



Centre Park Plaza Limited v Rural Housing Estate Limited (Environment & Land Case E013 of 2022) [2024] KEELC 13582 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E013 OF 2022
JM ONYANGO, J
DECEMBER 5, 2024**

BETWEEN

CENTRE PARK PLAZA LIMITED PLAINTIFF

AND

RURAL HOUSING ESTATE LIMITED DEFENDANT

RULING

1. This ruling is with respect to 4 Applications dated 27th July, 2024, 30th July, 2024 and 14th October, 2024. The first is the Defendant's Notice of Motion dated 27th July, 2024 seeking the following orders:-
 - a. Spent
 - b. Spent
 - c. That the Honourable court be pleased grant interim orders of injunction barring and/or restraining the respondent and the interested party from proceeding with the planned auction of land parcels listed below or any other property whatsoever belonging to the applicant in the auction slated for 1st August 2024 pending the hearing and determination of this application.
 - i. Eldoret Municipality/Block 15/314
 - ii. Eldoret Municipality/Block 15/331 & 323
 - iii. Eldoret Municipality/Block 15/324
 - iv. Eldoret Municipality/Block 15/296
 - v. Eldoret Municipality/Block 15/297-299
 - vi. Eldoret Municipality/Block 15/300
 - vii. Eldoret Municipality/Block 15/301-309



- viii. Eldoret Municipality/Block 15/310
 - ix. Eldoret Municipality/Block 15/311-313
 - x. Eldoret Municipality/Block 15/382
 - xi. Eldoret Municipality/Block 15/383
 - xii. Eldoret Municipality/Block 15/384-409
 - xiii. Eldoret Municipality/Block 15/410
 - xiv. Eldoret Municipality/Block 15/411
 - xv. LR No. 2309
- d. That the honourable court be pleased to grant an order of barring the deputy registrar of this court and/or any other person to whom the judgment directs from causing the signing of the transfer forms on behalf of the applicant pending the hearing of this application inter-partes and thereafter the main motion.
 - e. Spent
 - f. That the honourable court be pleased to grant orders of stay of execution of the judgment and/or decree delivered by this court on 21st September, 2023 pending the interparties (sic) hearing of this application interpartes and thereafter pending the hearing and determination of the application.
 - g. That the honourable court be pleased to set aside the exparte judgment and/or decree delivered in this matter on the 21st of September 2023.
 - h. That if prayer 7 hereinabove is granted, the draft statement of defense (sic) annexed herewith be deemed as duly filed and served upon the payment of the filing fees thereof.
 - i. That the respondent be ordered to pay any legal fees or whatever resulting from the [auctioneers act](#) and/or omissions.
 - j. That the costs of this application be provided for.
2. The Application was supported by the Affidavit of Shrikesh Gheewala, a director of the Defendant. He deponed that the ex-parte judgment was obtained fraudulently and irregularly through concealment of material facts which he explained at great length in his affidavit. He deponed that the Defendant learnt of this suit when the Plaintiff advertised the properties listed in the Notice of Motion in a daily newspaper of 16th July, 2024 for auction. He further deponed that the properties were still charged to the National Bank of Kenya. He deponed that the Defendant is in danger of having its properties auctioned without being heard contrary to Article 25(c) and 50 of [the Constitution](#). That as a result, the Defendant would suffer immense loss and harm that cannot be remedied by damages. He expressed the Defendant's wish of defending the suit and having it determined on its merits.
3. He also accused Elesh Gheewala of staging the communication with the firm of Akenga Kimutai Advocates to hoodwink the court, yet the said firm had no instructions to act for the Defendant as there is no resolution to that effect. He averred that the suit was commenced without authorisation from the directions as no resolution was filed alongside the Plaintiff's documents. Further, that the suit is time barred for being based on a sale agreement of August, 2010. He explained that no prejudice would be suffered by the Plaintiff if the Application is allowed, urging that it is proper and in the interest of



justice that the judgement and decree be set aside. He urged that the application was made timeously, in good faith and without inordinate delay and should be allowed.

4. The second Application is dated 30th July, 2024 (the Sisiwa Application) seeking for orders THAT:-
 - a. Spent
 - b. The Honourable Court be pleased to order that the Intended Interested Parties be joined in the suit as Interested parties.
 - c. The Honourable Court be pleased to set aside the judgment and proceedings herein and to grant leave to the proposed Interested parties to fully participate in the proceedings herein and file such pleadings, affidavits, submissions and other documents subsequent to joinder.
 - d. Spent
 - e. The Honourable Court be pleased to order the firm of IGARE AUCTIONEERS or any other auctioneer to stop the intended sale by way of public auction of those parcels of land known as ELDORET MUNICIPALITY BLOCK 15/325, ELDORET MUNICIPALITY BLOCK 15/330 and ELDORET MUNICIPALITY BLOCK 15/332 pending the hearing and determination of this suit.
 - f. Costs be in the cause.
 - g. Any other relief that the Honourable Court may deem fit and proper to grant.
5. This Application was supported by the Affidavit of Hassan Kipkorir Sisiwa, one of the Intended Interested Parties. He deponed that he is the Administrator of the Estate of Ahmed Malakwen Arap Sisiwa, his late father. He deponed that his late father sold ELDORET MUNICIPALITY BLOCK 15/2309 to Mohamed Ifthekhar Ghani who has been in occupation since 1994 and the land has now been transferred to him. The Defendant herein sued them and Mr. Ghani in Eldoret ELC Case No. 237 of 2012 claiming that they trespassed onto the land but they successfully defended the suit, obtained a judgment against the Defendant and were awarded costs.
6. Mr. Sisiwa deponed that the Plaintiff and Defendant Companies belong to the same person, Elesh Gheewala, and the suit herein is a ploy to avoid the liabilities of the Defendant Company. He deponed that the said parcels of land had been wrongly, erroneously and mistakenly included in the suit herein, thus, should the auction be allowed to proceed inclusive of the properties, they would be deprived of their legal and beneficial interest in the land. Further, that unless the intended auction is stopped and/or suspended, they would suffer substantial loss as it would prevent them from enjoying the fruits of the judgement in Eldoret ELC Case No. 237 of 2012.
7. The Plaintiff opposed these two Applications through the Replying Affidavit of Eleshkumar Chandrakant Gheewala (hereinafter referred to as Eleshkumar), a director of the Plaintiff company, sworn on 25th September, 2024. In response to the Application dated 27th July, 2024 he deponed that he served the pleadings on the Defendant who entered appearance through their advocates AK Advocates LLP on 25th March, 2022. That he also served the Defendant's said advocates with a hearing notice for the Application dated 23rd May, 2022.
8. He gave several instances that he claimed the Defendant was served with mention and hearing notices in the matter leading up to the delivery of the judgment. He alleged that the Defendant had not denied appointing the firm of AK Advocates to act in the matter, and that in fact the same firm is the one that filed the Application of 27th July, 2024. He deponed that the judgment entered against the Defendant was regular as it was properly served, and that in the interest of justice, the judgment ought to remain



- undisturbed. He accused the Defendant of waiting a whole year to file the defence in an attempt to deny the Plaintiff the fruits of its judgment.
9. In response to the Application dated 30th July, 2024 he reiterated that the judgment was regular and the Interested Parties cannot purport to join the suit after judgment has been entered. It was deponed on behalf of the Plaintiff that the properties mentioned in the Interested parties application are not in the auction list as alleged. He urged that the applications were devoid of merit and should be dismissed forthwith.
 10. The third application is a Notice of Motion brought by 3 Intended Interested Parties (the Gheewala Family) dated 2nd October, 2024 which seeks the following orders:-
 - a. Spent
 - b. Spent
 - c. This Honourable Court be pleased to order that Mukta Chandrakant Gheewala, Mamta Chandrakant Gheewala and Shrikesh Gheewala be enjoined in the suit herein as the 1st, 2nd and 3rd Interested Parties respectively.
 - d. That upon prayer No. 3 being granted, the Interested Parties be granted leave to file any pleadings, submissions and/or affidavits and to be heard in the proceedings herein.
 - e. Any such further orders that this Honourable Court may deem fit to grant.
 - f. The costs of this Application be provided for.
 11. The grounds in support of the said application are on the face of the motion and on the Affidavit of Mamta Chandarant Gheewala. She deponed that the 3 Intended Interested parties are the beneficiaries of the Estate of Chandrakant Shamjibhai Gheewala (Deceased), while the 1st Interested Party was also the Executrix of the said Estate. She also deponed that the assets held in the name of the Defendant Company formed part of the estate of the deceased and were listed in the Mediation Settlement Agreement (MSA) dated 31st July, 2019, adopted as an order of court on 16th October, 2019 in Succession Cause No. 264 of 1984. That the Plaintiff intentionally and fraudulently concealed these as well as other facts from this court.
 12. She averred, that they have a stake in the proceedings before court which can only be articulated if they appear and champion their cause. They aligned themselves with the Defendant's application dated 27th July, 2024 to set aside the judgment, urging that their participation in the suit would assist the court to effectively and efficiently decide the issues raised herein. In addition, that the Plaintiff will not suffer any prejudice that cannot be compensated by way of costs or otherwise, thus it is in the interests of justice that the application is allowed.
 13. Opposing the Application, the Plaintiff through a Replying Affidavit sworn by Eleshkumar on 11th October, 2024 also opposed this Application. He conceded that the 3 Interested Parties are indeed the beneficiaries of the estate of the late Chandrakant Gheewala. That however, since a company is a separate entity, its assets belong to the company and not its shareholders. That the assets of the Defendant company therefore do not belong to beneficiaries of the Estate of Chandrakant Gheewala. Further that the suit has been determined and a regular judgment entered hence no proceedings exists that the Interested Parties can join, and that they have not shown any basis for seeking to be joined to the proceedings. He averred that the terms of the MSA are irrelevant to the proceedings before this court. He added that the death of a shareholder cannot halt the operations of a company, thus failure



- to confirm the grant is no impediment to execution. He urged that the application is without merit and the same should be dismissed.
14. On behalf of the Gheewala Family, on 9th October, 2024 Shrikesh Gheewala swore an Affidavit in response to the Plaintiff's reply deposing that their father who owned the Defendant Company left it to his beneficiaries. He explained that Eleshkumar was his elder brother who had been in control of both the Plaintiff and Defendant Companies as their Chairman after their father's demise. He denied the alleged service on AK Advocates LLP and pointed out a possible conflict of interest and fiduciary duty owed by Eleshkumar as a Director of the Defendant. He alluded to the fact that it was unclear who was served on behalf of the Defendants since AK Advocates was not a party to the suit and that no stamped copy by the representatives of the Defendant has been exhibited.
 15. He deponed that AK Advocates were only instructed to act for the Defendant after execution commenced and annexed minutes to that effect, thus the firm could not act prior to that for lack of instructions. He deponed that Eleshkumar being the chairman of the Defendant received the documents himself on behalf of the Defendant, the company he had sued. He deponed that a person cannot sue and equally receive pleadings and purport to respond to the same via proxies. He urged that the judgement was irregular and the court would have held otherwise had it been aware of the Plaintiff's conduct. He reiterated that they had a meritorious defence necessitating the setting aside of the judgement to avoid injustice or hardship.
 16. The final Application is brought by the County Government of Uasin Gishu and is dated 14th October, 2024. The County seeks the following orders:-
 - a. Spent
 - b. That the firm of M/S Tirop S.C Company Advocates be granted leave to come on record for the proposed 2nd Defendant herein THE COUNTY GOVERNMENT OF UASIN GISHU.
 - c. That the Honourable Court be pleased to enjoin the proposed 2nd Defendant herein THE COUNTY GOVERNMENT OF UASIN GISHU as the 2nd Defendant in these proceedings.
 - d. That the Honourable Court be pleased to set aside, and vary the ex parte judgment dated 21st September, 2023 with its consequential decree dated 27th September, 2023.
 - e. Costs of this application be in the cause.
 - f. Any other relief that this Honourable Court may deem fit and proper to grant.
 17. The motion is supported by the affidavit of Boaz K. Bulbul, the proposed 2nd Defendant's County Solicitor, who deponed that the County is mandated to hold land on behalf of the community and land set aside as public utility land. That the lands claimed by the Plaintiff fall within L.R. Nos. 773/1, 776/4/1, 776/4/2 and 775/1 where there are public utilities utilised by the community being Huruma Health Centre, Kandie Primary School and Huruma Police Station among others. He deponed that the community will lose these amenities, which are visible and have been there since time immemorial, if the Plaintiff is allowed to execute the ex parte judgement delivered on 21st September, 2023. He also deponed that the Plaintiff extracted a decree thereunder and has instructed Igare Auctioneers to sell the land by public auction. That the proposed 2nd Defendant became aware of these proceedings after the Auctioneer advertised the intended sale of the lands. Further, that they have a meritorious defence that raises serious triable issues thus the application should be allowed.
 18. The Plaintiff similarly opposed this Application, through a Replying Affidavit sworn by Eleshkumar on 29th October, 2024. He deponed that the County Government had adduced no evidence to prove



that the suit properties form part of public land and house public utilities as alleged. He deponed that the properties are in fact private properties. He deponed that the suit properties are Eldoret Municipality/Block 15/325, 330 and 332 and that the properties listed by the County Government are not in the notification of sale. He deponed that the said properties had been sold by the Defendant to the Plaintiff, thus any dispute the proposed 2nd Defendant had with the Defendant herein. He asked that the court to dismiss this application also for lack of merit.

19. The court directed that the 4 applications be canvassed by way of written submissions. The Court further directed the parties to file their written submissions on the same, and they complied.

Analysis and Determination

20. I have considered the 4 Applications and their supporting Affidavits, the responses filed thereto, the annexures presented as well as the respective submissions by the parties'advocates herein. The issues arising for determination are:-

- i. Whether the court should set aside, vary the ex parte judgement delivered on 21st September, 2023 and the ensuing decree dated 27th September, 2023;
- ii. Whether the court ought to stop and/or bar the intended sale by public auction as advertised by the firm of Igare Auctioneers and the execution of transfer forms;
- iii. Whether the court should allow the prayers for joinder of the intended interested parties and the proposed 2nd Defendants;
- iv. Whether the firm of M/s Tirop S.C Company Advocates should be allowed to come on record for the proposed 2nd Defendant;

i. Whether the court should set aside, vary the ex parte judgement delivered on 21st September, 2023 and the ensuing decree dated 27th September, 2023;

21. The power to set aside an ex parte judgment is provided under Order 10 Rule 11 of the [*Civil Procedure Act*](#), which provides that:-

“ 11. Setting aside judgment [Order 10, rule 11]

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.”

22. It is not in doubt that the decision whether or not to set aside ex parte judgement is discretionary. It is also trite that this discretion is to be exercised cautiously, to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error. The Court of Appeal in *James Kanyita Nderitu vs Maries Philotas Ghika & Another* [2016] eKLR, set out the considerations in an application for setting aside an exparte judgment, holding that:

“ ... 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 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 such party is likely to suffer.”

23. In addition, Justice Odunga in *Mureithi Charles & another vs Jacob Atina Nyagesuka* (2022) eKLR, held that:-

“In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See *Bouchard International (Services) Ltd vs M’mworeria* (1987) KLR 193; *Evans vs Bartlam* (1937) 2 All ER 647.”

24. The Defendant herein has raised the issue of lack of service of the pleadings herein. I have perused the court file and found an Affidavit of Service sworn by Ruth Kyeva Advocate on 24th May, 2022. It indicates that the advocate on the same day served a copy of hearing notice for hearing of the Plaintiff’s Notice of Motion dated 14th February, 2022 via email to the firm of Akenga Kimutai Advocates. Another Affidavit of Service on record was sworn by the same advocate on 21st July, 2022 with respect to the order issued by the court. However, none of the numerous Affidavits of Service herein relate to service of summons or the pleadings in this suit. In his Replying Affidavit, Elsehkumar did not explain exactly who was served with the pleadings and/or summons to enter appearance on behalf of the Defendant. He instead that he served the Notice of Motion of 14th February, 2022 and hearing notice thereto. He in fact never mentioned serving the pleadings or summons to enter appearance on the Defendant at all.
25. In civil disputes, service of summons to enter appearance is so paramount that courts have held that without being served with the summons, one need not enter appearance or file a defence. That is why Order 5 rule 1 provides that every summons shall be accompanied by a copy of the plaint, since it is the summons which calls upon a defendant to enter appearance and not the plaint. The plaint simply



states a party's case, whereas summons call upon the cited party to enter appearance within the period stated in therein. The Civil Procedure Rules, 2010 at Order 5 Rule 1 provides that:-

- “ 1. Issue of summons [Order 5, rule 1]
- (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.
 - (2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
 - (3) Every summons shall be accompanied by a copy of the plaint.
 - (4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days.
 - (5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.
 - (6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.”

26. Failure by the Plaintiff herein to serve summons on the Defendant is contrary to the mandatory provisions of Order 5 of the Civil Procedure Rules. the Defendant being a company, it ought to have been served in compliance to Order 5 Rule 3 on service of summons on corporations which provides that:-

- “ 3. Service on a corporation [Order 5, rule 3]
- Subject to any other written law, where the suit is against a corporation the summons may be served—
- (a) on the secretary, director or other principal officer of the corporation; or
 - (b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—
 - (i) by leaving it at the registered office of the corporation;
 - (ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
 - (iii) if there is no registered office and no registered office or physical address of the corporation, by leaving



it at the place where the corporation carries on business; or

- (iv) by sending it by registered post to the last known postal address of the corporation.”

27. On failure to serve summons, the Court of Appeal in the case *Misnak International (UK) Limited vs 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan & 3 Others* (2019) eKLR held thus:

“We concur with and adopt the following sentiments of Aburili, J. in *Law Society of Kenya vs Martin Day & 3 Others* (supra):

‘It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that Summons must be served in the manner provided for in the rules to enable the defendants ... submit to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked’.” (Emphasis mine)

28. I am not certain whether any summons were filed at the time when the Plaintiff filed the suit since I have seen no proof in the court file that the Plaintiff ever prepared, had signed or collected the summons to enter appearance for service on the Defendant. It is clear however that the Defendant was never served with the pleadings or summons to enter appearance in this suit. For this reason, the judgment delivered herein cannot be said to be a regular judgment. The Court of Appeal in *James Kanyita Nderitu vs Maries Philotas Ghika* (Supra) had this to say concerning an irregular judgment:-

“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 issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

29. As to whether the applicants have a defence that raises triable issues, I have considered the issues raised in the application in the Defendant’s Application and the Draft Defence annexed to its motion. Also annexed to the Defendant’s Supporting Affidavit are pleadings in various suits in the high court where Eleshkumar has described himself invariably as either a director or the chairman, as the case may be of Rural Housing Limited, the Defendant herein. I have seen a CR12 dated 11th April, 2024 showing that he is indeed a Director/Shareholder of the Defendant Company.
30. In the *ex parte* judgement delivered herein, his name though wrongly spelt as Gileskumar, he is described as a director of the Plaintiff herein, Centre Park Plaza. It is alleged that service herein was



not proper as Eleshkumar sued the Defendant company, served himself and without informing the other directors, went ahead and purported to instruct an advocate to represent the Defendant. It is also alleged that the Affidavit of service purporting to serve the pleadings on the Defendant does not indicate who exactly was served on behalf of the Defendant and that no stamped copy by the Representatives of the Defendant has been exhibited. I have indeed perused the file and note that Eleshkumar indeed swore the Verifying Affidavit to the Plaintiff filed herein as a director of the Plaintiff. It is their contention also that the suit properties herein are subject of other cases pending in court.

31. Being a director/shareholder of the Defendant, Eleshkumar must very much be aware of the position of such suits, one of them being the suit mentioned in the Sisiwa Application. In this Motion, it is claimed that their land, being parcel No. Eldoret Municipality/Block 15/2309 is the property of the late Ahmed Malakwen Arap Sisiwa who sold it to a third party. Eleshkumar however filed Eldoret ELC Case No. 237 of 2012 against them and the said buyer claiming they were trespassing, but they emerged victorious in that suit. As a result, any interest that the Defendant Company had in the said lands was extinguished by the said judgment. The said properties therefore are not available for attachment in execution of a decree against the Defendant.
32. The County Government also filed a draft defence setting out its case. The County Government has averred that the suit properties which are being claimed by both the Plaintiff and now the Defendant fall within L.R. Nos. 773/1, 776/4/1, 776/4/2 and 775/1 on which stands public utilities. It was averred that the parcels are public land set aside for the public utilities and do not form part of the Agreement dated 30th August, 2010 and the County Government sought a declaration to that end. The County Government urged that allowing execution would lead to the community losing the said amenities. The County Government annexed photographs of what is supposed to be the suit property. The photographs show that standing on what is alleged to be the suit properties are a County Reference Laboratory, the Huruma Sub-County Hospital, the Atnas Kandie Primary & Junior School, an Assistant Chief's Office, Huruma Sub-location and the Huruma Police Station. There is no doubt that the Defence thus raises triable issues that ought to be considered by this court, especially bearing in mind that the interests of the community using the alleged public utilities are at stake.
33. As was held by the Court of Appeal in *CMC Holdings Ltd vs Nzioki* (2004) KLR 173,

“The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside ex parte judgement... What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed.”



34. Consequently, the failure to serve the summons to enter appearance on the Defendant renders the ex parte judgement irregular. That aside, the facts as laid out by the parties in their respective motions and the annexed draft defences reveal triable issues on which they have a right to be heard before a decision is rendered which will definitely affect their rights to the suit properties herein. Therefore, it goes without saying that the ex parte judgment ought to be set aside as a matter of right. Indeed, I see no prejudice that the Plaintiff will suffer which cannot be compensated by way of damages. In any event, the Plaintiff will also have a chance to present its case to the court to rebut the Defendants allegations. For the above reasons, this court is convinced that it is in the interest of justice that the ex parte judgement delivered herein on 21st September, 2023 be set aside.

ii. Whether the court ought to stop and/or bar the intended sale by public auction as advertised by the firm of Igare Auctioneers and the execution of transfer forms;

35. Having allowed the prayer for setting aside and varying of the judgment, it follows that the decree is equally set aside. Since the auction arises from the intended execution of the said decree, it automatically follows that the auction cannot proceed. I need not say anything else under this head. The same fate befalls the prayers for an injunction against the intended auction and stay of execution of the judgment.

36. There was also a prayer in the Defendant's Application seeking an order to bar the Deputy Registrar of this court and/or any other person directed under the judgment from signing the transfer forms on its behalf. By the setting aside of the judgment herein, I am of the opinion that I need not discuss the said prayer for barring execution of transfers further. This is because the judgment upon which such transfers were to be signed have been set aside, therefore the decree cannot be executed through the signing of the transfers by the Deputy Registrar of this court or any other person so mandated. For the avoidance of doubt, the judgement having been set aside, it follows that the decree arising therefrom cannot and ought not be executed in any way, shape or form.

iii. Whether the court should allow the prayers for joinder of the intended interested parties and the proposed 2nd Defendants;

37. Joinder of parties is provided for under Order 1 Rule 10 (2) of the Civil Procedure Rules as follows:-

“(2)The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

38. The court's mandate is that as far as possible all matters in controversy between the parties should be completely and finally determined and while also avoiding a multiplicity of suits concerning any of the matters raised. In this regard, it is appropriate and in the interest of justice that all matters touching and concerning the subject matter of the suit herein at hand be determined finally and completely to avoid litigating over the same matters again.

39. The Supreme Court of Kenya in Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others (2014) eKLR, citing the case of Meme vs Republic (2004) 1 EA 124 listed the instances where a party may be joined to a suit as follows:-



- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
 - ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
 - iii. Joinder to prevent a likely course of proliferated litigation.
40. Joinder of parties is not a matter of right, but is at the discretion of the Court, hence, sufficient grounds must be laid before the Court for it to determine whether the parties ought to be joined to the suit. Moreover, the importance of parties in proceedings before a court of law cannot be gainsaid. In *Apex International Ltd and Anglo Leasing and Finance International Finance Ltd v Kenya Anti-Corruption Commission* (2012) eKLR, the Court quoted the words of Mukhtar J. of the Supreme Court of Nigeria in *Goodwill and Trust Investment Ltd vs Will and Bush Ltd* (2011) LCN/B820 (SC) as follows:-
- “It is trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the Court, the Court lacks jurisdiction to hear the suit and where the Court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”
41. As to who is a proper party to a suit, in the case of *Zephir Holdings Limited vs Mimosa Plantations Limited, Jeremiah Matagaro & Ezekiel Misango Mutisya* [2014] eKLR, the Court explained that:
- “A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.”
42. On its part, the County Government of Uasin Gishu seeks to be joined to the suit as the 2nd Defendant. The County claims that the suit properties herein are part of parcels of land designated as public lands on which stands public utilities/amenities such as a hospital, a police station and a school. The County Government without a doubt stands to suffer if it is not allowed to come on record and defend its interest in the suit properties and so will the community being served by and benefitting from the said public utilities. Since it has been alleged that the suit properties are possibly public utility land, the County Government, as the entity mandated to hold land on behalf of the community, has sufficient interest in this suit to warrant being joined to this suit. It is therefore a proper party to this suit and ought to be joined.
43. In the *Gheewala Family Application* and the *Sisiwa Application*, the Applicants therein seek to be joined to the suit as interested parties. The elements to be considered in an application for joinder as



an interested party were set out by the Supreme Court in the Communications Commission of Kenya Case (Supra), where held directed itself as follows:

“In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court’s Ruling in the Mumo Matemo case where the Court (at paragraphs 14 and 18) held:

‘An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...’

44. The Gheewala Family application to be joined is based on the fact that they are the beneficiaries of the Estate of the late Chandarakant Shamjibhai Gheewala. They claim that the suit properties herein are assets of the Defendant Company which was owned by their late father. The Plaintiff has opposed the Application on grounds that the properties are the Defendant Company’s assets, and being a separate entity in law from its shareholders, its assets do not belong to the beneficiaries of the estate. It must be noted that as beneficiaries of the estate of their deceased father, they do have a stake in the shares he held in the Defendant company. To that end their father’s share in the assets of the Defendant Company would ideally devolve to the beneficiaries of his estate. That being the case, they do have sufficient interest in the suit herein to warrant their being given a chance to be heard in this suit. To find otherwise would be to bar them from being heard in a matter that has great bearing on property that may be part of the estate of their late father.
45. In the Sisiwa Application, the Applicants are in agreement with the County Government that the properties form part of L.R. No. 773/1, 775/1, 776/4/1 and 776/4/2. The Applicants therein informed this court that the Commissioner of Lands placed a restriction on these lands since their registration in the name of the Defendant was done and title thereto issued before the original titles were surrendered. Further that the Defendant instituted suit against the Applicants in this Motion and a third party claiming they had trespassed on its land but the suit was decided in the Applicants’ favour, hence the land cannot be included as part of these proceedings. Since these are the same parcels of land being claimed by the County Government as public land and alleged to be hosting public utilities, I deem it fit to join the Administrators of the estate of Ahmed Malakwen Arap Sisiwa so that it is made clear how exactly they acquired their interest in the said properties.
46. It is a mandatory tenet of our laws that a person should not be condemned unheard, and that decisions should not be reached behind his back. To this end, proceedings that affect a person’s life and property should not continue in his absence and neither should he be precluded from participating in them. For this court to do justice between the parties, it is important that the various parties be allowed an opportunity to present their respective cases for a merit based determination of the matters raised. For this reason, and considering the circumstances outlined hereinabove, it is only fair that the applicants here be joined to this suit in the capacities sought to enable the court determine the issues relating to the suit properties herein effectively and with finality.



iv. Whether the firm of M/s Tirop S.C Company Advocates should be allowed to come on record for the proposed 2nd Defendant;

47. The County Government also sought leave for the firm of Tirop S.C Company Advocates to be allowed to come on record. This prayer is made pursuant to Order 9 Rule 9 of the Civil Procedure Rules, which provides that:

“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.”

48. The essence of this provision was explained in S.K. Tarwadi vs Veronica Muehlemann [2019] eKLR as follows:-

“In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away.”

49. From the above case, it follows that, the provisions of Order 9 Rule 9 of the Civil Procedure Rules is mandatory for an Advocate coming on record post judgment to either first seek leave of court by way of a formal application or obtain consent from the outgoing counsel. In the instant suit however, the County Government was not a party to this suit initially. It cannot be said that there is any danger that they want to be mischievous to sack an outgoing advocate because there is in fact no outgoing advocate. For that reason, it was not necessary to seek leave for the firm of Tirop S.C Company Advocates to represent it in this matter. The County Government is thus at liberty to employ any firm of its choice to represent it in the suit at this juncture, including the firm of Tirop S.C Advocates.

Orders

50. The upshot is that the Applications herein succeed and I make the following orders:

- a. That the exparte judgment delivered on 21st September, 2023 and the decree arising thereon issued in this matter on the 27th September, 2023 are together with all consequential orders hereby set aside.
- b. That an order be and is hereby issued barring the Deputy Registrar of this court and/or any other person to whom the judgment is directed from causing the signing of the transfer forms on behalf of the Defendant pending the hearing and determination of this suit.
- c. That the firm of IGARE AUCTIONEERS or any other auctioneer is hereby barred from proceeding with the intended sale by way of public auction of any parcels of land listed in the Notice of Sale or as advertised in execution of the Decree issued in this suit on 27th September, 2023 pending hearing and determination of this suit or until further orders of this court.



- d. That Hassan Kipkorir Sisiwa, Salim Kiptoo Sisiwa, Sophia Cherotich Sisiwa and Musaa Kitur, being the Administrators of the Estate of Ahmed Malakwen Arap Sisiwa and the Applicants in the Applications dated 30th July, 2024 be and are hereby joined to this suit as Interested parties.
- e. That Mukta Chandrakant Gheewala, Mamta Chandrakant Gheewala and Shrikesh Gheewala, the Applicants in the Motion dated 2nd October, 2024 be and are hereby joined in the suit as Interested Parties.
- f. That leave is hereby granted to the Interested Parties to fully participate in the proceedings herein and file such pleadings, affidavits, submissions and other documents as may be necessary subsequent to joinder.
- g. That the Applicant in the Application dated 14th October, 2024 being the County Government of Uasin Gishu be and is hereby joined as a 2nd Defendant herein.
- h. That the draft statements of defence annexed to the Applicants' Supporting Affidavits (if any) shall upon the payment of the requisite filing fees thereon be deemed as duly filed and served.
- i. That the Plaintiff shall pay any legal fees resulting from the auctioneers acts and/or omissions.
- j. The costs of the Applications herein shall be in the cause.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER 2024

.....

J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Mungisha for the Plaintiff
2. Mr. Ogutta for the Defendant
3. Mr. Mathai for the Proposed 2nd Defendant
4. Mr. Langat for the 1st Objector
5. Mr. Kagunza for the 2nd – 26th Objectors
6. Mr. MMBogori for the 1st – 3rd Proposed Interested Parties

Court Assistant: Brian

