



**Matulu & another (Suing as Administrators of the Estate of Makuthi Ngovi) v Kariuki & 4 others (Environment and Land Case Civil Suit E015 of 2020) [2025] KEELC 6742 (KLR) (7 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6742 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE CIVIL SUIT E015 OF 2020  
AY KOROSS, J  
OCTOBER 7, 2025**

**BETWEEN**

**BENEDICT SIKUKU MATULU ..... 1<sup>ST</sup> PLAINTIFF  
SIMON KASYOKI MATULU ..... 2<sup>ND</sup> PLAINTIFF  
SUIING AS ADMINISTRATORS OF THE ESTATE OF MAKUTHI NGOVI**

**AND**

**GEORGE NGURE KARIUKI ..... 1<sup>ST</sup> DEFENDANT  
JANE NJOKI KARIUKI ..... 2<sup>ND</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT  
THE HON.ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT  
MALUKI MUSEMBI NDETI ALIAS GEORGE MALUKI  
MUSEMBI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of a notice of motion dated 13/07/2023 filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, expressed to have been moved within the provisions of Articles 25 (c) & 50 (1) of *the Constitution* of Kenya, and they seek the following reliefs from this court: -
  - a. Spent.
  - b. The honourable court be pleased to set aside the proceedings before this court of 11/05/2022 and 3/10/2022.



- c. The honourable court be pleased to allow the 1<sup>st</sup> and 2<sup>nd</sup> defendants to tender evidence in support of their defence by enlarging the time within which they can file their witness statements and list and bundle of documents.
  - d. The honourable court be pleased to recall the plaintiff for cross-examination by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  - e. In the alternative, the honourable court be pleased to order that the suit do start de novo.
2. The motion is premised on the grounds listed on the face thereof and counsel Murimi Murango's supporting affidavit, sworn on 13/07/2023. In summary of both, counsel contends: - a) the suit proceeded for hearing on diverse dates of 11/05/2022 and 3/10/2022 and on 3/03/2023, he was served with a hearing notice of the further hearing of 15/03/2023; nonetheless, he misdiarised the hearing date and worse, he was relocating his law firm's offices; and
  3. B) That he subsequently visited the registry which informed him that the suit had proceeded for hearing on the earlier dates of 11/05/2022 and 3/10/2022; c) the 1<sup>st</sup> and 2<sup>nd</sup> defendants were yet to comply with pretrial directions by filing their witness statements and list and bundle of documents, and it is necessary for time to be extended; d) the defence raised triable issues, these defendants should be allowed to tender their evidence and the mistake of counsel's nonattendance should not be visited on the clients; e) the suit property had been sold to 3<sup>rd</sup> parties, and, finally f) the 1<sup>st</sup> and 2<sup>nd</sup> defendants should be allowed to cross examine the plaintiffs.
  4. Accordingly, and in brief opposition to the motion, counsel Paul Maingi Musyimi for the plaintiffs filed a replying affidavit that he deposed on 25/08/2023, where counsel maintained inter alia: the motion is an abuse of the court process and will unnecessarily delay the determination of the suit herein; b) the motion seeks to rewind the clock to the pre-trial stages notwithstanding that the case is part-heard, if the orders are issued then it will necessitate having the case heard denovo, and lastly, c) the 1<sup>st</sup> and 2<sup>nd</sup> defendant's counsel were duly served with the hearing notices and the claim of misdiarizing has not sufficiently been demonstrated but left to the court's imagination.
  5. As directed by the court, the parties' arguments were adequately canvassed by the written submissions that were received from the law firms of Mss. Murimi Murango & Associates Advocates for the defendants dated 21/02/2024 and Maingi Musyimi & Associates for the plaintiffs dated 5/03/2025, and this court is grateful to counsels for their illuminating submissions. In consequence, counsel's arguments and provisions of the law and judicial precedents relied upon in presenting their rival submissions shall be considered by this court.

#### **Issues for determination, Analysis and Determination.**

6. Thus, having given careful thought to the motion, its grounds, affidavits and rival arguments as contained in the submissions, the distilled issues for determination that will adequately address the matters in controversy are: -
  - a. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants have met the legal threshold to warrant setting aside of this court's proceedings and for the matter to be heard de novo.
  - b. Whether the plaintiffs' witnesses should be recalled.
  - c. Whether this court is functus officio on the relief for extension of time for the 1<sup>st</sup> and 2<sup>nd</sup> defendants to file their witness statements and list and bundle of documents.

These issues shall shortly be handled chronologically.



**a. Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants have met the legal threshold to warrant setting aside of this court's proceedings and for the matter to be heard de novo**

7. On this issue and as glanced from the motion, the 1<sup>st</sup> and 2<sup>nd</sup> defendants' counsel has relied on Articles 25 (c) & 50 (1) of our Constitution, which deal with the right to fair hearing and trial. What this court hears counsel saying is that the proceedings of 11/05/2022 and 3/10/2022 were in breach of the Constitution insofar as the 1<sup>st</sup> and 2<sup>nd</sup> defendants were condemned without an opportunity to be heard.
8. However, having considered the record, such a dereliction never arose, as even from counsel's own affidavit, it is clear these defendants were afforded the opportunity to tender their evidence or attend court, but never did. Nothing prevented them from doing as they had already entered an appearance, filed a defence and served with various notices. Consequently, it follows that these Articles are inapplicable to the circumstances herein. Therefore, and to this court's mind, the applicable legal proviso that applies to the instant case is Section 1A of the Civil Procedure Act ("CPA"), which provides as follows;
- “(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”
9. As concerns the prevailing jurisprudence, courts usually exercise judicious discretion in determining whether or not to allow a motion for setting aside proceedings. The legal principles for such exercise of unfettered discretion were expounded in the decision of *Shah vs Mbogo* (1979) EA 116 in the following manner: -
- “Applying the principles that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”
10. Thus, the question that suffices is whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants have presented a rational excuse as to why they never attended court on the diverse hearing dates. In this instance, and as read from the affidavit, no reasons have been demonstrated whatsoever as to why counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants never attended court on the hearing dates of 11/05/2022 and 3/10/2022.
11. As a matter of fact, counsel admits that as of 3/03/2023, he was aware the matter was part heard, thus demonstrating he was aware of the earlier dates that the matter had taken off for hearing. One wonders what dates were allegedly misdiarized since on the hearing date of 16/03/2023, which counsel seems to have erroneously mentioned as 15/03/2023, M/s. Mwikali acted for these defendants. Moreover, these defendants are obviously guilty of delay in filing the instant motion, because it was filed on 13/07/2023, which was 3 months after their counsel attended court on 16/03/2023.



12. Besides, and of significance, is that, with the introduction of e-filing by the judiciary, which was effectively launched on 1/07/2020 which was before the impugned hearing dates were issued, the e-filing court systems usually sends parties automated notifications, either by email or Short Message Services (SMS), notifying them of upcoming court dates and any changes in the schedule.
13. Although the 1<sup>st</sup> and 2<sup>nd</sup> defendants' counsel has urged this court that the mistake of counsel should not be visited on their clients, this court is aware that advocates are recognised agents of their clients. Having been served, they were duty-bound to inform their clients. These defendants have not stated that they were not aware of the hearing dates, and if at all, they were not informed; recourse to them is available under a separate claim, but not in this matter or court. See *Omwoyo vs African Highlands & Produce Co Ltd* [2002] 1 KLR.
14. On application of the guiding principles of *Shah vs Mbogo* (Supra), this court finds the plaintiffs who are at the tail end of the hearing of their case will be prejudiced for several reasons; the proceedings will be set aside without any procedural error on the part of the court, the matter which has been in court for 5 years will undeniably be delayed and hearing the matter denovo without any fault on the plaintiffs will cause undue hardship on them as they will incur expenses and recall their evidence. This court finds, in the absence of plausible reasons for non-attendance and undue hardship to the plaintiffs, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have not met the legal threshold to warrant setting aside the court's proceedings.

**b. Whether the plaintiffs' witnesses should be recalled.**

15. The 1<sup>st</sup> and 2<sup>nd</sup> defendants' motion did not lay a legal basis for the recall of the plaintiffs' witnesses; nonetheless, the relevant legal provisions are found in Section 146 (4) of the *Evidence Act*, which permits the court to recall a witness either for further examination-in-chief or for further cross-examination. This Section of the law is replicated in our Order 18, Rule 10 of the Civil Procedure Rules (CPR), which additionally allows the court to pose questions to a witness.
16. In re-opening a case, the court exercises judicious discretion anchored in law, evidence and reasons. The tests to be applied in such exercise of discretion were well summarised by the persuasive decision of *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] KEELC 8 (KLR) in the following manner: -

“First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that the proposed re-opening of a part's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible.”
17. In this court's humble view, and having considered the grounds in support motion, the 1<sup>st</sup> and 2<sup>nd</sup> have not specified any reason whatsoever as to why such a discretion should be exercised in their favour. Consequently, this court finds this relief is not merited.



**c. Whether this court is functus officio on the relief for extension of time for the 1<sup>st</sup> and 2<sup>nd</sup> defendants to file their witness statements and list and bundle of documents**

18 In respect of this issue and to refresh the parties' minds, when Ms. Mwikali appeared before this court on 16/03/2023, she made a similar application as the relief being sought herein for an extension of time to comply with pretrial directions. The court, on hearing her, gave reasons and orders as follows: -

“This is a part heard. No reasons have been given by the defence for failure to comply with directions for compliance given on 9/11/2021. The record shows that the firm of Murimi Murango was served with directions on 22/11/2021. I decline to grant more time for compliance.”

19. The common law doctrine of functus officio prevents the reopening of a matter once the court has rendered its final decision, and it bars a merit-based decisional re-engagement with the case once a final decision has been entered. Its origins, purpose and exceptions were highlighted in the decision of Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] KECA 600 (KLR).

20. Having issued final orders on 16/03/2023 denying these defendants an opportunity to do their filings, this court is now functus officio and its decision can only be overturned by way of an appeal. This court thus finds the motion is an abuse of the court process.

21. In the end, and for the above reasons and findings, the court finds the notice of motion dated 13/07/2023 is not merited. It is dismissed with costs to the plaintiffs. A mention date shall be given for purposes of taking a further hearing date.

**Orders accordingly.**

**DELIVERED AND DATED AT MACHAKOS THIS 7<sup>TH</sup> DAY OF OCTOBER, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

7. 10.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant.

Miss Mwikali holding brief for Mr. Murango for 1<sup>st</sup> and 2<sup>nd</sup> defendants.

N/A for plaintiff.

N/A for 3<sup>rd</sup> to 4<sup>th</sup> defendant.

