IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: G.B.M. KARIUKI, F. SICHALE, & S. ole KANTAI, JJA)

CIVIL APPEAL NO. 44 OF 2017

BETWEEN

JULIUS WAHINYA KANG'ETHE.........................1ST APPELLANT

JULIANA WARIGI KANG'ETHE.........................2ND APPELLANT

AND

MUHIA MUCHIRI NG'ANG'A..................................RESPONDENT

(Being an Appeal against part of the Ruling and Order of the

Environment and Land Court at Nakuru, (Munyao Sila, J.)

dated 9th November, 2016

in

ELC Case No. 253 of 2012)

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JUDGMENT OF THE COURT

In a plaint filed on 16th March, 1988 at the High Court of Kenya at Nairobi being HCCC No. 1012 of 1998 Maria Wangari Muhia sued Kang'ethe Wahinya claiming that the latter had entered upon her land known as Plot No. 231 Mkungi Settlement Scheme in the then Nyandarua District and occupied 10 acres of the same. It was prayed that an injunction be issued to prevent acts of trespass and general damages be awarded for the said trespass. Kang'ethe Wahinya (he in the course of the proceedings also became ***"Julius"*** and is the 1st appellant here) delivered a defence where it was claimed that Maria Wangari Muhia's Plot No. 231 was in Mkungi Settlement Scheme while the 1st appellant's Plot was No. 214 and was situate in a different Scheme called Nandarasi Settlement Scheme. It was further claimed in the defence that if, indeed, the 1st appellant had occupied Maria's land such occupation had been as of right and was open and continuous for a period of more than 12 years.

Events took a turn some 9 years later.

By an amended plaint filed on 12th November, 2007 the respondent Muhia Muchiri Ng'ang'a (son of Maria Wangari Muhia) took over the suit and the defendants in the suit were the appellants Julius Wahinya Kang'ethe and his mother Juliana Warigi Kang'ethe. It was claimed in this version of the plaint that Maria Wangari Muhia had been allocated a parcel of land known as Plot No. 231 Mkungi Settlement Scheme by the Government of Kenya; that the appellants had without the knowledge or consent of the respondent (or his mother) entered the said land and occupied 10 acres of the same; that the appellants had been asked to vacate the land but had refused to do so; that in or about 23rd March, 2001 the 1st appellant as registered owner of a parcel of land known as Nyandarua/Nandarasi/214 had subdivided the same into 10 plots which he had registered in his own name and one plot in the name of his mother the 2nd appellant; that the subdivision included the 10 acres claimed by the respondent. It was prayed that the titles to the plots resulting from the subdivision - Plot Nos. Nyandarua/Nandarasi/2310, 2302, 2304, 2305, 2307, 2308, 2309, 2377 and 2378 – be cancelled by order of the Court. There were also prayers for injunction, eviction and damages.

The appellants delivered separate statements of defence where the respondents' claim was denied in full and it was claimed that the suit was incompetent and an abuse of the process of the court and should be struck out.

Somewhere along the way and upon the establishment of the Environment and Land Court the suit was transferred from the Nairobi Registry to the Environment and Land Court, Nakuru, and acquired another Case Number – ELC No. 253 of 2012.

The record shows that on 16th February, 2015 the file was before Munyao Sila, J. Present in court before the learned Judge was the respondent, his lawyer Mr. Karanja Mbugua and lawyer Miss Njeri Muiruri who held brief for Mr. Kahari, advocate for the appellants. It was recorded that the respondent had fully complied with trial directions given earlier by the trial court. It was ordered, *inter alia*, that the matter proceed for hearing on 18th March, 2015.

On the said date – 18th March 2015 – the same lawyers appeared before the Judge but both lawyers requested that the matter be adjourned for reasons recorded. The learned Judge granted the request and allocated a new hearing date – 9th July, 2015.

On 9th July, 2015 the appearance before the learned Judge was as follows – the appellants and the respondent were present. They were respectively represented by Mr. Eric Kinyua who held a brief for Mr. Kahari while Mr. Waiganjo appeared for the respondent. The hearing commenced and the respondent gave evidence in chief at the end of which it is recorded:

> ***"Court: Before we proceed any further, I note that the plaint seeks cancellation of several parcels of land sub-divided from the land parcel Nyandarua/Nandarasi/214. Those sub-divisions are owned by persons some of who are not parties to this suit. It will be unfair to proceed without them being parties.***
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> ***I therefore direct that the plaint be amended accordingly. The amended plaint be filed and served within 14 days and the defendants file their amended defence (or new defence for new defendants if need be) within 14 days thereafter.***
>
> ***So that the properties are preserved, I do issue an order of inhibition, inhibiting the registration of any disposition and restricting all dealings over the land parcels Nyandarua/Mkungi/231 and Nyandarua/Nandarasi/214, 2301, 2302, 2303, 2304, 2305, 2307, 2308, 2309, 2377 and 2378 or any other land sub-divided or accruing from a sub-division of the land parcel Nyandarua/Nandarasi/214. This order to be in force until the conclusion of this suit.***
>
> ***Mention 17/9/2015.***

MUNYAO SILA

JUDGE".

Those orders resulted in a further amended plaint filed at the ELC Court, Nakuru, on 20th July, 2015. Apart from the parties already identified in this appeal the following were added as 3rd to 6th defendants: Catherine Gathoni Kogi, Monicah Wambui Kang'ethe, Ng'ang'a Kang'ethe and Kinyanjui Kang'ethe.

At the resumption of the hearing on 17th September, 2015 the appellants and the respondent were represented by counsel. Counsel for the respondent informed the court that he had filed further amended plaint as ordered and had served the appellants and the new parties accordingly. Those new parties had not entered appearance to the suit. The matter did not proceed that day and on a subsequent date. On 20th January, 2016 a date set for further hearing, only the respondent and his lawyer Mr. Waiganjo were in court. Learned counsel for the respondent addressed the court as follows:

> ***"The matter is for further hearing. We took today's date by consent with Mr. Kahari Kiai. I served the 3rd – 6th defendants. I am ready to proceed."***

The court was satisfied that the appellants' advocate had taken the date by consent and that the new parties to the suit had been served. The hearing therefore continued where the respondent completed his evidence and it was ordered that judgment would be reserved to be delivered on 17th February, 2016. It was further ordered that a judgment notice be served on the appellants and the other defendants.

There is on record a ***"judgment Notice"*** dated 3rd February, 2016 by M/s Waiganjo & Company, Advocates for the respondent, addressed to the law firm of Kahari & Kiai, Advocates (for the appellants) and to the other defendants who had been added to the suit but who had not entered appearance. In an Affidavit of Service, Wilson M. Wanjohi, a Court Process Server, stated that he had received the said judgment Notice from the respondents' Advocates on 4th February, 2016 and that he had, the same day, proceeded to a place called Ndunyu Njeru in Nyandarua County and that he had served the said defendants with judgment Notice but that they had refused to acknowledge receipt. He further stated that he knew them well and had served them with court documents before. The said Judgment Notice was addressed to a known address of the appellants' advocates and service was not disputed.

In a Judgment delivered on 17th February, 2016 by Munyao Sila, J. the learned Judge found that the respondent had proved his case to the required standard. The learned Judge made the following orders:

> ***"From the above, I now make the following final orders:***
>
> ***1. That the defendants' titles to the land parcels Nyandarua/Nandarasi/2301, 2302, 2303. 2304, 2305, 2306, 2307, 2308, 2309, 2377 and 2378 be cancelled forthwith and upon cancellation of these mentioned titles the defendants' land do revert back to the land parcel Nyandarua/Nandarasi/214 with its original proprietorship.***
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> ***2. That I hereby declare that the land parcel Nyandarua/Nandarasi/214 is 18.0 hectares or thereabouts and in any event, that said land ought to be confined within the previously existing Nandarasi Settlement Scheme which scheme is defined in the original survey maps published by the Survey of Kenya in April 1983 and produced in this case as plaintiff's exhibits numbers 5 and 6 and should not extend to the previously existing Mkungi Settlement Scheme.***
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> ***3. That the Registry Index Map be amended to align itself with the judgment herein.***
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> ***4. That I declare the defendants to have trespassed into the plaintiff's Plot No. 213 situated at Mkungi Settlement Scheme by about 12 acres or thereabouts and I order them to vacate forthwith from the said land, and confine themselves to the land parcel Nyandarua/Nandarasi/214 as defined in order 2 above.***

5. The plaintiff is awarded the sum of Kshs.2.352,000/- as against the defendants jointly and/or severally together with interest from the date of filing of suit till settlement in full.

6. The plaintiff shall have costs as against the defendants jointly and/or severally.

It is so ordered."

That Judgment was not and has not been appealed.

Two applications followed.

In a Notice of Motion filed on 3rd March, 2016 by the law firm of Njuguna, Kahari & Kiai, Advocates, for the appellants it was prayed that the law firm be allowed to be on record in place of the previous law firm called Kahari & Kiai Advocates; that the judgment delivered on 17th February, 2016 be stayed, be vacated and set aside or, alternatively, that the judgment be reviewed and the suit be heard *de novo*. In grounds in support of the Motion it was stated that the appellants were registered proprietors of stated lands subject of the suit; that the appellants had occupied and developed the lands; that a new law firm had come on record in place of a previous one; that the previous law firm had not attended a scheduled hearing of the case on a date taken by consent; that non-attendance was due to inadvertence; that the appellants fundamental rights to own land had been violated; that the defence filed raised triable issues and finally, that there was an error apparent on the face of the judgment which should be reviewed. In further support of the Motion were 2 affidavits – one by Joseph Waithaka Kahari, the advocate on record for the appellants, and one by the 1st appellant.

Mr. Kahari stated *inter alia* in his affidavit that a new law firm had come into being called Njuguna, Kahari and Kiai, Advocates; that he had always been in personal conduct of the suit on behalf of the appellants; that although the hearing date for the case had been taken by consent their law clerk had through inadvertence failed to record the date in the law firms' diary; that they had learned that the case had proceeded in their absence and judgment entered for the respondent; that there was an error on the face of the judgment as the sum awarded as special damages had not been proved; that the court should accord the appellants a hearing as required by Article 159 of the Constitution of Kenya, 2010; that the inexcusable mistake of an advocate should not be visited on the client; and that his law firm had not been served with a Notice of judgment.

In an affidavit sworn on 3rd March, 2016, the 1st appellant, Julius Wahinya Kang'ethe stated amongst other things that his father was the registered proprietor of parcel of land Plot No. Nyandarua/Nandarasi/214 which was sub-divided into 10 plots; that he was the registered proprietor of one of the plots – Nyandarua/Nandarasi/2308 which he had occupied for 15 years; that his lawyer Mr. Kahari had informed him and his mother the 2nd appellant that judgment had been entered against the appellants; that they wanted to defend the suit as shown in their defences that raised triable issues and that the trial court should look at the justice of the case but not be influenced by procedural technicalities which the Constitution of Kenya did not permit.

The 2nd Motion filed by M/s Chuma Mburu & Co. Advocates – for the 3rd, 4th and 5th defendants – these were some of the parties ordered by court to be included in the suit as we have already seen – asked for a stay of execution of the judgment; that judgment delivered on 17th February, 2016 be set aside and the said defendants be granted leave to file their defences and be heard on the same.

We shall not go into detail on the 2nd application as the appeal before us is by the appellants (the parties in the 1st application) in relation to the ruling delivered in respect of the two applications.

The applications were heard by the Judge who had heard the case who, in a ruling delivered on 9th November, 2016, found that the hearing date had been taken by consent; that the appellants and the other defendants had not appeared for the hearing; that no valid reason had been advanced for non-attendance

and that the decree that followed the judgment had been executed against the 3rd to 6th defendants. The learned Judge found that Mr. Kahari had always been on record for the appellants and that the change of partnership of the law firm where a new partner was admitted did not in any way change the character of the matter as the said advocate had always been on record. The learned Judge further found that there was no violation on the rights of any party as it was those parties who had failed to attend the hearing when they knew of the same.

The learned Judge found that the appellants had not advanced any valid reasons for failure to attend court. He further found that the other defendants to the case had been properly served for the hearing but had absented themselves from the hearing without any or any valid reason.

Having made those findings and, where in the natural order of things, the Motions should have been dismissed as lacking in merit, the learned Judge concluded the ruling as follows where he allowed the Motions conditionally:

> ***"20. In all honesty, I do not see any basis for setting aside the judgment. I have every reason to decline these applications. That said, I do take seriously the right of every party to be heard. I am prepared to hear the applicants but I will place conditions on this.***
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> ***21. I do note that when I gave the order for stay, I directed the 1st and 2nd applicants to deposit half of the decretal amount. They could not do so. Indeed it was stated that they are financially constrained. It does appear that they are not in a position to meet any financial aspect of the judgment in the event that the plaintiff is still successful after hearing the defendants. Their continued stay on the land will therefore prejudice the plaintiff, as the plaintiff, in the event that he remains successful, may not benefit from the claim for mesne profits. There is no purpose being served in the applicants' continued stay on the land for they cannot meet any award for damages. I therefore order the 1st and 2nd applicants to vacate the land parcels Nyandarua/Nyandarasi/2307 and 2308 forthwith and hand over possession to the plaintiff as a condition for setting aside this judgment. They must vacate the two land parcels and hand over possession to the plaintiff within the next 30 days, and if they fail to do so, the judgment delivered on 17th February, 2016 will stand. If they do hand over possession, the plaintiff will remain in possession for the duration of this case. If they do not, then as I have mentioned, the judgment of 17th February, 2016 will stand and may be executed by the plaintiff.***
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> ***22. I feel that it is also appropriate in the circumstances of this case, that I give the same condition for the setting aside of the judgment in respect of the 2nd – 5th defendants. I am prepared to set aside the judgment but subject to them vacating the land parcels that are registered in their names. If they do not hand over possession within the next 30 days, then the judgment against them as delivered on 17th February, 2016 will stand and the plaintiff will be at liberty to execute it.***
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> ***23. I have not seen application to set aside by the 6th defendant. The judgment as against the 6th defendant therefore stands and may be executed by the plaintiff.***
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> ***24. On costs, it was the applicants' fault that they did not attend court. I therefore give costs of this application to the attend court. I therefore give costs of this application to the plaintiff. Considering that the plaintiff has labored to attend court and has no doubt spent enormous resources, in my discretion, I order each applicant to pay to the plaintiff thrown away costs of Ksh.20,000/- within the next 30 days. If these are not met alongside the order ceding possession, then the judgment will stand and may be executed against any party in default.***
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> ***25. The judgment of 17th February 2016 is therefore hereby set aside on two conditions. First is the condition on giving vacant possession of the premises, and second is the condition on payment of thrown away costs. These conditions to be met in 30 days. In default, the judgment to stand and may be executed against the party in default.***

26. Orders accordingly."

M/s Njuguna, Kahari & Kiai, Advocates for the appellants, filed a Notice of Appeal against the said ruling. It states as follows in the relevant part:

"NOTICE OF APPEAL

Take notice that JULIUS WAHINYA KANG'ETHE and JULIANA WARIGI KANG'ETHE, the 1st and 2nd defendants herein, being dissatisfied with part of the Ruling and Orders of the honourable Justice Munyao Sila delivered at Nakuru on the 9th day of November, 2016 INTENDS to appeal to the Court of Appeal against that part of the said Ruling and Orders directing the 1st and 2nd Defendants herein to give vacant possession of the suit land to the Plaintiff within thirty (30) days and further ordering the 1st and 2nd Defendants to pay to the Plaintiff a sum of Ksh.20,000.00 as costs within thirty (30) days."

In the Memorandum of Appeal drawn by the said Advocates 13 grounds of appeal are set out. In essence the appellants fault the learned Judge for finding for the respondent when it is said that there was no evidence in support of the case; that the learned Judge erred in not finding that a mistake of counsel should not be visited on the client; that the learned Judge was wrong to make the order against the appellants to vacate the lands; that the learned Judge was wrong in appreciating "***right to be heard***" and "***ownership of property"*** under Articles 40 and 50 of the Constitution; that the learned Judge erred in imposing conditions on setting aside judgment; that the appellants had placed material before the court to show that they had valid reasons for non-attendance at the hearing that proceeded in their absence; that the learned Judge had not appreciated the law on review under Order 45 Civil Procedure Rules and, finally,

"…. The entire ruling and orders of the learned Judge made on 9th November, 2016 and the entire reasoning was fatally flawed and/or erroneous in law."

For all these we are asked to allow the appeal and set aside the said ruling by allowing the Motion that had been filed by the appellants.

At the hearing of this appeal on 26th September, 2017 Mr. J.W. Kahari Advocate appeared for the appellants while Mr. Waiganjo Mwangi Advocate appeared for the respondent. We observed that the advocate on record for interested parties had been served with a hearing notice but was absent and we allowed the appeal to be urged.

Both parties had filed written submissions as ordered by Court and appeared on the said date to give a highlight on the same.

Mr. Kahari gave a brief history of the matter and submitted that the learned Judge was wrong in setting aside judgment on conditions that the learned counsel thought to be unjust. Learned counsel faulted the learned Judge who, according to counsel, exercised his discretion wrongly and against the law.

Mr. Waiganjo Mwangi, learned counsel for the respondent, in opposing the appeal submitted that prayers sought by the appellants were not available. According to learned counsel, the prayers sought in the High Court by the appellants were allowed conditionally. Learned counsel further submitted that orders in the judgment delivered on 17th February, 2016 had taken effect and no appeal had been filed against that judgment. Learned counsel drew our attention to a ruling delivered by this Court in Nakuru Civil Application (Nyeri) No. 97 of 2016 involving parties to this appeal where an application for stay pending appeal had been refused. The Court found the appellants not entitled to a stay and stated:

"What would happen if we declined to grant the orders sought, and the applicants succeeded in the main appeal? In our view, nothing irreversible. All the two applicants are giving up is physical possession of portions they evidently cultivated only, since they reside elsewhere. They

will retain the title documents they hold and so there is no danger of alienation of the disputed parcels. With an appropriate order for maintenance of the status quo by noninterference with the titles by the applicants and non-permanent developments of the land by the respondents should he take possession, the intended appeal would not be rendered nugatory. We are inclined in the circumstances of this case, to make such an order pending the hearing and determination of the intended appeal, and now do so. The application is otherwise dismissed as it has fallen short of satisfying the two limbs as by law required. The costs of the application shall be in the intended appeal,"

Learned counsel for the respondent concluded his submissions by stating that allowing the appeal would have the effect of setting aside a judgment that had not been appealed.

In a brief reply learned counsel for the appellants Mr. Kahari submitted that the conditions imposed by the learned Judge in setting aside judgment were harsh.

We have considered the whole record, submissions of counsel, the case law cited and the law and have come to the following determination of this appeal.

We have set out in full in this judgment that part of Notice of Appeal by the appellants challenging the ruling of the High Court. The appeal relates to two issues as set out in that Notice – the part of the ruling directing the appellants to give vacant possession of the suit lands to the respondent within 30 days pending appeal and, secondly, the order directing the appellants to pay to the respondent a sum of Ksh.20,000/- each as costs within 30 days.

We have already observed that judgment delivered by the High Court on 17th February, 2016 was not and has not been appealed. The Notice of Appeal donating jurisdiction to us in this appeal challenges the order against the appellants to vacate suit lands and the other challenge relates to the award of costs to the respondent who had succeeded in the suit.

The main prayers in the Motion before the learned Judge ruling whereof is subject of this appeal asked that the law firm of Njuguna, Kahari & Kiai Advocates be allowed to be on record in place of a previous firm of advocates; that the judgment delivered on 17th February, 2016 be stayed and vacated and the suit be heard *de novo* or, in the alternative, that the said judgment be reviewed, vacated and/or set aside.

The learned Judge considered the Motion and all material placed before him and found that no valid reason had been placed before court by Mr. Kahari, Advocate for the appellants, on why neither the advocate nor the appellants had attended court on a scheduled hearing date which was taken by consent. The learned Judge was not impressed by the argument that the taking in of a partner in a law firm had affected the character of the matter in any way it being true that Mr. Kahari had appeared for the appellants all along since the institution of the suit.

Looking at the whole record we would agree with the learned Judge that Mr. Kahari, who had all along appeared for the appellants, did not give any reason for being absent at the scheduled hearing on a date taken by the parties advocates by consent. Mr. Kahari was a partner in a law firm called Kahari & Kiai, Advocates, for the appellants, and continued appearing for the appellants even after that law firm admitted a new partner acquiring the name Njuguna, Kahari & Kiai Advocates. It is true that excusable mistakes of counsel should not be visited on their clients who have not participated in making the mistake and who stand to suffer if that mistake is not excused. In the matter before the learned Judge the advocate for the appellants explained that a new law firm had come into being in place of a previous one and this led to the case not being entered in the advocates' diary. The learned judge considered that explanation and did not find merit in it. The learned Judge was of the view that Mr. Kahari had always been on record for the appellants and the coming into being of a new law firm where Mr. Kaharis' law firm admitted a new partner did not change the character of the law firm in a way to explain Mr. Kaharis' failure to attend court. We are unable to find any fault or error in this finding by the learned Judge. Mr. Kahari did not explain in any way or any satisfactory manner how a matter that he had handled all along for the appellants had escaped his attention to the extent that the hearing of the case had proceeded in his

absence and judgment entered against his clients, that mistake cannot be said to be excusable. The lawyer should have given reasonable grounds for failure to attend court, failure of which he could fall foul of the law. Ringera, J (as he then was) in **Omwoyo v African Highlands & Produce Co. Limited** [2002] KLR 698 observed that time had come for legal practitioners to shoulder the consequences of their negligent acts of omissions like other professionals did in their fields of endeavour. In the case before the learned Judge no reasonable explanation was placed before the learned Judge why the Advocate failed to attend court on a hearing date taken by advocates for parties by consent.

Another relevant issue in an application to set aside a default judgment or a judgment entered because of the absence of a party is whether there is a viable defence to the suit. That is discussed fully in various decisions of this Court such as **Philip K. Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende [1982-88]** IKAR 1036. The trial Court has unlimited discretions to set aside or vary a judgment entered in default of appearance upon such terms as are just in light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties. Another relevant consideration is whether there is a triable issue in the defence. These factors are not relevant here in view of the final decision reached by the learned Judge in the ruling subject of this appeal.

The appellants asked the learned Judge to, in the alternative, review the judgment.

The law on review of judgments or rulings is set out at Section 80 Civil Procedure Act and Order 45 Civil Procedure Code. By those provisions a party who considers himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order from which an appeal is allowed, may apply for a review of the judgment to the court that passed the decree or made the order. Upon such an application the court may make such order thereon as it finds fit. By Order 45 of the said Rules, other conditions are set out which a party applying for review must satisfy. For an applicant to succeed in an application for review he has to show that there has been discovery of a 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. A second limb on which that party may succeed in the application is to prove that there is a mistake or error apparent on the face of the record. Such party may also approach the court for any other sufficient reason. This must be done without any unreasonable delay.

The appellants did not state, in the Motion, the limb on which they prayed to the learned Judge to exercise jurisdiction to review the judgment - whether it was discovery of new and important matter or evidence which, after exercise of due diligence, was not within the appellants knowledge or whether there was mistake on the face of the judgment or whether it was for sufficient reason. The appellants had a duty to satisfy the provisions of Section 80 of the Civil Procedure Act and the rules made thereunder on an application for review.

We have not seen on record any new material that was placed before the learned Judge which was not before the Court when judgment was entered. We have not seen a mistake apparent on the face of the judgment. Learned counsel for the appellants is wrong to fault the learned Judge for awarding special damages which, according to counsel, were not proved. The respondent claimed special damages and evidence was led on the same at the hearing without a challenge and the learned Judge was entitled to award special damages on the evidence produced in support of the claim.

As we have stated the learned Judge was satisfied that the appellants had not made any case to be entitled to setting aside the judgment or a review of the same. The learned Judge did not dismiss the application despite finding no merit in the same. He instead recognized that he was dealing with a land issue which was emotive and decided to give parties, even those who had been served but had not entered appearance, an opportunity to defend the suit. The learned Judge found that the respondent had succeeded in the suit and was entitled to certain rights. In the event the learned Judge set aside the said judgment but imposed conditions.

In an application to set aside judgment the trial Court has a wide discretion. It was held as long ago as 1974 in **Patel v E.A. Cargo Handling Services Ltd** [1974] EA 75 that the discretion of the Court is not

limited. As per Sir William Duffus; P. -

> ***"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. Mr. Inamdar has submitted that before the court grants an application under this rule, the court must first be satisfied that (a) there is a good defence, and (b) further be satisfied as to the cause of the delay in entering an appearance. He relied on various English authorities and on our decision in Mbogo v. Shah, [1968] E.A. 93. In his judgment NEWBOLD, P. adopted the principles set out by HARRIS, J. in Kimani v. McConnell, [1966] E.A. 547 when he said:***
>
> ***"….in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."***
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> ***I also agree with this broad statement of the principles to be followed. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given 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."***

In the instant case the learned Judge exercised his discretion and set aside the judgment thereby allowing the appellants and the other defendants to defend the suit. The learned Judge in exercising his discretion did so on conditions in the circumstances of the case before him. We should not interfere with that discretion unless the learned Judge has considered irrelevant factors or failed to consider relevant factors, or he has reached a decision that is plainly wrong. The appellants have not shown this to be the case and it is our finding that the learned Judge was entitled in the circumstances to set aside judgment with conditions.

We have considered all the grounds of appeal within the record of appeal and did not find any merit in the same. There was no error on the part of the learned Judge in exercising his discretion and setting aside the judgment with conditions. No appeal was filed to challenge the judgment of the trial court. We agree with learned counsel for the respondent that the appellants are trying to set aside a judgment that was not appealed through this appeal which is not against the judgment but is against certain orders in the ruling as we have shown. The appellants had breached legal procedures by absenting themselves from a hearing on a date taken by consent. They have not lost the Motion – What the learned Judge held was that the appellants and other defendants be entitled to a hearing subject to meeting some conditions.

We have not detected any error in the way the learned Judge dealt with the application where he was being asked to set aside a judgment or review the same. This appeal has no merit and it is accordingly dismissed with costs to the respondent.

Dated and delivered at Nakuru this 22nd day of November, 2017.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR