Kidunga & 8 others (Suing on Their Behalf and on Behalf of Squatters/ Residents of Vikwatani Estate Residing Upon the Suit Property/ Plot No. 180/II/MN Title No. CR.613 Numbering 123 People Whose Names Appears in the Schedule of List of Members of Hakikisho Development Group attached to the Originating Summons Herein) v Shafi & 3 others (Environment and Land Case Civil Suit 64 of 2015) [2024] KEELC 4513 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 4513 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND CASE CIVIL SUIT 64 OF 2015

LL NAIKUNI, J

MARCH 20, 2024

BETWEEN

MWANZALA NYAE KIDUNGA ..... 1ST PLAINTIFF

KAKALA NGALA HINZANO ..... 2ND PLAINTIFF

UMAZI KEA ..... 3RD PLAINTIFF

JUSTUS BUSHUTI MKONGO ..... 4TH PLAINTIFF

JOEL OGEMBO ..... 5TH PLAINTIFF

MRS.REGINA WANJIRU NDUNGU ..... 6TH PLAINTIFF

LEA DICSON MUSHAMBA ..... 7TH PLAINTIFF

SABINA KISHANGA WANAZA ..... 8TH PLAINTIFF

MRS.KHADIJA NYAE ..... 9TH PLAINTIFF

SUING ON THEIR BEHALF AND ON BEHALF OF SQUATTERS/ RESIDENTS OF VIKWATANI ESTATE RESIDING UPON THE SUIT PROPERTY/ PLOT NO. 180/II/MN TITLE NO. CR.613 NUMBERING 123 PEOPLE WHOSE NAMES APPEARS IN THE SCHEDULE OF LIST OF MEMBERS OF HAKIKISHO DEVELOPMENT GROUP ATTACHED TO THE ORIGINATING SUMMONS HEREIN

AND

ATHUMANI MZEE SHAFI ..... 1ST DEFENDANT

SITI MZEE SHAFI ..... 2ND DEFENDANT

MKASI MZEE SHAFI ..... 3RD DEFENDANT

REGISTRAR OF LANDS ..... 4TH DEFENDANT

RULING

I. Introduction

1. This is a ruling arising from an Affidavit of the Land Registrar, Mombasa sworn on 4th August, 2022 and filed in Court on 8th August, 2022 from the failure and inability by the said Land Registrar to execute the Decree of this Court. From the said Affidavit, the 4th Applicant responded to through an answer filed on 21st September, 2022. Subsequently, it was followed up by a supplementary affidavit by the Land Registrar, Mombasa sworn on 5th December, 2022.

2. As a brief background, This Honourable Court delivered its Judgment on 19th May, 2021 by Justice Yano. Ordinarily, the Plaintiffs extracted a Decree and had it served upon the land Registrar for the said offices to execute accordingly. Despite all efforts, this could not happen and it caused the Plaintiffs to move Court accordingly. It was from this situation that the Court summoned the Land Registrar who orally explained the difficulties he was facing. As a result, the Court directed him to file an Affidavit explaining the difficulties he was facing for the failure to execute the Court orders. That now forms the pith and substance of this Ruling.

II. The 2nd Respondent's case

3. On the 8th August, 2022, as directed by this Honourable Court the 2nd Respondent, Mr. Samuel Mwangi, the Land Registrar, Mombasa filed a filed a 12th paragraphed affidavit dated 4th August, 2022 where he averred that:-

    a. He made the affidavit pursuant to the orders issued by Honourable Justice L.L Naikuni on 4th July, 2022.

    b. He had read and understood the contents of the Judgement and the Decree of this Honourable court delivered by Hon. Justice Yano on 19th May, 2021 and wish to respond as hereunder;

    c. Further to his testimony in Court on 4th July, 2022, he wished to confirm that parcel of land Reference Number MN/II/190 registered under title CR 613 has been sub-divided and the respective sub-divisions transferred out to 3rd party owners and individual Certificates of title issued thereof to each sub - division.

    d. He had enclosed herewith Certificates of Titles and their respective transfer documenting how the sub-divisions were registered over the years with the first sub-division being registered in the year 1992. Annexed in the Affidavit bundle and marked as "SMK".

    e. Consequently, parcel of land Reference Number MN/II/180(CR 613) never existed the same having been sub-divided and the title register closed on sub-division.

    f. He had read the Judgment delivered on 19th May, 2021 and had been advised by the Counsel for the 2nd Respondent and had noticed that the registered owners of the sub- divisions are not parties to the suit giving rise to the decree dated 14th June, 2021 which vested the entire parcel of land plot No.MN/II/180 to the Plaintiffs herein.

g. Therefore, it followed that the Land Registrar could not implement the orders of the Decree in as far as it was affecting the constitutional rights to property of 3rd party owners who were not parties to the suit.

h. Some of the titles held by 3rd Parties had been charged or used as security to various banks and financial institutions.

i. Seeing that the suit was filed in the year 2015 and the sub - divisions having taken place in the year 1992, it would have been prudent for the Plaintiffs to have enjoined the registered owners of the sub-divisions to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

j. The land issues being sensitive and emotive; registering the order as it is will be prejudicial to other parties not in the suit opening up further litigation.

III. The 4th Applicant's case (Answer to the Land Registrar's affidavit).

4. On 21st September, 2022 filed a 9th Paragraphed answer of the affidavit sworn by Justus Bushuti Mkongo where he averred that:-

a. In answer to the contents of Paragraph *2* in addition to orders issued by the Judge, the Land Registrar should answer with provisions from the *Land Registration Act*, No. 3 of 2012 and *Land Act*, No. 6 of 2012and he had authority to swear this affidavit on behalf of the rest of the Plaintiffs.

b. In answer to averments under Paragraph 3 of the Land Registrar's affidavit, the decree delivered by Hon. Justice Yano, was an order of possession of land as a result of a case based on the Land adverse possession.

c. Paragraph 4 of the Plaint was news to them because their claim was for the claim of title under the land adverse possession which meant that they had stayed on the land for more than 12 years without any molestation, and their case was that, up to now there was nobody who had come to claim that land. So this people claiming ownership of the said parcel of land were represented by an Advocate and after his death, he was represented by Legal Administrator and nobody made any other claim.

d. There was no representation to deny that they had stayed there for over 12 years so what the Land Registrar was saying was like getting away to defeat the Judgment of Hon. Justice Yano without appeal against it.

e. The bundle marked as "SMK" purporting to show new Titles could not be true because the said owners Ahmed Kiarie, Charles Kadenge, Daniel Owino, Abdalla Kibwana, Lilian Rongo, Susan Rhoda Mwanyumba Said Khamis, Joseph Ngundi Mawia, Hisadi Yusuf, Abdoul Mohamed, Julia Muthoni Mwawira, Ahmed Kombo. None of these people appeared in the case before Hon. Justice Yano.

f. His lawyer told him that registration should be done on a prescribed form and the disclosure of some documents the Land Registrar should have shown why he registered the people. If he had subdivided this land property the owners should have known, there is no evidence that he signed, either Mr. Shaffi was cheating the Court and the Court gave the verdict on the same.

g. In answer to Paragraph *6*, they maintained that the parcel of land exist and the Court has the authorityto transfer that land to them according to that Judgment.

h. In answer to averment under Paragraph *7* if the Land Registrar stated that he had read the Judgment, the only thing was to instruct his advocate the Attorney General to institute an Appeal. Otherwise it is a claim based on Titles and fraudulent practices.

i. The Land Registrar's word only could not set aside the court order and if he wants to do so, he could make an Appeal and it was his belief that the actions was irregular and the so-called Certificate of Title was not obtained correctly and could not be genuine and the registrar could not purport to act for the so called owner as their Advocate.

IV. The Supplementary Affidavit by the Land Registrar

5. The Chairman of Hakikisho Self Help group and a resident of Vikwatani Mombasa filed a 16th paragraphed supplementary affidavit. It was sworn on 5th December, 2022 by Justus Bushutu Mkongo. He informed the Honourable Court that:

i. After reading the affidavit of the Land Registrar sworn on 4th August, 2022 where he claimed he did not own the land. His Advocate asked him to go to conduct an official search of the land at the Land Registry.

ii. On the 1st November, 2021, he presented 14 search forms for the Official Searches on the Plots. He presented the forms to the Lands Office.

iii. The Lands Office Clerk retuned a search that the Registrar of Lands had the files but had refused to authorize for them to be accessed by anyone. He left the search forms with the Lands Office Clerk who gave his name and telephone number. It was agreed between them that the Deponent would keep on ringing him and that he would keep on seeking for the release of the files. On the 3rd November, 2022, he rang the clerk who indicated that the files were yet to be released by the Land Registrar.

iv. On Friday 4th November,2022 the deponent went again to the Land Registry. He personally met the Lands Office Clerk who told him that the Land Registrar had not released the files. His advocate had guided him on the Land Registration Regulations, Section 86 which stated that "persons who wish to carry our official search shall apply in Form LRM 86 schedule 6".

v. He had applied for official Search but the Land Registrar was refusing to avail the file. It meant that either the Land Registrar never had the register of the alleged Search or was just disobeying the Regulations of Land Acts and land regulations. He was supposed to follow these regulations.

vi. After the Lands office, he went to the municipality at the rates office to ask for rates. While there they found the Land was still under the name of Mzee Shaffi Mwahima and no Sub division and unpaid rates standing at a sum of Kenya Shillings Ten Million (Kshs.10,000,000.00/=).

V. Analysis and Determination

6. I have carefully read and considered the affidavit and responses thereof. To determine the remedy for what has been adduced by the Land Registrar in his affidavit, the Court would have to consider the background of this suit. From the pleadings and documentation filed it is my finding that the following issues are for determination:-

a. Whether the Affidavit by the Land Registrar, Mombasa is merited and explains the situation before the Honourable Court?

b. Whether this Honourable Court can review the judgment and subsequent decree of another judge who is currently not sitting in Mombasa Environment and Land Court?

c. What can be done to remedy the defects in the judgment delivered on 19th May, 2021

d. Who bears the costs of the affidavit by the Land Registrar sworn on 4th August, 2022

Issue No. a.) Whether the Affidavit by the Land Registrar, Mombasa is merited and explains the situation before the Honourable Court

7. Under this sub – title, it is imperative that the Court extrapolates on the brief facts of the case before embarking on the analysis. The Plaintiffs filed an Originating Summons dated 23rd March 2015 and amended on 13th April 2018 brought under the provision of Sections 37 and 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, Order 37 Rule 7 (1) and 2 of the Civil Procedure Rules, 2010, the *Land Act* No. 6 of 20102, the *Land Registration Act* No.3 of 2012 and all other enabling provisions of the law.

8. From the Judgment delivered by this Honourable Court on 19th May, 2021, the Honourable Court opined itself as follows:-

> " From the material presented before this court, I find that the plaintiffs have on the balance of probabilities proved that they have a claim over the suit property by way of adverse possession. I find the amended originating summons filed on 13th April, 2018 has merit and the same is hereby allowed. I enter judgment as follows:
>
> a. That the plaintiffs are hereby declared to have become entitled by virtue of adverse possession of all that parcel of land comprised in TITLE NO.180/II/ MN CR.613 measuring 16.819 acres or thereabouts.
>
> b. That the plaintiffs are entitled to be registered as proprietors in common of the suit land in place of the Defendants
>
> c. That the Defendants, agents, servants and anyone else claiming under them are hereby restrained by a permanent injunction from entering the suit property or demolishing houses and/or properties and structures therein and/ or evicting the Plaintiffs, their families, and/or tenants or in any other manner whatsoever interfering with the Plaintiffs' peaceful occupation of the suit land.
>
> d. Each party to bear their own costs."

9. According to the averments made out by the Land Registrar in his affidavit dated 4th August, 2022, and further to his testimony in Court on 4th July, 2022, he wished to confirm that parcel of land MN/II/190 registered under title CR 613 had been sub-divided and the respective sub-divisions transferred out to 3rd party owners and individual certificates of title issued thereof to each subdivision over the years with the first sub- division being registered in the year 1992. Consequently, parcel of land MN/II/180 (CR 613) never existed the same having been sub-divided and the title register closed on sub-division.

10. Resultantly, according to the land Registrar, the Judgment delivered on 19th May, 2021 could not be executed as the orders were projected to a non - existent parcel of land taking that title had already been sub - divided and cancelled. While agreeing with the land Registrar and in the given circumstances, therefore, this Honourable Court is fully satisfied that there is great need and as the only remaining

alternative, to consider causing and/or moving its own motion ("Suo Moto") for the review of the Judgment delivered on 19th May, 2021.

Issue No. b.) Whether this Honourable Court can review the Judgment and subsequent decree of another Judge who is currently not sitting in Mombasa Environment and Land Court

11. Under this Sub – heading, I will first examine on the legal rationale when a Court can review the Judgment of another Judge who is no longer in the station. It is essential for the maintenance of the rule of law and order that the authority and the dignity of Courts is upheld at all times. A Court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realize that once they are brought to court they are subject to the jurisdiction of the Court. Under the provision of Article 159 (1) of *the Constitution* of Kenya, 2010, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under *the Constitution*. In exercising judicial authority the Courts and Tribunals are, inter alia, to be guided by the principle that the purpose and principles of *the Constitution* shall be protected and promoted. Under Article 10(1) of *the Constitution* the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law.

12. Under the provision of Order 45 Rule 2(2), of the Civil Procedure Rules, 2010 provides that:-

> If the Judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other Judge who is attached to that court at the time the application comes for hearing.

13. As already stated herein, the Judgment delivered on 19th May, 2021 and the subsequent decree was made by my brother Justice Yano. He is no longer sitting at the Mombasa Station but administratively transferred to Meru, Environment & Land Court. Therefore, this Honourable is competent enough to move this Honourable Court and direct the parties on the next cause of action in this suit.

14. In this particular case, the Court orders were issued on a land title that had already been sub - divided and fresh titles issued to other parties who were not in the suit information which was not disclosed to the Honourable Court at the time it was delivering its judgment.

15. This Honourable Court on its own motion moves to examine the merits of whether, the Judgment of Justice Yano delivered on 19th May, 2021 should be reviewed and provided a remedy in the given circumstances.

Issue No. c). What can be done to remedy the defects in the Judgment delivered on 19th May, 2021

16. Under this sub title the Honourable Court has agreed with the Land Registrar that he may find it difficult (in fact impossible) executing the Judgment delivered on 19th May, 2021. This was due to the fact that the suit property in the Judgment never existed as it was already sub - divided yet the information was never disclosed to the Judge. Therefore, the Honourable Court in the interest of justice will be compelled to review the same Judgment and weight the options it has to be able to dispense justice to all the parties in this suit.

17. To begin with, review, setting aside and/or varying of Court orders are mainly governed by the provision of Section 80 (1) of the *Civil Procedure Act*, Cap. 21 and Order 45 Rules 1, 2 and 3 of the

Civil Procedure Rules, 2010. A clear reading of these provisions indicate that the provision of Section 80 is on the power to do so while the provision of Order 45 sets out the rules on doing it. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

> " Any person who considers himself aggrieved—
>
> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

18. While the provision of Order 45 of the Civil Procedure Rules, 2010 provides as follows: -

> " Order 45 Review
>
> [Order 45, rule 1.]
>
> Application for review of decree or order.
>
> 1.
>
> (1) Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
>
> [Order 45, rule 2.] To whom applications for review may be made.
>
> 2.
>
> (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

[Order 45, rule 3.] When court may grant or reject application.

3.

(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same: Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

.....

[Order 45, rule 5.] Re-hearing upon application granted.

5. When an application for review is granted, a note thereof shall be made in the register, and the court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit."

19. In the instant case, the Honourable Court delivered its Judgment on 19th May, 2021 as indicated above, the suit property of all that parcel of land comprised in TITLE NO.180/II/MN CR.613 measuring 16.819 acres or thereabouts. And the Honourable Court opined itself that the Plaintiffs were entitled to be registered as proprietors in common of the suit land in place of the Defendants.

20. In the case of:- "Republic – Versus - Public Procurement Administrative Review Board & 2 others [2018] eKLR" it was held:-

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

21. Further, in the case of:- "Pancras T. Swai – Versus - Kenya Breweries Limited [2014] eKLR" the Court of Appeal held: -

> " Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or "for any sufficient reason....."

22. Additionally, in the case of:- "Sarder Mohamed – Versus - Charan Singh Nand Sing and Another (1959) EA 793" where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

23. Discussing the scope of review, the Supreme Court of India in the case of "Ajit Kumar Rath – Versus - State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608", had this to say:-

> " the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

24. In the case of:- "Republic – Versus - Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR" High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge called out the following principles from a number of authorities: -

    i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

    ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

    iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

    iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

    v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

    vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

    vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge

and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

25. I have previously stated in this Honourable Court in the case of "Sese (Suing as the *Administrator of the Estate of the Late Shali Sese) – Versus - Karezi & 8 others (Environment and Land Constitutional Petition 32 of 2020*) [2023] KEELC 17427 (KLR)" held that:-

> "The power of review is available only when there is an error apparent on the face of the record. Indeed, this Court emphasizes that a review is not an appeal. The review must be confined to error apparent on the face of the record and re – appraisal of the entire evidence or how the Judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is permissible."

26. According to the Land Registrar he could not implement the said court orders in contention because the decree was in respect of a suit property which had since 1992 been subdivided and therefore did not exist and the registered proprietors of the suit properties were not enjoined in the suit. This information was not presented before the Honourable Court before the judgement was rendered and therefore qualified as discovery of new and important matter or evidence that was not available or availed to the Honourable Court at the time of decree being passed.

27. The Land Registrar also told the Honourable Court on 4th July, 2022 that he could not implement the court's decree being that the stated title number is to a parcel of land that was sub divided and titles were issued and therefore does not exist according to the land registry. In the judgment the Honourable Court quotes the land parcel number of the sub – divided property thereby qualifying the same for review under the ground of some mistake or error apparent on the face of the record.

28. While the provisions of Section 80 of the *Civil Procedure Act*, Cap. 21 and Order 45 Rule 1 of the Civil Procedure Rules, 2010 gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision, such discretion should be exercised judiciously and not capriciously. The court of Appeal in the case of "National Bank of Kenya Ltd - Versus - Ndungu Njau (1997) eKLR" held thus:-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter."

29. I am satisfied that the instant suit is one which qualifies for the Honourable Court to exercise its jurisdiction reviewing the Judgment dated 19th May, 2021. It should not be gainsaid that the grant of orders for setting aside of a judgment provides opportunity to an aggrieved party under two scenarios: one, is where the Judgment is irregular, two, where the judgment is regular. For an irregular judgment sought to be set aside, it shall go that way as of right because it means that the party was not given an opportunity to be heard and rules of natural justice cannot permit it to be that a party is condemned unheard.

30. In cases of irregular judgment, the Court will set it aside ex debito justiciae - as of right. As the Court of Appeal observed in "James Kanyiita Nderitu & Another [2016] eKLR", there is little option for a court but to set aside such a judgment. The Court stated:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another -vs- Shah (1968) EA 98, Patel -vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another -vs- Kubende (1986) KLR 492 and CMC Holdings -vs- Nzioka [2004] I 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 justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

31. The registered proprietors of the suit properties were not included in these proceeding and the Honourable Court is of the opinion that they have a right to be heard as much as the other parties had a write to be heard. Therefore, as much as I find that the judgment delivered on 19th March, 2021 is hereby set aside and the suit will be started "de novo" to be concluded within the next 90 days from the date of this ruling.

Issue No. d). Who will bear the Costs of the Affidavit by the Land Registrar sworn on 4th August, 2022

32. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh – Versus - Tarchalan Singh" eKLR (2014) and Cecilia Karuru Ngayo – Versus - Barclays Bank of Kenya Limited, eKLR (2014).

33. In this case, this Honourable Court finds that there shall be no orders as to costs.

VI. Conclusion and Disposition

34. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience.

35. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus affidavit, this court arrives at the following decision and makes below order:-

    a. THAT this Honourable Court be and hereby sets aside the Judgment delivered on 19th May, 2021 and all consequential orders on account that the said Judgment quotes a title document for a parcel of land that does not exist.

    b. THAT an order made herein in the interest of natural Justice, Equity and Conscience and the strength of the provision of Section 80 of the *Civil procedure Act*, cap. 21 and Order 45 (1), (2), (3) and (5) of the Civil Procedure Rules, 2010 that the suit has to commence "De Novo" in order to re – establish the actual facts and apply the law afresh and appropriately.

    c. THAT the suit be fixed for hearing on priority basis on 2nd July, 2024. There shall be a mention on 22nd May, 2024 for purposes of conducting a thorough and intensive Pre – Trial conference under Order 11 of the Civil Procedure Rules, 2010.

    d. THAT the alleged legal proprietors of the suit properties as per the title deeds attached by the Land Registrar be enjoined in this suit as interested parties to the suit.

    e. THAT there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF MARCH 2024.

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HON. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. No appearance for the Plaintiffs/ Applicants

c. No. appearance for the Defendants/Respondent.