Ndolo v City Council of Nairobi & another (Environment & Land Case 1295 of 2013) [2023] KEELC 856 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 856 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1295 OF 2013

JO MBOYA, J

FEBRUARY 16, 2023

BETWEEN

JOSEPHAT MAILU NDOLO ..... PLAINTIFF

AND

CITY COUNCIL OF NAIROBI ..... 1ST DEFENDANT

MARY ASIYO ..... 2ND DEFENDANT

RULING

Introduction And Background

1. Vide notice of motion application dated the September 22, 2022, the 2nd defendant/applicant has approached the honourable court seeking for the following reliefs;

    i. That the honourable court do certify this application as extremely urgent and be heard on priority basis and orders be made *ex-parte*.

    ii. That the honourable court be pleased to set aside the default judgement dated November 5, 2019; and all consequential orders.

    iii. That the honourable court do grant the 2nd defendant stay of execution of orders arising from the said judgment.

    iv. That the honourable court do grant an opportunity to the 2nd defendant /applicant to defend the suit herein for determination on merit.

    v. Costs of this application be provided for.

2. The instant application is anchored and premised on the grounds which have been alluded to in the body thereof. Besides, the instant application is supported by the affidavit of the 2nd defendant/ applicant sworn on even date.

3. Upon being served with the instant application, the plaintiff herein filed a replying affidavit sworn on the October 24, 2022 and in respect of which the plaintiff/respondent stated *inter-alia*, that the 2nd defendant/applicant was duly and effectively served with the requisite summons to enter appearance *vide* substituted service in terms of the court orders that were issued on the September 26, 2014.

4. Other than the plaintiff/respondent, the 1st defendant/respondent also filed a replying affidavit sworn on the October 24, 2022 and in respect of which the 1st defendant/respondent, essentially supported the application by the 2nd defendant/applicant.

5. In this regard, even though the said affidavit is christened and titled as a replying affidavit, same however, replicates and resembles a supporting affidavit, save that it has been filed by the adverse party.

6. Nevertheless, it is imperative to state and underscore that the instant application came up for direction on the December 7, 2022, as pertains to the manner in which same was to be canvassed and ventilated. For clarity, the advocate for the respective parties agreed to canvass and ventilate the instant application by way of written submissions.

7. In line with the agreement by and at the instance of the advocates for the respective parties, the honourable court proceeded to and directed that the parties do file and exchange their respective written submissions.

8. Additionally, it is appropriate to underscore that the advocates for the parties thereafter complied with and adhered to the terms of the court order; and duly filed the requisite written submissions.

Submissions By The Parties

a. Applicant's submissions

9. The applicant filed submissions dated the January 9, 2023 and in respect of which the learned counsel for the applicant has isolated, highlighted and amplified three issues for consideration.

10. First and foremost, learned counsel for the applicant has submitted that the applicant herein was neither served nor notified of the existence of the instant suit or at all.

11. Furthermore, learned counsel has added that to the extent that the applicant was never served with the summons to enter appearance and plaint, it was therefore not possible or practicable for the applicant to enter appearance and file a statement of defense to and in opposition to the instant suit.

12. In addition, learned counsel has contended that insofar as the requisite summons to enter appearance and plaint were not served or properly served upon the applicant, it is therefore imperative that the resultant judgment, which was entered by the honourable court was an irregular judgment and thus ought to be set aside as a matter of right, (read, ex-debito justitae)

13. Other than the foregoing, learned counsel for the applicant has made alternative submissions to the effect that the summons to enter appearance having been served vide substituted service, same did not come to the attention and knowledge of the applicant or at all.

14. Furthermore, learned counsel has contended that the applicant herein does not buy newspapers, on a daily basis and hence same did not come across the impugned advertisement or better still, get to know of same, in good time to enable her to enter appearance and file statement of defense, or take other necessary steps in the matter.

15. Be that as it may, learned counsel for the applicant has submitted that either way, the honourable court is seized and vested with the requisite jurisdiction and discretion to set aside, vary and or rescind, any

default judgment and thereafter afford the applicant an opportunity to be heard on the merits of his/her case.

16. Secondly, learned counsel for the applicant has submitted that the applicant herein has a *bona fide* and triable defense, which ought to be canvassed and ventilated before the court, prior to and before judgment can be passed.

17. Nevertheless, learned counsel has added that insofar as judgment has since been entered, the applicant herein shall not be able to ventilate and canvass her defense before the honourable court, unless the impugned judgment is duly set aside and/or vacated.

18. In respect of the submissions that the applicant has a bona fide and triable defense, learned counsel has invited the attention of the honourable court to the decision in the case of *Giciem Construction Ltd v Amalgamated Trade & Service* LLR No 103 CAK and *Olympic Escort International Company Ltd & 2 others v Parminder Singh Sondhu & another* (2009)eKLR.

19. Thirdly, learned counsel has submitted that the right to hearing is key and fundamental and that it behooves the honourable court to afford the 2nd defendant/applicant an opportunity to be heard. In this regard, learned counsel has added that unless the applicant is granted the requisite opportunity to be heard, same shall have been driven away from the seat of justice and by extension condemned unheard.

20. Additionally, learned counsel for the applicant contended that the honourable court has unfettered and unlimited discretion to set aside and vacate a default judgment, on such terms as the court may deem fit, just and expedient.

21. Furthermore, counsel added that whilst exercising the discretion conferred upon the court, it behooves the court to take into account *inter-alia*, the interest of the parties and the need to have the matter determined on merits, as opposed to technicality.

22. To this end, learned counsel cited and quoted the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75, *Gladys Chpepkosgei Boss v Star Publication Ltd* (2021)eKLR and *Mercy Karimi Njeri & Another v Kisima Real Estate Ltd* (2015)eKLR.

23. In a nutshell, learned counsel for the applicant implored the honourable court to find and hold that the applicant has established her case to the requisite standard and hence the default judgment ought to be set aside, vacated and rescinded.

b. Plaintiff's/respondent's submissions

24. The plaintiff filed written submissions dated the February 7, 2023 and in respect of which the plaintiff/respondent has similarly identified, highlighted and amplified three salient issues for due consideration by the court.

25. First and foremost, learned counsel for the plaintiff/respondent has submitted that upon the filing and lodgment of the instant suit, the plaintiff duly extracted and obtained the summons to enter appearance for purposes of service upon the defendants.

26. Furthermore, learned counsel for the plaintiff/respondent has contended that upon procuring and obtaining the summons to enter appearance, the plaintiff/respondent made diligent efforts to trace the 2nd defendant/applicant, with a view to effecting service of the summons to enter appearance upon her.

27. Nevertheless, counsel has added that despite diligent efforts to serve the summons to enter appearance upon the 2nd defendant/applicant, same were unable to effect personal service.

28. Premised on the foregoing, learned counsel has submitted that the plaintiff/respondent was thereafter constrained to and reverted to court with an application dated the March 24, 2014, wherein the plaintiff/respondent sought to be granted liberty to serve the summons to enter appearance by substituted means.

29. In addition and for completeness, counsel submitted that the said application was heard and allowed/ granted by the honourable court *vide* orders issued on the September 26, 2014.

30. On the other hand, learned counsel has contended that thereafter the plaintiff/respondent proceeded to and advertised service in the Standard Newspaper of the November 4, 2014.

31. In view of the foregoing, learned counsel for the plaintiff/respondent has therefore submitted that the 2nd defendant/applicant was duly and properly served with the summons to enter appearance. For clarity, counsel has invited the court to take cognizance of the provisions of order 5 rule 17(2) of the *Civil Procedure Rules 2010*.

32. Secondly, learned counsel for the plaintiff/respondent has submitted that even though the honourable court is vested with the requisite discretion to set aside, vary and/or rescind a default judgment, such discretion can only be exercised judiciously and on the basis of good reason.

33. However, in respect of the instant matter, learned counsel for the plaintiff/respondent has submitted that no such good reason or explanation has been tendered or better still, placed before the honourable court, to warrant the exercise of the discretion in favor of the applicant.

34. Thirdly, learned counsel for the plaintiff/respondent has submitted that the instant application by and at the instance of the 2nd defendant/applicant has been filed and mounted with inordinate and unreasonable delay, taking into account that the judgment sought to be set aside was entered and delivered on the November 5, 2019.

35. Owing to the length of time that has been taken by the 2nd defendant/applicant prior to and or before the filing of the instant application, learned counsel for the plaintiff/respondent has therefore submitted that the current application is defeated by the doctrine of latches.

36. Additionally, learned counsel for the plaintiff/respondent has also submitted that the defendant/ applicant has not tendered or availed any defense exhibiting *bona fide* and triable issues or at all. in this regard, learned counsel has contended that in the absence of a *bona fide* and triable defense, the intended exercise of discretion would be in vain and shall serve no useful purpose.

37. Finally, learned counsel for the plaintiff/respondent has also contended that the intended setting aside of the judgment that was entered by the honourable court shall occasion undue prejudice and detriment to the plaintiff, taking into account that the instant suit was filed in the year 2013.

38. In support of the various submissions, details which have been alluded to in the preceding paragraphs, learned counsel for the plaintiff/respondent cited and relied on various decisions *inter-alia*, *James Kanyita Nderitu & another v Marius Phillotas Chikas & another* (2016)eKLR, *Elizabeth Kavere & Another v Lilian Athoo & Another* (2020)eKLR, *Noniko Holdings Ltd & 2 others v Atticon Ltd & 5 others* (2020)eKLR, *Daniel Kimani Njiha v Francis Mwangi Kimani & another* (2015)eKLR and *Nicolas Kiptoo Arap Korir Salat v IEBC & 6 others* (2013)eKLR, respectively.

39. Based on the foregoing, learned counsel for the plaintiff/respondent has impressed upon the court to find and hold that the 2nd defendant/applicant is therefore not deserving of the orders sought and essentially, the setting aside of the judgment which was delivered by the court.

c. 1{{^st}} defendant's/respondent's submissions

40. The 1st defendant filed written submissions dated the February 7, 2023 and in respect of which same has raised and highlighted two issues for consideration by the court.

41. Firstly, learned counsel for the 1st defendant/respondent has submitted that though the plaintiff/respondent was lawfully allocated the suit property, same however failed to pay the various rates to and in favor of the 1st defendant/respondent.

42. In addition, learned counsel for the 1st defendant/respondent has submitted that as a result of the failure to pay the requisite rates, as and when due, the 1st defendant/respondent was compelled to and indeed repossessed the suit plot.

43. In the premises, learned counsel for the 1st defendant/respondent has therefore submitted that based on the repossession of the suit property, the 1st defendant/respondent therefore has a bona fide a triable defense which should also be considered by the honourable court.

44. Secondly, learned counsel for the 1st defendant/respondent has submitted that upon the repossession of the suit property, the 1st defendant/respondent auctioned and sold the suit property to and in favor of the 2nd defendant/applicant.

45. As a result of the foregoing, learned counsel for the 1st defendant/respondent has therefore contended that the 2nd defendant/applicant herein, therefore acquired and hence has valid rights and interests to and in respect to the suit property.

46. In view of the foregoing, it is the contention by counsel for the 1st defendant that the 2nd defendant/applicant therefore has a *bona fide* and triable defense, which ought to be interrogated and investigated by the honourable court in the conventional manner.

47. Furthermore, learned counsel for the 1st defendant/respondent, has also submitted that the 1st defendant/respondent was similarly not served with the summons to enter appearance and plaint. Consequently, it was contended that the entry of the impugned judgment has also prejudiced the 1st defendant.

48. In a nutshell, counsel for the 1st defendant/respondent, has supported the application by and at the instance of the 2nd defendant/applicant and has essentially implored the court to set aside the impugned default judgment.

Issues For Determination

49. Having reviewed the notice of motion application dated the September 22, 2022, the supporting affidavit thereof and having reviewed the replying affidavits filed on behalf of the plaintiff/respondent and the 1st defendant/respondent, respectively; and having duly considered the written submissions filed by and on behalf of the parties, the following issues do arise and are thus worthy of determination;

    i. Whether or not the 2nd defendant/applicant was duly served with the summons to enter appearance and the consequential court process.

    ii. Whether or not the impugned judgment is a regular judgment and if so, whether the 2nd defendant/applicant has established sufficient basis to warrant the setting aside, variation and/or rescission of the impugned judgment.

iii. Whether the 2nd defendant/applicant has exhibited or displayed a *bona fide* and triable defense, if at all.

Analysis And Determination

Issue number 1

Whether or not the 2nd defendant/applicant was duly served with the summons to enter appearance and the consequential court process.

50. The current application by and at the instance of the 2nd defendant has been mounted and predicated on the basis that the 2nd defendant/applicant was never served with any summons to enter appearance or court process pertaining to and concerning the subject matter at all.

51. Furthermore, the 2nd defendant/applicant has contended that same only came to know of the existence of the subject suit and the consequential judgment when she was called by a gentleman, namely, Patrick, who lives and resides on plot number D-436.

52. In addition, the 2nd defendant/applicant has further contended that the said Patrick informed her that same (Patrick) had received information about the subject suit and by extension a decree issued by the honourable court, from the chief.

53. On the other hand, the applicant has also contended that upon receipt of the information which was relayed unto her by (sic) Patrick, same proceeded to and retained the services of her current advocate with a view to perusing the court file and advising her on the appropriate way forward.

54. It has become imperative and necessary to rehash the position taken by the 2nd defendant/applicant, (in terms of the preceding paragraphs), because the said position is important in seeking to unlock the claims by and on behalf of the applicant.

55. On the other hand, it is also imperative to state and underscore that upon being served with the instant application, the plaintiff/respondent duly filed a replying affidavit and in respect of which same illustrated how summons to enter appearance were duly and effectively served upon the 2nd defendant/applicant.

56. Be that as it may, I beg to state the despite being served with the elaborate replying affidavit by and on behalf of the plaintiff/respondent, the 2nd defendant/applicant never filed any further affidavit, to challenge and/or controvert the various averments contained in the plaintiff's replying affidavit.

57. In particular, the 2nd defendant/applicant did not controvert and or challenge the averments that same was duly and properly served with summons to enter appearance by way of substituted service. Consequently and in this regard, there is no gainsaying that the issue of service is not contestable.

58. Additionally and for good measure, I hasten to state that where service is effected by way of substituted means, such service, constitutes effective and proper service in eyes of the law.

59. To this end, it is appropriate to recall and take cognizance of the provisions of order 5 rule 17(2) of the *Civil Procedure Rules 2010* whose terms are pertinent. Consequently, the named provisions are reproduced as hereunder;

> 17. Substituted service [order 5, rule 17.]
>
> (1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this order, the court may on

application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.

60. My understanding of the foregoing provisions of the law, is that once the service is duly advertised, as was done in respect of the subject matter on the November 4, 2014, it is deemed that the named person became aware of and knowledgeable of the said service.

61. In the premises, it cannot lie in the mouth of the 2nd defendant/applicant to contend that same was never served with the summons to enter appearance, together with the consequential court process. In any event, the contention that same was never served with summons to enter appearance, despite the obtaining evidence, falls flat.

62. In a nutshell, I come to the conclusion that the 2nd defendant/applicant was duly and properly served with the summons to enter appearance in accordance with the prescription of the law and in compliance with lawful court orders issued on the September 26, 2014.

Issue Number 2

Whether or not the impugned judgment is a regular judgment and if so, whether the 2nd defendant/applicant has established sufficient basis to warrant the setting aside, variation and/or rescission of the impugned judgment.

63. Having found and held that the 2nd defendant/applicant was duly and lawfully served with the summons to enter appearance and the court process, the question that then arises is whether the resultant judgment was regular or otherwise.

64. To the extent that the 2nd defendant was duly served with summons to enter appearance vide substituted means and in line with lawful court orders, there is therefore no gainsaying that the resultant processes, proceedings and judgment, if any, were therefore regular and lawful.

65. In the premises, I find and hold that the impugned judgment, which the 2nd defendant/applicant is seeking to set aside, vary and or rescind, is indeed a regular judgment.

66. The next question that does arise; is whether the honourable court is seized and vested with the requisite mandate or better still discretion, to set aside and/or vary a default judgment.

67. Without belaboring the point, it is imperative to state and underscore that until and unless the court has heard and determined a dispute on merits, the court is bestowed with residual and inherent powers (read discretion) to set aside, vary and/or recall any such default Judgment or orders.

68. Nevertheless, it must not be lost on the court that even though same is conferred with and vested with the requisite discretion, such discretion must be exercised judiciously and on the basis of sufficient cause, reason and explanation.

69. Put differently, it is imperative to underscore that the discretion conferred upon the court, for purposes of setting aside, varying and rescinding a default judgment, must not be exercised arbitrarily, capriciously or whimsically. In this regard, the court ought not to act on the basis of sympathy or empathy.

70. To underscore the foregoing observation, it is appropriate to adopt, restate and reiterate the holding of the Court of Appeal in the case of *James Kanyita Nderitu v Maries Philotas Ghika & another* [2016] eKLR where it was held:

> " We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearances or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such as the reason for the failure of the defendant to file his Memorandum of appearance or defence, as the case may be, the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer (see *Mbogo & another v Shah* (supra); *Patel v EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004]1 KLR 173).
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> In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiciae, 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.
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> The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General* [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh v Election Tribunal*, Kotch, AIR 1955 SC 664, at 711:
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> "There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not precluded from participating in them."

71. Having taken into account the observation and holding by the honourable Court of Appeal, as enunciated/demonstrated in the decision (supra), it is now worthy to return home and deal with the issue in respect of the instant matter.

72. Firstly, there is no gainsaying that the current application has been mounted and made well after two years from the date when the impugned judgment was delivered and pronounced.

73. Having filed and lodged the current application approximately two years from the date of delivery and pronouncement of the judgment, it behooved the applicant to explain to the court the reasons belying the delay and/or lateness in mounting the application.

74. However, I beg to point out that despite the length or longevity of delay, between the time of delivery of the impugned judgment to when the current application was filed, the 2nd defendant/applicant has not found it appropriate, just and expedient to offer any iota/scintilla of explanation or at all.

75. In the absence of any explanation underlining the delay, it is left for the court to draw an inference. In this regard, I am compelled to observe and hold that the reason why no explanation has been tendered, is because (sic) none exists.

76. Secondly, the applicant herein was under an obligation to show the reason why the matter was left to proceed to judgment, without any defense or steps being taken. Yet again, no reason was availed, other than the contention that same was not served, which I have addressed elsewhere hereinbefore.

77. To the contrary, the reason which was offered was to the effect that the 2nd defendant/applicant was never served with summons to enter appearance. However, in this respect, I must point out that the issue of service has since been addressed by the court elsewhere herein before.

78. In view of the foregoing consideration, I come to the conclusion that the 2nd defendant/applicant has neither established nor proved any sufficient cause, basis and/or reason to warrant the invocation and exercise of equitable discretion in her favor.

79. Furthermore, what is evident and apparent is that the 2nd defendant/applicant adopted a care free, lacklustre and (sic) perfunctory approach in respect of the subject matter.

80. No wonder, even though the 2nd defendant/applicant states that same was informed about the existence of the subject suit and the consequential decree by one, namely Mr Patrick, same has not found it fit to procure an affidavit from the said Patrick to justify that indeed that was the time that she (read, the 2nd defendant) got to know the existence of the subject suit/proceedings.

81. In addition, it is also imperative to note that the 2nd defendant/applicant has similarly not procured and obtained any affidavit from (sic) the chief, who is said to have passed the information pertaining to the current suit and the consequential decree to (sic) Patrick.

82. Either way, it was incumbent upon the 2nd defendant/applicant to endeavor to and thereafter place before the court credible material to enable the court to ascertain and discern that the failure to defend the subject suit was not informed by the negligence, inaction or intentional and deliberate lapse on the part of the 2nd defendant/applicant.

83. Be that as it may, I must add that where the default or failure to defend a suit/court proceedings is informed by negligence, inaction or intentional conduct, which is calculated to defeat, obstruct or delay the court process, then a court of law cannot aid a party who is adjudged to be guilty of such inaction/negligence.

84. To this end, I hasten to take cognizance of the holding in the case of *Johnson Home Gichuhi & another v Isaac Gathungu Wanjohi & 5 others* Nairobi Civil Appeal No 335 of 2017 (unreported), where the Court of Appea stated and held as hereunder;

> We are in agreement with the decision in *Registered Trustees of the Archdiocese of Dar es salaam v The Chairman Bunju Village Government & others* from the Tanzania Court of Appeal followed by Mativo, J in *Stephen Gathu Kimani v Nancy Wanjira Waruinge T/A*

Providence Auctioneers (supra), that a party can only talk of substantial justice where "no negligence, or inaction or want of *bona fide*" can be imputed upon him. The appellants herein have been indolent and have not exhibited any urgency in bringing this litigation to conclusion.

85. At any rate, there is also no gainsaying that a party who is keen to procure and obtain equitable discretion of the court must move with due diligence and necessary urgency. In this regard, the import and tenor of article 159 2(b) of the *Constitution* are paramount and imperative.

86. Furthermore, the necessity to approach the court with due diligence and necessary haste has also received judicial pronouncement, vindication and enunciation in the case of *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR where the honorable Court of Appeal stated as hereunder;

> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation.

87. In view of the foregoing considerations, it is my humble view that the 2nd defendant/applicant has neither met nor satisfied the requisite threshold to warrant the exercise of discretion in her favor and by extension the grant of the impugned application.

Issue Number 3

Whether the 2nd defendant/applicant has exhibited or displayed a bona fide and triable defense, if at all.

88. Other than the need and necessity to explain the reason why the matter was left to proceed undefended, (which has been dealt with in the preceding paragraph) and in any event which the 2nd defendant has failed to muster, it was also incumbent upon the 2nd defendant/applicant to exhibit that same has a triable defense.

89. Suffice it to point out that the 2nd defendant/applicant contends that same bought and acquired the suit property from an auction, after the same (suit property) was repossessed by the 1st defendant/respondent.

90. In the premises, the propriety and validity of the 2nd defendant/applicant claim to and in respect of the suit property, would depend on the legitimacy/propriety of the process of repossession that was commissioned and undertaken by the 1st defendant.

91. Be that as it may, I beg to state that the 1st defendant herein had previously filed a similar application to set aside the judgment herein, *inter-alia*, on the basis that same had a bona fide and triable defense. For clarity, the 1st defendant had anchored their application for setting aside on (sic) the fact that the suit property was lawfully repossessed.

92. However, it is worth noting that the honourable court (differently constituted) dismissed the application and essentially confirmed the default Judgment.

93. The question that then arises is whether there can arise a bona fide and triable defense on the part of the 2nd defendant/applicant, if the repossession of the suit plot was irregular and faulty.

94. In my humble view, the moment the court declined and dismissed the application by and on behalf of the 1st defendant/respondent, which had hitherto sought to impugn the default judgment, then the semblance of a triable issue, (sic) premised on the lawful acquisition of the suit property, dissipated in this air.

95. Consequently and in the premises, I am afraid that the statements contained and alluded to in the draft statement of defense, do not exhibit any triable issue when juxtaposed against the totality of the evidence and the various court orders hitherto made in the subject file.

96. Notwithstanding the foregoing, I must point out that I am alive to the fact that a triable issue is not one that will ultimately succeed. However, in assessing and ascertaining whether an issue is triable or otherwise, the honourable court is called upon to form an opinion on the impugned issues, albeit on a *prima facie* basis and not otherwise.

97. Without belaboring the point, what constitutes and amount a triable issue was elaborated upon and underlined in the case of *Patel v E A Cargo Handling Services Ltd* (1974) EA 75 at page 76, where the court held as hereunder:

> " The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.
>
> In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

98. In a nutshell, I am not persuaded that the 2nd defendant/applicant has exhibited or established a *bona fide* and triable issue to warrant interrogation and investigation during a plenary hearing, subject to setting aside the impugned judgment.

99. In short, even if the 2nd defendant/applicant had surmounted the hurdle pertaining to establishing a sufficient cause, basis and/or reason, (which is not the case), I would still not have been persuaded to set aside or impugn the judgment on the basis of the existence of (sic) a *bona fide*/triable issue.

Final Disposition

100. Having duly evaluated and analyzed the issues for consideration, which were isolated and itemized herein before, I come to the conclusion that the instant application is not meritorious.

101. Consequently and in the premises, the application dated the September 22, 2022, be and is hereby dismissed with costs to the plaintiff/respondent.

102. In addition, it is imperative to state that the previous interim orders, which were issued on the September 26, 2022, are now spent. Consequently and in this regard, same be and are hereby vacated and discharged.

103. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Ms. L Magotsi h/b for Mrs. Kethi Kilonzo for Plaintiff/Respondent.

Ms. Karanja h/b for Mr. Osoro Juma for the 2nd Defendant/Applicant.

N/A for the 1st Defendant/Respondent.