



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MILIMANI LAW COURTS, NAIROBI**  
**ELC CASE NO. 813 OF 2014**

**NDAISI**

**NGONYO.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**MOHAMMED SHEIKH YUSUF .....1<sup>ST</sup>**

**DEFENDANT/RESPONDENT**

**EZEKIEL KIPKULEI C. KOMEN .....2<sup>ND</sup>**

**DEFENDANT/APPLICANT**

**THE REGISTRAR OF TITLES .....3<sup>RD</sup>**

**DEFENDANT/RESPONDENT**

**RULING**

**The Application**

1. Before Court for determination is the 2<sup>nd</sup> Defendant/Applicant's Chamber Summons dated 3<sup>rd</sup> October 2025, brought under Sections **1B, 3, 34 and 63(e) of the Civil Procedure Act**, Order **19 Rules 1, 2 and 9 of the Civil Procedure Rules, 2010**, Section **35 of the Evidence Act**, and all other enabling provisions of the law. The Applicant seeks the following orders verbatim:

- a) **THAT** the Honourable Court be pleased to grant leave to the Applicant to file the Affidavit dated 6<sup>th</sup> October 2023 sworn by Mr. Sammy Silas Komen Mwaita which was struck out on 12<sup>th</sup> October 2023 for want of leave.
- b) **THAT** the Honourable Court be pleased to allow the Affidavit sworn by Mr. Sammy Silas Komen Mwaita be adopted as evidence in the suit in the interest of substantive justice herein and cross-examination on the same.
- c) **THAT** the costs of this application be provided for.
2. The Application is supported by the affidavit of Ezekiel Kipkulei C. Komen, the 2<sup>nd</sup> Defendant/Applicant, sworn on 3<sup>rd</sup> October 2025. The Applicant depones that the Plaintiff alleges in her pleadings that the Grant relating to L.R. No. 14720 was signed by Mr. Sammy Silas Komen Mwaita, the former Commissioner of Lands, on 7th May 2002, an allegation which Mr. Mwaita has denied in an affidavit sworn on 6th October 2023.
3. It is further the Applicant's case that the said affidavit by Mr. Sammy Silas Komen Mwaita, which denies execution of the Grant and would assist the Court in reaching a just determination of the dispute, was struck out on 12<sup>th</sup> October 2023 for having been filed out of time and without leave of the Court. The Applicant contends that no party will suffer prejudice if leave is granted, as all parties will be afforded an opportunity to cross-examine the deponent in the interest of substantive justice.

### **The Response**

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4. The Plaintiff/Respondent opposes the Chamber Summons dated 3<sup>rd</sup> October 2025 through Grounds of Opposition dated 4<sup>th</sup> November 2025, contending that the Application is bad in law, incompetent, and an abuse of the process of the Court. The Plaintiff maintains that the affidavit sworn by Mr. Sammy Silas Komen Mwaita on 6<sup>th</sup> October 2023, and filed on 12<sup>th</sup> October 2023, was filed without leave and outside the timelines prescribed under the Civil Procedure Rules, and was therefore irregular, improperly on record, and rightly struck out.
5. The Plaintiff/Respondent further contends that the present Application is res judicata, the issue of admission of the said affidavit having previously been determined by the Court. It is also asserted that the Applicant has failed to provide any sufficient or reasonable explanation for the delay or for the failure to seek leave prior to filing the impugned affidavit, and that a mere assertion that the affidavit would assist the Court does not constitute good cause or a legal basis to regularize non-compliance with procedural rules.
6. It is the Plaintiff/Respondent's position that allowing the Application would occasion prejudice, given the age of the matter and the procedural steps already undertaken, and would offend the principles governing timelines under **Order 50 Rule 6** and **Order 51 Rule 14(2)** of the Civil Procedure Rules. The Plaintiff contends that the Application is an afterthought and a delay tactic, and urges the Court to dismiss it with costs and direct that the matter be set down for finalization.

### **The Submissions**

7. Pursuant to the directions of the Court, the Application was canvassed by way of written submissions. In support of the Chamber Summons dated 3<sup>rd</sup> October 2025, the 2<sup>nd</sup> Defendant/Applicant submits that the affidavit sworn on 6<sup>th</sup> October 2023 by Mr. Sammy Silas Komen Mwaita is material to the determination of the suit as it allegedly denies execution of the Grant relating to L.R. No. 14720 and raises issues of fraud and illegality which the Court is duty-bound to interrogate.
8. The Applicant contends that the affidavit was struck out on a procedural technicality and that no prejudice will be suffered if leave is granted, as the defence case has not commenced and all parties will have an opportunity to cross-examine the deponent. Reliance is placed on the principles of substantive justice under Articles 25(c), 50(1) and 159 of the Constitution, and on authorities affirming the Court's discretion to admit evidence or re-open proceedings where justice demands, including ***Wambui vs- Frank Investment Ltd Civil Suit No.207 of 2017 [2022] KLR*** and ***Samuel Kiti Lewa v Housing Finance of Kenya Ltd & Another [2015] eKLR***.
9. The Plaintiff/Respondent, in opposing the Application, submits that the affidavit dated 6<sup>th</sup> October 2023 was filed out of time and without leave, was properly struck out, and cannot be reintroduced in the absence of sufficient cause. The Plaintiff frames the issues for determination as whether the affidavit is properly on record, whether the Applicant has demonstrated sufficient cause to warrant the exercise of discretion, whether prejudice would be occasioned if the Application is allowed, and who should bear the costs. It is submitted that procedural rules are not mere technicalities and that discretion should not be exercised to aid indolence or disregard of court orders.

The Plaintiff relies on ***Rajesh Rughani v Fifty Investment Ltd & Another [2005] eKLR***, ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR***, ***Utalii Transport Company Ltd v NIC Bank Ltd [2014] eKLR***, and ***Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR***, and urges the Court to dismiss the Application with costs.

### **Issue for Determination**

10. Having considered the Application, the Grounds of Opposition, and the rival written submissions by the parties, the Court is of the view that only one issue arises for determination, namely: Whether the 2<sup>nd</sup> Defendant/Applicant's Chamber Summons dated 3<sup>rd</sup> October 2025 is merited.

### **Analysis and Determination**

11. The Application before the Court seeks leave to reintroduce and adopt an affidavit sworn on 6<sup>th</sup> October 2023 by a former Commissioner of Lands, which affidavit was filed without leave and was struck out on 12<sup>th</sup> October 2023. The central question is whether the Applicant has demonstrated sufficient legal basis to warrant the Court's discretion to regularize that affidavit.

12. There is no dispute that the affidavit was filed outside the timelines prescribed under the Civil Procedure Rules and without prior leave of the Court. Once struck out, such an affidavit ceases to exist on the record unless reinstated through a proper and principled exercise of discretion. That discretion must be exercised judiciously, upon

sufficient cause being shown, and in a manner that promotes procedural order and fairness.

13. Although the Plaintiff/Respondent raised the issue of res judicata, the Court notes that the affidavit was struck out on procedural grounds and not upon a substantive determination on its admissibility. The doctrine is therefore not strictly applicable; nonetheless, the Applicant remains under an obligation to demonstrate sufficient cause to warrant the exercise of discretion.
14. In determining whether sufficient cause has been demonstrated, the Court must consider not only the explanation for delay, but also the necessity, propriety, and legal relevance of the evidence sought to be introduced. The burden rests on the Applicant to show that the impugned affidavit is indispensable to the just determination of the dispute and that its admission cannot reasonably be achieved through procedurally compliant means.
15. The Applicant's justification is that the affidavit sworn by Mr. Sammy Silas Komen Mwaita contains facts that would assist the Court, specifically a denial of execution of the Grant relating to L.R. No. 14720. That assertion must, however, be examined within the statutory framework governing land registration and proof of registered interests.
16. Under the Land Registration Act, 2012, the execution, issuance, custody, and evidentiary proof of registered instruments are statutory functions of the land registry, exercised through the Registrar.

**Sections 7 and 9** establish the land register and parcel files as the official repositories of instruments supporting subsisting entries, while **Section 14** vests the Registrar with powers to require production of documents, summon persons, and conduct inquiries relating to land records.

17. Further, **Section 26 of the Act** provides that a certificate of title issued by the Registrar shall be taken by all courts as prima facie evidence of proprietorship, subject only to the statutory exceptions set out therein. Section **35** is explicit that entries in the register and certified copies or extracts issued by the Registrar are to be received in proceedings as prima facie or conclusive evidence of the matters recorded, with certified extracts being preferred to original registers except with leave of the Court.
18. In that statutory context, the authenticity, execution, or regularity of a registered grant is ordinarily proved through official records and evidence emanating from the land registry, with the Registrar being the lawful custodian and authoritative source of such records. The Applicant has not demonstrated why the statutory mechanisms under the Act including certified extracts, registry records, or testimony from the Registrar are unavailable, inadequate, or incapable of addressing the issue raised.
19. It is also material that the Registrar of Titles is a party to these proceedings as the 3<sup>rd</sup> Defendant/Respondent and is the statutory custodian of the land register and parcel file relating to L.R. No. 14720. Any challenge to the authenticity, execution, or regularity of a registered grant is therefore, in the first instance, properly

interrogated through evidence emanating from the land registry, rather than through collateral affidavits by former office holders whose statements are not anchored in the statutory evidentiary framework.

20. Additionally, the Applicant has offered no explanation for the delay or for the failure to seek leave prior to filing the impugned affidavit. The mere assertion that the affidavit may assist the Court cannot, in itself, amount to sufficient cause. To hold otherwise would render procedural timelines meaningless and undermine the overriding objectives under **Sections 1A and 1B of the Civil Procedure Act**, which require the just, expeditious, and proportionate determination of disputes while preserving procedural discipline.

21. On the question of prejudice, the affidavit was properly struck out and the matter has since proceeded on the basis of the existing record. Reintroducing it at this stage would reopen the evidentiary framework, disrupt the orderly conduct of proceedings, and prejudice the Plaintiff/Respondent, particularly given the age of the matter. It would also set an undesirable precedent that parties may disregard procedural requirements and later seek indulgence without justification.

### **Disposition**

22. The upshot is that I find no legal or factual basis upon which to exercise my discretion in favour of the Applicant. The Chamber

Summons dated 3<sup>rd</sup> October 2025 lacks merit and is hereby dismissed.

23. Costs shall be borne by the 2<sup>nd</sup> Defendant/Applicant.

**Orders accordingly.**

**DATED, SIGNED and DELIVERED** virtually at **NAIROBI** on this **16<sup>TH</sup>** day of **FEBRUARY, 2026.**

**MOHAMMED N. KULLOW**  
**JUDGE**

**Ruling delivered in the presence of: -**

**Mr. Ochanda**..... for 2<sup>nd</sup> Defendant/Applicant

**Mr. Nyakundi**..... for the Plaintiff/Respondent

**Mr. Mutua**..... for 1<sup>st</sup> Defendant/Respondent

**N/A**..... for 3<sup>rd</sup> Defendant/Respondent

**Philomena W.**..... Court Assistant