

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELCLC NO. E049 OF 2023

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

VERSUS

JAMES MICHEAL LUYALI (suing as administrator
of the Estate of Ezekiel Luyali Liyai).....1ST
DEFENDANT

DAVID KALUME RANDU.....2ND
DEFENDANT

AHMED MWIDHANI.....3RD
DEFENDANT

AND

COUNTY GOVERNMENT OF MOMBASA.....1ST INTERESTED
PARTY

UNIVERSITY OF NAIROBI.....2ND INTERESTED
PARTY

RULING

A. Introduction

1. The plaintiff instituted the instant suit vide a plaint dated 29.05.2023 and amended on 19.02.2025. The plaintiff's case was that Mombasa/Block XIX/305 was a road reserve that was illegally created from Machakos Road and illegally allocated to

the 1st defendant by the 2nd and 3rd defendants. The plaintiff averred that the execution of the lease by the 2nd and 3rd defendants was fraudulent and incapable of conferring any lawful right on the 1st defendant. The plaintiff prayed for judgment against the defendants, jointly and severally for:

- a. *A declaration that the lease dated 1st September 1994 and registered on 2nd September 1994 in favour of the 1st defendant over parcel described as Mombasa Municipality/Block XIX/305 was issued ultra vires the 2nd and 3rd defendant's powers hence null and void and incapable of conferring any interest to the defendant and/or any other person whatsoever.*
- b. *An order directing the Chief Land Registrar to rectify the register by cancellation of the entries relating to the issuance of a lease dated 1st September 1994 and registered on 2nd September 1994 in favour of the 1st defendant over the parcel described as Mombasa Municipality/Block XIX/305.*
- c. *A declaration that the survey plan folio register (F/R) No. 264/37 creating parcel known as Mombasa Municipality/Block XIX/305 is null and void and incapable of conferring any interest to the 1st defendant or any other person.*
- d. *An order directing the director of survey to cancel and expunge survey plan folio register (F/R) No. 264/37 re-*

survey the land and prepare new survey plans and amend the registry index map (RIM).

- e. An order of permanent injunction restraining the 1st defendant, his servants, agents and/or assigns from alienating, selling, charging or further charging, leasing, transferring, wasting, disposing or in any other manner dealing with Mombasa Municipality/Block XIX/305.*
- f. An order for vacant possession directing the 1st defendant, his servants, agents or assigns to vacate Mombasa Municipality/Block XIX/305 forthwith.*
- g. General damages for trespass*
- h. Costs and incidental to the suit*
- i. Any other or further relief that the court may deem just and fit to grant.*

2. The parties herein presented their witnesses and adduced evidence to the court through the trial process and closed their respective cases. On 18.09.2025 the court issued directions for the parties to file submissions and slotted the matter for judgment on 22.01.2025.

B. The 1st defendant's application

3. Before the court could deliver its judgment, the 1st defendant filed the instant application dated 09.10.2025 which sought to

arrest the delivery of the said judgment and for leave to reopen the suit for the 1st defendant to present his evidence.

4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn on 09.10.2025 by Japhet Mwamburi Luyali, the legal representative of the estate of James Luyali Liyai. He contended that James Luyali died on 21.05.2017 and there has been no representation on behalf of the 1st defendant. He pleaded that he had never been served with any hearing notices in the case, and that he would be greatly prejudiced if judgment were rendered without being accorded an opportunity to present his case. He urged the court to set aside the proceedings, reopen the case and allow him to present his case on its merits.

C. The plaintiffs' Response

5. The plaintiff opposed the application vide a replying affidavit sworn by Songole Asingwa on 21.10.2025. It was contended that the 1st defendant was represented by legal counsel at all times. In particular, it was contended that on 05.03.2024 when the matter came up for hearing, advocate Amadi appeared for the 1st defendant and informed the court that ELC No. 425/2009 was related to the instant matter and that he would seek

consolidation of the two suits. However, when the matter came up for mention next on 10.07.2024, Mr. Amadi informed the court that he would not be filing the application for consolidation but would prefer that ELC No. 425/2009 be held in abeyance while this instant suit proceeded for hearing.

6. It was further contended that at all material times when the matter proceeded for hearing Mr. Amadi was served with hearing notices but never attended court despite service. It was argued that the 1st defendant has always been aware of the progress of the suit. In addition, it was contended that an application dated 10.02.2025 for the substitution of James Luyali with Irene Otinga was served upon the firm of Kadima & Co Advocates, which was then on record for the 1st defendant. The counsel for the 1st defendant was said to have informed the court that he would make an application to cease acting.
7. The plaintiff further argued that the 1st defendant was aware of this instant suit since Irene Otinga and James Luyali are both parties in ELC No. 425 of 2009 and were represented by the same advocate who had requested the court to hold the matter in abeyance. It was further argued that the 1st defendant has always been fully represented at all hearings and that the onus

was on him to attend court and defend the suit. The instant application was said to be an afterthought to derail the court from pronouncing its judgment on a matter of public interest. The court was consequently urged to dismiss the application.

D. Directions on Submissions

8. When the application was listed for *inter partes* hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that only the plaintiff filed submissions and a list of authorities dated 11.11.2025 in opposition of the application by the time of preparation of the ruling.

E. Issues for Determination

9. The court has perused the application, the response thereto, and the material on record as well as the submissions made by counsel. The court is of the view that the following key issues arise for determination herein:

- a. Whether leave should be granted to the 1st defendant to reopen the case.*
- b. Who shall bear the costs of the application.*

F. Analysis and Determination

a. Whether leave should be granted to the 1st defendant to reopen the case

10. From the record, it appears that the 1st defendant entered an appearance on 08.02.2024 through the firm of Kadima & Company Advocates. The proceedings show that on 05.03.2024, advocate Amadi appeared for the 1st defendant and informed the court that he wished to make an application for the consolidation of two related suits on the next hearing date which was 25.04.2024. On 25.04.2024, Counsel Amadi did not appear in court nor did he make the application. However, on 10.07.2024, he appeared and informed the court that he wished to proceed with the matter. On that day, the court directed that the suit be heard on 14.10.2024. The record shows that neither the 1st defendant nor his counsel attended court on the said hearing date or any other hearing date until the case was heard and closed for judgment.
11. From the court proceedings, it is evident that the plaintiff's case proceeded on 22.01.2025 and 10.06.2025 where 7 witnesses were called and the case was closed. While on 17.06.2025, the 2nd interested party and 2nd defendant each called one witness and closed their respective cases. The

court then directed parties to file submissions and set a judgment date.

12. The plaintiff has demonstrated through an affidavit of service sworn on 16.01.2025 that on 16.01.2025, they served the firm of Kadima advocates alongside the firm of Khaminwa advocates with the hearing notice for 22.01.2025. The plaintiff has also demonstrated through an affidavit of service sworn on 09.06.2025 that on 30.04.2025 they served the firm of Kadima & Co Advocates with a hearing notice for 10.06.2025. In addition, the plaintiff has demonstrated through an affidavit of service sworn on 20.06.2025 that they served the firm of Kadima & Co Advocates with their final submissions and authorities.

13. The 1st defendant has claimed that James Micheal Luyali, the initial legal representative of the estate of Ezekiel Luyali, the 1st defendant, was his father and he died on 21.05.2017. He further contended that since the demise of his father, there has been no representation for the estate and urged the court to find that as the administrator of his father's estate he has not been informed of the progress of the case. From the court's proceedings, it is evident that the 1st defendant made

an application dated 19.02.2025 seeking leave to substitute James Micheal Luyali as the administrator of the estate of Ezekiel Luyali Liyai with Irene Juliet Otinga. The said application was allowed in court on 20.03.2025.

14. In *Shah v Mbogo and Another [1967] EA 116 at 123*, was held that;

“I have carefully considered, in relation to the present application the principles governing the exercise of the court’s discretion to set aside a judgement obtained ex parte. 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.”

The court is of the view that the same principles would apply to an application to set aside ex parte proceedings.

15. The material on record shows that at all material times the 1st defendant was represented by an advocate who was duly served with hearing notices and other court process. The record shows that he made some court appearances before the suit was set down for hearing, but did not appear at the

hearing. The 1st defendant has completely avoided providing a candid explanation for the advocate's failure to attend the trial. The reason for non-attendance would be highly relevant to the application, given that the advocate had previously threatened to cease acting for lack of instructions.

16. There is no letter or affidavit from the previous advocate explaining the reasons or the circumstances under which the hearing proceeded in the absence of the 1st defendant. It is thus impossible to tell whether failure to attend court was due to any excusable mistake, error or inadvertence. The 1st defendant has been quite economical with the truth on the circumstances under which he parted ways with his previous advocate. Although the court has a wide discretion to set aside *ex parte* proceedings, the applicant should provide a credible and reasonable explanation for his default before the court can exercise such discretion in his favor.

17. *Sections 1A & 1B of the Civil Procedure Act* obligate the court to further the overriding objective of the Act which includes just and expeditious determination of disputes before it. To grant leave to the 1st defendant to reopen his case does not meet this objective, instead it will delay the conclusion of the

suit. The court in *Catherine Njeri Angote (suing as the Administrator of the Estate of Samuel Angote Ababu (Deceased) v Lucy Wangari Ngugi & another* [2017] eKLR, held,

“Sections 1A and 1B of the Civil Procedure Act deal with the issue of overriding object of the Act which is to facilitate the just, expeditious proportionate and affordable resolution of disputes. Further, the Court has a duty to further the said overriding objective of this Act. The Court is called to further the said overriding objective by ensuring that disputes are determined in a just manner to all the parties, efficient and expeditious disposal of the matter and timely disposal of the proceedings. How does the Court ensures that the above objectives are achieved? The Court is supposed to manage its proceedings and ensure that parties are not given leeways to cause unnecessary delay in timely disposals of proceedings before it. Further that the proceedings of matter in court should be controlled and regulated by the Court but not the parties.”

18. The court is of the view that the 1st defendant is seeking a second chance to be heard after being indolent in the proceedings. The court is not satisfied that the 1st defendant has made out a case for setting aside the proceedings or

reopening the case. It would appear that the 1st defendant is simply out to delay or obstruct the course of justice. The 1st defendant has not even sought to demonstrate that he has a bona fide and reasonable defence to the action to warrant the reopening of the case.

(b) Who shall bear the costs of the application

19. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to *Section 27 of the Civil Procedure Act (Cap 21)*. A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287*. The court will not depart from the rule and as such the 1st defendant shall bear the costs of his own application.

G. Conclusion and Disposal Order

20. The upshot of the foregoing is that the plaintiff has failed to satisfy the criteria upon which our courts exercise discretion to set aside the proceedings and to reopen the suit for hearing. As

a consequence, the court makes the following orders for the disposal of the application:

- a. That the 1st defendant's application dated 09.10.2025 is hereby dismissed.***
- b. The plaintiff is hereby awarded the costs of the application.***
- c. Judgement on 02.07.2026***

Orders accordingly

Ruling dated and signed at Mombasa and delivered virtually via Microsoft Teams on this **12th day** of March **2026**.

.....

Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Ms. Songole for the plaintiff

Mr. Odhiambo for the 1st defendant

Ms. Wambui for the 2nd defendant

N/A for the 3rd defendant

Ms. Muema for the 1st interested party

Mr. Omondi for the 2nd interested party