msagha J. on 28/1/1997 in relation to the properties known as LR Samia/Budongo/241, 244, 245 and 246, pursuant to which the Plaintiff was registered as the owner of the same. The details of the respective applications are as follows:

**The 2<sup>nd</sup> Defendant's Application**

The 2<sup>nd</sup> Defendant's application is in a Notice of Motion dated 27/5/2008 in which he seeks the following substantive orders:

- a. The Court be pleased to review its Order (Ruling) of 9/7/2001 and set aside the judgment delivered on 28/1/1997 and all consequential orders.
- b. The Land Register for Samia/Budongo/245 be rectified by the removal of Entry No. 4 of 16/8/2000 in the Proprietorship Section (Part B).
- c. The 2<sup>nd</sup> Defendant be granted unconditional leave to enter a Defence to the Plaintiff's claim.

In support of the application, the 2<sup>nd</sup> Defendant swore an affidavit dated 27/5/2008 and a supplementary affidavit sworn on 18/6/2009. His application is premised on grounds that the subject matter of the application and suit is the parcel of land known as LR. Samia/Budongo/245, whereupon the 2<sup>nd</sup> Defendant and his family have erected their home and lived since his childhood. The 2<sup>nd</sup> Defendant avers that the Plaintiff is likely to alienate or encumber the suit property by leasing, charging or selling in the event that an order of inhibition is not entered upon the register. It is the 2<sup>nd</sup> Defendant's contention that since he was not served with the Complaint and Summons to Enter Appearance as stipulated by the law, the proceedings which resulted in the Judgment of the Court of 28/1/1997 are a nullity.

It is the 2<sup>nd</sup> Defendant's disposition that in exercise of powers conferred by the Land Adjudication Act, the Adjudication Officer undertook the process of land adjudication and made a determination that he was the lawful owner of a parcel of land which was registered in his name on 27/3/1980. The deponent reiterated that the registration was a first registration within the intendment and meaning of section 143(1) of the Registered Land Act. He deposed further that during the adjudication process, the officer was made aware and paid due regard to judicial decisions in: **Sifuyo Divisional Court Land Case No. 52 of 1959, Stephen Kubiro S/O Sipeme vs. Edward Osalo; Funyula African Court Land Case No. 48 of 1964, Michael Makokha vs. Edward Osalo, Cornel Achoka and Enock Ratori; and Funyula Land Case No. 24 of 1967 – Sylvester Okumu vs. Edward Osalo.**

The deponent narrated that documents in connection to a High Court case filed in Nairobi were shown to him by his wife on 27/3/2001, and that he thereafter instructed Mr. Gilbert J. Mungu of M/S Mugo, Otunga and Company Advocates to act on his behalf in the matter. On perusal of the court file, Mr. Mungu informed him that judgment had been entered against all the Defendants, including him. Further, that he in turn disclosed to his advocate that he had been served with a Chamber Summons application dated 21/4/1994 and a hearing notice dated 27/10/1994 stating that the Chamber Summons was to be heard on 9/11/1994. However, that when he attended court on 9/11/1994, the case was stood over generally following an application for adjournment by the Plaintiff's advocate.

The 2<sup>nd</sup> Defendant deposed further that at the time, the urgency was to set aside the judgment, and on the strength of his advocate's word as to his professional competence, he signed the supporting affidavit of the application to set aside without the contents having been read back to him. He contends that despite his efforts to give the advocate proper instructions, the said advocate either disregarded or misapprehended them, and drew an affidavit that was at variance with his instructions. In particular, that the said Advocate drafted erroneous instructions that the 2<sup>nd</sup> Defendant had been served with Summons to Enter Appearance and copy of the Complaint, and that such service notwithstanding he did not have financial ability to hire an advocate.

The 2<sup>nd</sup> Defendant states that his application to set aside the judgment was dismissed on 9/7/2001 by Aganyanya J. (as he then was). Further, that he subsequently withdrew instructions from his previous Advocates and instructed Mr. N. W. Amolo, Advocate to act on his behalf. The deponent states that he has now been made aware that his previous application was dismissed because the affidavit sworn on 7/6/2001 contained the erroneous deposition to the effect that he had been served with the Summons to Enter Appearance and a copy of Complaint, and that the decision of the Learned Judge was informed by the depositions in the said affidavit.

Further, that as a result he had no opportunity to intervene and correct the facts, and he therefore must present an application for review to enable him bring before Court all the necessary and correct facts. The 2<sup>nd</sup> Defendant disclosed that he had filed an application dated 26/3/2002 for review of the order by Aganyanya J. (as he then was), but withdrew the same in November 2006 on advice of his counsel currently on record. Further, that the delay in filing this application is because of his advanced age and ill health.

The 2<sup>nd</sup> Defendant further avers that the decision by the learned Trial Judge to proceed *ex parte* and deliver Judgment on 28/1/1997 was against the mandatory requirement of Order XX Rule 5A of the repealed Civil Procedures Rules, and therefore constitutes an error apparent on the face of the record. He

contends that he has a *prima facie* defence to the substance of the Plaintiff's claim as follows:-

- a. Whereas the claim in the Plaint alleges a trust, the particulars pleaded do not disclose any trust or incidence of a trust.
- b. Given the provisions of Section 143 of the Registered Land Act the registration of Edward Osalo as the proprietor of the suit property is a first registration and indefeasible.
- c. The usufructure and ownership of that parcel of land which was eventually registered as L.R Samia/Budongo/245 was in issue in prior Judicial/Quasi-Judicial Proceedings which were determined in his favour.
- d. The registration of the suit property on 27/3/1980 resulted from the process of adjudication pursuant to the provisions of the Land Adjudication Act due regard being given to the decision passed in **Funyula Land Case No. 24 of 1967 – Sylvester Okumu vs. Edward Osalo.**
- e. The Plaintiff failed, neglected or refused to avail himself the mechanism enacted in the Land Adjudication Act and the endeavour to file a civil claim to challenge the validity of Edward Osalo's title over the suit property twelve (12) years after registration of the parcel in the name of Edward Osalo amounts to challenging the Land Adjudication process through the back door.

The 2<sup>nd</sup> Defendant in his Supplementary Affidavit reiterated that he only had cognizance of the injunction application but was never served with copy of Plaint and Summons to Enter Appearance, therefore, the trial and judgment were undertaken without any notice to him. The 2<sup>nd</sup> Defendant contends that the cases involving the suit property herein are proof that dispute over the parcels of land predate the land adjudication process, which therefore provides a strong case to allow the application for review to avail to him an opportunity to defend the Plaintiffs' claim. He further reiterates that the land adjudication exercise in the Budongo Adjudication Section of Busia District settled all issues of the ownership of the said land, and the Plaintiff's suit is an effort to challenge a first registration contrary to the provisions of section 143 of the Registered Land Act.

In support of this application, the 2<sup>nd</sup> Defendant annexed the following documents: Proceedings in Sifuyo Divisional Court Land Case No. 52 of 1959 and in Funyula African Court Land Case No. 48 of 1964; a copy of the ruling by Aganyanya J.(as he then was) dated 9/7/2001; a copy of an amended Return of Service dated 20/7/1994 sworn by Moses Odero indicating that there was personal service upon the 2<sup>nd</sup> Defendant on 5/12/1993; and a copy of a Green Card of the suit property indicating that the Plaintiff was registered owner on 16/8/2000 pursuant to a Judgment of the Court.

#### **The 4<sup>th</sup> Defendant's Application**

John Juma Ogale and Florence Auma Juma were on 17/6/2013 granted leave to substitute their deceased father in the proceedings as the 4<sup>th</sup> Defendant herein. They seek the following orders in a Notice of Motion application dated 6/10/2011:

- a. The ex-parte proceedings and judgment entered and all consequential orders be set aside, and the 4<sup>th</sup> Defendant be granted leave to enter appearance and file a defence to contest the suit.
- b. Upon the grant of prayer (a) the Court be pleased to direct that the hearing of the court be conducted in Busia.

The application is premised on grounds that the 4<sup>th</sup> Defendant was the first registered owner of the Samia/Budongo/246 following the uncontested land adjudication process. The Applicants aver that despite the suit being instituted in the lifetime of the 4<sup>th</sup> Defendant, he was never served with the Plaint or Summons to Enter Appearance. Further, that the ex-parte proceedings and judgment were conducted and attained on the basis of a false Affidavit of Service quoting one Silfano Nyangweso Kodoli as the person who accepted service. Consequently, that the judgment was irregularly obtained. The Applicants further aver that they have a good defence to the suit, and that the deceased's estate stands to lose their ancestral land in the event they are not afforded an opportunity of being heard in defence of the suit.

In support of the application, John Juma Ogale swore an affidavit dated 6/10/2011 wherein he deposed

that the Plaintiff and all the Defendants are neighbours in Busia County, and that the 3, 4<sup>th</sup> and 5<sup>th</sup> Defendants are since deceased. He deponed that there is no member within their family known as Silfano Nyangweso Kodoli who indicated to have received summons on behalf of their deceased father. The deponent stated that the Plaintiff placed a caution on Samia/Budongo/246 through Nairobi HCCC No. 375 of 1982, and subsequently through this suit removed the said caution and had the property registered in his name. The deponent's contention is that they have been deprived of ownership of the land belonging to their deceased father's estate without an opportunity to contest the case.

On the prayer to transfer the suit to the High Court in Busia, the deponent avers that the parties to the suit are residents of Busia as well as the subject matter is situate in Busia County, and therefore the records of the property are kept in the Lands Registry at Busia. Further, that this suit has given rise to other suits filed in Busia Court. It is the deponent's view that the transfer of this suit will result to a faster disposal of the same since Busia registry is less busy than the Nairobi registry, and that it will also save on travelling expenses.

### **The 5<sup>th</sup> Defendant's Application**

The 5<sup>th</sup> Defendant filed an application by way of a Chamber Summons dated 19/5/2003 seeking orders that:

- a. The Judgment of the Court delivered on 28/1/1997 against Donati Ogale (the original 5<sup>th</sup> Defendant) be set aside.
- b. Benjamin Ogale be granted unconditional leave to defend the Plaintiff's claim
- c. The Land Register of Samia/Budongo/241 be rectified and Sylvester Okumu be ordered to surrender the title deed of the parcel to the court.

The application is premised on grounds that the Judgment delivered herein offends the provisions of Order 20 Rule 5A of the Civil Procedure Rules, and Section 143 of the Registered Land Act. Further, that Donati Ogale died on 25/2/1992 before the suit was filed hence there is no competent suit against the deceased. The application is supported by an affidavit sworn on 19/5/2003 by the 5<sup>th</sup> Defendant, who deponed that he is the Legal Representative of the Estate of Donati Ogale and was joined as a Defendant to these proceedings pursuant to an order made on 16/5/2003.

The 5<sup>th</sup> Defendant deponed that following the land adjudication process in the 1970's the deceased was registered as the proprietor of Samia/Budongo/241 on 27/3/1980. It is the 5<sup>th</sup> Defendant's deposition that the Plaintiff never availed himself the grievance settlement procedures outlined in the Land Adjudication Act to contest the decision by the adjudication officer. Further, that being a first registration and in view of the provisions of section 143 of the Registered Land Act, the deceased's proprietorship cannot be challenged in a Court save upon proof of an existing trust between the deceased and the Plaintiff.

### **The Plaintiff's Response**

The 2<sup>nd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants' applications were opposed by the Plaintiff. It is the Plaintiff's disposition that he is the registered owner of the suit property pursuant to the Judgment of the court (Mboghli-Msagha J.) delivered on 28/1/1997. He swore a Replying Affidavit to the 2<sup>nd</sup> Defendant's application on 9/7/2008, wherein he stated that he is aware of the 2<sup>nd</sup> Defendant's application for setting aside the said judgment dated 5/6/2001, which application was dismissed by this Court on 9/7/2001. The Plaintiff contended that the 2<sup>nd</sup> Defendant, having executed the supporting affidavit to that application, was fully aware of the contents and therefore his present application is intended to malign the previous advocate with a view of getting undue advantage. Further, that the 2<sup>nd</sup> Defendant was aware of the suit as he attended court on 9/11/1994, and the Affidavit of service sworn by the process server attests that he was served with Summons to Enter Appearance.

The Plaintiff deponed that the cases referred to by the 2<sup>nd</sup> Defendant namely, **Sifuyo Divisional Court**

**Land Case No. 52 of 1959 - Stephen Kubiro S/O Sipeme vs. Edward Osalo and Funyula Africa Court Land Case No. 48 of 1964 – Michael Makukho vs. Paulo Osalo, Edward Osalo, Cornel Achola and Enoch Ratori** are not in any way relevant to the application and the suit herein. The Plaintiff deponed that **Funyula Land Case No. 24 of 1967 - Sylvester Okumu Okello vs. Edward Osalo** is the one relevant to this case and was decided in his favour, and the decisions of the lower courts upheld by superior courts in **High Court (Kisumu) Appeal Case No. 15 of 1971**. It is the Plaintiff's disposition that the dispute over the suit property having been determined by the High Court, there was no matter to be resolved under Section 26 of the Land Adjudication Act.

It is the Plaintiff's contention that the 2<sup>nd</sup> Defendant does not disclose any new matter of evidence of both fact and law to warrant and justify the review of the ruling made on 9/7/2001. Further, that the 2<sup>nd</sup> Defendant is guilty of inordinate delays in filling this and previous applications, and that the explanation given for the delay is unsubstantiated. The Plaintiff depones that the 2<sup>nd</sup> Defendant's application is an afterthought, having been filed subsequent to the suit in **Nairobi HCCC No. 2245 of 2008, Slyvester Okumu v Edward Osalo and Caroline Akinyi Khagodi**, in which eviction orders were sought following the judgment of the court. The Plaintiff deponed further that the said application is an abuse of the court process in view of the similar application that was filed on 29/4/2002 and withdrawn on 13/11/2006. The Plaintiff in urging the court to dismiss the application stated that the suit having been heard by a court of competent jurisdiction, it is only fair and just that he be allowed to enjoy the fruits of his judgment.

The Plaintiff swore a Replying Affidavit on 8/11/2011 in response to the 4<sup>th</sup> Defendant's application, wherein he deponed that the death certificates annexed in the affidavit of John Juma Ogale are suspect and there is need for cross-examination on the same. The Plaintiff contended that all the Defendants in this matter were served with the Plaint and Summons to Enter Appearance as indicated by the Process Server, and were therefore aware of the suit. Further, that the application filed herein is a delaying tactic intended to deny him his right to enjoy the judgment in his favour. As regards the prayer to transfer the suit to Busia, the Plaintiff deponed that the suit as filed in Nairobi is convenient for him, and the attempt to have it transferred is part of wanting the matter to be further delayed.

The Plaintiff's response to the 5<sup>th</sup> Defendant's application is in a Replying Affidavit he swore on 27/6/2013 wherein he refuted the claim made by Benjamin Ogale, and deponed that as at the date he instituted the suit, Donati Ogale was alive and had knowledge of the existence of the suit having been periodically served with pleadings. The Plaintiff further deponed that the application as filed is a delaying tactic, filed to delay the legal process and interfere with the speedy disposal of the suit.

### **The Submissions**

The applications were canvassed by way of written submissions. Amolo and Kibanya Advocates for the Applicants filed submissions dated 14/10/2013, wherein counsel reiterated the contents of the pleadings and affidavits in support thereto. Counsel also outlined the proceedings of the court from the inception of the case to demonstrate that the Applicants' and their deceased fathers were unaware of the pendency of the suit. Counsel submitted that it is only through trial where the Applicants can canvass their defences to the Plaintiff's claim of ownership.

Withn respect to section 143 of the Registered Land Act, counsel submitted that the Plaintiff had failed to demonstrate that the Applicants' registration to their respective parcels of land, being a first registration, was obtained by fraud or mistake to warrant the court to make an order of rectification of title. Further, that the allegation of trust made by the Plaintiff was not particularized and that such an allegation must be supported by solid evidence. It was counsel's submission that where a court is in doubt as to the sufficiency of service it ought to adjourn a hearing and order fresh service and that the court must favour a party the opportunity to be heard on merits of a case.

In respect to the application for review, counsel submitted that following the decision of the Court of Appeal in the case of **Mbogo v Muthoni & Another (2008) 1 KLR (G & F) 358**, it was confirmed that

in matters of review, the court exercises judicial discretion and that the power of the courts to review is not limited to mistakes or errors, but also for sufficient reason. Counsel urged the court to invoke the oxygen principal contemplated under Section 1A & 1B of the Civil Procedure Act and allow the application. Counsel also stated that between the Applicants on the one hand and the Plaintiff on the other, it is the Applicants who stand to suffer irreparable loss since the Plaintiff will not be exposed to any prejudice that costs cannot redress.

A.N Ndambiri, the counsel for the Plaintiff, filed submissions dated 12/11/2013 wherein he reiterated the contents of the applications and of the affidavits in support and in opposition thereto. On the issue of whether the judgment of the court delivered on 28/1/1997 should be set aside, counsel submitted that the same was proper and should not be set aside, for reasons that no cogent or sufficient reasons were advanced to warrant the setting aside and that at the time of filing of the suit all the Defendants were alive and were served with summons. On whether the Applicants should be given unconditional leave to file defences, counsel submitted that the Applicants are guilty of undue delay in bringing their application for review and therefore cannot benefit from the discretion of the court without laying sufficient basis for the inordinate delay. Counsel also submitted that the Applicants had failed to state how the judgment of the Court had offended Order 20 Rule 5A (now Order 21 Rule 6).

On the application for review made by the 2<sup>nd</sup> Defendant, counsel submitted that the said Applicant had failed to establish the requirements set out under Order 45 of the Civil Procedure Rules as to discovery of new and important evidence. The counsel submitted that the allegation of mistake on the part of the 2<sup>nd</sup> Defendant's previous advocate is unjustified, and referred the Court to the decision in the case of **Kariuki Macharia v Mwangi Maina & Another, Civil Application No. NAI 234 of 1994** where Lakha J.A quoting the case of **Ketteman v Hansel Properties Limited, (1988) ALL ER 38** stated that there are cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their client's heads, rather than allowing an amendment at a very late stage.

As regards rectification of the register in respect to Samia/Budongo/241, 245 and 246, and whether the judgment delivered herein offends section 143 of the Registered Land Act, counsel submitted that the initial registration in favour of the Applicants was obtained illegally, and after a successful challenge in court the Plaintiff is now the lawful owner of the said properties. Counsel urged the court to dismiss the prayers of inhibition against the title, rectification of the register and surrender of title. The counsel's parting shot was the principle restated by Newbold P. in **Lakhamshi Bros Ltd v Raja & Sons, (1966) E.A. 313** that it is in the interest of justice that there should be an end to litigation.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the Applicants and Plaintiff. I need to state at the outset that even if this court were to find that the disputed order and judgment should be set aside, the prayers by the 2<sup>nd</sup> and 5<sup>th</sup> Defendants that the Land Register of Samia/Budongo/245 and 241 be rectified, and that Silvester Okumu be consequently ordered to surrender the title deed of the said parcel to the court cannot be granted at this stage, as they are final in nature. The said prayers are therefore denied. There are thus three issues for determination raised by the three applications before the court as follows:

1. Whether the order and judgment given herein on 9/7/2001 and 28/1/1997 respectively are amenable to review and/or setting aside and if so, whether the consequential decrees arising therefrom should be set aside.
2. If the said order and judgment given herein are reviewed and /or set aside, whether the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants should be granted leave to defend the suit herein.
3. If the said order and judgment given herein are set aside, whether the suit herein should be transferred to the Busia Environment and Land Court for hearing and determination.

### ***Review and/or setting aside of order given on 9/7/2001***

On the issue on whether the order and judgment herein can be reviewed and/or set aside, the provisions of

section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. The Applicants have in this regard shown that they have proprietary interests over the parcels of land that are the subject matter of the judgment delivered herein, and have demonstrated that they are directly affected by the judgment of the court.

Order 45 Rule 1 (b) spells out conditions that must be met in an application for review of a decree or order as follows:

- i. There must be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made,
- ii. mistake or error apparent on the face of the record,
- iii. or for any other sufficient reason,
- iv. the application must be made without unreasonable delay.

This court will need to first determine whether the order given on 9/7/2001 can be reviewed and/or set aside, as it raises similar issues as those raised by the pending applications herein. The 2<sup>nd</sup> Defendant bases his application for review of the said order on his own, and his previous Advocate's mistake. It is his case that his previous advocate misapprehended his instructions which led to the dismissal of his application to set aside the judgment of Mbogholi-Msagha J., and that he signed the supporting affidavit with the said errors without reading it.

Review of an order of the court based on mistake of counsel is not one of the grounds expressly stated under Order 45 of the Civil Procedure Rules. However, it is my view that it is a ground that can fall under the category of "sufficient reason". It is also my view that if there are allegations of mistake made, then the issue of a fair hearing as enshrined under Article 50 of the Constitution which entails hearing a case on merits also arises. I am in this regard persuaded by the decision in in the case of **Philip Chemwolo & Another v Augustine Kubende, (1982 – 88) KAR 103** where Apoloo J. rendered himself thus:

**“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits ..... I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”**

In the case of **Belinda Murai & others vs Amos Wainaina, [1978] LLR 2782 Madan, J.A.** (as he then was) described the effects of a mistake in the following words:

**“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”**

It is thus my opinion that it is in the interests of justice that the 2<sup>nd</sup> Defendant's application be heard and determined on the facts he alleges to be the true and correct ones, and that he should be given the opportunity to canvass the said facts. I therefore find that he has shown sufficient reason for the setting aside of the order given by the court on 9/7/2001 which dismissed his application dated 5/6/2001 for setting aside of the judgment herein.

## ***Review and/or setting aside of judgment delivered on 28/1/1997***

On the setting aside of the judgment delivered on 28/1/1997, the Applicants' entire claim is that they were not served with summons to enter appearance and could therefore not participate nor produce their evidence at the hearing. The Plaintiff's response is that the Applicants knew of the existence of the suit and were served with the summons to enter appearance and the Plaint. He relies on various affidavits of service on the court record sworn on 30<sup>th</sup> December 1993 and filed in court on 6<sup>th</sup> January 1994 by Moses O. Odera, a process server, were he attests to having served the Applicants.

I have perused the said affidavits, and note that while they do attest to service of the summons to enter appearance and Plaint on the Applicants, there are various irregularities therein. The first is that the 4<sup>th</sup> Defendant was said to be illiterate, and it is stated that the person alleged have been served, one Silfano Kodoli was a son of the 4<sup>th</sup> Defendant. The applicants for the 4<sup>th</sup> Defendant have stated that the said person is not known to him and that he is not a son of the deceased 4<sup>th</sup> Defendant. Secondly, the process server does acknowledge in his affidavit of service that the 5<sup>th</sup> Defendant was deceased at the time of service, and that he instead served one of his sons, namely Oundo Donah Ogalle.

The 2<sup>nd</sup> Defendant on his part denies that he was ever served with the said summons to enter appearance. I note that the affidavit of service by the said process server filed with regard to the 2<sup>nd</sup> Defendant is in relation to a chamber summons dated 21<sup>st</sup> April 1994 and a hearing notice for the said chamber summons. No affidavit of service of the Plaint and summons to enter appearance with respect to the 2<sup>nd</sup> Defendant was found on the court record, and the Plaintiff did not provide any evidence of one.

It is thus my finding that the evidence points to lack of proper service of the Summons to enter Appearance and the Plaint on the Applicants. The courts have been very categorical that where there is no proper service of summons to enter appearance, the court must set aside a judgment as a matter of right. Ringera J. (as he then) in his ruling in **Remco Ltd V Mistry Jadva Parbay & cO. & 2 Others, HCCC No. 171 of 2001** put it quite succinctly thus:-

**“I begin by stating the applicable law as I understand it. First, if there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment as an irregular one which the court must set aside ex debito justitiae ( as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. Secondly, if the default judgment is a regular one, the court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rules.”**

The principles of setting aside an ex-parte judgment are also well stated in the case of **Pithon Waweru Maina V Thuka Mugiria [1983] eKLR** as follows:

- a. **Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.**
- b. **Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo* [1967] EA 116 at 123B, *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48.)**
- c. **Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice. (*Mbogo v Shah* [1968] EA 93.)**
- d. **The court has no discretion where it appears there has been no proper service (*Kanji Naran v***

*Velji Ramji (1954) 21 EACA 20).*

- e. **A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (*Smith v Middleton [1972] SC 30*).**

There is thus sufficient cause to review and/or set aside the judgment delivered on 28/1/1997 for the foregoing reasons.

Lastly, it was alleged by the Plaintiff that there was delay in bringing the applications for review and/or setting aside of the order and judgment herein. The judgment sought to be set aside was entered in 1997. The 2<sup>nd</sup> Defendant filed the initial application to set aside the Judgment in 2001 which was dismissed by Aganyanya J. (as he then was), a subsequent application in 2006 which was withdrawn with the leave of court, and the present application filed in 2008. The 5<sup>th</sup> Defendant brought his application in 2003, whereas the 4<sup>th</sup> Defendant filed his in 2011.

The 2<sup>nd</sup> Defendant attributes the delay to his advanced age and failing health which hampers him from traveling to Nairobi to sign supporting affidavits. It is however noted that his initial application was filed in 2001. In addition the original 4<sup>th</sup> and 5<sup>th</sup> Defendants have since died and this is a reasonable explanation for the delay by the 4<sup>th</sup> and 5<sup>th</sup> Defendants. In addition the ultimate aim of the court is to do justice to both parties as is now stated in Article 159(2) of the Constitution and section 1A & 1B of the Civil Procedure Act. In the context of delay, this principle was aptly explained by Lord Denning M.R. in **Allen vs. Sir Alfred Mc Alpine & Sons Ltd, [1968]1 ALL E.R. 543 at 547** as follows:

**“The principle on which we go is clear; when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straightaway ...” So the overriding consideration always is whether or not justice can be done despite the delay.”**

The Applicants aver that they have a good defence to the Plaintiff’s claim including section 143 of the repealed Registered Land Act on first registration, and that they should be afforded an opportunity to present the same. The Applicants are also the ones more likely to be prejudiced, as they have been in possession of the disputed parcels of land since the institution of the suit. This court also notes that there has been previous litigation on the said parcels of land that needs to be examined and considered in reaching a fair determination in the matter. It is thus my finding that the delay in bringing the applications is excusable, and that it is in the interests of justice the suit herein should be heard on its merits.

### ***Leave to Defend Suit***

Having found for the setting aside of the disputed order and judgment, this court shall proceed to consider the issue whether the Applicants should be granted leave to defend the suit filed herein. The provisions of Order 6 Rule 1 and Order 7 Rule 1 of the Civil Procedure Rules provide that a defendant is required to enter appearance and file their Defence after he or she has been served with a summons to appear. As this court has found that there was no proper service of the summons to enter appearance and the Plaintiff on the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants, they are accordingly entitled to file their Defences after proper service has been effected.

### ***Transfer of suit***

On the final issue on the transfer of this suit to the Busia courts, it is not disputed that the disputed parcels of land are in Busia County, and that the Plaintiff and Defendants are also resident in Busia County. The applicable law on jurisdiction of courts where the subject matter is land is in section 12 of the Civil Procedure Act, which provides as follows:

**“Subject to the pecuniary or other limitations prescribed by any law, suits -**

**(a) for the recovery of immovable property, with or without rent or profits;**

**(b) for the partition of immovable property;**

**(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;**

**(d) for the determination of any other right to or interest in immovable property;**

**(e) for compensation for wrong to immovable property;**

**(f) for the recovery of movable property actually under distraint or attachment,**

**where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:**

**Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.”**

In addition there is now an Environment and Land Court established in Busia, and the dispute herein is therefore within the said Court’s jurisdiction. It is thus my view that the overriding objectives of efficient and timely disposal of the proceedings, and at a cost affordable by the respective parties set out in sections 1A and 1B of the Civil Procedure Act will be better met if this suit is to be heard and determined by the Busia Environment and Land Court.

### **The Orders**

The upshot of the foregoing is that the applications by the Applicants are allowed. This court accordingly orders as follows:

1. The order given herein on 9/7/2001 by Aganyanya J. (as he then was) and judgment delivered herein on 28/1/1997 by Mbogholi Msagha J. and all consequential decree and actions arising therefrom are hereby set aside, and the suit herein shall proceed to full hearing.
2. The Plaintiff shall properly serve the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants with the summons to enter appearance and Plaint within 30 days of the date of this ruling.
3. The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants are granted leave to file and serve their Defences to the Plaintiff’s claim in the suit herein within 30 days of service of summons and Plaint by the Plaintiff.
4. This suit and file thereof shall after sixty days of the date of this ruling be forthwith transferred to the Busia Environment and Land Court for further hearing and determination. The file for this suit shall be placed before the Presiding Judge of the Busia Environment and Land Court on 28<sup>th</sup> July 2014 for further directions.
5. The costs of the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants’ Notices of Motion and Chamber Summons shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 6<sup>th</sup> day of May , 2014.

**P. NYAMWEYA**

**JUDGE**