



**Chairperson, Secretary and Treasurer of Diani Scheme Resource
Centre CBO v Thiga (Environmental and Land Originating Summons
E008 of 2023) [2025] KEELC 3310 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2023**

LL NAIKUNI, J

APRIL 8, 2025

BETWEEN

**THE CHAIRPERSON, SECRETARY AND TREASURER OF DIANI SCHEME
RESOURCE CENTRE CBO RESPONDENT**

AND

WALLACE MUNGAI THIGA APPLICANT

RULING

I. Introduction

1. This Honourable Court was tasked to make a determination of the Notice of Motion application dated 18th December 2024 which is the subject of this ruling. It was filed by Wallace Mungai Thiga, the Applicant herein. It was brought pursuant to the provisions of Order 51 Rule 1, Order 10 Rule 11, Order 12 Rule 7, Order 1 Rule 3 and 9, Order 40 Rules 1, 2, 3 and 10; Order 50 Rule 6 of the Civil Procedure Rules, 2010 and Sections 1A,1B and 3A of the *Civil Procedure Act*, Cap. 21 and all other enabling provisions of the law.
2. The application was opposed by the Respondent through a Replying Affidavit dated 28th February 2025 sworn by Mwafumbiri Matatizo the Chairman to the Respondents. The Honourable Court shall be dealing with it in depth at a later stage of this Ruling hereof.

II. Applicant's Case

3. The Applicant sought for the following prayers:-
 - a. Spent.
 - b. That this Honourable Court allow the Respondent/Applicants Advocate to come on record after Judgement was entered against the Respondent/Applicant.



- c. That the Honourable Court be pleased to set aside the Ex - Parte Judgement entered against the Respondent/Applicant on 27th September 2024 and decree issued on 1st October 2024 upon such terms as are just.
 - d. That the Respondent/Applicant be granted leave to file his Replying Affidavit in response to the originating summons out of time
 - e. That the person known as John Kamau Kibe be joined as the Respondent in this suit in his capacity as the registered owner of Kwale/Diani S.S/5190
 - f. That this honourable court be pleased to issue a temporary injunction restraining the Applicant/Respondent from alienating, wasting or dealing with the Kwale/Diani/ S.S/5189 and Kwale/Diani S.S/5190 [hereinafter referred to as the “suit properties” in any manner whatsoever pending the hearing and determination of this application and issue leave to register the said order against the current titles to the suit properties that may have already been issued to the Applicant/Respondent.
 - g. That this honourable court be pleased to issue a temporary injunction restraining the Applicant/Respondent from alienating, wasting or dealing with the suit properties in any manner whatsoever pending the hearing and determination of this suit.
 - h. That this honourable court be pleased to grant orders for preservation of the suit properties to prevent any further invasion into the suit property and inspection to establish the number of invaders on the suit property pending both the hearing and determination of this instant application and suit.
 - i. That upon setting aside the Judgement entered on 26th September 2024 and the consequential Decree through which orders were issued on 1st October 2024 and allowing Mr. Kibe to be a party in this instant suit that this court be pleased to consolidate Kwale ELCLC E061 of 2024 with this suit as it arose from the same cause of action to enable this court to hear and determine appropriate reliefs sought by parties being that of eviction orders and adverse possession orders all emanating from the same suit properties.
 - j. That costs of this application be provided for
4. The application is premised upon grounds, testimonial facts and the averments made out under theParagraphed supporting affidavit sworn by Wallace Mungai ThigA and dated 18th December 2024 together with nine (9) annextures marked as “WMT - 1 to 9” annexed thereto. He averred as follows that:-
- a. He was the immediate former registered owner of the suit properties known as Kwale/Diani S.S/5190 and Kwale/Diani S.S/5189 upto until November 2022 or thereabouts.
 - b. He had previously acquired the suit properties as one property previously known as Kwale/ Diani S.S/466 from its first owner Veronica Kibe after he had paid for her husband’s medical bills the previous year. And acquired good title to the land. Annexature marked as “WMT – 1 & 2” were copies of the transfer of land and title deed issued on 19th February 2014.
 - c. The reason why it took long for the land to be registered was that a caution had been placed on the same but eventually the same was lifted.



- d. He had taken possession of the suit property as it then was and requested the services of a Land surveyor for boundary identification for the suit property to enable her fence off the land as per letter marked as “WMT - 4” was a copy of the boundary identification.
 - e. Sometime on 15th August 2015 the Applicant learnt that the fence earlier erected had been demolished by unknown people.
 - f. Mr. John Kibe confirmed to the applicant that several attempts had been made by squatters to invade the land and to revoke the titles but the attempts had failed. The applicant stated that he had sold part of the suit property to Mr. John Kibe and the sale led to subdivision of the suit property to two portions.
 - g. Mr. Kibe upon going to follow up on eviction orders against the squatters established that vide an ex - parte Judgement by this court the respondents had cancelled the Applicants title as proprietors of the suit property and had been issued with title over the suit property.
 - h. The ex - parte Judgement entered on 27th September 2024 and the decree dated 1st October 2024 were obtained irregularly on false information and ought to be set aside.
 - i. The Applicant was never served with summons to enter appearance or the originating summons and the right to fair hearing was thus curtailed.
 - j. Further that the Respondent deliberately left out Mr. John Kibe who was the registered owner of Kwale/Diani S.S/5190 from 10th November 2022.
 - k. Thus, he applied to be granted the temporary injunction orders sought restraining the Defendants herein.
5. Additionally, the application was also supported by the averments the 18 Paragraphed supporting affidavit by Mr. John Kamau Kibe sworn and dated 18th December 2024. It was together with six (6) annexures marked as “JKK – 1 to 6” annexed hereto. He averred as here below that:-
- a. He had been the registered owner of suit parcels Kwale/Diani S S/5476, 5477, 5478, 5479, 5480, 5481, 5482, 5483, 5484, 5485, 5486 and 5487 which were all sub divisions of parcel no Kwale/Diani S.S/5190 a sub - division of Kwale/Diani S S/466.
 - b. The deponents late mother Veronica Njeri Kibe had acquired the property Kwale/Diani S.S/466 and the title to the same on or about 25th October 1993 after she paid the settlement fund trust for transfer of the property.
 - c. On 20th July 2012 the deponents late mother received a letter from the advocate representing Gandakala Welfare Association the 2nd Defendant in Kwale ELC E061 of 2024 through Malalani Community which asked that the deponents mother surrenders the title to the suit property alleging that the same had been allocated wrongly by the deponent’s father who was a land adjudication officer in year 1992.
 - d. The land was initially public land registered as Kwale/Diani S.S/337 and had been converted to Kwale/Diani S.S/466.
 - e. Members of the Malalani Community had been occupying some of the properties in Diani Settlement Scheme and have refused to vacate the properties resorting to violence.
 - f. A caution had been registered by one Salim Ali Nyawa over the suit property but the same was removed prior to transfer of the land to the applicant Wallace Mungai Thiga.



- g. The Applicant Wallace Mungai Thiga owned the property from 8th June 2022 and applied for consent to have the same subdivided to Kwale/Diani SS/5189 and 5190. The deponent then acquired the land in November 2022 for valuable consideration.
- h. The deponent averred that he took possession of the land but later in November 2022 discovered the invasion of the Malalani Community. That in order to prevent further invasion he sought for the subdivision of Kwale/Diani SS/5190 to new numbers and titles.
- i. The local administration had been involved in resolving the trespass by the Malalani Community and further the filing of Kwale ELC No. E061 of 2024.
- j. The deponent was shocked to learn about the adverse possession orders issued and stated that the same was based on a false narrative.
- k. The Deponent sought to be granted the orders sought from the application herein.
- l. The Respondents would not be prejudiced in the event that the orders sought were granted.

III. The Respondents Case

- 6. In opposing the application, the Respondents filed a Replying Affidavit sworn by Mwafumbiri B. Matatizo the Chairman of Diani Scheme Resource Centre. He stated that:
 - a. He was swearing the affidavit on behalf and with authority from the Diani Resource Scheme officials.
 - b. The application was scandalous, vexatious, frivolous and devoid of merit and intended to waste the court time and ought to be dismissed with costs.
 - c. The Respondent/Applicant never participated in the suit despite proper and regular service being effected on him by way of substituted service twice and it could be confirmed from the court record and proceedings. A copy of the dailies “the Daily Nation” and “The People’s Daily” newspapers where substituted service was effected was attached.
 - d. The deponent stated that substituted service is a formal mode of service duly recognized under the Civil Procedure Rules and that this could not be a ground for setting aside the Judgement of the court.
 - e. The threshold to be met for a court to set aside a Judgement entered against a party was first, when the service in the matter was said to be irregular or unsatisfactory in which case, the service in this suit had been proven to have duly happened to the required standard.
 - f. At the time a search was conducted on the suit land, the name of a one John Kamau Kibe never appeared anywhere in the search or green card hence he was not party to the suit and neither served as he was not in the records at the land registry and neither were the alleged sub - divisions captured on the register for the properties known as Kwale/Diani/S. S 5189 or 5190.
 - g. Moreover, a change in ownership as a defence is of no value in a claim for adverse possession as the Court of Appeal held in case of: “Githu – Versus - Ndeete [1984] KLR” where the new owner cannot prove having taken possession of the suit property or instituting legal proceedings and is a position that has been reiterated in numerous decisions till date
 - h. It was further deposed that change in ownership does not interrupt a person’s adverse possession over the property and this was definitely not a defence with a probability of success that was required in order to set aside the Judgement duly entered.



- i. The only defence with a probability of success in this suit would be one that spoke to the fact that the Respondents were in fact not in the suit property or that the period of occupation as deponed by the Respondents was not in excess of the statutory required period of 12 years.
- j. The deponent points out that the supporting affidavit of the both Wallace Mungai Thiga and John Kibe, they only deponed to activities within the register of the suit properties but not even once, their presence on the suit property.
- k. The other reason to set aside a Judgement of the court was if the Applicant was able to demonstrate that they had a good defence with a probability of success.
- l. The only defence with a probability of success in this case would be to prove that the Applicants were in possession of the suit premises or that the Respondents had been dispossessed. However, the applicants had not proven any of these.
- m. Nothing in the applicant's application and affidavits indicated that they had dispossessed the respondent, they do not in fact dispute the Applicants had been in the property for the period exceeding 12 years. In any case, even the documents they had provided before this case were evidence that we the respondents have been in the suit property even as far back as year 2012 and before.
- n. The Respondent's occupation was further evidenced by the contention that through their previous clan welfare association, Gandakala Development Welfare Association, they had actively demanded for them to surrender the titles for them to be registered in the name of the community.
- o. Since then, they had duly registered this welfare this association as a Community Based Organization called Diani Resource Scheme for purposes of streamlining their community activities.
- p. In fact the suit that the applicants claim to have been filed, ELCLC E061 of 2024 was filed on the 27th September 2024 at 4:09 p.m., which was after the Judgement in this suit had been delivered in the morning of 27th September 2024.
- q. The matter had since then become res - judicata and the said suit could not be sustained in the environment and land court at Kwale and it ought to be struck out.
- r. The court was asked to dismiss the application as prayed.

IV. Submissions

- 7. On 3rd February 2025 while all the parties were present in Court, they were directed to have the application disposed of by way of written submissions. Pursuant to that, the Applicant obliged. Unfortunately, at the time of penning this Ruling, the Honourable Court could not access the written submission by the Respondents from the Judiciary CTS Portal.
- 8. Subsequently, the Honourable Court reserved the delivery of ruling date for 2nd April 2025. However, eventually it was delivered on 8th April, 2025 accordingly.

A. The Written Submissions by the Applicants

- 9. The Applicant submitted under the following grounds for setting aside of the Judgment entered on 27th September 2024 and the consequential orders that followed and were issued on 1st October 2024:



a. Irregular and Unfair Judgment

10. It was submitted that the Applicant was not properly served, and the Judgment was obtained in their absence. The Respondent/Applicant reiterated grounds b) of the Notice of Motion Application dated 18th December 2024 and paragraphs 16 and 17 of the Supporting Affidavit of Mr. Wallace Mungai Thiga dated 18th December 2024. That the Substituted service was carried out through a newspaper publication, but this was inadequate given the nature of the dispute and its impact on land ownership rights.

b. Non - joinder of a Necessary Party

11. The Counsel for the Applicant submitted that the suit never included Mr. John Kamau Kibe, the registered owner of Kwale/Diani S.S/5190, denying him the right to be heard. The failure to include Mr. Kibe resulted in an unfair adjudication of the matter, as his interests were not represented. The Applicant sought to have Mr. Kibe enjoined in the suit to ensure all affected parties are heard.

c. Existence of Triable Issues

12. The submission on triable issues was that the Applicant raises several triable issues regarding:
- a) The validity of the Applicant/Respondent's claim to adverse possession.
 - b) Whether the Applicant/Respondent has been in uninterrupted possession for over 12 years.
 - c) The existence of ongoing disputes over ownership and possession, including prior legal complaints and police reports against the alleged adverse possessors.
 - d) The subdivision and transfer of Kwale/Diani S.S/5190 by Mr. Kibe, which affects the claim to adverse possession.
- d. Necessity of a Fair Hearing
13. The Applicant submitted that the right to be heard, as enshrined under Article 50 of *the Constitution* of Kenya ought to be considered by this court. That the principles of natural justice dictate that no party should be condemned unheard, particularly in a land ownership dispute with far-reaching consequences. Allowing the Respondent/Applicant to file a Replying Affidavit and participate in the proceedings would ensure justice was served.

V. Analysis and Determination

14. I have keenly considered the applicants case as raised through the dated 18th December 2024 by the Applicant herein, the replying affidavit dated 28th February 2025 opposing the same, the written submissions on record, the authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
15. In order to reach at an informed, reasonable and fair decision on the matter, the Honorable Court wishes to be guided by the following five (5) issues for its determination. These are: -
- a. Whether the Notice of Motion application dated 18th December 2024 has any merit?
 - b. Whether the Applicant has met the threshold for grant of orders setting aside the Ex - Parte Judgment by this court
 - c. Whether John Mungai Kibe should be enjoined in this suit



- d. What orders should issue by the court
- e. Who bears the costs of the application?

Issue No. a). Whether the Notice of Motion application dated 18th December 2024 has any merit?

16. Under this sub – title, the Honourable Court will endeavour to examine the substratum of this application being mainly to set aside Ex – Parte Judgement and provision of temporary injunction orders. The Laws that govern the setting aside Ex – Parte Judgement was founded under the provision of Order 10, Rule 11 of the Civil Procedure Rules, 2010. It provides that Ex - Parte interlocutory Judgment in default of appearance or defence may be set aside, it states as follows: -

“Where Judgment has been entered under this Order the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just.”

17. A simple reading of the above provisions shows that setting aside ex-parte Judgement is at the discretion of the court, which discretion must be exercised judiciously. In the case of:- “Patel – Versus - EA Cargo Handling Services Limited (1974) EA 75, the Court held that:-

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

18. Also see the case of:- “Esther Wamaitha Njihia & 2 Others vs Safaricom Ltd (2014) eKLR”, where the Court held:-

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah – Versus - Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a Court. (See Sebei District Administration – Versus - Gasyali). It also goes without saying that the reason for failure to attend should be considered.”

19. The court of appeal in the case of:- “Thorn PLC – Versus - Macdonald [1999] CPLR 660”, highlighted the following guiding principles in the exercise of this discretion as follows: -

- i. While the length of any delay by the Defendant must be taken into account, any pre-action delay is irrelevant;
- ii. any failure by the Defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
- iii. the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and



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

Issue No. b). Whether the Applicant has met the threshold for grant of orders setting aside the Ex - Parte Judgement by this court

20. Under this Sub heading, the Court will endeavour to find whether there are any basis in the instant case to set aside the Ex – Parte Judgement herein. As stated above, one of the key factors to consider when setting aside an Ex - Parte Judgment is whether the Defendant has a defence on merit. In the case of: “Sebei District Administration – Versus - Gasyali & others (1968) EA 300” Sheridan J. observed that:

“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered”

21. The Applicant states that the reason for seeking the order to set aside orders is that he was never served with the summons to enter appearance and the originating summons instituting the suit against him. From what is on record, the originating summons instituting this suit were filed before court on 2nd May 2023. The claim was based on the doctrine of adverse possession. The Respondents informed the court then that efforts to trace the respondent has proved futile and sought for orders to have the Applicant served by way of substituted service.

22. At paragraph 6 of the affidavit in response to the application, the Respondents confirm that the Applicant was served twice by way of substituted service as orders by the court. I have seen the copies of the advertisements published in the local dailies of “The Daily Nation” and “The People’s Daily” newspapers bearing he empirical documentary evidence of service having been effected upon the Applicant. Substituted service is provided for by law under the provisions of Order 5 Rule 17 of the Civil Procedure Rules, 2010 as follows:

“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 courthouse, 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”

23. The Court in the case of:- “Ephraim Njugu Njeru – Versus - Justin Bedan Njoka Muturi & 2 others [2006] eKLR” held as follows: -

“Substituted service is normally ordered where the court is satisfied that there is reason to believe that the person to be served is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. Service in the ordinary way is generally personal service.”

24. It is noted that proper service was effected upon the Applicant. The Respondents have made it clear that having been unable to physically trace the Applicant, the other option was for the substituted service was properly effected. The Applicant’s assertion that service was not effected is therefore disregarded by this court.

25. The Applicants other defence is that the Respondents claim was based on falsehoods. On this, it is my humble view that at this point I cannot re-evaluate the evidence tendered until an order is made to



set aside the orders earlier issued and the matter heard on merit. I agree with the holding of Ojwang, J (as he then was) in the case of:- “Haile Selassie Avenue Development Co. Limited – Versus - Josephat Muriithi & 10 others [2004] eKLR where he stated that:

“The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure.”

26. However, bearing in mind that the suit properties are registered in the names of the Applicant herein and one John Kibe. It will be in the interest of justice to grant them an avenue to ventilate their case and perhaps defend their ownership of the suit properties. I am guided by the position of the Supreme Court of India which stated in the case of:- “Sangram Singh – Versus - Election Tribunal, Koteh, AIR 1955 SC 664, at 711 cited in the case of:- “Gerita Nasipondi Bukunya & 2 others – Versus - Attorney General [2019] eKLR that:-

“[T]here must be ever present to the mind the fact that our laws 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 be precluded from participating in them.”

27. Additionally, in the case of:- “Wachira Karani – Versus - Bildad Wachira (2016) eKLR” as was quoted in the case of “David Gicheru – Versus - Gicheha Farms Limited & another [2020] eKLR” the Court held that: -

“The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter...”

ISSUE No. c). Whether John Mungai Kibe should be enjoined in this suit.

28. On the prayer to have John Kibe enjoined as a party to this suit post judgement. The point of departure is in the Law on joinder of parties as enshrined under the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 which states as follows: -

“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 or settle all questions involved in the suit, be added.”

29. The jurisdiction to join a party to a case post judgment is exercised only in exceptional and justifiable circumstances. See the case of:- “Mudembei & Another – Versus - Malembi *& Another (Environment & Land Case 3 of 2020)* [2024] KEELC 1239 (KLR) (7 March 2024) (Ruling)”. One such exception is where a case has been determined and adverse orders have been issued against a party who was neither given notice of the case nor heard on the issue in dispute.



30. In the case of:- “Mary Beach Limited – Versus - Attorney General and 18 others (2018) eKLR” the Court of Appeal outlined the relevant principle as follows: -

“However there are exceptional circumstances that could justify a court to enjoin a party even after Judgment has been passed. One such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. Enjoining such a party a court would also have to set aside the judgement entered to give him/her an opportunity to be heard.”

31. From what is on record, John Kamau Kibe became the registered owner of the suit property Kwale/ Diani S.S/5190 from 10th November 2022. The originating summons instituting the suit were filed on 2nd May 2023 way after Judgement was entered. The substituted service did not include John Kamau Kibe. The said party is therefore necessary in this suit for him to be accorded an opportunity to be heard and to further shed light on the registration of the suit property in his name.

Issue No. d). What orders should issue by the court

32. Based on the elaborate analysis caused herein, what other orders ought to be issued? I have seen the prayer for temporary injunction and for preservatory orders over the suit property. From the hearing of the suit what was gathered is that it is the respondents who are currently in occupation of the suit property. The applicant in his affidavit in support of the application alluded to violence having erupted at one point when the said Respondents were asked to vacate the suit property. I believe the most appropriate orders to issue at this juncture will be those of maintenance of status quo.

33. The Court of Appeal in the case of: “Mugah – Versus - Kunga [1988] KLR 748”, upheld the practice of issuing status quo orders in land matters and stated as follows:

“Status quo orders should always be issued for purposes of preserving the subject matter. This court’s practice direction vide Gazette Notice No. 5178/2014 have followed suit. Practice direction No. 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.”

34. Further, in the case of: “Fatuma Abdi Jillo – Versus - Kuro Lengesen & another [2021] eKLR. In Republic – Versus - National Environment Tribunal, Ex - Parte Palm Homes Limited & Another [2013] e KLR, Odunga J. (as he then was stated:-

“When a court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...”In TSS Spinning & Weaving; Company Ltd – Versus - Nic Bank Limited & another [2020] e KLR, the unpacked the purpose of a status quo order as follows: “In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention. ‘In Kenya Airline Pilots Association (KALPA) – Versus - Co-operative Bank of Kenya Limited & another [2020] eKLR, the purpose of a status quo order was explained as follows:“..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties



before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”Murithi Jin Boabab Beach Resort as quoted by F. Tuiyot Saifudeen Abdullahi & 4 Others in Mombasa High Court Misc. Civil Cause No. 11 of 2012, described the nature of a status quo order as follows: “In my view, an order to Status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof. It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint.”

35. The prayer to consolidate Kwale ELCLC E061 of 2024 with the instant suit is denied for the simple reason that issues to do with ownership of the suit properties herein will be canvassed in the instant suit. The court cannot have two different matters running concurrently in the same court over similar subject matters. If anything, the suit [Kwale ELCLC E061 of 2024] was filed few hours after judgment in this suit was rendered which was rather odd but the same is not an issue for discussion herein.
36. Lastly a prayer was made for the Applicants Counsel to be allowed to come on record post judgment. Order 9 Rules 9 and 10 of the Civil Procedure Rules, 2010 provides:
- Rule 9. 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.
37. The provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010 are couched in mandatory terms. For an Advocate or a party coming on record post judgment, they ought to either first seek leave of court by way of a formal application or obtain consent from the outgoing counsel. The advocate on record for the applicant made the instant application to be allowed to represent the Applicant and which the court hereby allows as prayed.

Issue No. e). Who will bear the costs of the application

38. It is trite that issues of costs is at the discretion of the Court. Costs are the award that are granted to a party at the conclusion of any legal action and/or proceedings of any litigation. The Proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 provides that costs follow the event, By event it means the result or outcome of the legal action.
39. In the instant case, the filing of this Application was occasioned by the Applicant to set aside the Judgement. In the given circumstances, the Respondents have been denied the right to enjoy the fruits of their judgment. Thus, to subject the Respondents to pay costs will not only be unfair, unreasonable but burdening on them. On the contrary, I hold that the Respondents will be entitled the costs of this application.



VI. Conclusion and Disposition

40. In the long run, upon causing an indepth analysis of the framed issues, based on the principles of Preponderance of Probabilities and balance of convenience, the Honourable Court proceeded to grant the following orders. These are:-
- a. That the Notice of Motion application dated 18th December 2024 be and is hereby found to be meritorious and thus allowed.
 - b. That the law firm of Messrs. Joram Wangombe & Associates advocates be and is allowed to come on record on behalf of the Applicants after the delivery of Judgement on 27th September, 2024.
 - c. That the honourable court is hereby pleased to set aside the Ex - Parte Judgement entered against the Respondent/Applicant on 27th September 2024 and decree issued on 1st October 2024.
 - d. That the person known as John Kamau Kibe is hereby joined as the Respondent in this suit in his capacity as the registered owner of Kwale/Diani S.S/5190
 - e. That the Respondent/Applicant be and is hereby granted leave to file his Replying Affidavit in response to the Originating Summons out of time
 - f. That an order of Status quo on the suit properties to be maintained to the extent that the Respondents shall remain in possession of the suit properties until the suit is heard and determined.
 - g. That there be corresponding leave of 14 days to the Applicants to file and serve any further documents in support of their case.
 - h. That for expediency sake there be a mention on 2nd July, 2025 for purposes of conducting Pre – trail conference under the provision of Order 11 and taking direction under the provision of Order 37 Rules 13, 16 and 18 of the Civil Procedure Rules, 2010 and a hearing of the case by consensus on 3rd November, 2025.
 - i. That the costs of this application be awarded to the Respondents to be borne by the Applicant – Mr. Wallace Mungai Thiga.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 8TH DAY OF APRIL 2025

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**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT AT KWALE.**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. Mr. Wang'ombe Advocate for the Applicants.
- c. Mr. Kowade Advocate for the Respondents.

