

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELC CASE NO. 83 OF 2014

ERNEST MUNGAI KAMAU.....1ST

PLAINTIFF

GALEROC LIMITED.....2ND

PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION1ST

DEFENDANT

JIHAN FREIGHTERS LIMITED2ND

DEFENDANT

CONSOLIDATED WITH ELC NO. 90. 2011

HARDWARE & GENERAL.....

.....PLAINTIFF

VERSUS

JIHAN FREIGHTERS LTD.....1ST

DEFENDANT

DEFENDANT

RULING

1. By a notice of motion dated 15.07.2025 expressed to be based upon *Article 159 of the Constitution of Kenya, 2010 Sections 1A, 1B and 3A of the Civil Procedure Act, Order 12 Rule 17 of the Civil Procedure Rules, 2010* and all other enabling provisions Galeroc Limited (*the applicant*) sought, *inter alia*, the setting aside of the judgment dated 25.06.2025 and leave to file and a defence to counter-claim.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Enock Tuitoek on even date. The applicant contended that it was not accorded a chance for being heard at the trial and that its previous advocates had failed to file a substantive defence to the counter-claim by Kenya Railways Corporation (KRC). The applicant further contended it had a good defence to the said counter-claim hence the case should be re-opened to enable it call its evidence. The

applicant blamed its previous advocates entirely for failing to attend court of the hearing.

3. The record shows that KRC filed grounds of opposition dated 01.10.2025 and a replying affidavit sworn by Simon Karina on 07.10.2025 in opposition to the application. It was stated, *inter alia*, that the applicant was accorded an adequate opportunity of being heard; that a defence to counter-claim was actually filed a behalf of the applicant; that the applicant's suit for recovery of the suit properties was dismissed way back in 2014; that there was undue delay in filing the instant application; and that the applicant was an indolent litigant who was precluded from invoking the principles of equity. The KRC was of the view that the application was merely intended to delay the course of justice and it urged the court to dismiss it with costs. There is, however, no indication on record of the rest of the parties having filed a response to the application.
4. The record further shows that when the application came up for directions it was directed that it 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 the applicant filed submissions dated 16.08.2025 whereas KRC filed submissions dated 21.01.2026.

5. The court has considered the material and submissions on record. The court is of the view that the main issue for determination is whether or not the applicant has made out a case for setting aside the judgment dated 26.06.2025 which was delivered in its absence. The ancillary issue is the question of costs of the application.

6. In its written submissions, the applicant submitted that it had made out a case for setting aside the judgment. It was submitted that it was let down by its previous advocates who had failed to provide “effective” representation. It was submitted that a mistake of counsel should not be visited on the client and that application had been filed without undue delay. It was also the applicant’s submission that it had a good defence to the action which raised *bona fide* triable

issues. The applicant relied upon the case of *Shah vs Mbogo & Another* ([1967] EA 116 among others in support of its application.

7. On its part, KRC submitted, *inter alia*, that there was inordinate delay in filing the instant application; that there was no evidence of any mistake or inadvertence on the part of the previous advocates; and that the applicant was not a diligent litigant. It was further submitted that the judgment on record was a regular judgment and there was no legitimate reason to set it aside.
8. The court has noted that the applicant was the 2nd plaintiff in *Mombasa HCCC No. 90 of 2011- Ernest Mungai Kamau & Galeroc Limited vs Kenya Railways Corporation and Jihan Freighters Ltd*. By that suit, the applicant was seeking recovery of the suit properties from the defendants therein. The record shows that the suit was dismissed in 2014 for non-attendance. The ensuing application for reinstatement of the suit was not successful. There is no indication on

record to show whether or not the applicant pursued the issue on appeal.

9. Nonetheless, the material on record shows that a defence was actually filed to the counter-claim by KRC. It is thus a bit usual for the applicant to seek leave to file another defence to counter-claim simply because it considers the one on record to be sketchy.
10. When the suit came up for hearing on the morning of 10.02.2025 Ms. Shisia Advocate sought to adjourn the matter on behalf of all the plaintiffs on the basis that they had just instructed a new advocate called Mr. Omondi who was not ready to proceed. In the alternative, the advocate prayed for time allocation of 3.00 pm for hearing in case the court was not inclined to adjourn the suit.
11. For reasons which were put on record the court declined to adjourn the suit. The suit thus proceeded for hearing at 11.28 am with Ms. Shisia representing the plaintiffs. The record shows that at 1.18 pm Mr. Omondi entered the court room and was placed on record for the applicant only. The

defence case conducted and concluded without Mr. Omondi calling any evidence on behalf of the applicant.

12. Upon conclusion of the hearing the parties were granted timelines within which to file and exchange their respective submissions. The record shows that no submissions were filed on behalf of the applicant and its advocate was not present when the judgment was delivered on 26.06.2025.
13. The material on record shows that the applicant's current advocates, Ms. T. K. Rutto & Co Advocates, came on record on 19.06.2025 before delivery of the judgment but did not file the instant application until 15.07.2025. The question which would arise in the circumstances is this; if the applicant instructed a new advocate a few days before the hearing date of 12.02.2025 why did it not find it fit to avail its witnesses in court? Secondly, why didn't the applicant file an application re-open the case before delivery of judgment or immediately upon delivery of judgment?
14. The court is unable to find any credible explanation for the applicant's failure to tender evidence at the trial and of the

delay of over 5 months in challenging the proceedings. There was no allegation or demonstration that the applicant was not aware of the hearing date. There are no particulars of any *bona fide* mistake, inadvertence or error on the part of its previous advocate. In fact, the applicant simply blamed the previous advocate for alleged “ineffective representation and neglect”. That is clear from paragraph 11 of the supporting affidavit. The court is not satisfied that the alleged ineffective representation and neglect would be a good ground for setting aside a regular judgment.

15. Apart from the undue delay in filing the application for which there is no credible and satisfactory explanation, the court is not satisfied that the application was made *bona fide* to advance the course justice. The record shows that the applicant has not been a diligent litigant all along. Its suit for recovery of the suit properties was dismissed in 2014. The subsequent application for reinstatement was also dismissed for non-attendance. There is no indication on record to show

that it took any diligent steps to seek amendment of its defence to counter-claim or to avail witnesses at the trial.

16. The record shows that it waited until a few days before the hearing date to appoint a new advocate in a bid to adjourn a 14-years old suit. When its bid to adjourn the suit was rejected on 12.02.2025 it disappeared for another 5 months before seeking to re-open the case for hearing of the counter-claim. As was held in the case of *Shah v Mbogo & Another (supra)* the court has a wide discussion to set aside an ex-parte judgment. However, such discretion exists “to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the course of justice”.
17. The court is of the view that the applicant’s conduct clearly falls within the latter category. It is undoubtedly aware that both the original suit and the counter-claim by KRC are inextricably intertwined. The original suit was claiming recovery of the suit properties whereas KRC was seeking to

retain the same properties. The court is of the view that upon dismissal of the applicant's suit it would have no viable defence to the counter-claim by KRC. The court is thus of the view that the applicant has no bona fide or credible defence to the counter-claim to warrant re-opening of the case for hearing again.

18. The upshot of the foregoing is that the court is not satisfied that the applicant has made out a genuine case for setting aside of the judgment and decree dated 26.06.2025. As a consequence, the notice of motion dated 15.07.2025 is hereby dismissed with costs to the Kenya Railways Corporation.

It is so ordered.

Ruling dated and signed at Mombasa and delivered virtually via Microsoft Teams on this **19th day of March, 2026.**

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Y. M. ANGIMA

JUDGE

In the presence

Gillian – Court Assistant

No appearance for the plaintiffs

Ms. Julu for 1st defendant – Jihan Freighters Ltd

Mr. Tom Kongere for 2nd defendant- Kenya Railways Corporation

ORIGINAL