

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
MACHAKOS
ELC SUIT NO. 224 OF 2017
FORMERLY NAIROBI ELC NO. 1045 OF 2016
(CONSOLIDATED WITH ELC. 115 OF 2014)

SUNRISE VISION SELF-HELP

Suing through its officials

TITUS MUTWOTA (SECRETARY) and
BERNARD WAMBUA (Vice- Chair)

PLAINTIFF

VERSUS

PHILIP KARONJO NDEHI

DEFENDANT

BOAZ OKELLO AKAMA INTENDED 2ND

DEFENDANT

RULING

1. Judgment in this matter was scheduled for 10th July 2025 but before the Court could render it, two applications were filed

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and are for determination. The first one is the intended 2nd Defendant's Chamber Summons application dated 3rd July 2025, where he seeks the following Orders:

- a) Spent.**
- b) That pending the inter party hearing of this application, this Honourable court be pleased to arrest the judgment scheduled for 10th July 2025.**
- c) That this Honourable Court does order and direct that the Intended 2nd Defendant be joined in the suit herein as a 2nd Defendant.**
- d) That upon order (2) being granted, this Honourable Court does order and direct that the Intended 2nd Defendant be joined in the suit herein as a 2nd Defendant.**
- e) That this Honourable Court does order the Land Registrar and Director of Survey to bring the records touching on the suit property/properties herein.**

f) That the costs of this application be provided for.

2. The application is premised on grounds on its face and on the Intended 2nd Defendant's supporting affidavit. He avers that together with Kaswii Nzioki and Liberatta Njeri Kamau, they own and hold titles to **LR No. 12648/2** which has since been subdivided to form **LR No. 12648/188 (Original number 12648/2/2), LR No.12648/189 (Original Number 12648/2/3) and LR No. 12648/190 (Original number 12648/2/4).**
3. He claims the said parcels were allocated to them vide an allotment letter dated 13th August 1998 and that they have been in occupation and control, paying rates and have never been informed of this suit.
4. They explain that in late 2024, they sought a further subdivision of the land into two hundred (200) plots which was approved by the Ministry of Lands. Further, that being registered owners, it will be prejudicial if the suit is

determined in their absence because the Court will be devoid of material facts from their end.

5. The application is opposed by the Defendant. He avers that the Intended 2nd Defendant's claim is derivative and seeks to introduce a new dispute at the tail end of proceedings. Further, that joinder at this late stage of trial prejudices timely and fair adjudication. He insists that any claim over the alleged subdivision of **LR No. 12648/2** ought to await the outcome of this matter, which will determine its legitimacy.

Notice of Motion dated 4th July 2025

6. The Notice of Motion dated 4th July 2025 is filed by the Plaintiffs who seek the following Orders:

a) Spent.

b) Spent.

c) That pending the hearing and determination of this application inter-parties this Honourable Court be pleased to review its orders directing

the hearing of the matter had been closed and the judgment in the current suit would be delivered on the 10th of July 2025.

- d) That the Honourable Court be pleased to arrest its judgment in the current suit slated for judgment on the 10th day of July 2025 pending the hearing and determination of this application inter-parties.
- e) That the Honourable Court be pleased to issue further orders or better orders as shall meet the ends of justice.
- f) That the costs of this Application be borne by the Respondent.

7. The application is premised on grounds on its face and on the supporting affidavit of Joel Ndunda Kimilu, Chairman of the Plaintiff in (**Machakos 224 of 2017**) and the 1st Defendant in the consolidated suit, (**Machakos 115 of 2014**).

8. He avers that after the close of the Plaintiff's case (**Philip Karonjo Ndehi**), defence hearing did not materialize
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because their Counsel ceased to act for them without their knowledge. Further, that at the time, he was ill and his illness incapacitated him from standing trial.

9. He points out that in the suit, the Plaintiffs seek to be declared the absolute proprietors of **LR No. 12648/2** and that overtime, they have suspected the authenticity of the documents held by the Defendant and even reported to the police for investigations thus if they are not heard, the Court may render judgement based on misleading information and risks violating their right to hearing under Article 50 of the Constitution.
10. The application is opposed by the Defendant who filed a replying affidavit. He avers that the Plaintiffs have never produced any documentation proving allocation of the suit land and have fluctuated between claims of adverse possession and public allocation, of which neither has been substantiated. Further, that their case was closed due to

repeated adjournments, change of advocates and failure to present evidence.

- 11.** He claims that he has a valid leasehold over **LR 12648/2** and that he tendered evidence including survey plan approvals and has demonstrated quiet possession until the year 2011. Further, that his parcel was compulsorily acquired by the Government of Kenya for road expansion purposes and he was duly compensated.
- 12.** He contends that the Plaintiffs have not demonstrated any legitimate excusable ground for their inaction. Further, that their application is intended to obstruct judgement, as a party cannot sleep on their rights then invoke Article 50 of the Constitution.
- 13.** The two applications were canvassed by way of written submissions.

Submissions

14. The Plaintiffs submit that arresting judgement is necessary in order to prevent injustice and to ensure this Court's decision rests on verified facts as the authenticity of the Defendant's title remains untested. Further, that no prejudice will be occasioned to the Defendant if the Judgment is delayed temporarily, as the outcome will only be strengthened by verified evidence as mere production of certificates of title does not automatically prove ownership.

15. To buttress their averments, the Plaintiffs relied on the following

decisions: **Patel v E.A. Cargo Handling Services Ltd (1974) E.A 75, Republic v Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati (2008) eKLR and Judicial Service Commission vs Gladys Boss Shollei & Another (2014) eKLR.**

16. On his part, the Intended 2nd Defendant submits that he is a necessary party whose presence is required for effectual and

complete adjudication of the issues herein. Further, that since his concerns surround ownership and rights over parcels derived from **L.R. No. 12648/2**, he has a direct and substantial interest in the suit land, as any judgment will directly affect his registered title and constitutional right to property under Article 40. He further submits that failure to join him would lead to multiplicity of suits and potential nullity of any judgment for violating his right to fair hearing under Article 50 of the Constitution. It is also his submission that mere delay in filing joinder is not fatal, as the suit is yet to be finally determined and no prejudice has been demonstrated. On his prayer for production of documents, he submits that records touching on **LR 12648/2** and its subdivisions ought to be produced to establish true ownership.

- 17.** To buttress his averments, the intended 2nd Defendant relied on the following decisions: **Republic v Chief Land Registrar & another; Criticos (Interested Party) Ex**

Parte ... [2024] KEELC 1111 (KLR) and Meme v Republic [2004] 1 EA 124

18. With regard to the application for joinder, the Defendant submits that the Intended 2nd Defendant has not demonstrated any legally cognizable interest capable of grounding joinder under Order 1 Rule 10(2) of the Civil Procedure Rules, as he advances a derivative interest whose validity is entirely dependent on the fate of the root of title in **LR No. 12648/2**, which issue the Court is seized of. He argues that the Intended 2nd Defendant's application is a tactical attempt to arrest a pending judgment and reopen litigation that has already been fully heard and concluded, thus to grant the orders sought would violate the overriding objective under sections 1A and 1B of the Civil Procedure Act, undermine the principle of finality in litigation, and reward inordinate delay.

19. On the application to review this Court's orders dismissing the defence case, the Defendant submits that the Plaintiffs

have failed to bring themselves within the statutory grounds for review under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. He submits that the application is an abuse of the Court process calculated to delay, derail and frustrate the delivery of judgment in a matter that has been pending before this Court since 2014.

20. To buttress his averments, the Defendant relied on the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR)**.

Analysis and Determination

21. Upon consideration of the instant Notice of Motion and Chamber Summons applications including the respective affidavits and rivalling submissions, the following are the issues for determination:

- **Whether the Plaintiffs and the Intended 2nd Defendant have established sufficient grounds**

to warrant arrest of this court's judgement in the suit.

- **Whether the Intended 2nd Defendant has met the threshold for joinder under Order 1 Rule 10(2) of the Civil Procedure Rules.**
- **Whether the Plaintiffs have satisfied grounds for review of this Court's orders.**

22. On the issue on whether to arrest the judgement as sought by the Plaintiffs and intended 2nd Defendant, I note due to the pendency of the two instant applications, the judgement scheduled on the 10th July, 2025 was not rendered, hence this prayer has been overtaken by events.

Whether the Intended 2nd Defendant has met the threshold for joinder under Order 1 Rule 10(2) of the Civil Procedure Rules.

23. On joinder, Order 1 Rule 10 (2) of the Civil Procedure Rules, states as follows:

"The Court may at any stage of the proceedings, either upon, or without the application of either

party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”

24. In **Meme v. Republic [2004] eKLR**, it was held that joinder of parties will be permissible:

“(i) Where the presence of the party will result in the complete settlement of all the questions involved in the proceedings; (ii) Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law; and (iii) Where the joinder will prevent a likely course of proliferated litigation.”

25. Further, the Court of Appeal stated as follows in **J.M.K v MWK & Another [2015] eKLR**:

“We would however agree with the Respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar’s Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in Tang Gas Distributors Ltd v Said & Others [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage...” Emphasis Mine

26. In this instance, the intended 2nd Defendant has sought for joinder in these proceedings contending that together with Kaswii Nzioki and Liberatta Njeri Kamau, they own and hold titles to LR No. 12648/2 which has since been subdivided to form LR No. 12648/188 (Original number 12648/2/2), LR No. 12648/189 (Original Number 12648/2/3) and LR No. 12648/190 (Original number 12648/2/4). Further, that the said parcels were allocated to them vide an allotment letter dated 13th August 1998 and that they have been in occupation and control, paying rates and have never been informed of this suit and being registered owners, it will be prejudicial if the suit is determined in their absence because the Court will be devoid of material facts from their end.

27. The Defendant has vehemently opposed the joinder of the intended 2nd Defendant by insisting that his claim is derivative and seeks to introduce a new dispute at the tail end of proceedings. He argues that any claim over alleged subdivision of LR No.

12648/2 ought to await the outcome of this matter, which will determine its legitimacy.

28. From a reading of the legal provisions cited above, I note the Court may at any stage of the proceedings, order joinder of parties. From the facts before Court, I note the fulcrum of the dispute herein revolves around LR No. 12648/2, which is claimed by all parties.

29. Based on the facts before me while relying on the legal provisions cited including associating myself with decisions quoted and applying them to the circumstances at hand, I find that the intended 2nd Defendant has met the threshold for joinder under Order 1 Rule 10 (2) of the Civil Procedure Rules. Further, that since he also stakes ownership over the suit property, he is a necessary party whose presence is required for effectual and complete adjudication of the issues herein. Further, this will also avoid multiplicity of suits.

Whether the Plaintiffs have satisfied grounds for review of this Court's orders.

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30. The Plaintiffs seek a review of this Court's orders closing their case and fixing the matter for judgment which was scheduled for delivery on 10th July 2025. In opposition, the Defendant contends that once a matter has been fully heard, the Court's only remaining duty is to pronounce its judgment and that the process can only be interrupted through a properly grounded application for review or by an appeal duly lodged in accordance with the law.

31. Section 80 of the Civil Procedure Act gives this Court jurisdiction to determine an application for review and stipulates thus:

“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.”

32. While Order 45 of the Civil Procedure Rules provides *inter alia*:

“(1) 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 judgment to the court which passed the

decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

33. The Court of Appeal stated as follows in **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2019] eKLR;**

“....an order for review is restricted to parameters set out by the law..”

34. Further, in the case of **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J (as he then was) 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 in 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...”

35. While in the case of **CMC Holdings Limited -vs- Nzioki** [2004] 1 KLR 173, it was held that:

“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.’

36. It is trite that review or setting aside of an Order is discretionary but the Court has to consider sufficient cause
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proffered by the Applicant, before proceeding to do so. Based on the facts before me, I find that the Plaintiffs have demonstrated why they failed to attend Court for the defence hearing as their Counsel ceased to act for them without their knowledge. Further, that at the time, the Chairman was ill and his illness incapacitated him from standing trial. Since the judgement was yet to be delivered, I opine that they have demonstrated sufficient cause to warrant the review or setting aside of the impugned Order fixing the matter for judgement. In my view they will be indeed prejudiced if they are condemned unheard. It is my considered view that they have offered plausible reasons to warrant the setting aside of the impugned Order and in the foregoing, I will proceed to do so. In the circumstances, I find the Notice of Motion application dated the 4th July, 2025 merited and will allow it.

37. As for the Chamber summons application dated 3rd July 2025 , I also find it merited and will allow it in the following terms:

- a. The Intended 2nd Defendant is joined in these proceedings as 2nd Defendant and directed to file and serve his Statement of Defence within fourteen (14) days from the date hereof.
- b. Upon service the Plaintiffs' and 1st Defendant can file their reply to Defence in fourteen (14) days if need be.
- c. Costs of the two applications will be in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
11TH DAY OF FEBRUARY, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Nyabuto holding brief for Atancha for Applicant

Ms Kimanthi for Defendant

Court Assistant: Joan