



**M’Mukira & another v Kinuthia & another (Environment & Land
Petition 1 of 2023) [2025] KEELC 3268 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3268 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND PETITION 1 OF 2023**

**JO MBOYA, J
APRIL 2, 2025**

BETWEEN

CYPRIAN KAUME M’MUKIRA 1ST PETITIONER

MERCY NGUTA GATOBU 2ND PETITIONER

AND

LEONARD KIARIE KINUTHIA 1ST RESPONDENT

COUNTY GOVERNMENT OF ISIOLO 2ND RESPONDENT

RULING

1. The Petitioners/Applicants [hereinafter referenced as the Applicants] have approached the court vide the Notice of Motion Application dated 28th February 2024 and wherein same [Applicants] have sought the following reliefs:
 - i.spent
 - ii. That this Honourable Court be pleased to set aside dismissal orders of 11/12/2023 and reinstate the suit hearing.
 - iii. The costs of this Application be provided for.
2. The instant application is premised on the grounds highlighted in the body thereof. In addition, the application is supported by the affidavit of Mercy N. Nguta [the 2nd Applicant] sworn on even date and wherein the deponent has highlighted various reasons underpinning the failure by her advocates to attend court in time on 11th December 2023, when the Petition was dismissed for non-attendance.
3. The 2nd Respondent has opposed the application vide grounds of opposition which are undated. In particular, the 2nd Respondent has contended that the Applicants herein have neither exhibited due diligence nor desire to have the Petition heard and disposed of on merit. Furthermore, it has been



- contended that the Application beforehand has been filed with unreasonable and inordinate delay which has not been properly accounted for.
4. The 1st Respondent did not file any response to the Application. For good measure, the only response to the Application is the one filed by and on behalf of the 2nd Respondent.
 5. The Application came up for hearing on 4th March 2025; when the parties agreed/covenanted to canvass and dispose of the application by way of written submissions. Thereafter, the Applicants and the 2nd Respondent duly filed their respective submissions. Suffice it to state that the two [2] sets of written submissions are on record.
 6. Having reviewed the Application and the response thereto and upon taking into consideration the written submissions filed by and on behalf of the parties, I come to the conclusion that the determination of the instant application turns on three [3] salient issues, namely; whether the court is seized of the requisite jurisdiction to entertain and adjudicate upon the application; whether the application has been made with unreasonable and inordinate delay and if so, whether the delay has been accounted for; and whether the obtaining circumstances necessitate the exercise of discretion in favour of the Applicants or otherwise.
 7. Regarding the first issue, namely, whether the court is seized of the requisite jurisdiction to entertain and adjudicate upon the application, it is imperative to state and observe that the instant petition was scheduled for directions on 11th December 2023. Furthermore, it is evident that when the petition was called out on 11th December 2023 none of the parties and/or their advocates were present in court.
 8. Insofar as the parties and their respective advocates were absent, the court [differently constituted] proceeded to and dismissed the Petition.
 9. In particular, the court stated as hereunder:
 - “1. The Petitioners have not demonstrated that the orders issued by the court on 16th October 2022 were obeyed.”
 - “2. As the Petitioners are not in court and without proof that they had properly served the Respondent with today’s date, I am constrained to dismiss this Petition.”
 - “3. In the circumstances, the Petition is dismissed”
 10. It is worthy to recall and reiterate that the Petition was scheduled for directions and not for hearing. To the extent that the Petition was scheduled for directions, it was not open for the learned judge to dismiss the Petition. To my mind, the best the learned judge [now retired] ought to have done was to schedule the Petition for notice to show cause why same ought not to be dismissed for non-compliance with the orders of the court, [if any].
 11. Moreover, I beg to highlight that where a matter is scheduled for directions, which is akin to mention, no precipitate and/or substantive order[s] can issue. In this regard, there is no gainsaying that the impugned order was itself laced with irregularity and thus falls within the jurisdiction of this court to review, revise, and/or set aside.
 12. For good measure, this court is seized of both the statutory jurisdiction under the provision[s] of Order 12 of the Civil Procedure Rules, 2010; and the inherent/residual/intrinsic jurisdiction to avert a miscarriage of justice and/or to achieve the ends of justice. [See the provisions of Section 3A of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya].



13. The scope of the court's inherent jurisdiction has been variously highlighted and elaborated upon. In the case of *Narok County Government & another v Ntutu & 4 others* (Petition 3 of 2015) [2018] KESC 11 (KLR) (11 December 2018) (Judgment) the Supreme Court stated thus:
99. Further in *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR the Court of Appeal set out the principles to guide the Court in exercising inherent jurisdiction in these words;
- “The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection...” (Emphasis added.)
100. The conclusion drawn from the above citations is that this Court, indeed any other appellate Court, even where there are no specific provisions to do an act, has inherent and/or residual powers to act in a fair or equitable manner in the interest of justice and/or to ensure the observance of the due process of the law. Therein also lies the power for the Court to act to prevent abuse of Court process by one party so that fairness is maintained between all parties.
14. Moreover, it is not lost on this court that the dismissal orders in question were made in the absence of the parties. In this regard, there is no doubt that the resultant orders fall within the purview of the provisions of Order 12 Rules 1 and 2 of the Civil Procedure Rules 2010 and same lend themselves to the jurisdiction of the court as pertains to setting aside.
15. Pertinently, where a court of law makes orders in the absence of the parties and which is therefore not an order made on the merits, the court in question is bestowed with jurisdiction to recall and/or set aside its orders, subject to due explanation being offered. [See *Sebei District Administration v Gasyali* [1968] EA 300].
16. In a nutshell, I come to the conclusion that this court is seized of the requisite jurisdiction to entertain and adjudicate upon the application beforehand.
17. Next is the issue as to whether the application has been mounted with unreasonable and inordinate delay and if so, whether the delay has been accounted for or suitably explained. To start with, the impugned orders were made on 11th December 2023 while the Application beforehand was not filed until the 1st March 2024.
18. It is evident that the Applicants herein took some time before filing the subject application. Nevertheless, it is worthy to recall that the duration between the 21st December 2023 up to 13th January 2024 falls within the excluded timelines. In this regard, the timeline under reference is not to be taken into account [reckoned] in computing the duration of delay.
19. Be that as it may, the Applicants herein were obligated to account for the duration between 11th December 2023 to 20th December 2023 and thereafter 14th January 2024 to 1st March 2024. Evidently, the duration taken before the filing of the application is unreasonable.



20. However, I have looked at the supporting affidavit sworn by the 2nd Applicant and wherein same has tabulated the reasons attendant to the delay and more particularly, the aspect where same has indicated that the delay in filing the Application is because the valuation report which same was to rely upon had not been availed by the valuer.
21. Additionally, the 2nd Applicant has also posited that her advocates had also gone on leave and therefore her attempts to have the application filed timeously were defeated by the absence of the advocates.
22. It is instructive to note that the law does not set the minimum or maximum timelines that constitute[s] unreasonable delay. Be that as it may, what the law provides is that every delay must be accounted for and/or duly explained.
23. To this end, it is appropriate to cite and reference the decision in the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] KECA 701 (KLR) where the court observed and stated thus:
 - (12) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.
24. Without belabouring the point, I find and hold that the explanation that has been provided and elaborated upon at the foot of the supporting affidavit is clearly justifiable and reasonable. In any event, it is not lost on this court that the Applicants were only called upon to prove the reasons for the default to the satisfaction of the court and in any event, on a balance of probabilities. [See Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) at paragraphs 12 and 13 thereof].
25. Lastly, I now to turn to issue as pertains to the orders which the court ought to issue. Firstly, it is worthy to recall and reiterate that the dispute at the foot of the Petition touches on and concerns land. There is no gainsaying that matters pertaining to land are not only emotive but sensitive. In this regard, it behoves courts of law to endeavour to afford the parties an opportunity to have the disputes heard and determined on merits, unless there exists compelling reasons and circumstances.
26. In the case of Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] KECA 706 (KLR) the court of appeal [per Ouko PCA] stated thus:

Just as the sanctity of a person's property in the English common law was recognised in the famous dictum that "an Englishman's home (or occasionally, house) is his castle and fortress", *the Constitution* and land laws in Kenya protect, as fundamental the right to acquire and own property of any description; and in any part of Kenya. This sanctity was so important in the days of old that one Right Honourable, William Pitt, 1st Earl of Chatham graphically explained it thus;

"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter."

In Kenya the attachment to land is passionate, emotional and almost fanatical. Nations, neighbours, siblings, spouses and even strangers fight over land. In some instances, the disputes degenerate into bloodshed and death. This Court in *Gitamaiyu Trading Company Ltd v Nyakinyua Mugumo Kiambaa Co. Ltd & 11 others* Civil Appeal No. 84 of 2013, explained why land is such an important asset thus;



“Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities.”

27. The need to have disputes touching and concerning ownership of land and basically land disputes determined on merit and not on procedural technicalities was also underscored by the Court of Appeal in the case of *Oginga v Moko (Civil Appeal (Application) 33 of 2019)* [2024] KECA 1830 (KLR) (20 December 2024) (Ruling) where the court stated as hereunder:
20. Based on this reasoning, we are inclined, in part due to deference to a lawyer’s oath (as the applicant’s lawyer appeared before us and stated, as an officer of the Court, that he was, indeed, unwell on the date the appeal was called out for hearing), to allow the application and restore the appeal. In doing so, we note that the underlying appeal is about land ownership. As much as the practicalities and due process allow, we would err on the side of having such disputes receive resolution based on substantive consideration of the merits rather than procedural determinations.
28. Like the Court of Appeal in the decision [supra], I would rather err on the side of reinstating the Petition for hearing and determination on merit as opposed to sustaining the impugned dismissal orders.
29. In any event, it is worthy to reiterate that the impugned orders, which are substantive in nature, were made on a date scheduled for directions and not otherwise. In this regard, there is apparent injustice arising from and attendant to the said order[s].

Final Disposition:

30. For the reasons that have been canvassed and highlighted in the body of the ruling, it must have become crystal clear that the Application beforehand is meritorious and thus deserving of favourable orders. To this end, I am inclined to exercise my discretion in allowing the Application.
31. In the premise, the final orders that commend themselves to the court are as hereunder:
- i. The Application dated 28th February 2024 be and is hereby allowed.
 - ii. The dismissal orders made on 11th December 2023 be and are hereby set aside.
 - iii. The Petition be and is hereby reinstated for hearing and determination on merits.
 - iv. The Petitioners shall ensure that all the requisite documents are filed and served within fourteen (14) days from the date hereof.
 - v. The Respondents shall also have liberty to file and serve the requisite documents, if any, within fourteen (14) days from the date of service.
 - vi. Each party shall bear own costs.
32. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF APRIL 2025.

OGUTTU MBOYA

JUDGE.

In the presence of



Mustapha/Mukami Court Assistant

Mrs. Mercy Kaume for the Petitioners/Applicants

Mr. George Mwangela for the 2nd Respondent

No Appearance for the 1st Respondent

