

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELCLC NO. E039 OF 2024

**AGNES MBULA MWANZIA1ST PLAINTIFF/
RESPONDENT**
MARGARET ANTHONY MUTUA2ND PLAINTIFF/RESPONDENT
**(Suing in their capacity as the legal representatives to the estate of Samuel
Nyingi Mbondo Deceased)**

-VS-

**THE COUNTY GOVERNMENT OF
MAKUENI.....1ST DEFENDANT/APPLICANT**
JAKIMO INFRASTRUCTURE EAST AFRICA LTD2ND DEFENDANT

RULING

1. The 1st Defendant/Applicant filed the Notice of Motion dated 13th March, 2025 under the provisions of Section 13(5)(a) of the Environment and Land Court Act in addition to Order 40 Rule 1 of the Civil Procedure Rules.
2. The following orders have been sought: -
 - 1) **[SPENT]**
 - 2) **[SPENT]**
 - 3) **THAT pending hearing and determination of the suit herein, the Honourable Court be pleased to set aside the orders issued on 3rd March, 2025.**
 - 4) **THAT the application dated 25th November, 2024 by the Plaintiffs/Applicants be set down for hearing on its merits and the Defendants be granted leave to file their responses to the same out of time.**
3. The application is premised on the grounds appearing on its face together with the supporting affidavit of Dr. Justin Kyambi sworn on even date. The Applicant averred that he is the County Secretary of the 1st Defendant and that

on 3rd March, 2025 this court issued orders of a temporary injunction restraining the Defendants from entering, constructing and/or installing water pipes and/or solar panels and/or in any manner dealing with the land known as MAKUENI/UNOA/25.

4. The deponent averred that Counsel for the Plaintiffs did not disclose that the Estate of Samuel Nyingi Mbondo has four (4) administrators, two of which did not give their consent to the institution of the suit. It was further averred that the deceased sold a portion of the suit property to the 1st Defendant's predecessor in 2006 and it is where the borehole of Makueni County Referral Hospital sits. That one of the administrators of the estate of the deceased surrendered a portion of the suit property which was apportioned to him by the family court for the construction of a solar panel stand and that the said surrender was done long before this case was filed.
5. The deponent averred that by the time the orders dated 3rd March, 2025 were being issued, the Defendants had already taken occupation of the land and the said fact was never brought to the court's attention. It was further averred that the 1st Defendant was never served with the notice to appear in court as alleged by the process server. The deponent contended that in a meeting held on 9/12/2024, the 1st Defendant was keen on exploring an amicable settlement of the dispute regarding the two sites it is in occupation of leaving the Plaintiffs' family to finalize any other issues.
6. The Applicant averred that unless the orders issued are granted, the Defendants will be evicted from the suit property when its occupation thereat was granted by the deceased proprietor. That there is also a risk that the hundreds of people who are served by the water project will lack this basic commodity causing them harm. The deponent urged the court to allow the application as sought.

7. Opposing the application, the Plaintiffs filed a replying affidavit sworn on their behalf by Margaret Antony Mutua on 20th January, 2026. She contended that contrary to their allegations, the 1st Defendant was duly served with the hearing notice of the application on 10th February, 2025 and an affidavit of service was subsequently filed on 28th February, 2025. It was further contended that indeed the 1st Defendant's borehole was drilled in the year 2006 within the suit property but the borehole is not the subject matter of the instant suit.
8. The deponent averred that the suit relates to a different project known as 'KAITI II WATER SUPPLY PROJECT' which has been financed by the USAID and construction commenced by the 1st Defendant on a different portion of the suit property without the Plaintiffs' knowledge or consent. That the allegation that the deceased allowed the Defendants occupation of the suit property was false and misleading to the court. The deponent contended that the out-of-court negotiations failed because the Defendants failed to meet their end of the bargain while also failing to appear in court. The deponent urged the court to dismiss the application with costs.
9. The application was canvassed by way of written submissions.
10. In the Applicant's submissions dated 16th January, 2026, Counsel argued that the Respondents withheld from the court that the estate of Samuel Nyingi Mbondo (deceased) has four administrators, two of whom did not authorize filing of the suit. Counsel submitted that in line with the decision of the court in **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1995] eKLR**, the failure by the Respondents to disclose material facts disentitles them from equitable reliefs and warrants immediate discharge of the orders that were issued.
11. Counsel further submitted that the Plaintiffs' private interest cannot override public interest and the 1st Defendant's constitutional obligation to deliver

essential water services to the hundreds of residents of Kaiti Sub-County. Reliance was placed on the case of **Kenya Airports Authority v Mitu- Bell Welfare Society & 2 others [2016] eKLR** to buttress this submission. Counsel urged the court to allow the application with costs.

12. The Respondents filed their submissions dated 21st January, 2026. On their behalf, Counsel relied on the averments sworn by the 2nd Defendant in reply to the application. Counsel asserted that the orders issued by this court on 3/3/2025 are in line with the provisions of Order 40 Rule 1 of the Civil Procedure Rules.

13. It was submitted that the Applicant had not provided good reasons for their failure to attend court and or file a reply to the application dated 25/11/2024 when the same had been fixed for hearing on 3/3/2025. Reliance was placed on the decision of the Court of Appeal in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)** in reference to the factors which the court should consider before setting aside orders that have been issued in the absence of one party.

14. Having considered the application, the replying affidavit and the rival submissions, the sole issue for determination is whether the Applicant has met the threshold for setting aside of the orders dated 3rd March, 2025.

15. This court has the discretion to set aside an ex-parte in accordance with the provisions of Order 12 Rule 7 of the Civil Procedure Rules which outlines as follows: -

‘Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.’

16. Again, under Order 51 Rule 15 of the Civil Procedure Rules, the law sets out as follows: -

‘The court may set aside an order made ex parte.’

17. Being a discretionary power, the Court of Appeal observed as follows in **CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR** with regard to the setting aside of *ex-parte* orders: -

“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us 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 in our mind not be a 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. Such an exercise of discretion would in our mind be wrong in principle.”

18. The overriding objective under the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The discretion of this Court under Section 3A of the Act binds this Court to promote the ends of justice in civil litigation.

19. After a perusal of the record, it is evident that the 1st Defendant was served with a hearing notice for the application dated 25/11/2024 vide email on 10/02/2025. A return of service sworn by Aaron Mwendwa on 28/02/2025 confirms that proper service was effected as shown under paragraph 7 of the 2nd Respondent’s replying affidavit. The 2nd Respondent’s averments were not challenged by the 1st Defendant refuting service of the hearing notice.

20. The Applicant did not provide an explanation for non-attendance at the hearing of the Respondent’s application in court on 3/3/2025 or why it had not filed a formal reply thereto. Instead, the supporting affidavit is fraught with allegations

that the Respondents concealed material facts to the court when filing the suit and making their application dated 25/11/2024 for injunctive reliefs.

21. In Shah v Mbogo [1967] EA 116 at 123B Harris J, judiciously held as follows:-

“This discretion 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

22. Similarly, in Patel v EA Cargo Handling Services Ltd [1974] 1 EA 75 (CAM) the Court of Appeal aptly held thus:-

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

23. In Essanji & Another v Solanki [1968] EA 218 it was observed as follows: -

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”

24. Be that as it may, the court is cognizant of the fact that the suit pertains to an alleged illegal installation of a county water project within the Plaintiffs' LR No. MAKUENI/UNOA/25 by the 1st Defendant. The justice of this case demands that the substance of the dispute is fully and effectively determined in order to secure the interests of both parties. The court is also aware of the averments under paragraph 17 of the replying affidavit that the 1st Defendant has since removed its equipment and structures within the suit property.

25. Therefore, the court is satisfied that no prejudice will be occasioned to the Respondents if the orders sought are issued. It is also clear that the instant application was made on 13th March, 2025 which was only ten days after the impugned orders were made and hence, there was no inordinate delay. Evidently, the Applicant has demonstrated willingness to promptly oppose the Plaintiffs' application.

26. In the end, the instant application is meritorious and is hereby allowed in terms of prayers (3) and (4). Costs shall be in the cause.

It is so ordered.

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HON. E. O. OBAGA
JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS
THIS 12TH DAY OF MARCH, 2026.**

IN THE PRESENCE OF:

Ms. Mwau for Respondent.

Mr. Njeru for Applicant.

Court assistant – Musyoki and Nyaanga