

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELCLMISC NO E 047 OF 2025**

**GEORGE NGIGI KIBATHI** .....  
**PLAINTIFF**

**VERSUS**

**FRANCIS SHIDA MCHAWA & 18 OTHERS**.....  
**DEFENDANT**

**RULING**

1. On 25th September 2025 this court delivered a ruling allowing **prayer no 3** in the application dated 7/5/2025. The said prayer read as follows:

*“(c.) That pending the hearing and determination of this suit, a temporary injunction order be issued restraining the respondents by themselves, servants, agents and anyone claiming interest from the respondent from trespassing and entering onto the applicant’s land being plot number 208 - Mambrui measuring approximately 34.13 acres located in Mambrui Kilifi County and from cultivating, farming and doing any agricultural activities thereon and/or dealing with the land in any manner whatsoever.”*

2. The present Amended Notice of Motion dated 14<sup>th</sup> October 2025, now seeks an order that the court be pleased to vary or wholly set aside the order issued on 25<sup>th</sup> September 2025 granting the application dated 7/5/25, and also a declaration that the applicant and other 11 applicants were not served with summons To Enter Appearance or Plaint or any other Court document. The application also seeks orders that the suit be dismissed as against the 3<sup>rd</sup> defendant and the other 11<sup>th</sup> applicants who have authorized the 3<sup>rd</sup> defendant to appear and plead and represent them in this matter.
3. The amended application is not supported by any affidavit attached to it, but this court presumes that it is supported by the affidavit of **Emmanuel**

**Katoi** dated 26<sup>th</sup> June 2025. However, it is categorical that it is also supported by further affidavit of the same deponent, dated 14<sup>th</sup> October 2025.

4. The cumulative gist of all the supporting affidavits is that the deponent has the authority of the 2<sup>nd</sup> ,4<sup>th</sup> ,7<sup>th</sup> ,9<sup>th</sup> ,10<sup>th</sup> ,11<sup>th</sup> ,12<sup>th</sup> ,14<sup>th</sup> and 19<sup>th</sup> defendants to swear and plead for them and represent them this matter; that the affidavit of service filed by **Samson B. Kimbeja** sworn on 16<sup>th</sup> May 2025 on the basis of which the application dated 7<sup>th</sup> May 2025 was granted contains incorrect statements.
5. The deponent denies that he and his co-defendants were at the Chief's Office on 15<sup>th</sup> May 2025 when it is alleged that they were served; that the court inadvertently granted the application dated 7/5/25 on the basis that the defendants did not oppose the same while there is on record replying affidavits, one sworn on 26<sup>th</sup> June 2025 and filed on the 13<sup>th</sup> July 2025 by one **Emmanuel Katoi**;
6. It is also averred that the 1<sup>st</sup> defendant herein, Francis Shida Mchawa on behalf of himself and with the authority of the 4<sup>th</sup> , 5<sup>th</sup> , 6<sup>th</sup> ,12<sup>th</sup> ,17<sup>th</sup> and 19<sup>th</sup> defendants also swore a replying affidavit in response to the application dated 7<sup>th</sup> May 2025; that since the court arrived at the decision in the ruling without considering the said responses, it can *suo moto* and *ex debito justitiae*, set aside a ruling and orders issued on 25<sup>th</sup> September 2025 on the basis that the defendants were condemned unheard, that the orders made on 25<sup>th</sup> September 2025 are drastic and negatively affect the parties resident on the suit property and that prayer number 3 granted in the application contained serious restrictive and drastic orders against the affected parties;
7. It is urged that the prayer no 3 sought orders directing the defendants not to enter, cultivate or farm or carry out any activities on the land which they had lived on for a long period of time even before hearing of the suit has taken place; that in opposition to the application dated 7<sup>th</sup> May 2025, the applicant filed a replying affidavit on 30<sup>th</sup> June 2025 which had been

sworn on 26<sup>th</sup> June 2025, and it was served on the other side but the court did not consider that affidavit in its decision made on the application and the applicants have been condemned unheard; that a motion was filed to arrest the ruling scheduled for 25<sup>th</sup> September 2025 and the court slated the matter for hearing or further directions on 25<sup>th</sup> September 2025 when the ruling was eventually delivered.

8. The application is opposed by the plaintiff through his sworn affidavit dated 17<sup>th</sup> December 2025. The gist of that affidavit is that the defendants were served with Summons to Enter Appearance, plaint and the application dated 7/5/25 on 15<sup>th</sup> May 2025 at the Assistant Chiefs Office in Misufuni; that on 26<sup>th</sup> May 2025 Makworo Advocates LLB served counsel for the plaintiff with a Notice of Appointment dated 16<sup>th</sup> June 2023 on behalf of the 1<sup>st</sup> ,2<sup>nd</sup> ,3<sup>rd</sup> ,4<sup>th</sup> ,6<sup>th</sup> ,7<sup>th</sup> ,9<sup>th</sup> ,10<sup>th</sup> ,11<sup>th</sup> ,14<sup>th</sup> ,15<sup>th</sup> and 19<sup>th</sup> respondents. Notice of Change of advocates to the current firm of GKO Advocate LLP was filed on 13<sup>th</sup> June 2025 on behalf of the same respondents *plus* the 5<sup>th</sup> 8<sup>th</sup> 12<sup>th</sup> ,13<sup>th</sup> ,16<sup>th</sup> 17<sup>th</sup> and 18<sup>th</sup> respondents; that on the 16th June 2025 the plaintiff's advocates were again served with a notice of appointment by Makworo advocate LLP on behalf of the 1<sup>st</sup> ,2<sup>nd</sup> ,3<sup>rd</sup> ,4<sup>th</sup> ,6<sup>th</sup> ,7<sup>th</sup> ,9<sup>th</sup> ,10<sup>th</sup> ,11<sup>th</sup> ,14<sup>th</sup> ,15<sup>th</sup> and 19<sup>th</sup> respondents respectively.
9. It is further averred that on 20<sup>th</sup> June 2025, the plaintiff's advocates were served with a notice of change of advocates dated 16<sup>th</sup> June from Makworo Advocates LLP on behalf of the 1<sup>st</sup> ,4<sup>th</sup> ,5<sup>th</sup> ,6<sup>th</sup> ,9<sup>th</sup> ,12<sup>th</sup> ,17<sup>th</sup> and 19<sup>th</sup> respondents.
10. It is stated that the above notices filed by two law firms are clear indicators to the court that service was affected upon all the defendants; that however only the 4<sup>th</sup> ,5<sup>th</sup> ,9<sup>th</sup> ,12<sup>th</sup> ,17<sup>th</sup> and 19<sup>th</sup> defendants filed a response to the application in question and therefore the orders sought should not be granted.
11. The application was disposed of by way of written submissions. The defendants filed submissions dated 20<sup>th</sup> November 2025 and the Plaintiff

filed submissions dated 17<sup>th</sup> December 2021. This court has considered those submissions in the preparation of this ruling.

### **Analysis and determination**

12. The court has been asked to set aside orders made on 25<sup>th</sup> September 2025. The issues that arise for determination in the present application are follows:
  - a. *Whether the defendants were served with the application dated 7<sup>th</sup> May 2025;*
  - b. *Whether the orders made on 25<sup>th</sup> September 2025 ought to be set aside the application reheard;*
  - c. *Who ought to bear the costs of the application?*
13. For the purposes of setting aside the court's decision of 25<sup>th</sup> September 2025, it matters not whether only all or some of the defendants were represented and the reason will appear in the latter part of the present ruling. It is apparent that there may have been a confusion or an actual dispute relating to representation. However, the record is clear that two firms of advocate appeared in this matter on behalf of a section of the defendants: Makworo Advocate LLP and GKO Advocates LLP. The only difference in representation is that GKO Advocates LLP represented additional defendants.
14. Regarding the first issue, **Samson B, Kimbeja** the process server, was not summoned at the instance of the defendants for cross-examination, and his evidence still stands unshaken: that service was effected on all the defendants while at the Assistant Chief's office. The filing of notice of appointment of advocates dated 26<sup>th</sup> May 2025, a mere **10** days after the date of alleged service, suggests that the defendants got to know of this suit soon after the date of alleged service. That knowledge cannot in the context described above be attributed to a miracle or mere coincidence but to actual service upon the defendants. The court therefore finds that the defendants were therefore served and the ground of non-service

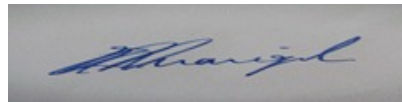
claimed by the defendant cannot and should not be relied on to seek a setting aside of the orders made on 25<sup>th</sup> September 2025.

15. Regarding the second issue, I have examined the ruling dated 25<sup>th</sup> September 2025. It contains not typographical errors that escaped editing, but and also an error on the face of the record to the effect that the 5<sup>th</sup> ,8<sup>th</sup> ,12<sup>th</sup> ,13<sup>th</sup> ,16<sup>th</sup> ,17<sup>th</sup> and 18<sup>th</sup> defendants had claimed not to be in occupation of the suit property; the correct position is that it is the 4<sup>th</sup> ,5<sup>th</sup> ,9<sup>th</sup> ,12<sup>th</sup> ,17<sup>th</sup> ,and 19<sup>th</sup> defendants who were claiming in their replying affidavit that the 5<sup>th</sup> ,8<sup>th</sup> ,12<sup>th</sup> ,13<sup>th</sup> ,16<sup>th</sup> ,17<sup>th</sup> and 18<sup>th</sup> defendants do not occupy the suit property.
16. It appears that the defendants represented by Mr Makworo were trying to point out other persons as not being in occupation, but they ended up pointing out some amongst their own group 5<sup>th</sup> , 12<sup>th</sup> , and 17<sup>th</sup> , which appears to be a mistake until clarified otherwise. There was therefore no express admission on the part of the 5<sup>th</sup> 8<sup>th</sup> , 12<sup>th</sup> , 13<sup>th</sup> ,16<sup>th</sup> , 17<sup>th</sup> and 18<sup>th</sup> respondents that they do not occupy the suit property. On their part the 4<sup>th</sup> 5<sup>th</sup> 9<sup>th</sup> 12<sup>th</sup> 17<sup>th</sup> and 19<sup>th</sup> defendants had already in the same affidavit opposed the application on the ground that the parcel of land has over 106 occupants some of whom who have lived on the land for a period of up to 50 years.
17. In the light of the foregoing, since the whole basis on which the application dated 7<sup>th</sup> May 2025 was granted was erroneous, this court must set aside the ruling and order made on 25<sup>th</sup> September 2025 *ex debito justitiae*.
18. The application dated 14<sup>th</sup> October 2025 therefore has partial merit and the same is hereby granted in terms of **prayer numbers (d)** only to pave the way for the rehearing of the application dated **7<sup>th</sup> May 2025**. I find that the prayer no (f) is premature while the others are either spent or undeserved.
19. This court also must observe that the application dated 7<sup>th</sup> May 2025 last came before it on 27<sup>th</sup> May 2025 when it was given a ruling date of

25<sup>th</sup> September 2025. The court never sat in the month of July and August. When the application dated 26<sup>th</sup> June 2025 came before Makori J, he ordered that the same be placed before me court for directions on 25<sup>th</sup> September 2025, the very date of the ruling. However, the orders he made never came to the attention of this court before that ruling date and the ruling was delivered as scheduled. The new application and its supporting affidavit were also not brought to the attention of this court before that date. That was the reason why the court delivered the ruling dated 25<sup>th</sup> September 2025 despite the pendency of the amended application dated 14<sup>th</sup> October 2025. Parties shall ensure readiness for highlighting submissions on the application dated 7/5/25 on 22/4/2026.

20. The costs of the present application shall be in the cause.

**Dated, signed and delivered at Malindi on this 12<sup>th</sup> day of March, 2026.**



**MWANGI NJOROGE,  
JUDGE, ELC, MALINDI.**