



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT NAIROBI**

**ELC PETITION CASE NO. E041 OF 2024**

**IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21, 22, 23, 24,  
25, 27**

**28, 19, 35, 48, 49, 50, 53, AND 159 OF  
THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE CONTRAVENTION OF THE  
FUNDAMENTAL RIGHTS AND FREEDOMS  
OF THE PETITIONER**

**UNDER ARTICLE 25, 27, 28, 40, 47, 48,  
AND 50**

**AND**

**IN THE MATTER OF: RULES 4,23 AND 24 OF THE  
CONSTITUTION OF KENYA (PROTECTION  
OF FUNDAMENTAL RIGHTS AND**

**FREEDOMS) (PRACTICE & PROCEDURE  
RULES)**

**AND**

**IN THE MATTER OF: SECTION 4, 6, AND 2 OF THE FAIR  
ADMINISTRATIVE ACT NO. 4 OF 2015**

**OWINO JACOB CATTWRIGHT.....  
.....PETITIONER**

**=VERSUS=**

**THE CHIEF MAGISTRATE COURT**

**MILIMANI LAW COURTS.....1<sup>ST</sup>**

**RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION.....2<sup>ND</sup>**

**RESPONDENT**

**THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....3<sup>RD</sup>**

**RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup>**

**RESPONDENT**

**NATIONAL LAND COMMISSION.....5<sup>TH</sup>**

**RESPONDENT**

**KENYA REVENUE AUTHORITY.....6<sup>TH</sup>**

**RESPONDENT**

**REALTY BROKERS LIMITED.....7<sup>TH</sup>**

**RESPONDENT**

**JAMES ISABIRYE MUGOYA.....8<sup>TH</sup>**

**RESPONDENT**

**LUCIA WANJIRU NGUGI.....2<sup>ND</sup>**

**DEFENDANT/APPLICANT**

**SAMSON MAHUGO.....3<sup>RD</sup>**

**DEFENDANT/APPLICANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 20<sup>th</sup> December 2024, brought under Articles 50, 159 2(d) of the Constitution, Order 45 Rule (1) and (2), Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, and 3A of the Civil Procedure Act, in which the Applicants seek the following orders:

**a) Spent.**

**b) Spent.**

**c) THAT this Honourable Court be pleased to vary, review, discharge or set aside its orders issued on 19<sup>th</sup> November 2024.**

**d) THAT this Honourable Court be pleased to set aside the proceedings and the impugned ruling and direct that the application dated 16<sup>th</sup> May 2024 be heard de novo.**

***e) THAT this Honourable court be pleased to re-open the hearing of the application.***

***d) THAT the costs of this application be in the cause.***

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of No. 100531 PC Anthony Mwaura, sworn on even date.

### **THE APPLICANTS CASE**

3. The deponent averred that the application dated 16<sup>th</sup> May 2024 was heard in the absence of the 1st, 3rd, and 4th Respondents. He further averred that the DC1 was not served with the pleadings and, therefore, was not afforded an opportunity to defend the matter. He asserted that he became aware of the ruling on 4<sup>th</sup> December 2024 only after being served with the ruling delivered on 19<sup>th</sup> November 2024. He maintained that the Petitioner would not be prejudiced if the orders sought are granted.
4. The deponent outlined the background of Criminal Case No. E. He explained that on 1<sup>st</sup> February 2022, the DCI Land Fraud Investigation Unit received complaints from Diro Advocates and Bill Simba & Associates on behalf of their clients, Mr. James Mugoya Isabrye and Mwadi Women Entrepreneurs Limited, who are alleged to be the genuine proprietors of L.R No. 209/10211.
5. Upon investigation, they arrested and charged the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 8<sup>th</sup> Petitioners in E271 of 2024. He asserted that the Petitioners have not shown that the 2<sup>nd</sup> Respondent acted beyond or in excess of the power conferred upon it. He

emphasized that it is in the interest of justice for the application to be heard on the merits. He pointed out that the evidence against the Petitioners is scientific in nature and must be proved in court. He argued that the DCI has a good defense and should be granted an opportunity to defend the matter in court.

### **THE 2<sup>ND</sup> RESPONDENT'S CASE**

6. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn by Edna Ntabo on 27<sup>th</sup> January 2025 in support of the application.
7. The deponent asserted that the 2<sup>nd</sup> Respondent was not served with the pleadings in this suit and, consequently, was not afforded an opportunity to mount a defence. She contended that the 2<sup>nd</sup> Respondent is aggrieved by the ruling and wishes to defend the matter.

### **THE PETITIONER/RESPONDENT'S CASE**

8. The Petitioner filed a replying affidavit dated 13<sup>th</sup> January 2025 in opposition to the application. He contended that the State Counsel misled the Court, as the record clearly shows that the State Counsel appeared on 20<sup>th</sup> June 2024 and requested five days to file a replying affidavit.
9. The deponent argued that the allegations of personal service by the 3<sup>rd</sup> Respondent are unfounded, as Section 13 of the Government Proceedings Act and Order 5 Rule 9 of the Civil Procedure Rules require service upon the government in civil proceedings to be made upon the 4<sup>th</sup> Respondent.
10. He maintained that the Respondents were aware of the matter, as the 4<sup>th</sup> Respondent was served with all the

pleadings and the dates were set in court in the presence of the Applicant on 20<sup>th</sup> June 2024.

11. He argued that it is prejudicial and oppressive to sustain the criminal proceedings against the Petitioner based on a skewed investigation. He asserted that the application is a delayed tactic intended to suppress evidence to aid the 7<sup>th</sup> and 8<sup>th</sup> Respondents in their dispute over ownership of the property, to the Petitioner's detriment.
12. The application was canvassed by way of written submissions.

### **THE 2<sup>ND</sup> RESPONDENT'S SUBMISSION**

13. The 2<sup>nd</sup> Respondent filed its submissions dated 8<sup>th</sup> May 2025.
14. On behalf of the 2<sup>nd</sup> Respondent, Counsel relied on Order 12, Rule 7 of the Civil Procedure Rules to submit that the Court has discretion to set aside its orders of 19<sup>th</sup> November 2024. Counsel argued that the Applicant had demonstrated sufficient cause to warrant the exercise of that discretion in its favor. To support this point, Counsel relied on the cases of **Patel v E. A Cargo Handling Services Ltd and Shah v Mbogo**. Counsel argued that denying a party a hearing on the merits should be the last resort and should be done only in the clearest of cases.
15. Counsel submitted that the main ground on which the Applicant seeks to set aside the ruling is sufficient cause. Counsel further submitted that sufficient cause is a question of fact requiring the Applicant to show that he was prevented from taking certain actions. To support this argument, Counsel relied on the case of **Auto Selection (K) Ltd & 2 others vs**

**John Mamasaka Famba (2016) eKLR.** Counsel cited the case **of Edith Gichungu Koine vs Stephen Njagi Thoithi (2014) eKLR** to submit that, in determining whether sufficient cause exists, the court must bear in mind that the object is to do substantial justice to the parties and that technicalities should not prevent the court from doing substantial justice.

16. Counsel argued that the Applicants have outlined triable issues that raise a prima facie defense, which should be considered on the merits. Counsel cited the case of **Ceneast Airlines Ltd vs Kenya Shell Ltd (2000)** to outline the factors to be considered by the court in exercising its discretion to set aside its orders. It was submitted that the reasons advanced for the Applicant's non-participation in the proceedings are valid and excusable. Counsel further submitted that the application was filed without unreasonable delay and urged the court to allow the application as prayed.

### **THE PETITIONER'S SUBMISSIONS**

17. The Petitioner filed his submissions dated 19<sup>th</sup> September 2025.
18. On behalf of the Petitioner, Counsel outlined the following issues for the Court's determination:
- a) *Whether proper service was effected upon the Applicant;*
  - b) *Whether failure to act after seeking extension and appearing implies or amounts to participation;*

- c) Whether the Applicants' later claim of non-service and non-participation can stand the face of a record indicating service, appearance, and participation;*
- d) Whether the application has been overtaken by events.*

19. Regarding the first issue, Counsel submitted that the Attorney-General, represented by Mr. Allan Kamau, appeared on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents, thereby confirming that they were duly served with the application. It was further submitted that the Court process server, Hopkin Ochieng Okeyo, filed an affidavit of service confirming service on the Respondents.
20. Regarding the second issue, Counsel contended that the Attorney General committed perjury under oath, as the Applicants appeared through the Attorney General and requested an extension of time to respond, but subsequently failed to do so.
21. Regarding the third issue, Counsel submitted that the orders can be set aside only if it is shown that they were obtained through non-disclosure or concealment of material facts. Counsel relied on the case of **Republic vs Vice Chancellor Moi University & 3 others Ex Parte Benjamin J Gikenyi (2018) eKLR** to address the principles governing the setting aside of orders. Counsel further submitted that the Applicant has not demonstrated sufficient cause to warrant setting aside the orders.

22. Regarding the fourth issue, Counsel submitted that the application is overtaken by events as the orders have already been implemented by the 1<sup>st</sup>, 5<sup>th</sup>, and 7<sup>th</sup> Respondents. Counsel maintained that the application is intended to aid and cover up the commission of a criminal offence by the 7<sup>th</sup> and 8<sup>th</sup> Respondents.

23. In conclusion, Counsel urged the court to dismiss the application with costs.

### **ANALYSIS AND DETERMINATION**

24. Having considered the application, the respective affidavits, and the rival submissions, the following issues arise for determination:

- a) Whether the application dated 16<sup>th</sup> May 2024 was served upon the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents; and*
- b) Whether the ruling dated 19<sup>th</sup> November 2024 should be reviewed or set aside.*

25. Regarding the first issue, Counsel submitted that the Applicants were not afforded an opportunity to be heard because they were not served with the application. It was further argued that the Applicants became aware of the matter only after they were served with the ruling.

26. The Petitioner insisted that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents were aware of the application and actively participated through the Attorney General.

27. The office of the Attorney General is established under Article 156 of the Constitution as the principal legal advisor to the government. Article 156(4)(b) of the Constitution mandates

that the Attorney General represent the National Government in court or in any other legal proceedings in which the National Government is a party.

28. State offices and government departments are ordinarily represented by the Attorney General unless otherwise provided by statute. In **Kenya Bus Services Ltd & another v Ministry of Transport & 20 others**, the court held that when Government entities are sued, the Attorney General is the proper party to represent them unless specific statutory provisions provide otherwise.
29. The court has discretion to set aside proceedings. It is well settled that failure to serve pleadings may render the proceedings irregular. The party alleging service bears the burden of proof.
30. In **Shah v Mbogo & Another 1967 E. A 116**, the court underscored that the discretion to set aside proceedings is intended to prevent injustice or hardship arising from excusable error or inadvertence, not to assist a party who has slept on their rights or seeks to obstruct justice. Further in **Patel v E. A Cargo Handling Services Ltd (1974) EA 75**, the court emphasized that the paramount consideration is whether justice can be done without undue prejudice to the other party.
31. In the matter at hand, the record shows that the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents were represented by the Attorney General, who appeared and sought time to respond to the application. There is no evidence suggesting that the Attorney General

declined to act for the Respondents or lacked the authority to appear on their behalf. No explanation has been offered as to why no replying affidavit was filed thereafter. Once the State Counsel appeared in Court and sought time to respond, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents were not only aware of the proceedings but had also formally participated in them through their legally mandated representative. The contention that the 3<sup>rd</sup> Respondent was not personally served cannot override the fact that representation had already been invoked and acknowledged in open court.

32. Regarding the second issue, the law governing applications for review is set out in Section 80 of the Civil Procedure Act and in Order 45 Rule 1 of the Civil Procedure Rules.

33. **Section 80 of the Civil Procedure Act** provides as follows:

***Any person who considers himself aggrieved -***

***a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***

***b) By a decree or order from which no appeal is allowed by this Act,***

***may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit***

34. **Order 45 Rule 1 of the Civil Procedure Rules** provides that: -

***Any person considering himself aggrieved -***

**a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or**

**b) By a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay.**

35. The provisions of Order 45 were restated by the Court of Appeal in the case of **Benjoh Amalgamated Limited & Another vs Kenya Commercial Bank Limited (2014) eKLR**, where the Court held that: -

***“In the High Court, both the Civil Procedure Act in Section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered, ranging from discovery of new and important matter or mistake or error apparent on***

***the face of the record or any other sufficient reason, but section 80 gives the High Court greater amplitude for review.”***

36. Similarly, in **Republic vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR**, the court held that:

***“Section 80 gives the power of review, and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”***

37. In the matter at hand, the Applicants have not shown that there is discovery of a new or important matter of evidence that the Applicant could not have discovered even after exercising due diligence.

38. Regarding the second requirement, the Applicants must establish that there is an error apparent on the face of the record. In **Nyamogo & Nyamogo vs Kogo (2001) EA 170**, the court held that;

***“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature, and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could***

***reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning, where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review, though it may be one for appeal.”***

39. Similarly, in **Timber Manufacturers and Dealers vs Nairobi Golf Hotels (K) HCCC No. 5220 of 1992**, Emukule J held that;

***“For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”***

40. The grounds presented by the Applicants do not reveal any errors apparent on the face of the record. The Applicants have not identified any errors apparent on the face of the record.

41. The Court is also mandated to consider whether there are sufficient reasons to review the Court’s ruling. In **Wachira Karani v Bildad Wachira (2016) eKLR**, the court held that:

***“Sufficient cause is thus the cause for which the Defendant could not be blamed for his absence.***

***Sufficient cause is a question of fact, and the court has to exercise its discretion in the varied and special circumstances of the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the Defendant must demonstrate that he was prevented from attending court by a sufficient cause...”.***

42. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in **The Official Receiver and Liquidator vs Freight Forwarders Kenya Ltd (2000) eKLR** stated that;

***“These words only mean that the reason must be one that is sufficient to the court to which the application for review is made, and they cannot, without at times running counter to the interest of justice, be limited to the discovery of new and important matter or evidence or occurrence of an error apparent on the face of the record.”***

43. In the present matter, the record shows that the Applicants were duly represented in Court and sought five days to file a replying affidavit. Despite being afforded that opportunity, no replying affidavit was filed, nor any explanation tendered prior to the delivery of the ruling. Based on the foregoing, I find that the Applicants have not demonstrated sufficient reason to warrant a review of the Court’s ruling.

44. Finally, the Applicants must demonstrate that the application has been made without unreasonable delay. I find that the application was filed without unreasonable delay.

45. The upshot of the foregoing is that the application is without merit and is hereby dismissed with costs to the Petitioner.

**RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2026.**

.....  
**HON. T. MURIGI**

**JUDGE**

**IN THE PRESENCE OF:**

Nyaata holding brief for Moriasi for the 7<sup>th</sup> and 8<sup>th</sup> Respondents

Ms Kemunto holding brief for Ms. Maema for the Petitioner