

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 81 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION.....
PLAINTIFF

VERSUS

REBECCA CHEPNGENO SANG.....1ST
DEFENDANT

KENNETH C KOMEN.....2ND
DEFENDANT

LYNNETTE JEBET RONO.....3RD
DEFENDANT

WILSON GACHANJA.....4TH
DEFENDANT

RULING.

Introduction.

1. This ruling is in respect of the 4th Defendant/Applicant's Notice of Motion application dated 14th July, 2025. The application is expressed to be brought under **Section 3A** of the **Civil Procedure Act** and **Articles 50 & 159** of the Constitution of Kenya.

2. The application seeks the following orders;

a. Spent

b. That the proceedings herein be set aside in so far as they relate to the hearing of the Plaintiff and Defendant's cases, in the absence of the 4th Defendant and/or his advocates.

c. That in the alternative to prayer (2) above, the Honourable Court be pleased to order for the recall of the Plaintiff's and Co-Defendant's witnesses for purposes of cross examination by the 4th Defendant.

d. That necessary directions do issue.

e. That the costs of this application be provided for.

3. The application is based on the grounds on its face and the supporting affidavit of **Wilson Gachanja** that is sworn on 14th July, 2025.

Factual Background.

4. The Plaintiff/Respondent commenced the present proceedings vide the Plaint dated 11th December, 2018 wherein it seeks the following prayers;

a. A declaration that the allocation to the 1st Defendant by the 4th Defendant and subsequent issuance of the Lease to the 1st Defendant Land Parcel LR NO 631/1833 - Kericho County comprised within Government House Number KERI/HOU/HG 2 and subsequent transfer to the 2nd and 3rd Defendants was irregular, fraudulent and illegal and consequently null and void.

b. An order for rectification of the register by cancellation of the grant and all entries on the Land Register for the suit property, Land Parcel L.R NO 631/1833 within Kericho County, made to the 1st, 2nd and 3rd Defendants.

c. An order for the Director of surveys to cancel the surveys for suit

property (sic) and compile a plan which will be registered as the land housing Government house number KERI/HOU/HG 2.

d. An order of permanent injunction against the 1st, 2nd and 3rd Defendants their agents, servants or assigns restraining them from leasing, transferring, charging, taking possession or in any other manner howsoever from dealing with the suit property otherwise than by transfer or surrender to the Government of Kenya.

e. Costs of and incidental to the suit.

f. Any other or further relief the court may deem fit and just to grant.

- 5.** The 1st Defendant/Respondent filed a Statement of Defence dated 5th March, 2019 wherein she denies the averments in the Plaint and seeks that the Plaintiff/Respondent's suit be dismissed with costs.

6. The 2nd and 3rd Defendants/Respondents filed a Statement of Defence and Counterclaim dated 5th April, 2019 which statement of defence was amended on 30th May, 2019. They seek the following orders in the Counterclaim;

a. Payment of General damages and compensation.

b. Costs and interest.

7. The 4th Defendant/Applicant filed his Statement of Defence dated 21st January, 2019. He denies the averments in the Plaint and seeks that the Plaintiff/Respondent's suit be dismissed with costs.

8. The Plaintiff/Respondent and the 1st, 2nd and 3rd Defendants/Respondents gave their evidence, closed their cases and the Court issued directions that they file submissions.

- 9.** On 15th July, 2025, the matter came up for mention to confirm filing of submissions when Counsel for the 4th Defendant/Applicant informed the Court that he had filed the application under consideration.
- 10.** The Court issued directions that the application be served upon the Respondents.
- 11.** The application came up for hearing on 22nd July, 2025 when Counsel for the 1st, 2nd and 3rd Defendants/Respondents informed the Court that they will not be participating in the hearing of the application.
- 12.** The hearing of the application was adjourned to 6th October, 2025 when the Court issued directions that it be canvassed by way of written submissions. It was mentioned to confirm filing of submissions and on 2nd December, 2025 it was reserved for ruling.

The 4th Defendant/Applicant's Contention.

- 13.** The 4th Defendant/Applicant contends that in December, 2019, he was served with the pleadings filed in this matter.
- 14.** He also contends that he instructed the firm of M/s Njuguna Kahari & Khai Advocates who entered appearance and filed a Statement of Defence on his behalf.
- 15.** He further contends that he, unfortunately lost track of this suit and did not receive any updates from his former advocates about the progress of this matter.
- 16.** It is his contention that this lapse was occasioned by the fact that numerous suits have been filed against him in various Courts around the Country. He goes on to state that the said suits arise from his execution of official duties as the Commissioner of Lands between the years 1989 and 1999.

- 17.** It is also his contention that in the said suits, he has been sued in his personal capacity and he therefore bears the burden of defending each suit which has strained his ability to keep track of the multiple proceedings filed against him.
- 18.** It is further his contention that sometime in July, 2025 he conducted a personal audit of his ongoing and concluded matters when he discovered that the present suit proceeded without his participation.
- 19.** He contends that he also discovered that the present suit has reached an advanced stage with both the Plaintiff/Respondent and the 1st, 2nd & 3rd Defendants/Respondent's cases closed.
- 20.** He also contends that upon making the said discovery, he sought legal advice from his current advocates and instructed them to seek legal redress from the Court.

- 21.** He further contends that his advocates on record checked the Case Tracking System and confirmed that the matter had proceeded to hearing and was scheduled to confirm filing of submissions.
- 22.** It is his contention that it is in the interest of justice that he be granted an opportunity to be heard and to cross examine the witnesses who testified in his absence. He goes on to state that he should be allowed to canvass his defence which raises substantive and triable issues.
- 23.** It is also his contention that the Court should exercise its discretion, set aside the proceedings and recall the witnesses for cross examination.
- 24.** It is further his contention that his failure to attend Court was not deliberate as it was occasioned by a communication breakdown between him and his former advocates in

addition to the overwhelming burden of defending numerous suits that are pending against him.

25. He contends that unless the orders sought herein are granted, he will suffer great prejudice as he will be permanently denied an opportunity to defend himself against the claims made by the Plaintiff/Respondent.
26. He ends his deposition by stating that he has made the application under consideration in good faith, without undue delay and in the interest of justice.

The Plaintiff/Respondent's Response.

27. In response to the 4th Defendant/Applicant's application, the Plaintiff/Respondent filed Grounds of Opposition dated 16th September, 2025. They are as follows;

a. That the application offends the principles of equity, Article 159(2)(b) of the Constitution and the overriding objective under Section 1A and 1B of

the Civil Procedure Act, which commands the Courts to facilitate the just, expeditious and affordable resolution of disputes.

b. That the Applicant and his advocates are not exempt from the provisions of section 1A (3) of the Civil Procedure Act. The Applicant had a duty to be vigilant on his matter in Court by following up what (sic) his advocates on record were doing. The Applicant's failure to act with reasonable diligence cannot be allowed to prejudice the Plaintiff.

c. That the Applicant was properly served and had notice of the hearing/proceedings herein as evidenced by Court records but chose not to participate.

d. That the Applicant has not demonstrated any exceptional circumstances or sufficient cause to set aside proceedings as no credible explanation for his nonattendance/participation has been

advanced. The rules of procedure cannot therefore assist the indolent.

e. That the Plaintiff will suffer great prejudice if the proceedings are set aside, having already closed its case, filed and served its written submissions.

f. That the application has been brought after inordinate and unexplained delay and the delay is prejudicial to the Plaintiff.

g. That the application and the evidence presented in support of it do not meet the threshold required for grant of the orders sought.

h. That the application is meant to frustrate and delay the expeditious determination of the instant matter, is without merit, vexatious, and constitutes an abuse of the Court process and should be dismissed with costs to the Plaintiff/Respondent. (sic)

Issues for Determination.

- 28.** The 4th Defendant/Applicant filed his submissions on 1st December, 2025 while the Plaintiff/Respondent filed its submissions on 21st November, 2025.
- 29.** The 4th Defendant/Applicant submits on each of the prayers sought in the application under consideration.
- 30.** With regard to prayer No. **2**, the 4th Defendant/Applicant submits that the closure of the Plaintiff/Respondent and the 1st, 2nd & 3rd Defendants/Respondents cases without his participation constitutes a direct violation of his right to hearing as provided for under **Article 50(1)** of the Constitution of Kenya.
- 31.** The 4th Defendant/Applicant also submits that the right to be heard includes the right to challenge evidence through cross examination.

- 32.** The 4th Defendant/Applicant further submits that he has demonstrated sufficient cause for nonattendance. Firstly, there was a communication breakdown between him and his former advocates and secondly, he was overwhelmed with the numerous suits filed against him in his personal capacity.
- 33.** It is the 4th Defendant/Applicant's submissions that his Statement of Defence raises specific, arguable points of fact and law.
- 34.** It is also the 4th Defendant/Applicant's submissions that his Statement of Defence deserves to be tested on merits and if he is denied an opportunity to participate, the judgement that will be delivered will cause him grave injustice.
- 35.** It is further the 4th Defendant/Applicant's submissions that that he has acted swiftly and there has been no undue delay in the filing of the application under consideration.

- 36.** The 4th Defendant/Applicant relies on **Sections 1A & 3A** of the Civil Procedure Act and **Article 159(2)(d)** of the Constitution of Kenya and submits that the Court's primary duty is to do substantive justice.
- 37.** The 4th Defendant/Applicant submits that while expeditious disposal of suits is important, it must yield where its pursuit will lead to a fundamental denial of justice.
- 38.** The 4th Defendant/Applicant also submits that if the orders sought are not granted, he will permanently lose his right to defend himself which is prejudicial while the prejudice the Plaintiff/Respondent is likely to suffer, is only a delay which can be remedied by an appropriate award of costs.
- 39.** The 4th Defendant/Applicant further submits that the scales of justice tilt in favor of setting aside the proceedings.

- 40.** With regard to prayer No. 3, the 4th Defendant/Applicant relies on **Section 146** of the **Evidence Act** and submits that if the Court does not set aside the proceedings, then it should allow him to cross examine the witnesses who have testified.
- 41.** The 4th Defendant/Applicant also submits that if he is allowed to cross examine the witnesses who have testified, then he will be in a position he would have been had he been present during the hearing.
- 42.** The 4th Defendant/Applicant further submits that this will allow him to challenge the evidence against him which is the cornerstone of adversarial litigation.
- 43.** With regard to prayer No. **4**, the 4th Defendant/Applicant submits that if the Court allows prayers **2 & 3** of the application, then it can issue further directions that include

timeline for cross examination of recalled witnesses and/or the hearing of his case.

- 44.** The 4th Defendant/Applicant concludes his submissions by urging the Court to allow his application and the costs of the application be in the cause.
- 45.** The Plaintiff/Respondent relies on **Article 159 (2)(b)** of the Constitution of Kenya, the judicial decision of **Hunker Trading Company Limited vs Elf Oil Kenya Limited [2010] eKLR** and submits that the 4th Defendant/Applicant's neglectful conduct compounded by inaction, is inconsistent with the principles enunciated in the Constitution and the **Civil Procedure Act**.
- 46.** The Plaintiff/Respondent also submits that equity aids the vigilant not the indolent.

- 47.** The Plaintiff/Respondent further submits that the 4th Defendant/Applicant slept on his rights and cannot now invoke the equitable jurisdiction of this Court to defeat the overriding objectives.
- 48.** It is the Plaintiff/Respondent's submissions that the discretion to set aside proceedings must be founded on sufficient cause supported by a credible explanation.
- 49.** It is also the Plaintiff/Respondent's submissions that the 4th Defendant/Applicant has not offered a plausible explanation for his non-attendance nor has he demonstrated any exceptional circumstances for the Court to allow his application.
- 50.** The Plaintiff/Respondent relies on the judicial decision of **Shah vs Mbogo [1967] EA 116** and submits that the 4th Defendant/Applicant has been indolent and should not be rewarded at its expense.

51. The Plaintiff/Respondent concludes its submissions by urging the Court to dismiss the 4th Defendant/Applicant's application.

Analysis and Determination.

52. I have considered the 4th Defendant/Applicant's application, the response thereto and the rival submissions. It is my view that the only issue that arises for determination is whether the application dated 14th July, 2025 has merit.

53. The 4th Defendant/Applicant is seeking that this Court sets aside the proceedings in this matter for the reason that the Plaintiff/Respondent and the 1st, 2nd and 3rd Defendants/Respondents gave evidence and called their witnesses in in his absence.

54. In the alternative, the 4th Defendant/Applicant is seeking that the Plaintiff/Respondent and the 1st, 2nd and 3rd Defendants/Respondents witnesses be recalled for purposes of cross examination by him.

- 55.** The 4th Defendant/Applicant contends that he instructed his previous advocates on record to enter appearance and file a Statement of Defence.
- 56.** The 4th Defendant/Applicant also contends that the said firm of advocates entered appearance, filed a Statement of Defence but failed to update him on the progress of the suit.
- 57.** The 4th Defendant/Applicant further contends that he was the Commissioner of Lands between the year 1989 and 1999 and that numerous suits have been filed against him in his personal capacity with regard to the duties he performed during his tenure as Commissioner of Lands.
- 58.** It is also the 4th Defendant/Applicant's contention that these numerous suits strained his ability to keep track of the multiple proceedings filed against him.

59. The 4th Defendant/Applicant submits that he has demonstrated sufficient cause for non-attendance and his application should therefore be allowed as prayed.

60. In response, the Plaintiff/Respondent submits that the 4th Defendant/Applicant has failed to offer a plausible explanation for non-attendance and he has therefore failed to demonstrate sufficient cause for this Court to exercise its discretion.

61. In the judicial decision of **Githui v Thiongo & 2 others [2025] KEELC 574 (KLR)** the Court cited **Shah v Mbogo and Another [1967] EA 116** where it was held as follows;

"This discretion (to set aside ex parte proceedings or decision) 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 evasion or otherwise, to obstruct or delay the course of justice.” (Emphasis mine)

- 62.** The 4th Defendant/Applicant contends that firstly, his previous advocates on record failed to update him on the progress of this suit and that is why he failed to attend Court when the matter came up for hearing.
- 63.** A perusal of the Court record shows that the firm of Njuguna, Kahari & Kiai Advocates entered appearance for the 4th Defendant/Applicant on 24th January, 2019 and filed a Statement of Defence.
- 64.** A further perusal of the Court record shows numerous affidavits of service sworn by one **Ray Ouko Abongo** who deposes that on various dates, he served hearing notices upon the firm of Njuguna, Kahari & Kiai Advocates. Some of

the affidavits of service are sworn on 28th September,2020, 8th October, 2020, 8th February, 2021 and 7th October, 2024.

- 65.** The Court record shows that before every hearing the Court demanded information on service upon the 4th Defendant/Applicant and was either shown or was informed that the 4th Defendant/ Applicant had been served. It is upon this background that the suit proceeded for hearing in the absence of the 4th Defendant/Applicant.
- 66.** It is, therefore, not in dispute that Counsel who was then on record for the 4th Defendant/Applicant was aware of the progress of this suit and thankfully, the Applicant does not dispute this. He, nevertheless, seeks orders that these proceedings be set aside or in the alternative that he be granted opportunity to cross-examine the witnesses who have testified.

- 67.** I note that the hearing of this suit commenced on 29th September, 2020 and the Plaintiff/Respondent called a total of seven witnesses while the 1st, 2nd and 3rd Defendants/Respondents have called five witnesses.
- 68.** This Court appreciates that a grant of these orders as sought by the 4th Defendant/Applicant will set back the trial. This Court also appreciates that it has a duty to ensure expeditious and fair disposal of the suit as guided by **Section 1A, 1B and 3A** of the **Civil Procedure Act** and **Article 159 (2)** of the Constitution of Kenya.
- 69.** I am, therefore, inclined to exercise my discretion in favour of the 4th Defendant/Applicant and allow the alternative prayer for cross examination of witnesses who have testified. This shall be done in strict compliance with the conditions set out in the disposal paragraph.

Disposition.

70. Taking the foregoing into consideration, the 4th Defendant/Applicant's application dated 14th July, 2025 is allowed in the following terms:

a. Leave is hereby granted to the 4th Defendant/Applicant to recall the Plaintiff's and his Co-Defendants' witnesses for purposes of cross-examination only.

b. The 4th Defendant/Applicant shall meet the cost of recall of the said witnesses which cost shall be agreed by counsel appearing in this matter.

c. In the event of failure to agree as set out in (b) above, the costs shall be determined by the Deputy Registrar of this court.

d. The cross-examination of the witnesses shall be done within 60 days of the date hereof and on two consecutive days as shall be directed by this Court.

71. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 5TH DAY OF MARCH, 2026.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

Miss Natome for the Plaintiff/Respondent

Mr. Koech for Kimeto for 1st-3rd Defendant/Respondent

**Mr. Okok Okumu for the 4th and 5th
Dedendant/Applicant**

Court Assistant; Mr. Joseph Makori.