Mwashigadi v Lyatonga (Cause 222 of 2016) [2024] KEELC 4730 (KLR) (5 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4730 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CAUSE 222 OF 2016

LL NAIKUNI, J

JUNE 5, 2024

BETWEEN

ELPINA MGHOI MWASHIGADI ..... PLAINTIFF

AND

MATHEW LYATONGA ..... DEFENDANT

RULING

I. Introduction

1. This Honourable Court is tasked for the determination of the Notice of Motion application dated 6th July, 2022 by Mathew Lyatonga, the Defendant/Applicant herein. It was brought under the provision of Order 12 Rule 7, Order 45 Rules 1 & 2 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and Sections 1A, 1B 3A and 63 (e) of the *Civil Procedure Act* Cap 21 Laws of Kenya.

2. Despite of proper service of the application being effected, the Plaintiff/Respondent never filed any opposition to it whatsoever.

II. The Defendant/Applicant's case

3. The Defendant/Applicant sought for the following orders:-

    a. Spent.

    b. This Honourable Court be pleased to unconditionally set aside the Judgment entered on 21st September 2018 and the resultant decree issued on 14th December 2018.

    c. The Plaintiffs suit be declared to have abated when the summons to enter appearance issued on 18th August, 2016 were not served within one (1) year from the date of issue.

    d. In the alternative and without prejudice to (4) above, the Defendant be granted unconditional leave to defend the suit.

e. The costs of this application be borne by the Plaintiff.

4. The application was premised on the grounds, testimonial facts and averments made out under the 22 Paragraphed Supporting Affidavit of Mathew Lyatonga, the Defendant/ Applicant herein with five (5) annextures marked as "ML 1 to 5" sworn and dated 6th July, 2022. He averred that:

a. The Defendant came to know of an ex - parte Judgment entered against him together with the court order dated 21st September 2018 and 14th December 2018 and an order for execution issued on 18th November 2019. (Annexed in the affidavit and marked as ML 1(a) and (b) were copies of the court order & decree.

b. The Defendant had never been served with any court process prior to the entry of Judgment and resultant decree.

c. Upon the aforesaid realization of (1) above, the Defendant instructed his Counsel on record to peruse the court file. From such perusal, the Defendant could tell the Affidavit of Service sworn by Timothy Kitsao on 17th May 2016 and 11th September 2019 respectively were fictitious and fraudulent because:-

i. Service of the Pleadings and summons to enter appearance was never effected upon the Defendant as per Order 5 of the *Civil Procedure Act*, Cap. 21 and Rules;

ii. Prior to the appointment of the Law firm of Messrs. J.A. Kahindi & Company Advocates, the Defendant had never instructed any advocate to accept service on his behalf and or to appear for him in this matter;

d. The Defendant was on the alleged time of service of the summons and the application for execution in Tanzania any service purportedly effected upon the Defendant was flawed and essentially not effective in law and the Defendant would with leave of Court seek to cross - examine the Process server on the same. (Annexed in the affidavit and marked as "ML – 2" was a copy of his passport).

e. Other than the failure to serve the summons as aforesaid, he ought to have been notified of the suit and/or even hearing of the remainder of the suit by way of formal proof.

f. The Defendant ought to have been notified of the suit and/or even hearing of the remainder of the suit by way of formal proof.

g. The notice of entry of Judgment should equally have been served upon the Defendant to make him aware of the Judgment entered against him, thereby giving him an opportunity to appeal the said Judgment.

h. Given Paragraphs *3*, *4* and *5* above, all the proceedings, resultant Judgment and consequential orders and/or decree were a nullity for violating the rules of natural justice enshrined in the provision of Article 50(1) of the *Constitution* of Kenya, 2010.

i. The failure to effect service of summons to enter appearance rendered them invalid at the end of the twelve (12) months from when they were issued. There was therefore no suit for the Defendant to respond to.The non - service of the summons for more than one (1) year means that the suit had abated.

j. On or about 26th June, 1993, he got in a sale agreement with John Kashindi Kwalale and he purchased the suit property being a house situated on plot 232/Miritini within Mombasa Count. (Annexed in the affidavit and marked "ML – 3" was a copy of sale agreement.)

k. The Plaintiff in this suit also obtained the Judgment and consequential orders and decree through concealment of materials facts inter alia:-

   i. The Plaintiff out rightly lied to the court that she was a wife to the Defendant yet she knew that she was never married to the Defendant who had his own wife and a family in Tanzania; (Annexed in the affidavit and marked as "ML – 4" was a copy of the Certificate of Marriage).

   ii. The Plaintiff failed to inform the Court that she was an employee of the Defendant and was being paid as a caretaker of the suit property. (Annexed in the affidavit and marked as "ML – 5" a copy of salary voucher.)

l. The Plaintiff had also failed to comply with the Judgment and court order by failing to remit accounts for half of the rental income collect as captured in paragraph 3 of the decree issued on 14th December 2018.

m. The decree issued on 14th December 2018 was defective and bad in law as there was a high likelihood that the Plaintiff withheld consent if he wanted to take possession and/or occupy the equivalent of fifty (50%) percent of the suit property.

n. The order left the Defendant at the mercy of the Plaintiff effectively sub - ordinating his right to the Plaintiff instead of holding them equal in their capacity as joint owners. It was impractical for the Defendant to exercise his 50% right over the property while the permanent injunction still exists.

o. Without prejudice to the foregoing, even if there was proper service and the suit still existed, the Defendant had a reasonable defence to the suit including but not limited to whether he was the sole owner of the property.

p. It was in those circumstances necessary to allow him to have his day in Court before he was condemned to loose his property.

q. Unless this application was heard urgently and orders granted, the Defendant/Applicant shall be grossly prejudiced as a result of the irregular Judgment.

r. It was in the interests of justice and fairness that the Defendant be granted the reliefs sought, the suit was heard and determined on merits.

s. No prejudice shall be suffered to the Plaintiff if the sought for orders herein are granted but he would suffer irreparable loss and damage if the orders sought for herein were not granted.

t. The affidavit was in support of his application herein.

III. Submissions

5. On 26th September, 2023 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 6th July, 2022 be disposed of by way of written submissions. By the time of penning down this Ruling, none of the parties had filed their written submissions. Pursuant to that, on 22nd February, 2024 a ruling date was reserved on 9th May, 2024 by Honourable Court on its merit accordingly.

IV. Analysis & Determination.

6. I have carefully read and considered the pleadings herein by the Defendant/Applicant, the relevant provisions of the Constitution of Kenya, 2010 and the statures.

7. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-

    a. Whether the non-service of the summons for more than one (1) year meant that the suit has abated when the summons to enter appearance issued on 18th August, 2016 were not served within one (1) year from the date of issue.

    b. Whether (if the suit was abated), an order setting aside the judgment entered on 21st September 2018 and the resultant decree issued on 14th December 2018 and whether the Honourable Court could grant the Defendant unconditional leave to defend the suit.

    c. Who will bear the Costs of Notice of Motion application dated 6th July, 2022.

Issue a). Whether the non - service of the summons for more than one (1) year meant that the suit has abated when the summons to enter appearance issued on 18th August,2016 were not served within one (1) year from the date of issue

8. The main issue here for the Court's determination ids whether the Judgement entered in default against the Defendant/Applicant should be set aside allegedly for non – service of Summons to Enter appearance and pleadings as required by law. The Law governing service of summons by the time this suit was instituted by the Plaintiff was Order V Rule 1 (1) of the *Civil Procedure Rules*, which provided as follows :-

    (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.

    (2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so

    (3) Where the validity of a summons has been extended under sub - rule (2), before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.

    (4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same sum which has not been served so as to extend its validity until the period specified in the order.

    (5) An application for an order under sub - rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

    (6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

    (7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

9. The current law is not different from the above, save that the above provision is now Order 5 Rule 2 of the *Civil Procedure Rules*, 2010.It will be seen that summons in the first instance is valid for only 12 months. Under Rule 2 (2) the court may extend the validity of summons from time to time where such summons has not been served upon a defendant, but under sub rule (5), one is required to file an application to extend the validity of summons, and the plaintiff is required to file an affidavit setting out the attempts made at service and their result. Under sub rule (7), where no application for extension of validity of summons is made, the court may dismiss the suit on expiry of 24 months from the date of issue of the original summons.

10. In the case of "*Leonard Njogu v Barclays Bank & Another*", Gikonyo J, stated *inter alia* as follows :-

> " My own view is; where a summons to enter appearance has expired and its validity has not been extended under the rules, there is not really a suit to talk about. The term "validity of summons" is used in the rules and it is not without any specific meaning and effect."

11. These words must be weighed carefully as they were stated obiter, because the application before court was one for dismissal for want of prosecution, and not on the question of validity of summons. In this case the said summons were issued on 18th August, 2016, according to Timothy Kiringi Kitsao in his affidavit of service sworn on 17th May, 2017 at paragraph *3* averred that on the 26th day of January, 2017 at around 12.00 pm. The licensed court process server proceeded to Miritini where the Defendant works near AVA and on arrival, he met the Defendant near an accident scene on introducing himself and the purpose of his visit tendered to him the summons to enter appearance Notice of Summons, Plaint, List of witnesses, list of documents and witness statements requiring him to acknowledge service on his copy. According to the Process server, the Defendant acknowledged service and agreed to sign his copy which the server returned to this Honourable Court duly served. Service of the Notice of Summons, Plaint, List of witnesses, list of documents and witness statements was done less than one month after the said summons were signed and dispatched, therefore the said summons were served within the period of 12 months.

12. Furthermore in case the said summons had expired, in my view, the effect of the 1996 amendment was to remove the 24 month maximum period previously given for the validity of summons. Now, summons may be extended from time to time, without there being a statutory limitation period, save that the court must be satisfied that it is just to do so.

13. Under this prayer the Defendant/Applicant fails as there was proper service. From the affidavit of service it is very evident that he was properly served with the Notice of Summons, Plaint, List of witnesses, list of documents and witness statements and was well aware of the case.

Issue No. b). Whether (if the suit was not abated), an order setting aside the judgment entered on 21st September 2018 and the resultant decree issued on 14th December 2018 and whether the Honourable Court could grant the Defendant unconditional leave to defend the suit.

14. Under this sub title the Applicant seeks an order setting aside the judgment entered on 21st September 2018 and the resultant decree issued on 14th December 2018 and whether the Honourable Court could grant the Defendant unconditional leave to defend the suit. The provision of Order 7 Rule 1 of the *Rules* provides the strict timelines within which to file a statement of Defence and the various accompanying documents as outlined under Order 7 Rule 5 of the Rules. Further, the provision of Order 11 Rule 2 of Rules provides for the filing and service of the Pre - trial Questionnaire within 10 days after the close of pleadings and the convening of a pretrial conference within 30 days after the close of pleadings as stated under Order 11 Rule 3 of the Rules. The provision of Order 10, of the *Civil*

Procedure Rules, 2010, addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. While Rule 11 empowers the court to set a side or vary a Judgment that has been entered under Order 10 of the Rule.

15. Order 12 Rule 7 of the Rule which is discretionary depending on the circumstances of the case states as follows:-

> " Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just".

16. The discretion of the court to set aside ex parte proceedings is unfettered by virtue of Order 12 Rule 7 of the *Civil Procedure Rules*, 2010. However, it must be exercised judiciously and not capriciously for the interests of justice. In the case of "*Shah v Mbogo & Another* (1967) EA 116", the East African Court of Appeal stated as follows;

> " This discretion (to set aside ex parte proceedings) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought out whether by evasion or otherwise, to obstruct or delay the course of justice."

17. The principles for the setting aside of an ex - parte Judgment were also considered in the case of:- "*Patel v East Africa Cargo Handling Services Ltd* [Supra]" where William Duffus, P. stated:-

> " 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 judgement as is the case here the court will not usually set aside the judgement 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."

18. In the case of:- "*Kenya Commercial Bank Limited v Nyantange &Another* (1990) KLR 443" Bosire J, (as he then was) held that: -

> " Order IXA rule 10 of the *Civil Procedure Rules* donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just."

19. Therefore, the discretion to set aside ex parte proceedings and orders ought to be exercised for purposes of furthering justice and not to obstruct or delay justice. Hence, it behooves an applicant for such orders to demonstrate the justification for such application by showing that there is sufficient cause why they failed to attend court and that their application is made in good faith and not meant to delay the course of justice.This was the position that was adopted in the case of:- "*Rayat Trading Company Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR" where the court listed the matters to be considered in the exercise of this discretion as follows: -

i. the Defendant has a real prospect of successfully defending the claim; or

ii. it appears to the court that there is some other good reason why;

iii. the Judgment should be set aside or varied; or

iv. the Defendant should be allowed to defend the claim

20. Similarly, in the case of, "*Thorn PLC v Macdonald* [1999] CPLR 660", the Court of Appeal highlighted the following guiding principles: -

i. while the length of any delay by the Defendant must be taken into account, any pre-action delay is irrelevant;

ii. any failure by the Defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;

iii. the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and

iv. prejudice (or the absence of it) to the claimant also has to be taken into account.

21. In the case of "*Rahman v Rahman* (1999) LTL 26/11/9", the court considered the nature of the discretion to set aside a default Judgment and concluded that the elements the judge had to consider were: the nature of the defence, the period of delay (i.e., why the application to set aside had not been made before), any prejudice the claimant was likely to suffer if the default judgment was set aside, and the overriding objective.

22. In the Indian case of "*Parimal v Veena Bharti* (2011)", the Supreme Court of India had the following to say;

> " Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently....."

23. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight jacked formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.

24. It is not in dispute that Judgment in this matter was delivered on 21st September, 2018 in favour of the Plaintiff as against the Defendant. The Honourable Court stresses that the Service of the Notice of Summons, Plaint, List of witnesses, list of documents and witness statements was though disputed, but the Court has confirmed above that the same was effected through the Affidavit of Service of Timothy Kiringi Kitsao sworn on 17th May, 2017. Despite of proper service, the Defendant did not enter appearance neither did he file a defence.

25. I have considered the Application and the submissions of the parties in total. The provision of Order 10, rule 11 of the *Civil Procedure Rules*, 2010 provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside, it reads 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."

26. One of the key factors to consider when setting aside an ex-parte judgment is whether the Defendant has a defence on merit. In the case of, "*Sebei District Administration v Gasyali & others* (1968) EA 300" Sheridan J. observed that:

> " The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court."

27. I reiterate that the Defendant/Applicant was properly served with theNotice of Summons, Plaint, List of witnesses, list of documents and witness statements. The Plaintiff has not filed a response to the said application. I have gone to the through the court record and I take note that by the affidavit of service to that effect. The above notwithstanding, I take cognizance that the Defendant/Applicant has a constitutional right to defend himself.

28. The Honourable Court also takes note that this application was filed on 6th July, 2022 and judgment in this matter was delivered on 21st September, 2018 which is 4 years and 2 months and 15 days after the ex parte judgment was entered. This is unreasonable and inordinate delay to file this application of setting aside of judgment without any reasons as to why there was a delay.

29. Be that as it may, every person has a constitutional right to be heard and the Defendant/Applicant's case is not any different. I shall therefore proceed to examine if the Defendant/Applicant has a triable defence as he seeks leave to defend the suit.

30. In the case of "*Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede* (1982-1988) KAR", the Court of Appeal held that: -

> " The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. *Kimani v MC Conmell* (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue."

31. One of the key factors to consider when setting aside an ex-parte judgment is whether the defendant has a defence on merit. In the case of "*Sebei District Administration v Gasyali & others* (1968) EA 300" Sheridan J. observed that: -

> " The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court"

32. In the case of, "*Tree Shade Motor Limited v DT Dobie Co Ltd* CA 38/98", the Court held that even when ex-parte judgment was lawfully entered, the court should look at the draft defence to see if it contains a valid or reasonable defence.

33. I have gone through draft defence and I am not persuaded that the applicants have made out a case for the granting of the discretionary orders to set aside the interlocutory entered herein. My considered opinion is that the reasons advanced by the applicant for the delay is not plausible and have no merit

in then case of:- "*Rayat Trading Co. Limited* [*Supra*]", the Court stated as follows on the subject of delay: -

> " It's an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the Court is obligated to promote the provisions of Article 159(2)(d) of the *Constitution* of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the Applicant and the Judgment Creditor for justice to be seen to be done. Even then a mistake by a Counsel is not a technicality. In the same vein the provisions of Section 1A and 1B of the *Civil Procedure Act* obligates the parties to assist the Court in the expeditious disposal of cases."

34. The above findings notwithstanding, this court is still minded to exercise its discretion so as to grant the applicants a reprieve by granting them a chance to be heard more so considering the fact that the suit involves land ownership which is a delicate matter under the constitution and in law.

35. This reprieve will however not be granted without any conditions on the part of the applicants who have clearly been indolent in their handling of the case. My line of thinking is bolstered by the decision in case of:- "*Rayat Trading Co. Limited* [*supra*]" where the Court held that: -

> " If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim."

36. My view is that the defence raises triable issues that the court may need interrogate after hearing the parties fully on the merits of their respective cases. Owing to the nature of the case, which appears to be a straightforward claim of monies owed, I direct that the matter be heard expeditiously so that justice can be seen to have been done. Considering the balancing interest of all parties, the application will be allowed but on condition that the Defendant/Applicant pays the Plaintiff some thrown away costs in the Interest of Justice, Equity and Conscience.

Issue No. c). Who will bear the Costs of Notice of Motion application dated 6th July, 2022.

37. It is now well established that the issue of Costs are at the 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 *Black Law Dictionary* defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

38. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 holds that costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provides as follows:-

> " (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the

costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

39. A careful reading of the provision of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

40. Additionally, the provision provides for 'costs of and incidental to all suit or application' which expression includes not only costs of suit but also costs of application in suit as described by Mulla (*supra*) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

41. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In "*Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR" the court noted that;

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

42. In this case, as this Honourable Court has opined above, there shall be no orders as to costs.

V. Conclusion & Disposition

43. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

    a. That the Notice of Motion application dated 6th July, 2022 be and is hereby found to have merit thus it is partially admitted in regards to the setting aside of the Judgment entered by this Court on 21st September, 2018, the decree and all subsequent orders thereof.

    b. That the interlocutory Judgment entered on 21st September, 2018 be and is hereby set aside on the following conditions:-

        i. The Defendant granted leave to fully comply with Orders 6, 7 and 11 of the *Civil Procedure Rules*, 2010 by filing his defence, and or Counter – Claim; statements and other relevant documents within 14 days of this ruling and upon making the pre - requisite payments/fees.

        ii. That the Defendant shall pay to the Plaintiff a sum of Kenya Shillings Three Hundred and Fifty Thousand (Kshs. 350,000/-) being thrown away costs within the next 14 days of this ruling;

iii. The Plaintiff granted corresponding 7 days leave thereafter to file Replies to Defence and and/or Defence to Counter – Claim if any and/or any other relevant documents arising from the filed ones by the Defendant.

c. That in default of compliance with order given in b (i) and (ii) then the order vacating the Interlocutory Judgment shall automatically lapse without further reference to the Court.

d. That being that this is a fairly old matter the, it should be set down for case management Pre – Trail Conference on priority basis on 29th July, 2024

e. That the matter to be and concluded within 90 days of this ruling – hearing date on 16th September, 2024 and Judgment delivered within the stipulated time on 9th December, 2024. No orders of adjournment shall be entertained by this Court.

f. That there shall be no orders as to the costs of the Notice of Motion dated 6th July, 2022.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF JUNE 2024.

.....

HON. MR. 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 Plaintiff/ Respondent.

c. Mr. Kahindi Advocate for the Defendant/ Applicant.