



**Mohamed & 17 others v County Government of Lamu & 6 others (Constitutional  
Petition 19 of 2022) [2023] KEELC 15719 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15719 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CONSTITUTIONAL PETITION 19 OF 2022  
MAO ODENY, J  
FEBRUARY 22, 2023**

**BETWEEN**

**ABDULAZIZ ADARUS MOHAMED ..... 1<sup>ST</sup> PETITIONER**  
**ALIFAN HASSAN LANGASO ..... 2<sup>ND</sup> PETITIONER**  
**ABUBAKAR ABDULRAHMAN ..... 3<sup>RD</sup> PETITIONER**  
**MOHAMED GARANI BETHENI ..... 4<sup>TH</sup> PETITIONER**  
**SULTUSAN ALI MZAMIL ..... 5<sup>TH</sup> PETITIONER**  
**ABDULRAHMAN ABOUD LALI ..... 6<sup>TH</sup> PETITIONER**  
**MOONA SALIM KARAMA ..... 7<sup>TH</sup> PETITIONER**  
**SAMSHA OMAR ..... 8<sup>TH</sup> PETITIONER**  
**MOHAMED K AHMED ..... 9<sup>TH</sup> PETITIONER**  
**MOHAMED ALI ABDALLA ..... 10<sup>TH</sup> PETITIONER**  
**SALIM OMAR C ..... 11<sup>TH</sup> PETITIONER**  
**MOHAMED DELE NOSURA ..... 12<sup>TH</sup> PETITIONER**  
**ESHA M OMAR ..... 13<sup>TH</sup> PETITIONER**  
**MOHAMED NOOR ADAM ..... 14<sup>TH</sup> PETITIONER**  
**ZAHRA ABOUD ..... 15<sup>TH</sup> PETITIONER**  
**JAFFER SHEBE ..... 16<sup>TH</sup> PETITIONER**  
**JUMA MBARAK JUMAA ..... 17<sup>TH</sup> PETITIONER**  
**OMAR HAMISI BAKARI ..... 18<sup>TH</sup> PETITIONER**

**AND**



COUNTY GOVERNMENT OF LAMU .....	1 <sup>ST</sup> RESPONDENT
NATIONAL LAND COMMISSION .....	2 <sup>ND</sup> RESPONDENT
MINISTRY OF LANDS AND PHYSICAL PLANNING .....	3 <sup>RD</sup> RESPONDENT
DIRECTOR OF SURVEY .....	4 <sup>TH</sup> RESPONDENT
LAND ADJUDICATION AND SETTLEMENT SCHEME .....	5 <sup>TH</sup> RESPONDENT
COUNTY LAND REGISTRAR LAMU .....	6 <sup>TH</sup> RESPONDENT
ATTORNEY GENERAL .....	7 <sup>TH</sup> RESPONDENT

## RULING

1. This ruling is in respect of a Notice of Motion dated July 13, 2022 by the 3<sup>rd</sup> -7<sup>th</sup> Respondents seeking the following orders; -
  - a) Spent
  - b) That this Honourable court be and hereby pleased to order stay of the orders issued on July 12, 2022 pending the hearing and determination of this application.
  - c) This Honourable court do set aside the orders issued on July 12, 2022.
  - d) That upon grant of prayers ii and iii above, unconditional leave be granted to the 3<sup>rd</sup>-7<sup>th</sup> Defendant/ Applicant to file their response to the application dated June 22, 2022.
  - e. That costs of this application be in the cause.

### **Applicant's Case**

2. The application is founded on the grounds set out on the face of the application and the sworn affidavit of Gabriel O Ojwang counsel for the Applicants who deponed that this matter came to court when he was attending to another matter He was attending to another matter ELCMISC E017 of 2022: *Ellias Katana Kobe v Land Registrar Kilifi* in the cause list and he was not aware that the Applicants were parties to this matter when it was called out.
3. Counsel further averred that when the matter was called out, it was identified as *Abdulaziz Aidarus Mohamed Vs The County Government of Lamu* and that there was no mention of the office of the Attorney General which could have alerted counsel present to attend to the matter even if the same had skipped their minds. Further the cause list for the week marked by the clerk at the offices omitted the matter due to it not mentioning the Attorney General and also not having been entered in the office electronic file register.
4. Counsel stated that his nonattendance for hearing of the application was not intentional and is excusable and if the court fails to grant stay orders, the applicants shall suffer substantial loss and irreparable damages as plans have already been finalized for issuance of title deeds.



## Respondent's Case

5. In response, the Petitioners filed a replying affidavit dated September 26, 2022 sworn by Victor Soita Wafula counsel for the Petitioners who stated that the instant application is inept and an abuse of the court process as it is an afterthought by the Applicants to mislead the court to grant the orders.
6. Counsel stated that the Petition, application and hearing notice were duly served upon the Attorney General on June 28, 2022 who made no effort to make an appearance during the hearing.
7. Counsel further stated that the Applicants have admitted to having finalized preparing titles and are about to issue them which is the subject matter hence if the intended action is executed, the Petition will be rendered nugatory and the Petition will be deprived of their right.

## Applicant's Submissions

8. The application was canvassed by way of written submissions whereby counsel for the Applicant submitted that the power to set aside ex parte orders is discretionary and in the instance of nonattendance, the court should consider whether an injustice will be occasioned if the application is allowed.
9. Counsel relied on Order 51 Rule 15 which provides that the court may set aside an order made ex parte and relied on the case of *Shah V Mbogo* CA [1968] EA 93 and submitted that the Applicants have sufficient cause warranting the exercise of the courts discretion to set aside the orders issued on July 12, 2022.
10. Mr Ojwang also relied on the case of *Nyamu v Mugambi* [2022] eKLR where the court defined what constitutes sufficient cause as what would prevent a Defendant from appearing in court, and what would be the fit conditions for the court to impose when granting such an order necessarily depends on the circumstances of each case. Counsel urged the court to allow the application as prayed.
11. Counsel for the 1<sup>st</sup> Respondent informed the court that they were in support of the application hence were not filing any submissions.

## Respondent's Submissions

12. Counsel for the Petitioners submitted that the 7<sup>th</sup> Respondent in the Petition was properly served and service was accepted and therefore the mistake by the 7<sup>th</sup> Respondent's office cannot be a justification for prejudicing the Petitioners herein.
13. Mr Soita further submitted that there was no irregularity, mischief or injustice of whatsoever kind that was occasioned following the issuance of the orders in favour of the Petitioners as the court acted judiciously and relied on the cases of *Philip Kiptoo Chemwolo & Another v Augustine Kubende* [1986] eKLR, *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997, *Robert Nyangaresi Onuonga suing as the administrator of the Estate of Zakayo Ondara v Mark Nyabayo Ratemo* [2016] eKLR and urged the court to dismiss the application with costs.

## Analysis and Determination

14. The issues for determination is whether the Applicant has met the threshold for setting aside ex parte orders and whether the court should set aside the orders issued on July 12, 2022.



15. Courts have inherent powers to make such orders as may be necessary for the ends of justice to be met as provided for under Section 3A of the Civil Procedure Act. Order 51 rule 15 of the Civil Procedure Rules gives the court power to set aside any order made ex parte.
16. In the case of Wachira Karani v Bildad Wachira [2016] eKLR the court held that: -

“Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application....”
17. Similarly, in the case of Richard Nchapai Leiyangu v IEBC & 2 others [2016] eKLR the court expressed itself as follows: -

“We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”
18. The Applicant filed the application a day after the order was granted on July 12, 2022 hence it was filed timeously without undue delay. This shows that the non-attendance was not deliberate and can be termed as an excusable mistake.
19. It is not disputed that the Attorney General’s office was served with a hearing notice as admitted by counsel for the Respondents. Counsel has elaborately explained what transpired and the court finds that the reasons advanced are sufficient to set aside the *ex parte* order.
20. The Petitioner’s counsel went to the merit of the case which we are not dealing with at this stage. We are at the stage where the court has to determine whether the ex parte order should be set aside or not. The Petitioners will suffer no prejudice as the application will be heard on merit with all the parties being given an opportunity to tell their story.
21. I have considered the application, the submissions by counsel and find that the application has merit and is therefore allowed as prayed. The Applicant to respond to the application and fix a date for hearing of the application inter partes within 14 days.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2023.**

**M.A. ODENY**

**JUDGE**

**NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.**

