

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCC NO. 364 OF 2015

CHRISTOPHER ONSEMBE MANDUKU ..... PLAINTIFF

VERSUS

KENNEDY OGORA MONGARE ..... 1<sup>ST</sup> DEFENDANT

PAUL OGEKA NYATWANGA ..... 2<sup>ND</sup> DEFENDANT

CHARLES OTEKI RIOBA ..... 3<sup>RD</sup> DEFENDANT

THE LAND REGISTRAR, KISII COUNTY ..... 4<sup>TH</sup> DEFENDANT

SAFCOR INVESTMENTS (K) LIMITED ..... 5<sup>TH</sup> DEFENDANT

KCB BANK KENY LIMITED ..... 6<sup>TH</sup> DEFENDANT

RULING

1. The application before me is one dated 1 December 2025 filed on behalf of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> defendants. It seeks the following orders :

- 1) *That this matter be Certified as extremely urgent and be heard in the first instance owing to the intervening and exceptional circumstances.*
- 2) *That the Firm of M/S C.A KERUBO & CO. ADVOCATES be granted leave to represent 1st to 3rd and 5th Defendants/Applicants.*
- 3) *The Honorable Court be pleased to vary, rescind and/or set aside the orders made on the 24th November,2025 Closing the 1st to the 3rd, and 5th Defendants/Applicants Defence and Counter Claim's Case.*
- 4) *Consequent to prayer (3) hereinabove being granted, the Honorable Court be pleased to reopen the 1st to the 3rd. and 5th Defendants/Applicants Defence and Counter Claim's Case for hearing and disposal on merits.*
- 5) *That there be an order of stay of proceedings in particular an order directing the parties to file their written submissions slated and/or scheduled on the 10th day of December 2025.*
- 6) *The Honorable Court to recall DW2 - James Waliaula Wekunda for cross examination by the 1st to the 3rd, and 5th Defendants/Applicants.*

7) *Cost of this application to be borne in the cause.*

8) *Such further and/or other orders be made as the court may deem fit and expedient.*

2. The plaintiff filed a replying affidavit to oppose the motion whereas the 6th defendant filed submissions in opposition to the application.
3. By way of background, this suit was commenced through a plaint which was filed on 28 July 2015. The plaintiff contends to be the rightful title holder of the land parcel Kisii Municipality/Block I/182. He filed suit to assert his title for there is also another title which is held by the 5th defendant and charged to the 6th defendant. The 1st and 2nd defendants contend that they purchased the suit property from one Nyatwanga Israel who is claimed to have been the original allottee, then transferred to the 3rd defendant, and eventually to the 5th defendant. The dispute therefore is on who is the rightful proprietor of the suit land between the plaintiff and the 5th defendant. Initially the suit had four defendants, i.e Kennedy Ogora Mongare, Paul Ogega Nyatwanga, Charles Oteki Rioba, and the Land Registrar, Kisii. An amendment to the plaint was effected on 13 December 2023 to join Safcor Investments (K) Limited as 5th defendant and KCB Bank Limited as 6th defendant as it emerged that title had moved from the 3rd defendant to the 5th defendant who charged it to the 6th defendant. The 1st, 2nd, 3rd, and 5th defendants were all along represented by the law firm of M/s Oguttu Mboya & Company Advocates which later morphed to the law firm of M/s Oguttu Mboya, Ochwal & Partners Advocates. I need to mention that the 3rd defendant is director of the 5th defendant company. The 4th defendant, the Land Registrar Kisii, is represented by the State Law Office.
4. The matter proceeded before me on 13 October 2025 when the plaintiff testified and closed his case. We then adjourned to 10 November 2025 for defence hearing. On 10 November 2025, Mr. Mulisa, learned counsel appearing for the 1st, 2nd, 3rd, and 5th defendants, applied for adjournment on ground that his clients were bereaved. I allowed the application and adjourned the matter to 24 November 2025. On that day, the 1st defendant was absent, but the 2nd and 3rd defendants were present. Mr. Mulisa stated from the bar that his clients had lost faith in his law firm's representation. The 2nd and 3rd defendant took oath and confirmed that position. I held that in that event, they, together with the 5th defendant, can be deemed as acting in person, but since the 1st defendant was not present to confirm what Mr. Mulisa stated, I held that Mr. Mulisa is still on record for the 1st defendant. I was however not persuaded to adjourn the matter. When I gave those orders at 11.28am I directed the case to proceed at 11.45am.

5. When we resumed, the 2nd and 3rd defendants stated that they were not ready to proceed. I held that in that event, it be deemed that they, together with the 5th defendant, have no evidence to offer and I closed their case. I closed the case of the 1st defendant too as he was not present. The 6th defendant's counsel offered a witness for the 6th defendant, who testified. Mr. Mulisa, for the 1st defendant had walked out of the proceedings and was not present to cross-examine the witness. The 2nd and 3rd defendant had no questions for the witness. After he had testified, I ordered closure of the defence case and gave directions on filing of submissions with a mention date scheduled on 10 December 2025 to confirm the filing of the said submissions.
6. On 2 December 2025, this application was filed and I have already outlined the prayers that it seeks. I need to mention that the application is filed by the law firm of M/s C.A Kerubo & Company Advocates.
7. The application is supported by the affidavit of the 3rd defendant, who swears that he has the authority of the 1st, 2nd and 5th defendant as well. Inter alia, he deposes that after close of the plaintiff's case, they had a fall out with their advocate on record. He decries that on 24 November 2025, the court declined to adjourn the case and instead gave them 15 minutes to prepare themselves. He deposes that he is an engineer by profession and he could not understand the pleadings nor adduce evidence, and that even, a seasoned lawyer could not do so in 15 minutes. He contends that refusal to be given more time violated their right to a fair hearing under Article 50 of the Constitution. He deposes that they deserve to be heard on merit and are bound to suffer substantial loss and prejudice.
8. In his replying affidavit, the plaintiff has deposed that through a ruling of the court delivered on 12 May 2017, the 3rd defendant was held to be in contempt of court and was fined Kshs. 50,000/= which he has not paid to date. He deposes that a litigant who is in contempt is not deserving of audience until the contempt is purged. He adds that the 3rd defendant has not explained his non-compliance with the said court orders. He continues to depose that the applicants had time to appoint an advocate if they fell out with their then counsel on 13 October 2025. He states that they have not explained why they did not appoint an advocate in a timely manner to ensure that they were represented. He also deposes that the 3rd defendant has even not been attending court despite alleging that he has all along been prepared to defend the case.
9. The 3rd defendant filed a supplementary affidavit. He avers that he filed a notice of appeal against the ruling that found him in contempt. He acknowledges that he has not

filed an appeal but neither has an application been made to strike out his notice of appeal. He nevertheless states that he is ready to abide by the court order.

10. I have taken note of the affidavits filed together with the submissions on record.
11. Let me first deal with a peripheral issue regarding the application. Prayer 2 seeks for leave for the law firm of M/s C.A Kerubo & Company to come on record. It is not necessary to seek leave since there is no judgment in the matter. The law firm should simply file the notice of change of advocate.
12. Having put that aside, the main issue is that the applicants want this court to exercise its discretion to re-open the case of the applicants so that they can ventilate their defence. The court has wide discretion but needs to exercise that discretion reasonably considering all the circumstances of the case. I think one of the best dicta on the considerations that a court needs to take is that expounded in the case of *Shah v Mbogo* [1967] EA 116 at 123 where the court stated as follows when dealing with an application to set aside an ex parte judgment:  
  
*“The 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.”*
13. The adopt dictum would apply, not just in cases of setting aside ex parte judgments, but generally in the manner of exercise of a court’s discretion on a wide ranging scale. As stated by the court, discretion is not to be exercised in order to aid a party who deliberately seeks to delay and/or obstruct the course of justice.
14. In the circumstances of our case, this is a matter that has been in court for over 10 years. I have gone through the record. I see that on 27 October 2015, the court gave an order of status quo. There was complaint raised by the plaintiff regarding violation of that order of status quo and through a ruling delivered on 12 May 2017 by Mutungi J, the 3rd defendant was held in contempt of that order. He was fined Kshs. 50,000/= to be paid within 10 days failure to which he was to serve 30 days in jail. It turns out that the 3rd defendant has not paid that fine and neither has he presented himself to serve the jail term more than 8 years later. I agree with counsel for the plaintiff that a court’s discretion ought not to be exercised in favour of a party who is in contempt of court and who has not yet purged his contempt. Seeking a court’s discretion is akin to approaching the seat of equity, and it is trite that when one comes to equity, one must come with clean hands. It

is clear that the 3rd defendant's hands are tainted and does not deserve discretion of court in his favour.

15. The above aside, I had earlier mentioned that the plaintiff closed his case on 13 October 2025. When the plaintiff testified, Mr. Mulisa, learned counsel acting for the applicants, cross-examined the plaintiff. There was no complaint at all regarding Mr. Mulisa's participation in the case. I scheduled defence hearing about a month later on 13 October 2025. It is Mr. Mulisa who was also present on that day and who applied for adjournment on the ground that his clients are bereaved. Again, there was no issue regarding instructions to Mr. Mulisa or the law firm of M/s Oguttu Mboya, Ochwal & Partners, who were on record for the applicants. The issue that the applicants have no faith in the law firm of M/s Oguttu Mboya, Ochwal & Partners was first brought up on 24 November 2025 on the date scheduled for defence hearing after I had adjourned the case on 13 November 2025. What the 2nd and 3rd defendants stated on oath in court is that they are uncomfortable proceeding with the said law firm since the principal partner, Mr. Oguttu, left the firm. I was not persuaded that this was a genuine reason because it is public knowledge that Mr. Oguttu was appointed a Judge of the Environment and Land Court in the year 2022 or thereabouts. It could not be that suddenly, three years later, and after counsel from the said firm had proceeded with the matter substantively, that it was now the position that they have no faith in the law firm because Mr. Oguttu left. In the present affidavit in support of the present application, that position has changed. It is now claimed that after the close of the plaintiff's case, they had a fall out. If indeed that was true, then you would expect consistency, and that this is what they would have said on 24 November 2025 in open court.
16. Moreover, as pointed out by counsel for the plaintiff, even assuming that they fell out after the close of the plaintiff's case, there was more than one month to appoint counsel. This is more so, given that the case had been in the court system for 10 years and counting.
17. In their affidavit, the applicants say that they were only given 15 minutes to prepare. That was grace being given by court for the court could as well have directed them to proceed immediately at 11.28am and they cannot claim any prejudice out of the grace of the court. In fact, any party ought to be ready to proceed immediately a case is called out.
18. My own view is that for reasons best known to the applicants, they were keen for this matter not to proceed on 24 November 2025, and were hell bent to have the matter adjourned. There was nothing genuine in their application for adjournment. I also find

nothing genuine in this application. As far as I can see, it is another attempt to continuously keep this matter in court and delay its conclusion.

19. The applicants cite Article 50 of the Constitution on the right to be heard. The duty of the court is to give one an opportunity to be heard. In this instance, the court discharged that duty by giving the applicant an opportunity to be heard when it listed the case for defence hearing on 13 November 2025 and 24 November 2025. It was now upon the applicants to seize that opportunity and present their case. They cannot fail to present their case then use that to complain that they were denied an opportunity to be heard. In any event, they had a chance to cross-examine the witness of the 6th defendants and they said that they had no questions. I wonder on what basis they now seek to have the same witness, whom they had no questions to, recalled.
20. For the above reasons, I find no merit in this application and it is dismissed with costs to the plaintiff, 4th defendant and 6th defendants.
21. The case to proceed from the point that it had reached.
22. Orders accordingly.

DATED AND DELIVERED THIS 26 DAY OF FEBRUARY 2026

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Matara for the plaintiff/respondent

No appearance on the part of the 1st, 2nd, 3rd, & 5th defendants/applicants

No appearance on the part of the 4th defendant/respondent

No appearance on the part of the 6th defendant/respondent

Court Assistant – David Ochieng