Manair Limited v Fleet Logistics Limited & 3 others (Environment & Land Case 34 of 2018) [2024] KEELC 6226 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6226 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 34 OF 2018

OA ANGOTE, J

SEPTEMBER 26, 2024

BETWEEN

MANAIR LIMITED ..... PLAINTIFF

AND

FLEET LOGISTICS LIMITED ..... 1ST DEFENDANT

SIGMA LIMITED ..... 2ND DEFENDANT

NATIONAL LAND COMMISSION ..... 3RD DEFENDANT

CHIEF LAND REGISTRAR ..... 4TH DEFENDANT

RULING

1. Vide a Motion dated 8th March, 2024, brought pursuant to the provisions of Articles 48 and 50(1) of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, Orders 9 Rule 9(a), 5 Rule 16, and 45 Rule 1 of the Civil Procedure Rules, 2010, the 1st Defendant/Applicant seeks the following reliefs:

    i. Spent.

    ii. That this Honourable Court be pleased to grant leave to the firm of Chekisaw and & Kiprop to come on record for the 1st Defendant/Applicant.

    iii. That the Honourable Court be pleased to stay the execution of the Judgement delivered on the 8th February, 2024 and any subsequent Decree extracted thereon and all consequential orders.

    iv. That the Honourable Court be pleased to issue summons to one Godfrey Kinyanjui Mbugua, a process server for purposes of examination on the contents of paragraph 5 of his Affidavit sworn on 7th February, 2018.

v. That the Honourable Court be pleased to review and set aside the Judgement delivered on 8th February, 2024 by Honourable Justice O. Angote and all consequential orders.

vi. That upon grant of prayer (5) above, the Honourable Court be pleased to grant leave to the Applicant to defend this suit and file its pleadings within Twenty-One (21) days.

vii. That the Honourable Court be pleased to expunge from the record all pleadings and documents filed by firms of Githinji Mwangi & Associates Advocates and Wetangula Adan & Company Advocates.

viii. That costs of this Application be in the cause.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Abdulkadir Hussein, the 1st Defendant/Applicants' Director of an even date. He deponed that vide a Judgement delivered on 8th February, 2024, the Court found in favour of the Plaintiff and granted orders restraining the 1st Defendant from interfering and attempting to alienate parcel L.R No 20274, Grant I.R 63991(suit property) and directed the Chief Land Registrar to cancel all entries for Grant I.R 63991 dated 28th January, 1994 over the suit property in the name of the 2nd Defendant and transferred to the 1st Defendant on the 19th October, 2015.

3. It was deposed that further, the Court granted the Plaintiff damages for trespass to the tune of Kshs 53, 760,000/= to be paid by the 1st Defendant; interest on the sum aforesaid and condemned the 1st Defendant to pay costs of the suit and the counterclaim.

4. According to Mr. Hussein, the 1st Defendant only learned of the proceedings on 5th March, 2024, when the Plaintiff, through its agents attempted to forcefully gain entry into the property and upon confrontation, produced a copy of the Judgement and that the service of summons in respect of this suit was served on the legal clerk as averred to by the process server, Godfrey Kinyanjui, in his Affidavit of Service sworn on 7th February, 2018.

5. Mr. Hussein deponed, that as advised by Counsel, the aforesaid service was improper and unlawful having not been served on the secretary, director or principal officer of the company pursuant to Order 5 Rule 3(a) of the Civil Procedure Rules and that as a result of the failure to be served with summons to enter appearance as well as the pleadings, the 1st Defendant has never instructed any Advocate to come on record.

6. The 1st Defendant's Director deponed that nonetheless, the firm of Githinji Mwangi & Associates Advocates acting without instructions, purported to represent the 1st Defendant and to that end filed a Notice of Appointment dated 6th February, 2018, defence, witness statements and list of documents all dated 27th June, 2018.

7. According to the deponent, the 1st Defendants never instructed the said law firm nor furnished it with any documents and the aforesaid act was a well-orchestrated scheme by the Plaintiff to defeat its interests; that in furtherance of this scheme, the firm of Wetangula, Adan & Co Advocates later on, came on record in place of the firm of Githinji Mwangi Advocates and that further, the firm of Wetangula, Adan & Company was granted leave to file an application to cease acting which was never served upon them as is customary.

8. The 1st Defendant's Director deponed that when the matter came up for hearing on 30th October, 2023, the 1st Defendant's case was marked as closed without the Court satisfying itself as to whether the 1st Defendant was indeed aware of the instant proceedings, and more importantly, after the fact

that the purported Advocate on record had filed a Motion to cease acting and that in issuing the orders herein, the Court condemned the 1st Defendant unheard.

9. The 1st Defendant's Director posited that upon perusing pleadings, they discovered that the Plaintiff had failed to disclose that the 1st Defendant was in actual possession and occupation of the suit property; that the Plaintiff obtained the Judgement unlawfully, for want of service of pleadings and through mis-representation and non-disclosure of material facts and that the 1st Defendant is ready and willing to comply with any directions issued by the Court.

10. The Plaintiff through its Director, Kaushik L. Manek, swore a Replying Affidavit in response to the Motions of 8th and 12th March, 2024 on the 11th April, 2024. He deponed that the Plaintiff is the legal, registered owner of the parcel of land registered as L.R No 20274, Grant Number I.R 63991 and that this position was confirmed by the Court vide its Judgement delivered on the 8th February, 2024.

11. Mr Manek deponed that the 1st Defendant was properly served with summons to enter appearance together with pleadings; that it was rightfully represented by an Advocate of its choice, entered appearance and filed a Defence and counterclaim together with witness statements and a bundle of documents all dated 27th June, 2018 thus complying with Order 11 of the Civil Procedure Rules.

12. He deponed that as advised by his Advocate, from the institution of the suit in 2018, to the delivery of the Judgement in 2o24 being a period of 7 years, the 1st Defendant has never challenged the pleadings and is subsequently estopped from doing so; that during the hearing of the main suit on 2nd October, 2023, he was the Plaintiff's witness and the 1st Defendants' Advocate cross-examined him using the 1st Defendant's title and Gazette Notice Vol CXVIII-43 all enclosed in its documents and that the 1st Defendant cannot allude to be a stranger to the aforesaid list.

13. The deponent urged that the 1st Defendant has not met the conditions and principles for stay of execution to enable the Court exercise its discretion to grant a stay of execution; that there is no appeal filed by the 1st Defendant upon which the Court can exercise its discretion; that similarly, the 1st Defendant has not met the threshold for review; that the Plaintiff has a valid Judgement and decree and has a right to realize the same and that the Motions are unmerited and should be dismissed.

14. The Attorney General, representing the 4th Defendant, filed grounds of opposition to the Motion on 19th April, 2024. Vide the said grounds, the 4th Defendant asserts that the 1st Defendant has not met the requisite conditions to warrant the grant of stay of execution having failed to implead and establish substantial loss and that the 1st Defendant has not only deliberately sought to obstruct and delay this matter contra to Article 159, but has also not established sufficient cause for setting aside of the Judgment and that consequently, it is not entitled to the Courts' exercise of discretion in its favour.

15. It was further set out in the grounds that the Application was filed after inordinate delay, being 30 days after delivery of the Judgement on 8th February, 2024; that the allegation of misrepresentation by the Advocates on record is baseless being unsupported by evidence and the 1st Defendant is estopped from making such assertions and that the 1st Defendant has not made out a case for the grant of review orders under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

Submissions

16. The 1st Defendant/Applicant filed submissions on 13th June, 2024. Counsel submitted that summons were never properly served upon the 1st Defendant pursuant to the provisions of Order 5 Rule 3 of the Civil Procedure Rules 2010, the same having been served upon the legal clerk; that consequently, the 1st Defendant was not aware of the proceedings and could not have appointed Counsel to act on its

behalf and that the process server should be called upon to be cross-examined on his service aforesaid pursuant to the provisions of Order 5 Rule 16 of the Civil Procedure Rules 2010.

17. It was submitted that the Court should exercise its discretion and review and set aside its Judgement delivered on the 8th February, 2024, the trial having been undertaken without the 1st Defendant's input in breach of its right to a fair hearing guaranteed by Article 50 of *the Constitution*.

18. It was submitted by counsel for the 1st Defendant that as expressed by the Courts in Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others (as consolidated) [2014] eKLR and Gerita Nasipondi Bukunya & 2 Others v Attorney General [2019] eKLR, the principles of natural justice require that a person should not be condemned unheard.

19. Counsel posited that pursuant to Order 22 Rule 22 of the Civil Procedure Rules and as affirmed by the Court in In New Nairobi United Services Ltd & another vs Simon Mburu Kiiru [2021] eKLR, this Court has the mandate to stay the execution of its decisions upon establishment of sufficient cause and that in the circumstances, the 1st Defendant will suffer substantial loss because it is in possession of the suit property and it risks eviction therefrom which will render the Motion nugatory.

20. Counsel submitted that because the 1st Defendant did not give instructions to the firms of Githinji Mwangi & Associates and Wetangula, Adan & Company Advocates, all documents purportedly filed by them are liable to be expunged from the Court records.

21. The Plaintiff filed submissions on 11th June, 2024. Counsel submitted that the 1st Defendant is estopped from denying the documents previously filed by its Counsel having never raised the issue within the 7 years from the institution of the suit and the Judgement and that the Court is functus officio and cannot re-open this matter. Reliance in this respect was placed on the cases of Telkom Kenya Ltd vs John Ochanda(suing on his behalf and on behalf of 996 former employees of Telkom Kenya Ltd[2014] and Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission and 3 Others[2013]eKLR.

22. It was submitted that the 1st Defendant has not met the threshold for the orders of stay of execution as per Order 42 Rule 6(2) of the Civil Procedure Rules and affirmed by the Court in James Wangalwa & Anor v Agnes Naliaka Cheseto[2012]eKLR, to wit, substantial loss will occur unless the order is made.

23. Counsel submitted that the Courts, to wit Kenya Shell Ltd v Benjamin Kibiru & Abor [1986] KLR 40, Machira t/a Machira & Company Advocates v East African Standard [2002]eKLR and Andrew Kuria Njuguna vs Rose Kuria, Civil Case 224 of 2001(unreported) were categorical that substantial loss must be specified and well demonstrated which has not been done in the circumstances; that further, the application has been filed after unreasonable delay and there is no appeal upon which a stay can be granted and that the 1st Defendant has equally not furnished security.

24. It was submitted that the 1st Defendant has not laid the basis upon which he seeks review nor met the threshold for the same under Order 45 Rule 1 of the Civil Procedure Rules, to wit, discovery of new and important matter or evidence, error apparent on the face of the record or for any other sufficient reason and that the plea to re-open the case falls outside the Court's mandate for review. Counsel referred to the cases of Parliamentary Service Commission v Martin Nyaga Wambora & Others [2018] eKLR and Ochieng v Tuko Media Limited [2024] KEELRC 713(KLR).

25. The 4th Defendant's counsel filed submissions on 19th April, 2024. Counsel submitted that the 1st Defendant has not established sufficient cause nor met the requisite conditions to warrant the grant of an order of stay of execution of the judgement of 8th February, 2024. Reliance in this respect was placed on the cases of Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986]eKLR, Machira T/

a Machira & Company Advocates v East Africa Standard Limited[2002]eKLR, James Wangalwa & Another v Agnes Naliaka Cheseto[2012]eKLR and Hon Attorney General v Law Society of Kenya & Anor(UR) no 133 of 2011.

26. Counsel asked the Court to be guided by the decisions in Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 Others [2013] eKLR and Samvir Trustee Limited v Guardian Bank Limited [2007] eKLR and find that the 1st Defendant is not entitled to the Court's discretion in its favour having deliberately sought to obstruct and delay the matter.

27. It was submitted that in any event, the application was filed after inordinate delay and is barred by the doctrine of laches. Reliance was placed on the cases of Joshua Ngatu v Jane Mpinda & 3 Others [2019] eKLR and Njoroge v Kimani [2022] KECA 1188(KLR).

28. It was submitted that the 1st Defendant has not laid any basis for disowning its previous Counsel and there is no evidence of any prior complaint to the Court in this respect; that the Court in Mwaniki Gachuba t/a Mwaniki Gachuba Advocates v Gyto Security Company Limited[2024] KEHC 4498 (KLR) criticized the habit of clients being represented by Counsel and thereafter disowning them terming those actions improper and unconscionable and that the 1st Defendant has not impleaded the grounds for review as set out under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. Reliance in this regard was placed on the case of Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a providence auctioneers [2016] eKLR.

29. Counsel urged that the present Motion constitutes an abuse of Court process, defined by the Courts in the Nigerian case of Sarak v Kotoye [1992] 9 NWLR and the Kenyan case of Satya Bhama Gandhi vs Director of Public Prosecutions & 3 Others [2018] eKLR as a situation where there is improper use of the judicial process and that the Motion is unmerited and should be dismissed.

Analysis and Determination

30. At the onset, it is noted that this Application is in the nature of an omnibus application. It seeks various orders including leave to have the Advocate come on record post judgement, stay of execution of the Decree issued in favour of the Plaintiff on 6th March, 2024, setting aside of the judgement of 8th February, 2024 and cross-examination of the process server who effected court process of the summons in the instant case.

31. These prayers are not made in the alternative to each other and are governed by different rules which are adjudicated by different judicial principles. Further still, by their nature, the grant of some orders will render the others incapable of being granted.

32. It is instructive to note that Courts have frowned upon applications of this kind and nature. The Court of Appeal in the case of Associated Construction Company (K) Ltd v Kyamu Construction & Engineering Ltd [2022] KECA 872 (KLR) dealing with an omnibus application stated thus:

> " This is yet another of those untenable omnibus applications where the applicant, Associated Construction Co (K) Ltd, seeks, in the same application, an order for extension of time to file an appeal out of time and an order for stay of execution. This Court has decried this practice, which is taking root among some practitioners at an alarming rate. This practice has to stop forthwith. Recently in Abdulrazak Rageh Haji v. Mahadho Abdulrazak Adichare, CA No. E030 of 2020 , I stated as follows:
>
> ...It is not rocket science to appreciate that under the Court of Appeal Rules an application for extension of time is the remit of a single judge whilst an application for stay of execution is

the business of the full court. How exactly the same application can be heard in instalments, first by a single judge, and subsequently by the full Court, is not clear to me. Plus, a party cannot obtain stay of execution of a decree or judgment of the High Court without first filing a notice of appeal! This practice has to stop forthwith."

33. This alone renders this Application ripe for dismissal. However, in deference to Article 159 (2) (d) of *the Constitution*, the Court will proceed to consider the same. Having considered the Motion, responses and submissions, the issues that arise for determination are:

    i. Whether this Court is functus officio?

    ii. Whether the firm of Chekisaw and Kiprop should be granted leave to come on record for the 1st Defendant?

    iii. Whether Godfrey Kinyanjui Mbugua, a process server should be summoned to Court to be cr0ss-examined on the contents of his Affidavit of service dated 7th February, 2018?

    iv. Whether or not the Judgment entered on the 8th February, 2024 should be set aside and the 1st Defendant granted leave to defend the suit? Or; whether the Court should stay the execution of its Judgement dated the 8th February, 2024?

    v. Whether the Court should expunge from the record all pleadings and documents filed by firms of Githinji Mwangi & Associates Advocates and Wetangula Adan & Company Advocates?

34. The Plaintiff asserts that this Court, having rendered its Judgement on 8th February, 2024 has been rendered functus and that the Court cannot, as implored by the 1st Defendant, re-open the suit and allow re-litigation. This contention was not responded to.

35. The functus officio doctrine is one of the mechanisms by which the law gives expression to the principle of finality. Discussing the same, the Supreme Court in Raila Odinga & Others v IEBC & Others [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law" [2005] 122 SALJ 832 in the following words:

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

36. This doctrine however has exceptions which were highlighted by the Court in Silvanus Kizito v Edith Nkirote Mwiti [2021] eKLR, thus:

> " It was thus incorrect for the trial court to have held as she did that the court had become functus officio. The court does not become functus officio merely because it has delivered a final decision in civil proceedings. The court retains its power to undertake several actions including but not limited to stay, review, execution proceedings and such other acts and steps...In Leisure Lodge Ltd v Japhet Asige and another [2018] eKLR the court said and held:
>
> "On the question that this court is functus officio, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings...That is the reason, the

court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act."

37. Indeed, the prayers sought herein are in the nature of matters incidental to the Judgement and those that this Court is vested with jurisdiction to entertain, including setting aside of the Judgement. The Court is thus not functus officio.

38. The 1st Defendant is seeking to have the firm of Chekisaw and Kiprop Advocates granted leave to come on record. None of the parties made any submissions under this head but as this prayer was not granted, it still falls for the Courts' consideration.

39. It is not in dispute that Judgement has been rendered in this matter. The rules and procedure for engagement of an advocate post Judgment are set out under Order 9 rule 9 of the Civil Procedure Rules which provides as follows:

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

40. It is clear from the foregoing that after judgment has been entered, where there was an Advocate, a new counsel can only come on record by way of an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated by the Court in S. K. Tarwadi v Veronica Muehlmann [2019] eKLR where the Judge observed as follows:

> "...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

41. Having considered the Motion, there is no indication, nor indeed assertion that the firm of Chekisaw and Kiprop Advocates herein served the firm of Wetangula, Adan and Company Advocates. Neither has any consent been sought. This is in direct contravention of the provisions of Order 9 Rule 9 aforesaid.

42. It is noted that the 1st Defendant alleges that they did not instruct any Counsel and are strangers to the firms of Githinji & Associates Advocates and subsequently, Wetangula, Adan and Company Advocates. They have however not made any attempts to substantiate this claim.

43. Having admittedly established the presence of the aforesaid Advocates, the 1st Defendant should have served them with the Motion not only in compliance with the provisions of Order 9 Rule 9 but to enable them respond to the damning allegations against them. The record indicates that the firm of Wetangula, Adan & Co Advocates still remains on record, its Motion to cease acting having been dismissed on 30th October, 2023.

44. The Courts have been categorical that the requirements of Order 9 Rule 9 are mandatory and the failure to comply the same has fatal consequences. This Court agrees. The Court declines to grant the firm of Kiprop and Chekisaw leave to come on record having not served the same on the "former"

advocate on record. Consequently, this Motion is incompetent. The Court will nonetheless continue and consider the remaining issues for purposes of completion.

45. The law provides for the cross-examination of a process server where service of summons is disputed. Order 5, rule 16 of the Civil Procedure Rules provides thus:

> "On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

46. It is the 1st Defendant's case that the summons and pleadings were not properly served upon it not having been served on a director, secretary or other principal officer of the Company pursuant to Order 5 Rule 3(a) of the Civil Procedure Rules. They assert that the same was served upon their legal clerk, an improper party as per the provisions of Order 5 Rule 3(a) aforesaid.

47. The 1st Defendant seeks to have the process server summoned to be cross-examined on the unlawful and improper service aforesaid. Considering the Affidavit of 7th February, 2018, the process server deponed to have served the legal clerk, one Ibrahim. It is noted that the 1st Defendant has not denied that the said legal clerk received the documents, only that the service upon him was improper.

48. The Court of Appeal in Shadrack arap Baiywo v Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987] eKLR, quoting Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670 stated that:

> "There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

49. In the circumstances, there is no factual dispute on service necessitating the process server being summoned. What is in issue is the legal propriety of service upon the 1st Defendant's legal clerk which the Court can determine without the need to summon the process server. This plea fails.

50. The 1st Defendant has asked this Court to set aside its Judgement of 8th February, 2024 and re-open the same and grant it leave to defend the suit. The law provides only two instances where a Court may set aside its own judgement. The first is found under Order 10 of the Civil Procedure Rules, 2010 which addresses the issue of consequences of non-appearance, default of defence and failure to serve by a party. Order 10 Rule 11 provides thus:

> "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."

51. The second instance is found under Order 12 of the aforementioned Rules, which deals with hearing of suits and non-attendance by parties. The Order empowers the Court to dismiss a suit where a party fails to attend Court. Where a party demonstrates that it was not aware of the hearing date through

no guilt of its own, the Court will exercise its discretion in favour of the party. Order 12 Rule 7 of the Rules provides 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."

52. In the present circumstances, the matter proceeded in the absence of the 1st Defendant who despite having entered appearance and filing a Defence did not participate at trial. However, the 1st Defendant seeks to denounce the appearance as well as all the pleadings filed on its behalf and essentially contends that the Judgement rendered was an ex-parte judgement falling within the ambit of Order 1o Rule 11 of the Civil Procedure Rules, as opposed to one in in default of attendance.

53. It is undisputed that at all times during these proceedings, the 1st Defendant has been represented by Counsel, and Counsel aforesaid duly entered appearance, filed pleadings and even partly defended the case. This being so, a presumption was created that service of summons and pleadings was proper. Even if the service was improper, nothing would fall on the same once the 1st Defendant entered appearance and filed its pleadings.

54. That being so, and having in mind the maxim 'he who alleges must prove,' it was upon the 1st Defendant to prove that it was indeed a stranger to the law firms which sought to represent it in the present suit not having issued them with any instructions. Only then can the question of service be considered.

55. Apart from mere allegations, no evidence has been provided in this respect. With such serious allegations, one would have expected that the 1st Defendant would have commenced disciplinary proceedings against the firms at the Law Society of Kenya, and possibly make a formal criminal complaint to the Police on the alleged conspiracy between the Plaintiffs and the Advocates.

56. It was also open to the 1st Defendant to have this Court summon the aforesaid Advocates and examine them on the same. This has not been done. Indeed, there is not even a letter to the aforesaid Advocates questioning where they received the instructions from.

57. Ultimately, nothing falls on the assertions that the 1st Defendant was condemned unheard and the Court finds that the Judgement of 8th February, 2024 was a regular Judgement and is not liable to be set aside in the manner sought. This plea fails.

58. The Court notes that the 1st Defendant relied on, and the parties submitted on aspects of review under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. However, as discussed above, these provisions are inapplicable in the circumstances. As regards prayer 6 seeking leave to defend the suit and file pleadings, the same fails the Court having declined to set aside the Judgement.

59. Having found no merit in the plea to set aside the Judgement, the Court will consider whether there is any basis for the stay of execution of the Judgment. The 1st Defendant seeks the same pursuant to the provisions of Order 22 Rule 22 of the Civil Procedure Rules. Order 22 Rule 22(1) of the said Rules provides as hereunder:

> " The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been

made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto."

60. In view of the above, it is evident that stay of execution under this head is not given indefinitely but for a reasonable time and for sufficient cause. The 1st Defendant has sought the stay in order to have the status quo maintained pending the setting aside of the Judgement. The Court has declined to do so. This means that the Courts Judgement and decree remain valid.

61. Further, there is no appeal on record, meaning that a stay of execution cannot be granted under the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Ultimately, there is no basis upon which a stay of execution of the Judgment can be given.

62. As aforesaid, the 1st Defendant has not established its allegations that the firms of Githinji Mwangi & Advocates and Wetangula, Adan and Co Advocates did not have instructions from it. Consequently, no basis has been laid for the expulsion of the pleadings filed by the aforesaid firms.

63. In conclusion, the Court finds that the Motion dated March 8, 2024 is unmeritorious. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mogeni & Ms Anyango Opiyo for Plaintiff

Mr. Mulinge for Kiprop for 1st Defendant

No appearance for Defendant

Mr. Allan Kamau for 4th Defendant/Respondent

Court Assistant - Tracy