



**Owuor v Mombasa Water Product Limited & 3 others (Environment & Land Case 44 of 2019) [2022] KEELC 13413 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13413 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 44 OF 2019  
LL NAIKUNI, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**DORCAS ATIENO OWUOR ..... PLAINTIFF**

**AND**

**MOMBASA WATER PRODUCT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JOHN TURASHA KINYANJUI ..... 2<sup>ND</sup> DEFENDANT**

**IRENE MBERE NJUE ..... 3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF TITLES, MOMBASA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**i. Introduction**

1. Before the honorable court for its determination is the notice of motion application dated September 3, 2021 filed in court on September 6, 2021.

The application was filed by the plaintiff/applicant herein. It was brought by the dint of sections 1A, 1B, 3, 3A, 80 & 95 of the [Civil Procedure Act](#) Cap 21 order 45 rules 1 & 2, order 50 rule 5 of the [Civil Procedure Rules](#), 2010.

**ii. The plaintiff's case**

2. The plaintiff/applicant sought for the following orders:-
  - (a) That this honorable court be pleased to review and/or vary the orders made on March 11, 2021 directing the applicant to provide security for a sum of Kenya Shillings two hundred and fifty thousand (Kshs 250,000/-) to the 1<sup>st</sup> defendant and Kenya Shillings two hundred and fifty thousand (Kshs. 250,000/-) to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants respectively within a period of sixty



(60) days from the date of the ruling and be pleased to enlarge the time for provision of such security for a further thirty (30) days from the date of the order for review; and

- (b) That cost of this application be in the cause.
3. The said application is premised on the grounds, testimonial facts and averments made out under the thirteen (13) paragraphed supporting affidavit of Dorcas Atieno Awour dated and sworn on September 3, 2021 and the four (4) annexures marked as 'DAO - 1 to 4' annexed thereto.
4. The deponent stated that being the plaintiff herein who resided at England was thus conversant with the facts of the case. She deposed that she filed this Suit vide a plaint dated March 15, 2019 and had since been desirous of having the matter prosecuted and finalized expeditiously within a reasonable time. She held that on March 11, 2021 this honorable court delivered a ruling making orders that required her to deposit security being a total sum of Kenya Shillings five hundred thousand (Kshs 500,000/-) into a joint interest earning account in the names of the advocates for the parties within sixty (60) days from the date of the ruling.

She had fallen ill and was seeking treatment at Poland and was not able to instruct her advocates on time. She indicated after the delivery of the ruling her advocates could not reach her on time and due to the outbreak of COVID-19 restrictions and her health complications could not travel to Kenya. Despite all these hurdles she managed to obtain a bank guarantee in favour of the defendants' advocates as ordered though after a slight delay.

5. She opined that the delay in providing security for costs was not deliberate the same having been caused by her ill health condition and the Covid-19 pandemic.

She urged court to allow the prayers sought as otherwise her constitutional right to have her claim heard on merit with the resultant loss on her part, her property and the amount paid for acquisition of the suit property she argued that the defendants would not suffer any prejudices if she was to be granted more time to comply with the orders issued by the court on March 11, 2021.

### **iii. The grounds of opposition by the 1<sup>st</sup> defendant**

6. On February 9, 2022, the learned counsels for the 1<sup>st</sup> defendant the law firm of Messrs Kamote Omollo & Co Advocates filed their four (4) points grounds of opposition summarized as follows:-
- a. That the application had not been made without unreasonable delay.
  - b. That the plaintiff's alleged hospitalization occurred after the plaintiff had already failed to comply with the court order of March 15, 2019.
  - c. That the court never ordered the plaintiff to provide a bank guarantee for a sum of Kenya shillings five hundred thousand (Kshs 500,000/-).
  - d. That the plaintiff had not given good grounds for the court to exercise its discretion in favour of the plaintiff.
  - e. That the plaintiff's suit was so hopelessly time barred that it was not necessary to revive it.

### **iv. The grounds of opposition by the 2<sup>nd</sup> & 3<sup>rd</sup> defendants**

7. On February 1, 2022, the learned counsel for the 2<sup>nd</sup> & 3<sup>rd</sup> defendants the law firm of Messrs AB Patel & Patel Advocates filed their six (6) points grounds of opposition dated January 28, 2022 condensed as follows:-



- a. That the plaintiff application was misconceived and bad in law.
- b. That there was no suit before this honorable court on the basis of which the relief sought by the plaintiff could be granted.
- c. That this honorable court lacked jurisdiction to hear and determine the plaintiff's application.
- d. That no sufficient grounds or evidence had been placed before this honorable court to enable it exercise its discretion in favour of the plaintiff.
- e. That from the plaintiff's own evidence placed before this honorable court, it was clear that:-
  - i. Nothing prevented the plaintiff from complying with the orders of this honorable court made on March 11, 2021 within the sixty (60) days period as directed.
  - ii. It was true that the plaintiff was ill or was hospitalized at any time.
  - iii. The plaintiff undertook a voluntary lifestyle enhancing medical procedure between 9<sup>th</sup> and June 12, 2021 which essentially was removal and disposal of fatty tissues in order to deal with obesity.
  - iv. The plaintiff was being less than candid in so far as her failure to comply with this honorable court's order was concerned.
- f. That the application was not bona fide but was an abuse of the process of this honorable court and completely lacked in candour. It was an attempt to deliberately mislead court as it was all about the plaintiff failing to comply and obey this court's orders.

#### **v. Submissions**

8. On diverse dates of February 23, 2022 and April 27, 2022, whilst in the presence of all the parties herein, the honorable court directed that the notice of motion application dated September 3, 2021 be disposed off by way of written submissions. Pursuant to that all the parties complied and the honorable court reserved a dated to deliver its ruling according.

#### **a. The plaintiff's written submissions**

9. On March 25, 2022, the learned counsel for the plaintiff the law firm of Messrs Sherman Nyongesa & Mutubia Advocates filed their written submissions dated March 16, 2022. Mr Mutubia advocate in his submission commenced by providing brief facts of the case and framed three (3) issues for consideration by this honorable court.

Firstly, he submitted that this court had powers to review its own decision of March 11, 2021. He based his argument on the provisions of section 80 of the [Civil Procedure Act](#) Cap 21 and order 45 rule 2 of the [Civil Procedure Rules, 2010](#).

To buttress this argument he relied on the case of '[Moyale Liner Bus Services – Versus - Gachui Ibrahim \[2021\] Eklr](#)' where court held this:-

' Based on the above authorities, this court finds that it cannot re-open the matter for an application for stay of execution, which the court has finally determined and is res - judicata, and for which the court is therefore functus officio. The only exception is if the applicant is seeking review in accordance with the parameters set under order 45 of the [Civil Procedure Rule](#) or extension of time under order 50 of the [Civil Procedure Rules](#) considered below'.



10. He held that based on the above captured provision of law and case law, the plaintiff's application has been filed in the same court that delivered the ruling on March 11, 2021 and as such this honorable court has jurisdiction to hear and determine the plaintiff's application for an order of review.

Secondly, the learned counsel submitted that the court could vary the terms of security as earlier ordered.

He relied on the provisions of section 80 of *Civil Procedure Act* and order 45 of *Civil Procedure Rules* thus he held review was a creation of the statute.

In the instant case, he argued that upon the delivery of the ruling on March 11, 2021, the plaintiff's advocates made efforts to inform the plaintiff of the said decision. However, the plaintiff was not reachable as she was undergoing medical treatment in Poland. The plaintiff only learnt of the court's decision when she returned to England. Upon learning of this she made frantic efforts despite all hurdles caused by Covid -19 travel restriction obtaining a bank guarantee in favour of the defendants' advocates as ordered by honorable court albeit a slightly delay.

He held that the delay on the plaintiff's part to provide security after was not deliberate as it was caused by health challenges and Covid -19 restrictions and hence the plaintiff's predicaments were sufficient reason for the court to grant her ruling delivered on March 11, 2021.

11. Thirdly, the learned counsel submitted that the court could extend the time for compliance. He relied on the provisions of section 90 of *Civil Procedure Act*, order 50 rule 5 of *Civil Procedure Rule*, 2010 and held that the plaintiff had shown her clear willingness as ordered by this honorable court and therefore sought for enlargement of time for further thirty (30) days from the date the order for review was granted in order to comply with provision of security for costs.

He held that the plaintiff's submission that the order for provision for security for costs and the delay to comply should not be the basis upon which the court should deny her constitutional right to a fair hearing noting that the plaintiff's claim was not frivolous and raised fundamental issues on the question of the sale of her property to the 2<sup>nd</sup> defendant in breach of her rights as the 1<sup>st</sup> plaintiff.

12. The learned counsel contended that it was clear that 1<sup>st</sup> defendant authored and promoted what was clearly a fraudulent transaction in order to illegally divert the plaintiff of her right as a purchaser in the suit property such a claim would not be locked out on a technicality particularly where the plaintiff was genuinely prevented from complying due to health complication and Covid-19 restrictions.

Finally, the counsel prayed that if its discretionary power allowed the plaintiff's application as prayed.

#### **b. The 2<sup>nd</sup> & 3<sup>rd</sup> defendant's written submissions**

13. On May 18, 2022, the learned counsel for the 2<sup>nd</sup> & 3<sup>rd</sup> defendants, the law firm of Messrs AB Patel & Patel Advocates filed their written submissions dated May 16, 2022; Mr Ondego advocate submitted firstly that based on order (c) of this court, delivered on March 11, 2021, there was no suit before this honorable court.

He argued that the plaintiff/applicant having failed to provide security as ordered by court by operation of court order this suit was struck out with costs to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants.

He argued that effectively there was no suit before this honorable court for the applicant's application to stand on and the application had been made without the leave of the court to reinstate the suit.

Consequently, the provisions of section 95 of *Civil Procedure Act* could not come to the aid of the applicant as time could not be enlarged for a further thirty (30) days where there was no suit.



He held that time could only be extended to do something on as existing Suit.

Secondly, the learned counsel submitted that this honorable court lacked jurisdiction to hear and determine the plaintiff's/application's application. He argued that having rendered its decision on March 11, 2021 the plaintiff was granted a grace period of sixty (60) days to provide such security for costs but the plaintiff defaulted and hence the suit got struck out on May 11, 2021 by operation of court order issued.

According to him, the court was now 'functus officio' and lacked the powers to entertain the suit any further and particularly after striking out the plaintiff's claim for want of compliance the decision was final and conclusive such a decision could not be varied nor revoked by the decision maker.

14. On without prejudice basis to the foregoing the learned counsel submitted that the applicant had not placed any or sufficient grounds or evidence before this court to exercise its discretion in favour of the applicant.

For instance, he held that there was no discovery of new and important matters which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed or order was made or a mistake or error apparent on the face of the record or there was other sufficient reasons or the application was made timely without undue delay.

He submitted that the plaintiff had failed to comply with any of these requirements to warrant being granted orders for review under order 45 of *Civil Procedure Rules*. To Support its point he relied on the decision of '*Republic – Versus - Cabinet Secretary for Interior and Coordination of National Government Ex - parte Abdullahi Said Salad [2019] eKLR.*'

He held that hospitalization and illness of the plaintiff was not analogous to the reasons specified in the provisions of order 45 rules 1 & 2 and on assessment of all the annexures marked as 'DAO – 1 to 4' he held that the plaintiff was being less than candid in so far as her blatant failure to comply with this honorable court order was concerned.

There was no good reason given as to why the applicant could not have complied with the court order within sixty (60) days period granted by court on March 11, 2021.

Besides, the learned counsel contended that it had taken the applicant over four (4) months to move court for the review of its orders without any plausible or lawful reason for the delay. Hence the delay was inordinate and inexcusable and urged court to proceed and dismiss the application with costs to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants herein.

#### **vi. Analysis and determination**

15. I have keenly considered all the filed pleadings herein in relation to the notice of motion application dated September 3, 2021 being the supporting affidavit, grounds of opposition, submissions, the cited authorities and the relevant provisions of the law. For the honorable court to arrive at an informed, just, fair and reasonable decision, it has framed the following four (4) issues for its determination. These are:-
- a. Whether the notice of motion application dated September 3, 2021 by the plaintiff/application meets the laid down standards for the review varying and/or setting aside court order as provided for under the provisions of section 80 of *Civil Procedure Act* and order 45 of *Civil Procedure Rules, 2010* and enlargement of time;
  - b. Whether this court has jurisdiction to hear and entertain this matter;
  - c. Whether the parties are entitled to the relief sought; and



- d. Who will bear the costs of the application.

**Issue No (a) whether the notice of motion application dated September 3, 2021 by the plaintiff/ applicant meets the laid down standards for the review varying and/or setting aside court order as provided for under the provisions of section 80 of *Civil Procedure Act* and order 45 of Civil Procedure rules, 2010 and enlargement of time.**

### **Brief facts**

16. Before embarking on the above issues for analysis, it's imperative that this court briefly extrapolate on the facts of this case. From the filed pleadings on March 5, 2019, the plaintiff instituted a suit against the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> & 4<sup>th</sup> defendants herein. She claimed that at all material times the plaintiff and the 1<sup>st</sup> defendant pursuant to a sale agreement made on the June 13, 2005 for a purchase of two (2) portions of land known as Plot No 12006/I/MN and registered as CR No 34748/2 situated in Mombasa County terms and conditions stipulated thereof. Eventually with time she discovered that the property had been unlawfully transferred to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants and who were already conducting development on the land, pursuant to this she filed the suit and sought for orders to preserve her interest over the suit property and that the gist of this suit.
- Upon service, the defendants filed their defences and the matter is ripe for hearing and final determination by this court.
17. Sometimes in the month of May, 2019, the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants filed a notice of motion application seeking for orders that pending the hearing and determination of this suit the plaintiff furnishes security for the defendants' costs. On March 11, 2021 the honorable court delivered a ruling in respect to the defendants application and made an order that the plaintiff ought to provide security for a sum of Kenya Shillings two hundred and fifty thousand (Kshs 250,000/-) to the 1<sup>st</sup> defendant and Kenya Shillings Two hundred and fifty thousand (Kshs 250,000/-) to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants respectively within a period of sixty (60) days from the date of the said ruling and in default of the provision of such security the suit shall be struck out with costs to the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants/respondents.
18. From the surrounding facts and inferences of the case the plaintiff who ordinarily resided in Europe was unable to immediately comply with the court order within the stipulated time limit. She indicated her predicament having been necessitated by her ill health and hospitalization at Poland and also the Covid -19 pandemic travel restrictions and hence could not instruct her advocates on time on the appropriate cause of action. However, later on she was able to secure a bank guarantee for a sum of Kenya Shillings five hundred thousand (Kshs 500,000/-) payable to the advocates for the defendants. It's for this reason that she has moved this court seeking the orders in the said notice of motion application.
19. Now turning to the issues raised under this sub-heading. The honorable court takes cognizance to the fact that all the learned counsels for the parties herein in equal measures have all concurred that all matters of review varying of court order are a creation of statutes being section 80 of the *Civil Procedure Act* Cap 21 and order 45 (1) (2) & (3) of the *Civil Procedure Rules*, 2010. Additionally the provision for the enlargement of time is founded in order 50 rule 5 of the Civil Procedure Rules, 2010.

Section 80 (i) provides:- review:-

Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this act, but from which no appeal has been preferred; or



- b. by a decree or order from which no appeal is allowed by this act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.'

Order 45 (1) (2) & (3) of [Civil Procedure Rules](#) provides:-

Application for review of decree or order [order 45, rule 1.]

1. Any person considering himself aggrieved—
  - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
    - (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.
2. To whom applications for review may be made [order 45, rule 2.]
  - (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
  - (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.
  - (3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.
3. When court may grant or reject application [order 45, rule 3.]



- (a) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.
- (2) Where the court is of opinion that the application for review should be granted, it shall grant the same: provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

Order 50 rule 5 of Civil Procedure Rules, 2010 provides:- Time for giving security for costs, when not to be reckoned [order 50, rule 5.]

The day on which an order for security for costs is served, and the time thenceforward until and including the day on which such security is given shall not be reckoned in the computation of time allowed to plead, or take any other proceeding in the cause or matter.

### **Issue No (b) whether this court has jurisdiction to hear and entertain this matter**

20. In the instant case, this honorable court on March 11, 2021 in ruling this court ordered:-
- a. The plaintiff shall provide security the amount of Kenya Shillings two hundred and fifty thousand (Kshs 250,000/-) to the 1<sup>st</sup> Defendant and Kenya Shillings Two Hundred and Fifty Thousand (Kshs 250,000/-) to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants respectively within a period of sixty (60) days from the date of this ruling.
  - b. That the said amount in lump sum be deposited into a joint interest earning account in the names of the respective advocates in a bank of their choice.
  - c. In default of the compliance with the provision of such security, the plaintiff's claim shall be struck out with costs to the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants.
  - d. No orders as to costs.
21. On its own admission, the plaintiff was not able to comply with the above orders and the timelines. The plaintiff has used her ailment and hospitalization at Poland and the Covid- 19 pandemic travel restriction as the main reason she could not be reachable for the orders and also instruct her advocates in good time. From the provisions of the law under section 80, (1) and order 45 rules 1, 2 & 3 of the Civil Procedure Rules I fully concur that the application by plaintiff does not meet any of the requirements stipulated thereof. Indeed, matters of health and hospitalization is not one of the reasons to be considered as sufficient cause to move this court to cause for the review and vary its orders granted on March 11, 2021; none of the evidence provided for by the plaintiff/applicant and under its annexure marked as 'DAO - 1 to 4' came to her aid, for this reason the application cannot succeed.
- Additionally although eventually the plaintiff became aware of the order as informed by her advocate but she blatantly caused two (2) breaches.
- Firstly, she proceeded to issue a bank guarantee for a sum of Kenya Shillings five hundred thousand (Kshs 500,000/-) as lump sum for both the advocates for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants. This was a total departure from the court order of making a deposit of cash for Kenya Shillings two hundred and fifty thousand (Kshs 250,000/-) to the 1<sup>st</sup> Defendant and Kenya Shillings two hundred and fifty thousand (Kshs 250,000/-) to the 2<sup>nd</sup> & 3<sup>rd</sup> defendant respectively and again with slight delay.



Secondly, the plaintiff only moved this court over four (4) months later after the ruling seeking for the orders sought. The delay is unreasonable, inordinate and unacceptable for this reason the application must fail.

#### **Issue No (c) whether the parties are entitled to the relief sought.**

22. Under this sub heading, the honorable court having assessed all the surrounding facts and inferences herein, it is satisfied that plaintiff/applicant seem to be keen and interested with her case. In my view, the court feels the plaintiff/applicant is entitled to the relief sought from the filed application.
23. Additionally, the court takes the cognizance of the fact that this is land matter and its sensitivities, this court has been compelled to invoke the provision of overriding objection on the proportionate, hearing expediency and just resolution of despite, under the provision of sections 3, 13 & 19 of the *Environment and Land* Act No 19 of 2011, section 101 of the *Land Registration Act* No 3 of 2022 and section 150 of the *Land Act* No 6 of 2022 and article 159 (1) & (2) of the *Constitution* of Kenya, 2010 and decree that although the court would have been declared functus officio by the operation of order (c) of the court orders, proceeds to grant the plaintiff/applicant an opportunity to exercise her constitutional right over private property under article 40 (1) (2) of the *Constitution* of Kenya.

For this reason, this court is vested with the jurisdiction to hear and entertain this matter.

#### **Issue No (d) who will bear the costs of the application.**

24. It is well established that costs are at the discretion of court. Costs mean the award granted to a party at the conclusion of any legal action, process and proceedings in litigation. Under the provisions of section 27 (1) of *Civil Procedure Rules*, 2010 provides that costs follow the events. By event here it means the result of the Suit.
25. In this case, taking that the plaintiff herein has succeeded in being granted the orders sought the costs of the application to be in the cause thereof.

#### **vii. Analysis and determination**

26. Consequently, having thoroughly and keenly analyzed all the framed issues herein, this honorable court proceeds to make the following orders:-
  - a. That the notice of motion application dated September 3, 2021 be and is hereby allowed.
  - b. That this honorable court proceed to review and/or vary its orders made on March 11, 2022 by enlarging the stipulated time frame made there as follows:-
    - i. The plaintiff to provide cash security for costs for a sum of Kenya Shillings two hundred and fifty thousand (Kshs 250,000/-) to the 1<sup>st</sup> defendant and Kenya Shillings two hundred and fifty thousand (Kshs 250,000/-) to the 2<sup>nd</sup> & 3<sup>rd</sup> defendants respectively within a period of thirty (30) days from the date of this ruling.
    - ii. The said amount in lump sum to be deposited into the joint interest earning bank account in the names of Messrs Sherman Nyongesa & Mutubia Advocates, Messrs Kamote Omollo & Company Advocates and AB Patel & Patel Advocates in a bank account of their choice within the said period of thirty 30 days.
    - iii. In default of the compliance of these orders, the plaintiff's suit shall automatically remain struck out with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants/applicants herein.



c. That the costs of this application to be in the cause.

**RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2022**

**HON. (MR) JUSTICE L.L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**In the presence of:-**

- (a) Mr Ben - court assistants.
- (b) M/s Asewe advocate for the plaintiff
- (c) Mr Omollo advocate for the 1<sup>st</sup> defendant.
- (d) Mr Ondego advocate for the 2<sup>nd</sup> & 3<sup>rd</sup> defendants.
- (e) M/s Kiti holding brief for M/s Langat for the 4<sup>th</sup> defendant.

