



Astoria Park Limited v Ngumbao & 3 others; Ali (Intended Defendant) (Environment & Land Case 15 of 2016) [2025] KEELC 3381 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3381 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 15 OF 2016**

**EK MAKORI, J
APRIL 24, 2025**

BETWEEN

ASTORIA PARK LIMITED PLAINTIFF

AND

NASIB NGUMBAO 1ST DEFENDANT

WILSON KEMENWA MUDOME 2ND DEFENDANT

WILLIAM CHIBUTE NDUNE 3RD DEFENDANT

NICKSON KITSAO CHARO 4TH DEFENDANT

AND

SHAHAME HAMISI ALI INTENDED DEFENDANT

RULING

1. The intended 5th Defendant/ Applicant herein filed a Notice of Motion dated 20th September 2024, primarily seeking the following orders, which will form the basis of the determination of this application:
 - a. That pending the hearing and determination of the application inter partes, an order to stay the execution of the judgment/decree issued on 15th January 2019 be granted.
 - b. The court will be pleased to set aside the judgment/decree issued on 28 February 2018 and that the 5th intended Defendant be joined as a Defendant in the suit, with leave to file a statement of Defence out of time.
 - c. That the costs of this application be provided for.



2. The Applicant alleges that vide a Notice of Intention to allocate Land dated 9th January 2019, the National Land Commission commenced the squatter settlement program for the properties known as LR NO.MN/III/336, and LR NO.337, Parcel NO. MN/III/1611 falls within parcel 337 as it was a parcel MN/III//313 subdivision.
3. The Applicant further alleges that a survey was conducted, and the squatters were granted plot numbers and are now awaiting the issuance of certificates of title.
4. The Respondent avers that it is the legal owner of the suit property No. 1611/III/MN.
5. Parties to the suit filed written submissions on the issues raised in the application, citing relevant statutory provisions and case law to guide the court.
6. It should be noted that this court (Olola J.) delivered judgment on 22nd February 2018 (seven years ago), and that judgment is annexed to the Respondent's replying affidavit. In that judgment, his Lordship recognized the Respondent's title to the suit properties and the need to protect that title. The case is reported as *Astoria Park Limited v Wilson Kemenwa Mudome & 2 others* [2018] KEELC 4508 (KLR).
7. The Applicant is of the view, and rightly so, that the law regarding the setting aside of a judgment is not in doubt. It involves the exercise of judicial discretion. The court has broad discretion to set aside a judgment. However, like all discretions, this discretion must be exercised judiciously.
8. The principles guiding the exercise of that discretion have crystallized over time, as stated in the leading decisions - *Patel v E.A. Cargo Handling Services Ltd* [1974] EA 75, and *Prime Bank Ltd v Paul Otieno Nyamodi* [2014] eKLR. These principles ensure the fairness and impartiality of the legal process. The court has discretion to set aside a judgment upon the Applicant fulfilling the following conditions: The Applicant must provide a reasonable or plausible explanation for why the defense on merits was not filed within the prescribed period.
9. The Applicants believe that, being affected by the current judgment and facing imminent eviction for themselves and over 100 other residents residing on the subject property, the current judgment should be set aside. They should be allowed to file defenses and join the NLC and the County Government of Kilifi, which are taking the lead in squatters' settlements. In this regard, the Applicants have cited the decision in *JMK v. MWM & Another* [2015] eKLR, which enunciated that: once a judgment affects a party directly, it will be in breach, not only of the law, but also of *the Constitution* in so far as it condemned a party without an opportunity to be heard and in violation of the right to a fair hearing guaranteed by Article 50 (1) of *the Constitution*.
10. On the one hand, the Respondent submits that the Applicant cannot be joined in law or principle in this matter. This court has been rendered functus officio, and since the case has been heard and adjudicated, it cannot be reopened – see Order 1 Rule 10 of the Civil Procedure Rules, which provides that a party may be joined to a suit at any stage of the proceedings. The implication here (read - according to the Respondent) is that a party may be joined in a suit during the pendency of that particular suit and not after the suit has been concluded and judgment delivered. See *Telkom Kenya Limited v John Ochanda & 996 Others* [2015] eKLR, where the Court of Appeal in Kenya held:

“The doctrine of functus officio is meant to preserve the finality of judicial decisions. Once a decision is made, the court lacks jurisdiction to reopen the matter except where the law allows for review or appeal.”



11. Similarly, in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* [2021] eKLR, the court stated:

“ Court of Appeal held that structural interdicts were “unknown to Kenyan law” because, in their view, “delivery of a judgment renders a trial court functus officio.”
12. Respondent's submission is that since this court became functus officio after rendering judgment on 22nd February 2018, the Applicant cannot be joined in a concluded matter. The Court must uphold this principle to ensure the finality and stability of judicial decisions. Therefore, entertaining this application would be a mere abuse of the court process, fatally defective, and bad in law.
13. I agree with the Respondent that joining the Applicants in this matter would be late in the day. While the joinder of a party can occur at any stage of the proceedings, even post-judgment, the substratum of the suit between the parties in the judgment by Olola J. is quite different. In the judgment rendered by his Lordship, he recognized that the Respondent had title to the suit properties, and that title needed to be protected.
14. The scenario now presented by the Applicant is that the same land has been allocated to them and others under a resettlement program without considering the process of acquiring the title held by the Respondent. It is important to note that the NLC and the County Government of Kilifi are involved in this process, as they are responsible for settling squatters, including the Applicant. However, it is the court's responsibility to ensure that this process does not infringe on the rights of the Respondent. I agree with the Respondent that the NLC could not have issued the Applicant and others new certificates of title. The suit property remains private property, which is still owned and registered in the name of the Respondent, according to the attached supplementary affidavit and the search dated 29 January 2025.
15. The NLC could not have surveyed, divided, and issued a new certificate of titles without informing the registered owners or revoking their titles at the Land Registry, in accordance with Section 14(5) of the *National Land Commission Act*, 2012, while undertaking a review of grants and dispositions of public land to establish their legality. If a title is found to have been acquired unlawfully, the NLC can direct the Registrar to revoke the title, and such revocation must be in accordance with due process of law.
16. Under the *Land Registration Act*, 2012, Section 26(1) states that a certificate of title is considered prima facie evidence of ownership; however, it can be challenged on grounds of fraud, misrepresentation, or if it was acquired illegally, procedurally, or through a corrupt scheme.
17. Section 79(2) of the Act allows the Registrar to rectify the register or cancel a title if it is determined that the title was acquired or the registration was made by fraud or mistake.
18. Further, under the *Land Act*, 2012, Section 14(1) mandates that before the NLC can allocate public land, it must ensure that the land is not subject to any private rights and that due process is followed.
19. These provisions underscore the necessity for the NLC to follow due process, including notifying registered owners and adhering to legal procedures, before making any changes to existing land ownership. Unilateral actions without following due process would be contrary to these statutory requirements.
20. See also the decision quoted by the Respondent, which I agree with - *Mwanaongoro & 8 others v National Land Commission & another* [2024] eKLR. The court emphasized the necessity for the National Land Commission (NLC) to adhere to due process when dealing with registered landowners. Specifically, the court noted that the NLC had not informed the plaintiffs about the withdrawal of



a demolition notice concerning their properties, and the landowner had not been informed of the cancellation/revocation of their title.

21. This underscores the requirement that the NLC notify registered owners before taking actions that affect their property rights. The current suit—even if reopened—will not address the two warring processes.
22. In conclusion, reopening this matter will not resolve the web of intricacies that will arise if setting aside and joining other parties is allowed. It will complicate the matter further.
23. I believe a different forum will be required to encompass all the affected parties since, on one hand, we have a lawful judgment that has not been overturned and a process carried out by NLC on the other hand, undertaken under its constitutional and statutory mandate that this suit will not address.
24. Looking at the proceedings, I can see this court (Olola J.) declined an application to stay the enforcement of the current judgment and join other affected parties on October 2, 2020. If I get the Applicant correctly, reopening will mean that the other parties will most likely want to be brought on board – a further convolution.
25. Considering the suit's long-changed substratum, the joinder of parties and setting aside judgment will not be the remedy but a conundrum since we have a totally new cause of action.
26. Consequently, the application dated 20th September 2024 is hereby dismissed with costs to the Respondents.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 24TH DAY OF APRIL 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Chege H/B for Mwanzia, for the Applicant

Ms. Kinuva H/B for Gakuo for the Respondent

Court Assistant: Happy

