



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**CIVIL SUIT NO. 245 OF 2004**

KENYA PORTS AUTHORITY.....PLAINTIFF

-VERSUS-

1. G. WAYUMBA

2. F. OKUMU practicing as GEOMETER SURVEYS LIMITED

3. COMMISSIONER OF LANDS

4. THE DISTRICT LAND REGISTRAR, MOMBASA

5. WAYAND LIMITED

6. ESSAM PROPERTIES LRTD

7. KILIFI GARDENSLIMITED.....DEFENDANTS

**RULING.**

1. For determination is the motion dated 24<sup>th</sup> October 2018 and filed in Court on 25<sup>th</sup> October 2018. No provisions of the law have been cited on the face of the application. The 6<sup>th</sup> & 7<sup>th</sup> defendants/applicants pray that the Court do grant them the following orders:

1. Spent

2. Spent

3. The Exparte Judgment dated 24/09/2018 and delivered at Mombasa on 5/10/2018 and the consequential orders be set aside for,

a. Material non-disclosure

b. Being nullity for lack of jurisdiction.

4. Costs

2. The application is premised on the grounds inter alia that:

(i) The plaintiff concealed to the Court that there were other pending suits/proceedings previously instituted.

(ii) The said suits were by the plaintiff herein as against the Applicants herein over the same subject matter being the registered ownership of the suit properties namely Mombasa/Block XXVI/928 and Mombasa/Block XXVI/508 as per copies of the plaints attached.

**(iii) The Judgment dated 24/09/2018 and delivered on 5/10/2018 should be set aside as of right because it is a nullity for want of jurisdiction.**

3. The application is opposed by the plaintiff through the grounds of objection dated 5<sup>th</sup> November 2018 which include the following:

**1. That the Application is bad in law and an abuse of the Court process.**

**2. That the judgement having been delivered on 5<sup>th</sup> October, 2018, the Application herein is incompetent as the firm of Muthee Soni & Associates are improperly on record and have no authority to move this Honourable Court.**

**3. That the judgement entered on 5<sup>th</sup> October, 2018 is a regular judgment summons having duly served and ignored by the Defendant/Applicant and the Applicants have not advanced any sufficient reason for setting aside the judgment having been determined on merits.**

**4. That the judgment entered being a regular judgment having been rendered on merits, the Applicant has not raised any ground or any reasonable ground that may disturb the decision of the Court in view of the position settled by the Court of Appeal in Henry Muthee Kadhurima vs Commissioner of Lands & Another (2015) eKLR and Nelson Kazungu Chai & Others vs Pwani University College Malindi Civil Appeal No 78 of 2016 and therefore the Application herein is devoid of merits and the same ought to be dismissed with costs.**

4. The parties argued the motion orally. Mr Karimba advocate for the applicants reiterated the contained in the motion. He added that the judgement is a nullity for want of jurisdiction as this suit was subjudice cases No 497 & 498 of 2001. He relied on the decision of **Uhuru Highway Development Ltd vs CBK & 2 others (1995) eKLR**. Counsel submits that the existence of the two suits have been admitted.

5. Setting aside an ex parte judgment is a discretion of the Court. For a party to have that discretion exercised in his/her favour, the party must demonstrate the principles enunciated in the case of **Mbogo vs Shah (1968) E. A 93** i.e.

**a) That the application is made without undue delay.**

**b) The setting aside is not intended to cause obstruction of justice.**

**c) Non-service of the pleadings upon the applicant.**

**d) There is a good defence to the suit.**

6. The applicants have submitted that the judgment as delivered is a nullity as this suit was subjudice Mombasa ELC cases No 497 of 2001 and 498 of 2001. The two suits are still pending since what was annexed was only the plaints. From the plaints, the plaintiff herein was also the plaintiff in the two suits.

7. Under the provisions of section 6 of the Civil Procedure Act which discusses the subject of subjudice, the principle can only be applicable if this suit was still pending. The case having proceeded to hearing, the judgment cannot be stated to be a nullity merely because of the existence of the other suits. The argument as presented by the applicant cannot hold any water. In my view, I hold the opinion that had this Court dismissed the Respondent's suit, the Defendants/applicants would have said the other suits were resjudicata this decision.

8. The applicants did not question the mode of service of summons to enter appearance exercised by the plaintiff. The plea raised in paragraph 16 of the supporting affidavit is not an indication to this Court that the Applicants were not served.

9. I do not find merit in the reasons given for setting aside the judgment as the applicants have neither denied service nor pleaded that they have a good defence to the claim. However on account that there are pending suits where the applicants have put in a defence; and the parties are the same and to enable this Court reach a just determination of the issues in dispute I shall grant the applicants their right to a hearing.

10. In conclusion, the application for setting aside is granted not based on the grounds put forth in the motion but only to fulfil the rules of natural justice. Consequently the judgment dated 24<sup>th</sup> September 2018 is set aside as it relates to the 6<sup>th</sup> & 7<sup>th</sup> defendants titles Nos MSA/BLOCK CCVI/508 and MSA/BLOCK XXVI/928. Cost of the application is awarded to the Plaintiff/Respondent.

**Dated, signed & delivered at Mombasa this 21<sup>st</sup> March 2019**

**A. OMOLLO**

**JUDGE**