

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC NO. E045 OF 2022 (OS)
IN THE MATTER OF AN APPLICATION UNDER SECTION 37 & 38,
LIMITATIONS OF ACTIONS ACT
CHAPTER 22, LAWS OF KENYA
IN THE MATTER OF AN APPLICATION FOR REGISTRATION OF
TITLE BY ADVERSE POSSESSION OVER 2.1 ACRES PORTION OF
LR. NO. 1757/6
BETWEEN

GEORGE KYALO MUVEU.....PLAINTIFF

-VERSUS-

ELIZABETH KAMENE NDOLO (Sued as the beneficiary of the estate of the late General Joseph Musyimi Lele Ndolo).....
DEFENDANT

RULING

Introduction

1. This is a ruling in respect of a notice of motion dated 2nd April, 2025 in which the Plaintiff/Applicant seeks the following orders:
 - 1) Spent
 - 2) That this honourable court be pleased to review, set aside and/or vacate the order issued on 25th September, 2024 dismissing the Plaintiffs suit.
 - 3) That there be interim stay of the said dismissal order pending the inter partes hearing and determination hereof.
 - 4) That costs of this application be awarded to the Plaintiff/Applicant.
2. The Application is expressed to be brought under the provisions of Order 10 Rule II, Order 22 Rule (1) and Order 51 Rule (i) of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

Applicant's Contention

3. The Applicant contends that on 25th September, 2024, this court dismissed his suit on the grounds that it was based on a nonexistent title namely LR No. 1757/6. The Applicant contends further that during the submissions which led to the dismissal of his suit, the Defendant/Respondent failed to inform the court that she had subdivided LR No. 1757/6 on or about 22nd October, 2019 resulting a new title LR. No. 1757/19.
4. The Applicant states that the Respondent failed to inform the court that his suit was part of other 17 suits which had been filed by different Plaintiffs against a common Defendant and that these suits had been consolidated on 16th January, 2023 under ELC No. 3 of 2022.
5. The Applicant further stated that the Respondent failed to inform the court that an application for amendment had been made in ELC No. 3 of 2022 which was seeking to amend the plaints to read the correct LR No. being 1757/19. He further stated that had the amendment in ELC no. 3 of 2022 been granted, it would have been binding upon the other 17suits which had been consolidated.
6. The Applicant contends that the Respondent was the cause of the confusion in title number and should not be allowed to benefit from her wrong doing. The Applicant states that it will be fair that the dismissal order be set aside so that the Applicant can proceed with his application for amendment which is pending in ELC No. 3 of 2022.
7. Finally the Applicant states that had the aforestated facts been brought to the attention of the court, the dismissal order of 25th September, 2024 would not have been made.

Respondent's Contention

8. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 19th May, 2025. The Respondent contends that the provisions cited by the Applicant cannot support the application. He states that what the Applicant is seeking is a review under Order 45 of the Civil Procedure Rules when there are no grounds for review of the orders of 25th September, 2024.
9. The Respondent further states that the order being sought to be reviewed was made on 25th September, 2024 yet the application was made 7 months later. The application is an afterthought after the Applicant realized that time for appeal had run out and extension of the same might not work.
10. On the allegations by the Applicant that the Respondent failed to inform the court of consolidation of the suit with others, he stated that there was no such order given and that the Applicant was given opportunity to respond to the application which resulted in the dismissal of his suit. The ruling of 25th September, 2024 made in ELC E045 of 2022 applied to all the other files in the series.
11. The Respondent states that the Applicant was to blame for not carrying out a search at the Lands Registry to ascertain the correct title.
12. In a further affidavit sworn on 10th June, 2025, the Applicant contends that he did not move the court under Order 45 of the Civil Procedure Rules. He states that his application is clearly expressed to be brought under Order 10 Rule 11 of the Civil Procedure Rules which calls for exercise of discretion of this court.
13. On the issue of consolidation in ELC 3 of 2022, the Applicant states that he was present in court when his advocate and the advocate for the Respondent entered a consent consolidating the matters. He stated that he was misled by his advocate as to what transpired on 16th January, 2023. It turned out that there was no consolidation after the court perused the court files. He stated that mistake of counsel should not be visited upon a litigant.

14. The Applicant further states that an application to set aside the subdivisions has been made in ELC No. 241 of 2017 and that the Respondent should not benefit from his own wrong doing.

Parties Submissions

15. The parties were directed to file written submissions. The Applicant filed his submission dated 16th June, 2025. The Respondent filed his submissions dated 28th July, 2025.

16. The Applicant submitted that whereas judgment has been entered under Order 10, court has discretion to set it aside. Order 10 Rule II of the Civil Procedure Rules provides as follows:

“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”.

17. The Applicant relied on the case of **Shah –Vs- Mbogo (1979) EA 116** where it was held as follows:

“I have carefully considered in relation to the present application the principles governing the exercise of the court’s discretion to set aside a judgment. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by eversion or otherwise to obstruct or delay the cause of justice”.

18. The Applicant further submitted that the confusion which resulted in dismissal of the suit was caused by the Respondent and that the Respondent should not be allowed to benefit from his own mistake. He relied on the case of **Kenya Airways Limited –vs- Satwant Singh Flora (2013) eKLR** where it was held as follows:

“Ex turpi causa non oritur action. This old and well known legal maxim is founded in a good sense and expresses a clear and well

recognized legal principle, which is not confined to indicating offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality the court will not assist him”.

19. On the issue of delay, the Applicant submitted that the delay was caused due to the mistaken fact that the suits had been consolidated under ELC 3 of 2022.

20. The Respondent submitted that the Applicant had not met the threshold for grant of a review under Order 45 of the Civil Procedure Rules. The Respondent relied on the case of **National Bank of Kenya –vs- Ndungu Njau** where it was held as follows:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter, nor can it be a ground for review that the court proceeds on an incorrect exposition of the law”.

21. On the issue of delay, the Respondent submitted that the mistake by the Applicant’s lawyer should not be excused. The Respondent relied on the case of **Mariam Mohamed Mbaruku –vs- Hamisis Mzee Ali (2021) eKLR** where Justice Onyiego held as follows:

“Whose mistake was it in taking a wrong route? According to Mr. Khatib, it was the mistake of counsel which should not be visited on

his client. As it is often said, choices have consequences. If the Applicant, through her counsel, misapprehended the law and did follow a wrong process or procedure all the way to the court of Appeal, only to hit a rock and bounce back, she cannot burden an innocent opposing party by starting afresh the appeal process.

It is not always that an advocate's mistakes cannot be visited on a litigant. Where an advocate fails to take diligent steps to prosecute his client's case, he cannot run away from responsibility”.

Analysis and Determination

22. I have carefully considered the Applicant's application, the opposition to the same by the Respondent as well as the submissions by the parties. The only issue for determination in this application is whether the Applicant has demonstrated that he has grounds which can warrant a review and setting aside of the orders of 25th September, 2024.

23. The Applicant in this matter had filed an originating summons on 21st November, 2022 in which he contended that he had acquired a portion of 2.1 acres or thereabouts comprised in LR No. 1757/6 (formerly LR No. 1757).

24. On 23rd May, 2023 the Respondent filed a notice of motion dated 19th May, 2023 in which sought to strike out the Applicant's suit on the ground that the suit was based on a non-existent title. On 25th May, 2023, the application was placed before Lady Justice Murigi who directed that the application was to be disposed of by way of written submissions. The directions which were given in ELC No. E045 of 2022 were to apply to ELC Nos. 3, 20, 21, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 of 2022.

25. The directions of the court were transmitted to the advocates for the parties via email. In a ruling delivered on 25th September, 2024 the Applicant's application was allowed and this order applied to all the other 17 files. The Applicant now seeks to have the order of 25th September, 2024 reviewed and

set aside so that an application for amendment made in ELC 3 of 2022 can be argued.

26. The Applicant's application is expressed to be brought under Order 10 Rule 11 of the Civil Procedure Rules. Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

“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.

27. The heading of Order 10 clearly shows that it is applicable to where there is nonappearance, default of defence and failure to serve. In the instant case, the Applicant fully participated in the application of 19th May, 2023 which resulted in the striking out of his suit. He cannot therefore invoke the discretion of the court to have the order of 25th September, 2024 set aside.

28. The Applicant had filed his suit on 21st November, 2022 and annexed a certificate of title for LR. No. 1757/6. As at the time of filing his suit, LR No. 1757/6 had ceased to exist as new subdivisions were in place as at 22nd October, 2019. It is therefore clear that had the Applicant sought to comply with Order 37 Rule 7 (2) he would have indicated the correct title. He instead chose to use a nonexistent title with the result that his suit was struck out.

29. The Applicant cannot blame the Respondent for his mistake. Failure to comply with mandatory provisions of a statute cannot be excused as procedural technicality. As the Applicant was seeking to be registered as an adverse possessor, it was incumbent upon him to make sure that his claim was based on a correct and existing title.

30. The Applicant's lawyer was aware that subdivision of LR No. 1757/6 had been done and new numbers were in place. This was clear to the lawyer as early as 23rd February, 2023 before the application for striking out was filed on 23rd May, 2023. Indeed the Applicant's lawyer had made an application to amend the originating summons in E003 of 2022. This application was made

on 23rd February, 2023 but remained unprosecuted until the application for striking out was made on 23rd May, 2023.

31. I have already found that there are no grounds which exist for this court to exercise its discretion under Order 10 Rule 11 of the Civil Procedure Rule. Equally, there are no grounds upon which this court can entertain a review under Order 45 of the Civil Procedure Rules as there is no sufficient reason given for setting aside the order of 25th September, 2024. There is no error on the face of the record or discovery of new evidence which could not be obtained if due diligence was exercised.

Disposition

32. The application was brought after 7 months. The reason given for the delay is not plausible. I therefore find that the Applicant's application is devoid of merit. The same is dismissed with costs to the Respondent. As was agreed by counsel for the parties on 21st May, 2025, the orders made in this file shall apply to ELC (OS) Nos. 3, 20, 21, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 all of 2022.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 20TH DAY OF NOVEMBER, 2025.**

IN THE PRESENCE OF:

Ms. Jematia for Mr. Ndalila for Respondent.

Mr. Chamia for Applicant.

Court assistant - Nelima

ORIGINAL