



REPUBLIC OF KENYA



Kungu & 17 others v Lesedi Developers Limited & 4 others (Environment & Land Case E049 of 2023) [2025] KEELC 1249 (KLR) (12 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1249 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E049 OF 2023**

JM ONYANGO, J

MARCH 12, 2025

BETWEEN

SAMUEL MURIRA KUNGU 1ST PLAINTIFF
JOSEPH NGUGI WANJOHI 2ND PLAINTIFF
BERNARD OUMA OBONDO 3RD PLAINTIFF
PAUL KAGUNDA MUTI 4TH PLAINTIFF
WINNIE STEPHANIE WAIRIMU 5TH PLAINTIFF
BERNARD ELISHA KAFUNA 6TH PLAINTIFF
CAROLINE NJERI MAINA 7TH PLAINTIFF
MARGARET WAMBUI MWANGI 8TH PLAINTIFF
PETER NJOROGE KANYANGO 9TH PLAINTIFF
MONICAH WANJIRU KIRABU 10TH PLAINTIFF
GEORGE GITONGA NDUNGU 11TH PLAINTIFF
JOYCE WAMBUI NGANGA 12TH PLAINTIFF
MARY WAIRIMU KAHUHU 13TH PLAINTIFF
JAMES MBURU KINGU 14TH PLAINTIFF
JOHN NJERI 15TH PLAINTIFF
JANE WANGECHI 16TH PLAINTIFF
VERONICA WAIRIMU KARIUKI 17TH PLAINTIFF
NAVIN SHIVJI HIRANI 18TH PLAINTIFF

AND



LESEDI DEVELOPERS LIMITED 1ST DEFENDANT
GEOFREY KAHUNGI KIRAGU 2ND DEFENDANT
AGNES MUMBI NGARU 3RD DEFENDANT
FRANCIS JOEL NGARU 4TH DEFENDANT
ESTER MUTHONI NGARU 5TH DEFENDANT

RULING

1. By Notice of Motion dated 18th December, 2023, the 3rd 4th and 5th Defendants/Applicant sought the following orders: -
 - a. Spent.
 - b. That this honourable court be pleased to review, vary or set aside its ruling, orders dated 27th July 2023 arising from the application dated 18th May 2023 and allow the Applicants to be heard on merit.
 - c. That this honourable court be pleased to lift the orders dated 27th July 2023 as against Land Parcels KIAMBU/MUNYU/8621, 8622 and 8675 and in its place maintain orders only in KIAMBU/MUNYU/8621 which is the relevant land being claimed by the Plaintiffs.
 - d. That this honourable court be pleased to make orders that are expedient in the circumstances.
 - e. That the costs of the Application be provided for.
2. The application is based on the 13 grounds set out on the face of the Notice of Motion and on the Supporting Affidavit sworn by Francis Joel Ngaru, on even date. He explained that the 1st and 2nd Defendants had expressed interest in buying a 5-acre portion of land parcel numbers Kiambu/Munyu/8136 and Kiambu/Munyu/8137 registered in his name and the names of the 3rd and 5th defendants at the price of Kshs. 20,000,000. He averred that as a result, the two aforementioned properties were amalgamated to give rise to land parcel number Kiambu/Munyu/8256.
3. It was his contention that the 1st and 2nd Defendants only managed to raise Kshs. 2,000,000 and after a lot of back and forth on the payment of the balance, he and the 3rd and 5th Defendants decided to subdivide land parcel Kiambu/Munyu/8256 in order to sell a smaller portion at a lower price, to the 1st and 2nd Defendants. The subdivision resulted in land parcel numbers Kiambu/Munyu/8274 measuring approximately 2.026 Ha and Kiambu/Munyu/8275 measuring approximately 3.366 Ha.
4. He added that they agreed to sell land parcel number Kiambu/Munyu/8274 to the 1st and 2nd Defendants, however, because they were once again unable to raise the purchase price for the said property, he and the 3rd and 5th Defendants agreed to subdivide land parcel number Kiambu/Munyu/8274 so that they could sell an even smaller portion to the 1st and 2nd Defendants. However, the 1st and 2nd Defendants were required to top up Kshs 5,000,000 as the purchase price.
5. He contended that subdivision of land parcel number Kiambu/Munyu/8274 resulted in land parcel numbers Kiambu/Munyu/8621 which was to be sold to the 1st and 2nd Defendants and Kiambu/Munyu/8622 measuring 0.809 Ha. He asserted that the 1st and 2nd Defendants are yet to pay the balance of Kshs 5,000,000.



6. He stated that a perusal of the plaint shows that the Plaintiffs sought orders over land parcel Kiambu/Munyu/8621. He faulted the Plaintiffs for seeking an injunction over land parcel numbers Kiambu/Munyu/8275 and Kiambu/Munyu/8622, which are not the subject of the dispute in the suit.
7. Further, he averred that his former advocates on record Njoroge Kugwa & Company Advocates failed to bring the aforementioned position to the attention of the court, compelling them to seek alternative legal representation.
8. He added that he would like to sell a portion of land parcel numbers Kiambu/Munyu/8275 and Kiambu/Munyu/8622, in order to use the proceeds of the sale to seek urgent treatment abroad for prostate cancer.
9. He urged the court to lift the injunctive orders relating to land parcel numbers Kiambu/Munyu/8275 and Kiambu/Munyu/8622 to enable him to sell a portion of it.
10. He attached an authority to sue on behalf of the 3rd and 5th Defendants, a copy of the sale agreement between him and the 3rd and the 5th Defendants and the 1st Defendant, copies of his medical documents, copies of the titles to land parcel numbers Kiambu/Munyu/8274, 8275 and 8622, copies of correspondences between the Defendants and a copy of a newspaper article relating to the 1st and 2nd Defendants' fraudulent dealings.
11. The application was opposed by the Plaintiffs through a Replying Affidavit sworn by their representatives Samuel Murira Kungu, Joseph Ngugi Wanjohi and Bernard Ouma Obondo (the 1st, 2nd and 3rd Plaintiffs) on 29th January 2024.
12. The Plaintiffs contended that they were not privy to the agreement between the Defendants. It was their claim that they entered into sale agreements with the 1st Defendant acting on behalf of the 3rd, 4th and 5th Defendants for the purchase of the plots of the proposed subdivision plans for land parcel number Kiambu/Munyu/8137 and not specifically land parcel number Kiambu/Munyu/8621.
13. They argued that they rightfully placed a caution on all the subdivisions that emanated from land parcel number Kiambu/Munyu/8137. They added that the caution could not be removed against Kiambu/Munyu/8621, 8622 and 8275 as they are properties emanating from the subdivision of Kiambu/Munyu/8137 from which they bought their plots.
14. In conclusion, they maintained that this application is an abuse of the court process hence it ought to be struck out. They also urged the court to award them the costs of the application.
15. The application was canvassed by way of oral submissions on 28th October 2024. Both counsels reiterated the contents in their respective Affidavits.

3rd, 4th and 5th Defendants' Submissions

16. Learned counsel for the 3rd, 4th and 5th Defendants submitted that the Defendants settled on a purchase price of Kshs 4,000,000 per acre vide the agreement for sale dated 15th November 2021.
17. Counsel contended that the 4th Defendant was ailing from prostate cancer, therefore, he needed to dispose of part of land parcel numbers Kiambu/Munyu/8622 or Kiambu/Munyu/8275 to get funds to seek urgent medical treatment abroad.
18. Counsel submitted that the Plaintiffs' claim ought to be channelled to only land parcel number Kiambu/Munyu/8621 and that the orders issued against land parcel numbers Kiambu/Munyu/8622



and Kiambu/Munyu/8275 ought to be lifted. Counsel urged the court to set aside/vary its orders dated 27th July 2023.

19. Counsel relied on Order 10 Rule 11 of the Civil Procedure Rules, 2010 and on the decision in the cases of Kwanza Estates Limited v Dubai Bank Limited (In Liquidation) & 2 Others [2019] and David Gicheru v Gicheha Farms Limited & Another [2020]eKLR.
20. On costs, counsel relied on the principle that costs follow the event and the decision in the case of DGM v EMG [2011] eKLR where the court relied on the said principle. Counsel urged the court to allow the application and award costs to the 3rd, 4th and 5th Defendants.

Plaintiffs' Submissions

21. Counsel for the Plaintiffs relied on the decision in the case of Gitere v Gitere Kahura Investments Limited & 3 Others [2023] where the court stated the principles for setting aside ex-parte orders.
22. Counsel submitted that the Plaintiffs' application dated 18th May 2023 filed under certificate of urgency, was heard in chambers on the same day and that the court gave orders on service of the application and the hearing thereof which was scheduled for 5th June 2023. Counsel further submitted that the said orders together with the application were served upon the Defendants.
23. Counsel contended that the 1st and 2nd Defendants were absent during the hearing on 5th June 2023, however, the 3rd, 4th and 5th Defendants were represented by Ms. Waigwa who sought 14 days to put in a response. Counsel further contended that the court directed the Plaintiffs to serve the Plaint together with the application dated 18th May 2023 upon the 3rd, 4th and 5th Defendants afresh. The court further granted the Defendants 14 days within which to file a response and directed that the parties file and serve written submissions. The application was rescheduled for hearing on 27th July 2023.
24. It was counsel's submission that the Plaintiffs served the application upon the 3rd, 4th and 5th Defendants together with submissions dated 5th July 2023. They also filed an affidavit of service dated 11th July 2023.
25. Counsel further submitted that on 27th July 2023, even though the Defendants were absent, the application proceeded for hearing on merits, upon the court being satisfied that it was duly served. The court (Eboso J) thereafter granted a status quo order preserving land parcel numbers Kiambu/Munyu/8621, Kiambu/Munyu/8622 and Kiambu/Munyu/8137.
26. On whether an explanation was given for the non-attendance of the Defendants during the hearing, counsel for the Plaintiffs faulted the 3rd, 4th and 5th Defendants for failing to give any sufficient cause as to why they did not attend the hearing of the application dated 18th May 2023.
27. Counsel contended that the Plaintiffs would be prejudiced if the status quo order rendered on 27th July 2023 is set aside given that the 3rd, 4th and 5th Defendants intend to dispose of the properties. Counsel further contended that it was in the interest of justice that the suit properties be preserved pending the hearing and determination of the main suit. Counsel relied on the case of Joel Mugambi Mukira & 2 Others (for and on behalf of Kimathi tenants welfare group) v County Government of Nyeri [2019]eKLR in support of his submission.
28. Counsel contended that the 3rd, 4th and 5th Defendants have neither given an explanation for the delay in filing this application nor have they demonstrated that they would suffer any substantial loss if the orders sought are not granted. Counsel further contended that the 3rd, 4th and 5th Defendants have not filed any defence to show that it raises triable issues and neither have they sought leave to file the same out of time. Counsel argued that the 3rd, 4th and 5th Defendants are indolent and are therefore not entitled to any reliefs.



29. Counsel urged the court to dismiss this application and award the Plaintiffs the costs of the application.

Analysis and Determination

30. This court is of the considered opinion that the main issue for determination is as follows:

Whether the 3rd, 4th and 5th Defendants have made out a case for reviewing, varying or setting aside the Orders issued on 27th July 2023.

Whether the 3rd, 4th and 5th Defendants (Applicants) have made out a case for reviewing, varying or setting aside the orders issued on 27th July, 2023.

31. The Applicants herein seeks to set aside the ex parte status quo order issued by this court on the 27th July, 2023. The application is expressed to have been brought under Sections 1A and 1B of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules. The Applicants also rely on Section 24 and 25 of the [Land Registration Act](#) 2012.

32. Order 45 rule 1 provides as follows:

- “(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.”

33. Review jurisdiction under Order 45 rule 1 of the Civil Procedure Rules is exercised on well-settled principles. In *Sanitam Services (E.A.) Limited v Rentokil (K) Limited & another* [2019] eKLR the Court of Appeal outlined the following criteria upon which trial courts exercise review jurisdiction under Order 45 of the Civil Procedure Rules:

“Jurisdiction to review a judgment or order of a court is donated by Section 80 of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay.”

34. The court is of the view that this application does not meet the threshold set out under Order 45 of the Civil Procedure Rules. The Applicants also relied on Order 10 Rule 11 of the Civil Procedure Rules in their submissions which states that:

“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.”

35. The said rule refers to judgments and not orders. The relevant rule in this application is Order 51 Rule 15 which states that the court may set aside an order made ex parte.

36. In *Philip Ongom, Capt v Catherine Nyero Owota Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003)*), the court stated that:

“In setting aside ex parte orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause.”

37. The court further stated that:

“...However, what constitutes “sufficient cause”, to prevent a defendant from appearing in court, and what would be “fit conditions” for the court to impose when granting such an order, necessarily depend on the circumstances of each case.”

38. The jurisdiction to set aside an ex parte order is discretionary. The court in *Shah v Mbogo & Another (1967) EA 116* outlined the following principle on exercise of the discretionary jurisdiction:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

39. Similarly, the Court of Appeal in *Richard Nchapi Leiyagu v IEBC & 2 others [2013] eKLR* expressed itself as follows:

“We agree with those noble principles which go further to establish that the court’s discretion to set aside an ex-parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or an excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

40. The 3rd, 4th and 5th Defendants have not given an explanation as to why they neither filed a response nor attended the hearing of the application dated 18th May 2023. They only stated that their former advocates on record *Njoroge Kugwa & Company Advocates*, failed to bring to the attention of the court that the reliefs sought in the suit were only with respect to land parcel number *Kiambu/Munyu/8621*. They added that the omission compelled them to seek alternative legal representation.



41. Accordingly, since no satisfactory explanation has been given to warrant the exercise of discretion by the court to set aside the ex parte orders, I find that the Application dated 18th December 2023 lacks merit and it is hereby dismissed. The 3rd, 4th and 5th Defendants shall bear the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 12TH DAY OF MARCH 2025.

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J.M ONYANGO

JUDGE

In the presence of:

Mr Kanyi for the 3rd, 4th, & 5th Defendants/Applicants

Ms Muiruri for the Plaintiff/Respondent

Court Assistant: Hinga

