



Carling (Suing as administrator of the Estate of Mona Ingegard Bjorklund) v Apoko alias Ringtone (Land Case E354 of 2021) [2025] KEELC 8505 (KLR) (4 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8505 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E354 OF 2021
MN KULLOW, J
DECEMBER 4, 2025**

BETWEEN

DANIEL MICHAEL CARLING (SUING AS ADMINISTRATOR OF THE ESTATE OF MONA INGEGARD BJORKLUND) PLAINTIFF

AND

ALEX APOKO ALIAS RINGTONE DEFENDANT

RULING

1. The Plaintiff/Applicant's Notice of Motion dated 7th November 2024 is brought under Sections 3 & 3A of the *Civil Procedure Act*, Order 51 Rule 15 of the Civil Procedure Rules and seeks the following substantive orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to set aside the ex-parte Ruling and order of 30th September 2022 staying the suit herein pending the hearing and determination of Milimani HCFP&A/E1209/2021 and all consequential orders thereto.
 - c. That this Honourable Court be pleased to reopen the proceedings and allow the Plaintiff to proceed and prosecute the suit.
 - d. That upon grant of prayers 2 and 3 above, this Honourable Court be pleased to grant the Plaintiff leave to amend the Plaint as per the draft Amended Plaint annexed hereto.
 - e. That thereafter, directions be issued on the timelines for filing and service of the Amended Plaint and filing and service of Statements of Defence.
 - f. That the costs of this Application be provided for.



2. The application is premised on the grounds that the ruling delivered on 30th September 2022 was made ex parte, the Court having indicated that it was unable to trace the Plaintiff's Replying Affidavit sworn on 16th November 2021 and his written submissions dated 22nd June 2022, despite the same having been duly filed on the e-filing system. The Applicant contends that the failure to consider his response resulted in a ruling made without the benefit of his evidence and arguments, thereby occasioning prejudice and an infringement of his right to be heard.
3. The Applicant further asserts that during the subsistence of the stay orders issued in that ruling, the suit property LR No. 7785/94 – IR 33637 (94 Runda Drive) was fraudulently and irregularly transferred to third parties, who subsequently commenced illegal developments on the land, including demolishing the house previously standing thereon. He states that he discovered these developments while following up with the Chief Land Registrar on reconstruction of the lost parcel register after the expiry of the gazette period.
4. According to the Applicant, the said third parties are necessary parties to the present suit and ought to be joined as defendants through amendment of the Plaint. He maintains that meaningful preservation of the suit property and effective prosecution of this matter cannot proceed unless the stay orders are lifted. He further argues that leaving the ruling of 30th September 2022 in place would render the proceedings an academic exercise while the property continues to be wasted, and that sufficient cause therefore exists to set aside the ruling, reopen the proceedings, and allow amendment of the Plaint.

Respondent's Response

5. The application is opposed through a Replying Affidavit sworn on 4th April 2025 by the Defendant/ Respondent, Alex Apoko, who contends that the Plaintiff lacks the requisite locus standi to institute or sustain these proceedings. He avers that there is an active Succession Cause, HCFP&A No. E1209 of 2021, in which the validity of the Plaintiff's grant of letters of administration is under challenge, including allegations that the power of attorney used to obtain the grant was revoked and expunged from the Ministry of Lands records.
6. The Respondent asserts that only the Succession Court can determine who is the lawful personal representative of the deceased's estate, and that allowing this suit to proceed before that determination would occasion grave injustice and offend the principle against multiplicity of proceedings.
7. The Respondent further states that it is precisely due to the existence of the succession proceedings and the pending application for revocation of the Plaintiff's grant that the Court previously stayed the present suit. He accuses the Plaintiff of failing to disclose the existence of the succession cause when filing this suit and of filing multiple proceedings with the intention of obscuring the true issues.
8. It is his position that if the Plaintiff were genuinely desirous of preserving the estate, he would instead have pursued expeditious determination of the applications before the Succession Court to first validate his capacity.
9. The Respondent also takes issue with the delay of two years between the ruling of 30th September 2022 and the filing of the present application on 7th November 2024, arguing that the Plaintiff has not offered any satisfactory explanation for the delay, failure to attend the earlier hearing, or failure to move with diligence.
10. He maintains that the Plaintiff has not demonstrated reasonable grounds for setting aside the stay or amending the Plaint, and that any concerns about alleged intermeddling or waste of the estate should properly be addressed before the Succession Court. He therefore urges that the application is an abuse of process, is intended to derail the timely disposal of the matter, and should be dismissed with costs.



Submissions

a. Plaintiff's Submissions

11. In his written submissions dated 26th June 2025, the Plaintiff argues that the Notice of Motion dated 7th November 2024 meets the threshold for the setting aside of the ruling delivered on 30th September 2022, on grounds that the ruling was issued ex parte after the Court failed to trace and consider his duly filed Replying Affidavit and submissions.
12. He submits that the ex parte stay orders enabled the fraudulent and irregular transfer of the suit property, LR No. 7785/94 – IR 33637, to third parties who have since undertaken illegal developments, thus necessitating the joinder of those parties as defendants and amendment of the Plaint.
13. On the issue of locus standi, the Plaintiff maintains that he remains the lawful administrator of the estate by virtue of a resealed foreign grant, annexed to his Further Affidavit, and asserts that the pendency of revocation proceedings in the Succession Court does not negate his standing until the grant is actually revoked. He relies on *Mwakivonje v Mwakaonje* [2024] KEELC 3794, *Elijah Nderitu Gachaga v Francis Gakuu Gachaga* [2019] eKLR, *Trouistik Union International v Jane Mbeyu* (2008), and other authorities for the proposition that locus standi flows from a valid grant unless revoked.
14. On whether sufficient cause has been demonstrated to set aside the ruling, the Plaintiff relies on *Shah v Mbogo* [1967] EA 116, *Wachira Karani v Bildad Wachira* [2016] eKLR, and *Civicon Limited v Joswa Kenyatta* [2020] eKLR, submitting that the Court's discretion should be exercised to prevent injustice resulting from accident, inadvertence, or excusable mistake.
15. He explains the alleged delay on account of a change of advocates and failure by prior counsel to attend court, circumstances he argues are verifiable from the record. He further submits that amendment of the Plaint is necessary to join the third parties who allegedly acquired the property during the stay period, relying on *Pakaja Limited v Trustees of Mombasa Simba Sports Club* [2022] eKLR and *Daniel Ngetich v K-Rep Bank Ltd* [2013] KLR for the proposition that amendments should be freely allowed where they are essential to determining the real issues in controversy and do not prejudice the opposing party. The Plaintiff therefore identifies three issues for determination: (i) whether he has locus standi; (ii) whether the ex parte ruling of 30 September 2022 should be set aside; and (iii) whether leave to amend the Plaint should issue.

b. Respondent's written submissions

16. The Respondent submits that the Plaintiff lacks locus standi because the resealed foreign grant upon which the Plaintiff relies is actively challenged in Succession Cause No. HCFP&A E1209 of 2021, and the grant was allegedly procured by reliance on a power of attorney that was subsequently revoked and expunged from Ministry of Lands records. Reliance is placed on settled authorities that locus standi to sue on behalf of an estate derives only from a valid grant of representation see *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR and *Trouistik Union International v Jane Mbeyu* and the Respondent argues that until the succession court determines the validity of the resealed grant the Plaintiff remains without capacity to maintain these proceedings.
17. The Respondent further contends there has been inordinate and unexplained delay of two years between the stay ruling (30th September 2022) and this application (7th November 2024); authorities cited to underscore the strict approach to delay include *Mombasa County Government v Kenya Ferry*



Services (2019), Mombasa County Government v Kooba Kenya Ltd (2024) and Ndiritu v Kinuthia (2025), such that the Applicant must give a satisfactory explanation for the entire period of delay.

18. On the question whether sufficient cause exists to set aside the stay, the Respondent submits the Plaintiff has not shown excusable mistake, inadvertence or circumstances beyond his control and relies on the equitable principles in *Shah v Mbogo* [1967] EA 116, *CMC Holdings Ltd v Nzioki* [2004] 1 KLR 173 and related authorities to insist the discretion should not be exercised to reward delay or abuse of process. As to amendment and joinder, the Respondent argues that the Court should refuse late amendments where the Plaintiff's competence to sue is under active objection, and where joinder would introduce new issues and prejudice the Respondent; reliance is placed on recent appellate guidance in *Sadera & Others v Kerema & Others* [2025] KECA and related decisions (including *GKW v RNK* [2025]) that emphasise necessity, identifiable stake, absence of prejudice and absence of abuse as preconditions to joinder.
19. The Respondent therefore urges the Court to uphold the stay, dismiss the application for want of locus standi, delay and insufficient cause, and refuse leave to amend or join third parties with costs in favour of the Respondent.

Issues for Determination

20. Having considered the application, affidavits and submissions on record, the Court is of the view that the following two issues arise for determination:
 - a. Whether the Plaintiff/Applicant has the requisite locus standi to institute and maintain the present suit and the application.
 - b. Whether, in the circumstances presented, sufficient cause has been shown to warrant the setting aside of the ruling and stay orders issued on 30th September 2022.

Analysis and Determination

Issue 1: Whether the Plaintiff/Applicant has the requisite locus standi to institute and maintain the present suit and the application.

21. Locus standi refers to the legal capacity to institute and maintain a suit. As settled in *Trouistik Union International & Another v Jane Mbeyu & Another* (1993) and reaffirmed in *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR, only a duly appointed personal representative clothed with a valid grant of representation may bring proceedings on behalf of the estate of a deceased person. It is not in dispute that the Plaintiff relies on a foreign grant resealed in Kenya on 21st September 2021 in HCFP&A No. E1209 of 2021, authorising him to act as the administrator of the estate of the late Mona Ingegard Bjorklund.
22. The Respondent argues that locus standi is lacking because the resealed grant is under challenge in the Succession Court, and because the power of attorney relied upon during the resealing process was allegedly revoked and expunged. However, the Court notes that no order has been placed before this Court to show that the resealed grant has been revoked, annulled or suspended.
23. The mere pendency of revocation proceedings does not in law extinguish or suspend a grant. The legal position is that a grant remains valid and operative until and unless it is set aside by the Succession Court see *Mwakivonje v Mwakaonje* [2024] KEELC 3794, where the Court held that locus standi flows from the grant itself and only ceases upon formal revocation.



24. In his Further Affidavit, the Plaintiff produced the resealed grant, which on the face of it remains in force. The Court is persuaded that the Plaintiff was clothed with capacity at the time of filing the suit and continues to hold capacity in the absence of a contrary order from the Probate Court.
25. The Respondent's challenge raised through affidavit rather than a formal preliminary objection does not displace the legal presumption of validity attaching to a subsisting grant. As observed by Justice Mutungi in *Komu v Principal Magistrate Kerugoya* [2024], a claim of want of locus standi is a pure point of law that must be grounded in a clear statutory or judicial bar, not a pending allegation or anticipated revocation.
26. Consequently, this Court finds that the Plaintiff/Applicant holds a valid and unrecalled grant, which vests him with the status of personal representative for purposes of Section 82(a) of the *Law of Succession Act*. His capacity to institute and maintain this suit, and the present application, therefore stands established.
27. For the foregoing reasons, the Court holds that the Plaintiff/Applicant has the requisite locus standi to institute and maintain this suit and the present application, the resealed foreign grant being valid and operative unless and until revoked by the Succession Court.

Issue 2: Whether in the circumstances presented, sufficient cause has been shown to warrant the setting aside of the ruling and stay orders issued on 30 September 2022.

28. The application before the Court seeks the setting aside of the ruling delivered on 30th September 2022, which stayed the present suit pending determination of the succession cause. The power to set aside is discretionary. Although Order 12 rule 7 of the Civil Procedure Rules does not directly apply to stays of proceedings, its principle on setting aside ex parte orders is instructive. It provides that the Court may set aside or vary such orders “upon such terms as may be just.” The jurisprudence on this discretionary power is settled.
29. In *Shah v Mbogo* (1967) EA 116, the Court stated that the discretion to set aside ex parte orders is intended “to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error,” and not to assist a party who has deliberately sought to obstruct or delay justice. This principle has been consistently reaffirmed, including in *CMC Holdings Ltd v Nzioki* [2004] 1 KLR 173, where the Court of Appeal reiterated that the discretion must be exercised so as to ensure that a litigant does not suffer injustice as a result of an excusable error.
30. Further guidance appears in *Patel v EA Cargo Handling Services Ltd* (1974) EA 75, in which the Court emphasised that there are no rigid limits on the judge's discretion, save that the Court must act on terms that are just. The “main concern” is to do justice to the parties, and the Court must guard against imposing fetters that would restrict this wide discretion. The approach is therefore fact-sensitive.
31. The Court of Appeal in *Mohammed & Another v Shoka* (1990) KLR 463 articulated three classic tests when considering the setting aside of an ex parte order: whether there is a reasonable explanation for the default; whether the Applicant has demonstrated prejudice or injustice arising from the ex parte order; and whether the matter discloses issues fit for ventilation at a full hearing.
32. The ruling of 30th September 2022 expressly states that the Court was “unable to identify the Plaintiff's Replying Affidavit from the e-filing portal” and therefore considered only the Defendant's submissions. The Applicant has produced copies of his Replying Affidavit and written submissions, which are stamped and acknowledged as filed in 2021 and 2022. It is therefore evident that the Applicant's material existed but was not brought to the Court's attention due to an inadvertent



- administrative lapse. This constitutes the kind of excusable mistake contemplated in *Shah v Mbogo and Wachira Karani v Bildad Wachira* [2016] eKLR.
33. Although the Respondent urged that the Applicant delayed for nearly two years before filing the present application, the explanation tendered — that the Applicant only realised, upon change of advocates, that his filings were never considered, and that significant dealings on the suit property only became known upon reconstruction of the land register in 2024 is a plausible and coherent account. While not entirely satisfactory, it does not demonstrate willful indolence or design to obstruct justice.
 34. The material before the Court shows that during the subsistence of the stay, the suit property LR No. 7785/94 – IR 33637 was allegedly transferred to third parties and subjected to developments, including demolition of the existing house. These allegations, supported by documents annexed as “DC-4” to “DC-6,” raise substantial concerns over the potential alteration of the substratum of the suit. If the stay persists, the risk of injustice is significant, as eventual determination of the suit may be rendered nugatory. The prejudice therefore weighs more heavily against maintaining the stay.
 35. The issues raised including disputed transfers, alleged fraud, need for joinder of new parties, and the preservation of property are substantive issues that fall squarely within the jurisdiction of this Court and warrant ventilation at trial. As observed in *Tree Shade Motors Ltd v D.T. Dobie* (CA No. 38 of 1998), a court must consider whether the applicant raises triable issues, not whether the issues will ultimately succeed. On the facts before the Court, the Applicant has raised matters that clearly require examination at a full hearing.
 36. The Respondent relies on *Belinda Murai v Amos Wainaina* [1979] eKLR, urging that the Court should not aid a party whose conduct reflects indolence. While delay is a relevant factor, it is not, in itself, determinative. In *Sebei District Administration v Gasyali* (1968) EA 300, the Court emphasised that denying a party a hearing should be a last resort and that the Court must consider whether any prejudice can be compensated by costs. In this case, any prejudice to the Respondent arising from reopening the proceedings can be mitigated by appropriate directions on timelines and costs.
 37. Having considered the explanation for the default, the potential prejudice, and the need to allow adjudication of the issues raised, this Court is satisfied that the Applicant has demonstrated sufficient cause to warrant the setting aside of the ruling and stay orders of 30th September 2022.
 38. The failure to consider the Applicant’s filed materials constitutes an excusable procedural error, and the continued stay risks occasioning substantial injustice in light of the alleged dealings on the suit property. The discretionary power of the Court is best exercised in favour of reopening the proceedings so that the issues in dispute may be fully and fairly adjudicated.

Final Orders

39. In the interest of justice, and having considered all the circumstances of this matter, the Court exercises its discretion in favour of the Applicant. The Notice of Motion dated 7th November 2024 is therefore allowed on the following terms:
 - a. The Ruling and Stay Orders issued on 30th September 2022 are hereby set aside.
 - b. The proceedings in ELC Case No. E354 of 2021 are hereby reopened.
 - c. The Plaintiff/Applicant is granted leave to amend the Plaintiff in terms of the Draft Amended Plaintiff annexed to the Application.
 - d. The Plaintiff shall file and serve the Amended Plaintiff within fourteen (14) days from the date hereof.



- e. The Defendant and any newly joined parties shall file and serve their Statements of Defence within twenty-one (21) days of service.
- f. As a condition for the setting aside, the Applicant shall pay to the Defendant costs thrown away assessed at KShs. 40,000/- within twenty-one (21) days from the date hereof.
- g. Upon compliance with Order (e), the Plaintiff shall fix the matter for directions under Order 11 within thirty (30) days, failing which the leave granted and the orders herein shall stand vacated automatically without the need for any further order.
- h. In default of compliance with any of Orders (c), (d), or (e) within the stipulated timelines, the present application shall stand dismissed, and all consequential orders shall be vacated forthwith.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4TH DAY OF DECEMBER, 2025.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Mr. Oloo for the Plaintiff/Applicant

Ms. Gathoni H/B for Mr. Mbabu for the Defendant/Respondent

Philomena W.....Court Assistant

