Kipchirchir v Nakweri & 7 others (Environment & Land Case 92 of 2014) [2024] KEELC 4882 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4882 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 92 OF 2014

JM ONYANGO, J

JUNE 20, 2024

BETWEEN

ELPHAS KIPCHIRCHIR .... PLAINTIFF

AND

PETER NAKWERI .... 1ST DEFENDANT

JAMES MUKUNYA KIMAIYO .... 2ND DEFENDANT

JAMES KWARKWAR .... 3RD DEFENDANT

JOHN NAGIRO .... 4TH DEFENDANT

MARK KIPLAGAT KOGO .... 5TH DEFENDANT

SAMWEL KIPKEMBOI CHERUIYOT .... 6TH DEFENDANT

ABRAHAM KIPSANG .... 7TH DEFENDANT

MUSA BOWEN .... 8TH DEFENDANT

RULING

1. The subject application is the Motion by the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Defendants dated 1st November, 2023 seeking the following orders:

   a. Spent

   b. That there be a stay of execution of the declaration and eviction orders of this honourable court issued on 19th October, 2023 and all the consequential orders including permanent injunction restraining the Defendants/Applicants, their agents, servants, assigns and/or any other person acting on their behalf from continued occupation, use, cultivation, ploughing, planting, erecting any structures and/or dealing in anyway inconsistent with the Defendant/

Applicants' rights as the beneficial owner of the land reference no. Plateau/Kipkabus Block 4 (Lelmokwo)/25 pending hearing and determination of this application.

c. That this honourable court be pleased to review, vary, vacate and/or set aside orders issued on 19th October, 2023 and proceedings of and the Defendants be allowed to file their defence and documents in respect to the Plaint herein.

d. That status quo be maintained in all that parcel of land known as Plateau/Kipkabus Block 4 (Lelmokwo)/25 pending hearing and determination of this application inter partes and thereafter pending hearing and determination of the main suit.

e. That the costs of this application be borne by the Plaintiff/Respondent.

2. The motion is supported by Affidavits sworn by the 7 Applicants, which I have read and summarise as follows: that the Plaintiff obtained ex-parte judgment on 19th October, 2023. The Defendants all claimed purchaser's interest for themselves or through others over LR No. 5798 most of them having purchased their land from one Benjamin Cheluley (now Deceased). The Defendants all deponed that they do not occupy Plateau/Kipkabus Block 4(Lelmokwo)/25 (the suit property herein) and that the portions they occupy are not the suit property. They deponed that the Plaintiff, his mother and brothers have been suing people occupying portions of land they believe belong to them, even if the occupants have been in occupation thereof before the Plaintiffs were born. They deponed that the family of Benjamin Cheluley, who sold land to most of the Defendants were not sued despite them occupying the land and sharing boundaries with them. They pointed out that there is discrimination in the manner in which the suits are filed, because it appears the suits are a scheme to evict them unlawfully because they are purchasers of the land who are not original members.

3. The Defendants all deponed that they did not know the suit property was subject to litigation before, during and after purchase. That in fact, they do not live on the suit property. However, in the same Affidavits, they in an interesting twist also deponed that they have lived on the property for 20 years and that it is a source of livelihood for them. They averred that they were not served and reserved the right to call the process server to be cross-examined as to the veracity the statements in his Affidavit of service. They deponed that it is only fair and just that the suit be re-opened for hearing on merit as it touches on their fundamental right to property and fair hearing as a rule of natural justice. That a party should not be locked out of proceedings unheard no matter the circumstances. They annexed a Draft Defence and Counterclaim, alleging that for the 10 years the matter took to be prosecuted to its conclusion, they were not aware of it.

4. The Defendants averred that the right to property is one that should not be curtailed at any cost. They urged that since it had taken 10 years to prosecute the case for alleged trespass, setting aside the suit for a few more months to give them an opportunity to be heard would not hurt. That they are clearly in occupation of the said portions of land. They averred that the Plaintiff will suffer no prejudice if the orders are granted as he is occupying a separate parcel from theirs. They indicated a willingness to abide by any terms and conditions that the court may impose on the stay of execution of the judgment and decree issued on 19th October, 2023. The Defendants deponed that the Application was brought in good faith and without delay. In addition, they deponed that it is in the interest of justice that the orders sought herein be granted.

5. The Plaintiff replied via a Supporting Affidavit sworn on 31st January, 2014 stating that he opposed the application herein in its entirety for being an abuse of court process and a waste of judicial time. He deponed that the Defendants were served with summons to enter appearance on 28th March, 2014 but none of them entered appearance. He deponed that he noted defects in the manner of service and

filed an ex parte Notice of Motion asking the court for an extension of the summons. The Motion was allowed on 27th March, 2014 and the Defendants were served with fresh summons but they still failed to enter appearance or file a defence. That the court proceeded to hear the suit by way of formal proof and judgment was delivered in the Plaintiff's favour on 19th October, 2023.

6. The Plaintiff deponed that he is the registered owner of the suit property measuring 9.71 Ha having inherited it from his late father. He deponed that he acquired it lawfully through transmission. That his late father was the owner of 329 Acres that were curved out of Land Parcel No. 3758 through which his father became the registered owner of LR No. Plateau/Kipkabus Block 4(Lelmokwo)/9. He deponed that the suit property is a sub-division of No. Plateau/Kipkabus Block 4 (Lelmokwo)/9 and contains by measurement 25 Acres. He deponed that although the Defendants claim to have bought land from third parties, they however settled on his land unlawfully. That he is not privy to the Agreements exhibited by the Defendants. He denied the Defendants claim that they were not served with the summons and only learnt of the suit after hearing and delivery of judgment.

7. The Plaintiff deponed that the Defendants were served with hearing notices but failed to appear in court to defend their suit. He averred that the Defendants were guilty of laches. That the judgment entered by this court is a regular judgment as the Defendants were properly served. Further, that the annexed Draft Defence is a sham and has no merit since it seeks to rely on cases that were not concluded. It would thus be a waste of judicial time to set aside the judgment. He deponed that in considering an application of this nature, a court must consider the defence put forward and only if it raises triable issues should it allow the Defendant unconditional leave to defend. He therefore prayed that the application be dismissed.

Submissions

8. The Plaintiff filed submissions dated 29th January, 2024 where Counsel cited Order 12 Rule 2 which provides for what is to happen when only the Plaintiff appears on a date fixed for hearing. He also cited Order 10 Rule 9, which explains what is to happen when any party served does not appear, and Order 10 Rule 10 on failure to file a Defence. Counsel submitted that paragraph 4 of the Certificate of Urgency is clear that the Defendants were served and were aware of the hearing date but chose to ignore the courts proceedings. That they were not diligent enough to apply to set aside the proceedings or arrest the judgment. He urged that justice delayed is justice denied and asked the court to be guided by Article 159(2) of the *Constitution*. Counsel relied on *Argan Wekesa Okumu v Dima College Limited & 2 Others* (2015) eKLR and *Mobil Kitale Service Limited v Mobil Oil Kenya Limited* HCCC No. 205 of 1990.

9. Counsel for the Plaintiff cited the case of *Tree Shade Motor Limited v DT Dobie Co Ltd* CA 38/98 where the court held that even where ex parte judgment was entered lawfully, the court should look at the draft defence to see of it raises a valid/reasonable defence. Counsel noted that the Draft Defence raised several grounds one being that the title to the suit property was obtained unlawfully, irregularly, unfairly and un-procedurally and ought to be declared null and void. Counsel submitted that Section 24 of the *Registration of Land Act* gives the registered proprietor of land absolute ownership, together with rights and privileges appurtenant to the registration. That the Plaintiff is the registered owner of the suit property herein as confirmed by the court, after considering the Plaintiff's documents.

10. Counsel also submitted that even though the Defendants alleged fraudulent misrepresentation in the process of acquiring the land, they failed to state the particulars thereto in their Draft Defence and Counterclaim. The Plaintiff's Advocate relied on *Ndolo v Ndolo* (2008)1 KLR (G&F) 742 and *Vijay Morjaria v Nansingh Mahusing Dabar & Another* (2000) eKLR. Counsel concluded that the Defence lacks merit and it would be a waste of judicial time to set aside the judgment. He cited *Sebei District*

Administration v Gasyali (1968) EA 300 and *Butchery Limited v Nthiwa* (1978) KLR. It was also submitted that the Defendants intention is to frustrate the court process and delay the course of justice contrary to Article 159(2) of the *constitution*. He relied on *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* (2018) eKLR as well as *Mbogo & Another v Shah*, where it was held that where the motion is sought to obstruct or delay the course of justice, it should be refused.

11. Counsel submitted that the Plaintiff has suffered loss and damage because he has been deprived of the use and occupation of the suit property since 2005, while the Defendants, who have no title have been using it for 18 years. Counsel submitted that the Plaintiff is likely to suffer more injustice if the judgment is set aside and a stay of execution granted, whereas the Defendants will continue to trespass on his land. Further, that starting the suit afresh will occasion the Plaintiff more expenses (*Beatrice Wanjiru Kamuri v John Kibira Muiruri* (2016) eKLR and *Eliud Kibitok Keter & 2 Others v Joseph Kipkosgei Bito & 7 Others* (2021) eKLR).

12. Counsel argued that the Defendants had not sufficiently proved that their Application has merit on any of the prayers and it should be dismissed in its entirety. He relied on the case of Abraham Kiprop Choge, *Nelson Kipyego Choge & Elphas Kipchirchir Choge v Thomas Kirwa & Abraham Rotich* where Justice Obaga dismissed a similar application for reasons that the Applicants had not proved their allegations. Counsel pointed out that the Defendants had not taken out Letters of Administration for the estates of their deceased partners and have no capacity to agitate on behalf of the deceased. Further, Counsel argued that the Defendants had shifted the burden of proof to the Plaintiff to prove that his title was valid, contrary to the law that he who alleges must prove. Counsel urged that the Application be dismissed with costs. Counsel contended that in the alternative, if the court is inclined to allow it, that it should condemn the Defendants to pay KShs. 100,000/- as a condition precedent to filing the Defence to reimburse the Plaintiff for costs incurred in serving the Defendants and prosecuting the case.

Analysis And Determination

13. The Court has considered the application together with the Supporting Affidavits and Replying Affidavit and has equally considered the rival submissions. The issue for determination before this court is:

> Whether this court should set aside the judgment delivered on 19th October, 2023 and grant the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Defendants leave to file their defence?

14. Order 10 Rule 11 of the Civil Procedure Rules provides that an ex-parte judgment in default of appearance or defence may be set aside, it provides as follows: -

> "Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

15. It is apparent from the above provision that the decision whether or not to set aside an ex parte judgement is discretionary. As in all instances where a court is clothed with discretion, the discretion donated under the above provision is to be exercised judiciously and in deserving cases only. It is to be used to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not meant to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In *David Kiptanui Yego & 134 others v Benjamin Rono & 3 others* [2021] eKLR, the court cited the case of *Mohamed & Another v Shoka* (1990) KLR 463 where the Court held that the tenets a court should consider in setting aside an interlocutory judgment include:

i. Whether there is a regular judgment;

ii. Whether there is a defence on merit;

iii. Whether there is a reasonable explanation for any delay;

iv. Whether there would be any prejudice.

Whether there is a regular judgment;

16. The first question for determination is whether the judgement is regular, where the court questions whether the judgment was procedurally entered. This is a matter of fact to be determined from the circumstances of the case. A regular judgment was defined in *James Kanyita Nderitu v Maries Philotas Ghika & Another* [2016] eKLR, where the Court stated that:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another v Shah (*supra*), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v Kubende [1986] KLR 492 and CMC Holdings v Nzioki [2004] 1 KLR 173).
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> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v Attorney General [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v Election Tribunal, Koteh, AIR 1955 SC 664, at 711:
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> "[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their

lives and property should not continue in their absence and that they should not be precluded from participating in them'."

17. The Plaintiff has explained that the Defendants were initially served with Summons to Enter Appearance on 28th March, 2014 but none of them entered appearance. However, the Affidavit sworn by the then process server was not competent to be used to enter interlocutory judgment because it did not mention the documents served on the Defendants. The Plaintiff then filed an ex parte Notice of Motion asking for extension of the Summons to Enter Appearance, which was allowed and the Defendants were served again with fresh summons. There is on record an Affidavit sworn on 17th January, 2023 by Vincent K. Ambani a licensed Court Process Server. Mr. Ambani deponed that he received Summons to Enter Appearance from the firm of Bungei & Murgor Advocates to serve on the Defendants herein. He deponed that he proceeded to serve the Summons on the Defendants herein on 21st December, 2023 and explained that they were pointed out to him by a Bodaboda rider whom he had hired to assist him with directions.

18. Despite being served with the summons, the Defendants once again failed to enter appearance or file their Defence. In *Bouchard International (Services) Ltd v M'mwereria* (1987) KLR 193, the Court of Appeal held that:

> "The basis of the approach in Kenya to the exercise of the discretion to be employed or rejected under either Rule 8 or Rule 10 (the latter dealing with judgment by default) is that if service of summons to enter appearance, has not been effected, the lack of an initiating process will cause the steps taken to set aside ex debito justitiae. If service of notice of hearing or summons to enter appearance have been served, then the court will have before it a regular judgment which may yet be set aside or varied on just terms. To exercise this discretion is a statutory duty; and the exercise must be judicial."

19. Service of the Summons aside, it is also apparent that the Defendants became aware of the existence of this matter in court before the judgment was delivered but took no steps to protect their purported interests. There is also an Affidavit of Service sworn on 18th July, 2018 by Kenneth O. Oduor, another licensed Court Process Server. He deponed that on 21st March, 2018 he served the Defendants with hearing notices for the dates of 23rd, 24th, 25th, and 26th of July, 2018. He deponed that he was in the company of the Plaintiff who pointed out the 1st, 2nd and 4th Defendants to him. He served them and they accepted the documents but refused to sign. Mr. Oduor stated that they proceeded to the office of the Kipkabus Area Chief, Mr. David Rotich, who summoned the 6th, 7th and 8th Defendants. He indicated that he served them and they accepted service but refused to sign the return copy. The 9th Defendant was pointed out to him by the Plaintiff and he served him in his homestead, but he also refused to sign the return copy. The Defendants did not dispute that some of them were served in the presence of the Chief, neither did they purport to want to call him to be cross-examined. Despite this, they still failed to appear to defend their suit.

20. Another Affidavit of Service was sworn on 26th June, 2023 by Vincent K. Ambani who deponed that on 19th June, 2023 he served the Defendants with a Hearing Notice for 5th July, 2023. All the people served on that day accepted the documents but declined to sign the return copy. Once again, they did not see the need to enter appearance or file a defence. The Defendants were aware of the existence of

the suit and they were informed of the dates for hearing of the suit. This is made clear at paragraph 4 of the Certificate of Urgency where the Counsel for the Defendants asserted that:-

> "The Defendants/Applicants were not served with any pleadings filed therein and only got to know of the same when they were informed of the hearing date for formal proof and in fact some got the documents days later after the said hearing had since passed."

21. Paragraph (e) of the grounds on the face of the motion reads:-

> "The Defendants/Applicants were not served with any pleadings filed therein and only got to know of the same when they were served with documents on 7th and 8th July, 2023 after their cases had been heard and judgment date given."

22. For the reason that Counsel for the Defendant cannot seem to get the position clear of when exactly his clients were served, I am more inclined to believe that the Defendants were served before the matter proceeded for hearing. The 3rd Defendant deponed in his Affidavit that he found the documents thrown at his front door after the hearing date had passed. Even if this court was to believe that they were served after the hearing, on 7th and 8th July, 2023 there was still three months before the delivery of the judgment. They had sufficient time to move the court to arrest the judgment, set the proceedings aside and allow them to file their Defence. But even being aware of the suit herein, they did not do so.

23. The law as well as the cases cited hereinabove are clear that in a regular judgment, a Defendant will have been properly served but for some reason, they failed to enter appearance or file a defence. From the facts outlined above, it is clear that in the instant suit, the Defendants were served with the Summons to Enter Appearance not once, but twice. They were also notified of the dates fixed for the hearing of the suit but still, they failed and/or refused to appear or take any steps to defend their interests in the suit property. For this reason, it is the court's finding that judgment entered herein was regular.

Whether there is a defence on merit

24. The second question is whether there is a defence on merit. Here, the court looks at the draft defence, if any, to see if it contains a valid or reasonable defence. Before the court can set aside its ex-parte decision or proceedings, it must satisfy itself that the Defence raises triable issues. See *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75.

    Annexure JMK2 of the 2nd Defendant's Supporting Affidavit is a Draft Statement of Defence and Counterclaim. At paragraph 4 of the draft Defence and Counterclaim it is averred that the Consent used to prepare title for land parcel no. Plateau/Kipkabus Block 4(Lelmokwo)/22 has been cancelled and therefore the Plaintiff does not have a clean title. Although there seems to be an error on the parcel number, since the rest of the document refers to the suit property by its proper number, no evidence was annexed to any of the 7 Affidavits filed herein in support of the Application. What the 2nd Defendant Annexed in support of the allegation that consent was cancelled is a Court Order made on 13th December 1994 and issued on 21st December, 1994 by Justice P.M. Nambuye in High Court Miscellaneous Civil Cause No. 262 of 1994. The order at Clause 1 reads:

> "That the letter of consent issued on 18th May, 1994 by the Uasin Gishu Land Control Board (Ainabkoi Divisional Land Control Board) and signed by the Chairman regarding the proposed subdivision of LR 5798 situate in Kipkabus area be and is hereby removed into the High Court and quashed and annulled forthwith."

25. In addition, in the Agreements for Sale annexed by the Defendants, the vendors were selling and the buyers were purchasing portions of Parcel No. 5798. Benjamin Cheluley who sold to most of the Defendants is described as the registered owner of the parcel of land known as Lelmokwo LR No. 5798. All the Supporting Affidavits are clear that the Defendants purchased or are claiming an interest in Parcel No. 5798.

26. I have seen no indication that the suit property herein emanated from the sub-division of the said Parcel No. 5798. At paragraphs 12-15 of the Replying Affidavit, the Plaintiff explained that the suit property was a sub-division of Plateau/Kipkabus Block 4 (Lelmokwo)/9. The said parcel of land measuring 329 Acres belonged to his father and was curved out of parcel No. 3758. The suit property is therefore a very different piece of land from the land the Defendants claim to have a beneficial interest in. Moreover, the Letter of Consent that was cancelled/quashed in HC Miscellaneous Civil Case No. 262 of 1994 does not apply to Parcel No. 3758. The taint of the nullified consent, which seems to be the backbone of the Defendant's prayer for cancellation of the Plaintiff's title, does not stain the Plaintiff's title.

27. That aside, the Defendants are all in agreement that they do not occupy the suit property and that the sections they occupy is not on the suit property. They then renege on this assertion and claim to have lived in the suit property for over 20 years or thereabouts. One then wonders what exactly their interest in the suit property is as it is not clear from their own pleadings. If they do not live on the suit property, how can it be a source of livelihood for some of them, or matrimonial properties for others?

28. The Defendants alleged that the Plaintiff herein has a multiplicity of suits all seeking to evict various people from their land. The 1st Defendant's Annexure PN4(a) is the first page of an unfiled plaint between one *Susan Sambai Choge v Hoseah Chepsat Kiplagat & 8 Others*, none of whom are the Defendants herein. The 1st Defendant's PN4(b) is the first page of the Plaint in ELC Land Case No. 6 of 2023 between the said *Susan Sambai Choge v Charles Cherop & 10 Others*. The pages of the said Plaints only show the names of the parties and part of the descriptions of the parties, but they do not indicate what the subject matter or property in dispute in those case are. It cannot be said with all certainty that they relate to the suit property herein or at all. In addition, the parties in those suits are different from the parties in this suit.

29. The Plaintiff has also raised issues of representation for the Defendants who are claiming a purchaser's interest through purchase by a third party. The 7th Defendant sought to assert a purchaser's interest from Moita Moek, with no explanation whatsoever as to where he had obtained authority to plead on behalf of the said Moita Moek. The 8th Defendant claims a beneficial interest because his wife purchased a portion from Benjamin Cheluley. However, it is not clear why he is claiming in the place of his wife or whether he has authority to appear or plead on her behalf. The 1st Defendant in his Affidavit deponed that his interest arose from his father's beneficial interest in the suit property herein. He stated that his father is one Nakhweni Ekali, who is deceased, yet he has not exhibited any Grant of Representation with regards to his late father's estate to show that he is the personal representative thereof. He thus has no *locus standi* to claim any interest with regard to his late father's estate or agitate on his behalf.

For the above-mentioned reasons it is the court's funding tha the Applicants Defence do not raise any triable issues.

Whether there is a reasonable explanation for any delay;

30. The third limb is whether there is a reasonable explanation for any delay, which in this case invites the court to consider the reasons advanced for the setting aside the default judgment. This matter was instituted in the year 2014. Despite being served in the manner outlined above, the Defendants failed to enter appearance and/or file a Defence. Judgment was delivered on 19th October, 2023 almost 10

years from the date of filing of the matter. Apart from the issue of service, which this court has already laid to rest, the Defendants have given no reason why they did not move this court earlier. As matters stand, no reason adequate or otherwise has been given as to why it took the Defendants 10 years to decide that they now wanted to pursue this matter.

Whether there would be any prejudice.

31. Time and time again, our courts have reiterated that when exercising its jurisdiction, a court needs to weigh the prejudice that is likely to be suffered by the innocent party, and weigh it against the prejudice to be suffered by the offending party before court exercises it's judicial discretion. Additionally, in *Shah v Mbogo* (1967) EA 166, court held that;

> " This discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its own unique facts and circumstances. Among the factors to be considered is whether the applicant will suffer any prejudice if denied an opportunity to be heard on merit."

32. On whether the respondent shall suffer any prejudice in the event that the orders sought by the appellant are granted, the Defendants argued that no prejudice will be suffered by the Plaintiff if the orders sought are allowed. The Defendants all indicate that since it took the Plaintiff 10 years to prosecute this suit, then setting it aside for a few more months to have the Defendants heard and the suit determined on merit would not hurt, adding that they are already in possession of their portions. I disagree.

33. The Plaintiff averred that the Defendants have been on his land since 2005, which tallies with the Defendants admission that they have been on the land for over 20 years. 10 of those years, the Plaintiff has spent in court fighting to protect his proprietary rights over the suit property. On 19th October, 2023 his rights crystallised when the court declared him the legal owner of the suit property and issued a permanent injunction barring the Defendants from interfering and dealing in any way with the Plaintiff's property. The Plaintiff has been denied enjoyment of his inheritance and/or his birth right, which is the suit property since 2005 to date. Re-opening the case and allowing the Defendants to mount a Defence that is a total sham would not only be a waste of the Court's precious time but would deny the Plaintiff from enjoying the fruits of his judgment.

34. Taking into account and weighing all the circumstances surrounding this case, I find this application unmeritorious. Consequently, the application is declined and dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH JUNE, 2024

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J. M. ONYANGO

JUDGE