



**Kamau & 2 others v Charles & another (Sued in Their Capacity as the Guardians Ad Litem of Cecilia Mou Charles Harris) (Civil Suit 337 of 2010) [2025] KEHC 10982 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10982 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 337 OF 2010**

**PM MULWA, J**

**JULY 24, 2025**

**BETWEEN**

**ROSE WAMBUI KAMAU ..... 1<sup>ST</sup> PLAINTIFF  
JUDY WAIRIMU KAMAU ..... 2<sup>ND</sup> PLAINTIFF  
JULIUS KARUGA MACHARIA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**NATALIE NJOKI CHARLES ..... 1<sup>ST</sup> DEFENDANT  
MARY MASHAVU ..... 2<sup>ND</sup> DEFENDANT  
SUED IN THEIR CAPACITY AS THE GUARDIANS AD LITEM OF CECILIA  
MOU CHARLES HARRIS**

**RULING**

1. The Applicants filed a Notice of Motion dated 21<sup>st</sup> December 2023, seeking the following substantive reliefs:
  - i. That the judgment delivered on 22<sup>nd</sup> June 2017, together with all consequential orders and processes, be set aside on grounds that they are void, defective, irregular, and unilateral.
  - ii. That upon setting aside the said judgment, the matter be reopened and heard afresh.
  - iii. That the costs of the application be in the cause.
2. The application is supported by the grounds on its face and an affidavit deposed by Natalie Njoki Charles, sworn on 21<sup>st</sup> December 2023 and also dated 9<sup>th</sup> November 2023 in which she asserts,



inter alia, that this Court lacked jurisdiction to entertain the dispute. The Applicants also contend that the dispute falls within the jurisdiction of the Environment and Land Court (ELC) established under Article 162(2)(b) of *the Constitution* of Kenya, 2010. Additionally, it is contended that the 1<sup>st</sup> Defendant, Cecilia Mou, was mentally incapacitated at the time the suit was heard and judgment rendered.

3. The Plaintiffs opposed the application through Grounds of Opposition dated 15<sup>th</sup> March 2024. It is submitted that the Court had jurisdiction at the time the matter was instituted, and that the Applicants, having filed defences and a counterclaim, submitted to the jurisdiction of the Court and are now estopped from challenging it. Further, the Plaintiffs contend that no sufficient evidence has been placed before the Court to support the claim of mental incapacity, and that the affidavit in support of the motion is defective for non-compliance with Section 5 of the *Oaths and Statutory Declarations Act*, Cap 15.
4. Parties filed written submissions, with the Defendants' submissions dated 3<sup>rd</sup> March 2025 and the Plaintiffs' dated 27<sup>th</sup> February 2025. Counsel also made brief oral highlights.

### **Analysis and determination**

5. Having considered the application, the responses and the rival submissions by counsel, the following issues arise for determination:
  - i. Whether this Court lacked jurisdiction to determine the matter ab initio;
  - ii. Whether the judgment delivered on 22<sup>nd</sup> June 2017 is irregular and should be set aside;
  - iii. Whether the 1<sup>st</sup> Defendant, Cecilia Mou, was incapacitated at the time of the hearing
5. As observed by the parties, jurisdiction is everything. Without it, a court must down its tools. This principle was famously enunciated by the Court of Appeal in *Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd* [1989] KLR 1, where Nyarangi, JA, stated:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence.”
5. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR), at paragraph 68, the Court held that:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both... It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
5. The Applicants contend that this matter, being land-related, fell within the exclusive jurisdiction of the Environment and Land Court (ELC) under Article 162(2)(b) of *the Constitution*. However, the suit was filed on 18<sup>th</sup> June 2010, well before the enactment of the *Environment and Land Court Act*, No. 19 of 2011, which came into force on 30<sup>th</sup> August 2011. Moreover, the ELC only became operational on 5<sup>th</sup> November 2012. At the time of filing, the High Court was properly seized of the jurisdiction to hear and determine the matter.
6. Further, vide Gazette Notice No. 5178 dated 25<sup>th</sup> July 2014, the then Chief Justice Dr. Willy Mutunga issued Practice Directions that permitted the High Court to continue hearing and determining land matters filed prior to the establishment of the ELC.



7. It is trite that jurisdictional objections must be raised at the earliest opportunity. The issue in this case was not raised during the proceedings but has instead been introduced over seven years after judgment was delivered. This delay is inordinate and unexplained. In the circumstances, the objection is not only belated but also inconsistent with the Applicants' prior conduct.
8. I note that the Defendants actively participated in the proceedings, filing two sets of defences, a counterclaim and multiple applications without raising any jurisdictional issue. The principle of estoppel precludes them from now challenging this Court's jurisdiction post-judgment. In *Global Multimedia International Ltd Paramedia Services and Others [2006] EIZT-IC 3612 (Ch)*, the court held:

“A person submits to the jurisdiction of the Court if he voluntarily recognizes, or has voluntarily recognized, that the Court has jurisdiction...The effect of a party's submission is that he is precluded thereafter from objecting to the Court exercising its jurisdiction.”
5. It is important to highlight the procedural history of the matter. In the ruling delivered by Tuiyott, J. (as he then was) on 1<sup>st</sup> December 2017, he pointed out the issue of jurisdiction and noted that the proper forum for such disputes was the Environment and Land Court pursuant to Section 13(1) and (2) of the *Environment and Land Court Act*. Nonetheless, the Court dismissed the application dated 4<sup>th</sup> July 2017, which sought to review the judgment.
6. Despite that ruling, the Defendants filed further applications, including one dated 24<sup>th</sup> May 2018, seeking judgment on a counterclaim. On 1<sup>st</sup> February 2018, the Court found that the issues raised were res judicata. Subsequently, on 4<sup>th</sup> July 2019, the Defendant requested the Court to draw a decree on the counterclaim, which was done by a ruling on 20<sup>th</sup> December 2019.
7. These events reflect consistent submission to the jurisdiction of this Court. Had the Defendants been genuine in their objection to jurisdiction, they ought to have acted following the 1<sup>st</sup> December 2017 ruling. Instead, they participated in multiple applications and only raised this issue after a ruling by the late Hon. Justice David Majanja on 8<sup>th</sup> June 2021 triggered execution.
8. As to the application to set aside the judgment, I note that the judgment was delivered on 22<sup>nd</sup> June 2017, while the present application was brought over six years later, that is on 21<sup>st</sup> December 2023. The Applicants have not proffered any sufficient explanation for this delay. It is trite that delay defeats equity.
9. Justice demands a fair balance. While the right to be heard is fundamental, the need for finality in litigation is equally crucial. The Plaintiff has been kept from enjoying the fruits of judgment for over seven years, which is prejudicial and contrary to the overriding objective under Sections 1A and 1B of the *Civil Procedure Act*.
10. The Court further observes that the multiplicity of applications filed by the Applicants points to a strategy of delay. The power to set aside a judgment is discretionary and must be exercised judiciously. Under Order 10 Rule 11 of the Civil Procedure Rules, the Court may set aside an ex parte judgment where sufficient cause is shown. In this case, the Applicants have failed to show any sufficient cause.
11. As regards the issue of whether Cecilia Mou, was incapacitated at the time of the hearing, the 1<sup>st</sup> Defendant offered no contemporaneous medical evidence to support the contention. The available records only demonstrate that Cecilia was diagnosed in 2022–2023, long after the conclusion of the suit. Her guardianship was similarly effected during that period.



12. The burden of proof lies on the party alleging incapacity. Courts require cogent medical evidence to establish mental incapacity. Bare allegations or retrospective inference of incapacity from present symptoms do not suffice.
13. The Applicants' argument that current symptoms mirror those allegedly exhibited years ago is speculative and lacks evidentiary backing. The Court cannot set aside a regular judgment on such vague and unsubstantiated grounds.
14. Given the foregoing, I find that the Applicants have failed to demonstrate any valid ground upon which this Court can invoke its discretion to set aside the judgment of 22<sup>nd</sup> June 2017.
15. Accordingly, the Notice of Motion dated 21<sup>st</sup> December 2023 is dismissed with costs to the Plaintiffs.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JULY 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Tirop h/b for Mr. Odoyo for Plaintiff

Ms. Mungai for Defendant/Applicant

Court Assistant: Carlos

