



REPUBLIC OF KENYA



KENYA LAW
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**Attorney General v Boma & 8 others (Environment and Land Petition
20 of 2021) [2025] KEELC 5822 (KLR) (28 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 5822 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND PETITION 20 OF 2021**

LL NAIKUNI, J

MAY 28, 2025

BETWEEN

HON ATTORNEY GENERAL APPLICANT

AND

JULIUS MURIZI BOMA 1ST RESPONDENT

**GIDEON CHIMONI MURIZI [BOTH SUING AS THE ADMINISTRATORS
OF THE ESTATE OF THE LATE LAWRENCE MULISHO**

NDURYA 2ND RESPONDENT

MWAVUMBO GROUP RANCH 3RD RESPONDENT

KAEMA JAWA 4TH RESPONDENT

DANIEL MWACHIRO DIYO 5TH RESPONDENT

KAINGU KARISA 6TH RESPONDENT

ABDALLA NYONDO 7TH RESPONDENT

MAMBO DALU 8TH RESPONDENT

NATIONAL LAND COMMISSION 9TH RESPONDENT

RULING

I. Introduction

1. The Honourable Court was tasked to make a determination to the Notice of Motion Application dated 3rd December 2024. It was brought under the provision of Sections 1A, 1B, and 3A of the [Civil Procedure Act](#), Cap. 21 and Order 51 Rule 1 of the Civil Procedure Rules, 2010.



2. It is instructive to note that on 27th March, 2025 the Learned Counsels in the matter informed court that they had entered into a consent among themselves to allow the application dated 3rd December, 2024 save for the issue of costs to be paid by the Honourable Attorney general, the Applicant herein.

II. The Notice of Motion Application

3. The Applicant seeks for the following orders: -
 - a. Spent.
 - b. That this Honourable Court be pleased to arrest the delivery of the Judgement which is scheduled to be delivered on 27th March 2025.
 - c. That this Honourable Court be pleased to re - open the Respondents case and the respondent be allowed to file a response to the amended Petition and written submissions so as to form part of the court in this matter to assist the court to reach a justifiable conclusion.
 - d. That costs of this application be in the cause.
4. The Application was premised on the grounds, testimonial facts and averments made out in the 12 Paragraphed supporting affidavit of IMMACULATE OPIO Senior Litigation Counsel together with three (3) annexures marked as “IO – 1 to 3” annexed thereto. She averred that:-
 - a. The matter was listed for a mention on 3rd December, 2024 before the Honourable Court at Kwale.
 - b. During the said call over of the Court’s Causelist, confusion arose as to which counsel at the office of Attorney General was dealing with the matter as records of it could not be traced anywhere in the Attorney General’s system. The matter therefore proceeded unattended by the Office of the Attorney General.
 - c. The court thereafter listed the matter for Judgment on 27th March,2025 and served the applicant herein the said directions vide their email. Copy of the email extract was annexed herewith and marked as “IO – 1”
 - d. It was upon the receipt of the above order via email from the ELC Court at Kwale that the Office of the Attorney General, was able to trace the matter via CTS and found that the Petitioner/ 1st Respondent amended the Petition and filed Submissions, which were never served on the Hon. Attorney General.
 - e. The matter herein had been proceeding ex - Parte as the Petitioner/1st Respondent had not been serving the Office of the Attorney General with documents since the matter was transferred to Kwale from the Environment and Land Court at Mombasa.
 - f. The Petitioner filed an affidavit of service sworn by one Micheal Thoya Mbwana on 22nd April, 2024 claiming to have served the Office of the Attorney General with a mention notice of the matter for 29th May, 2024 which was not the case. That a copy the mention notice showing it was received by the Attorney General was not annexed to the said affidavit. Further, the Hon. Attorney General’s Office at Mombasa never had a registry clerk named Peter, as indicated on said affidavit of service.
 - g. The Office of the Attorney General additionally had considerable difficulty with reconciling this matter with the original matter filed at Mombasa ELC Court as ELC Petition no 2 of 2020 because upon transfer to Kwale, the case number changed and the Petitioner amended



the Petition and completely changed the parties to the suit. (A copy of the Memorandum of Appearance and grounds of opposition filed in the matter at ELC Mombasa Court was hereby annexed and marked as “IO – 2” and “IO – 3” respectively.)

- h. The applicant had not had an opportunity to participate fully in the matter as proper service was not being effected upon it.
 - i. It was imperative that the Judgement be arrested and the Deponent be granted an opportunity to put in their written submissions so that the Court gets a chance to peruse and consider all relevant matters and evidence in the matter before Judgment was delivered.
 - j. The Petitioner/1st Respondent would not suffer any prejudice if the Application was allowed as the 8th Respondent/Applicant had a right to have this matter determined by the Application of the law to the prevailing facts and to bring all relevant case law before the Court.
5. On 27th March 2025 when Counsels appeared before this court for direction on the application, deliberations ensued in which the application was compromised. The court then issued the following directions that:-
- a. By consensus of the parties the notice of motion application dated 3rd December 2024 be and is hereby allowed and orders granted as prayed.
 - b. Parties - the petitioners granted 3 days leave to file and serve submissions on the issue of costs and thereafter the Respondents have 3 days to submit on the 6 same under the provisions of Section 27[1] of the Civil Procedure Act, Cap. 21
 - c. The Honourable Court to render a ruling on 28th May 2025.

III. Submissions

6. As indicated above, on 27th March 2025 while all the parties were present in Court, the Honourable Attorney General were directed to have the issue of costs disposed of by way of written submissions. A ruling date was reserved for 28th May 2025 by Court accordingly. Unfortunately, at the time of preparing this ruling none of the parties had complied. Nevertheless, the court will proceed to render its verdict over the issue on costs.

IV. Analysis and determination

7. I have keenly perused through the 13 paragraphed affidavit of Immaculate Opio a State Counsel at the office of the Applicant herein, and which affidavit is in support of the compromised application. The same is dated 3rd December 2024.
8. In order to arrive at a reasonable, fair and equitable decision, the Honourable Court will proceed to make a determination on a single issue this is whether the Honourable Attorney general should be subjected to paying costs of this application or not.
9. It is well established that the issue of costs is at the discretion of the Court. Costs mean an award granted to a party at the conclusion of legal action or proceedings at any litigation. The provisions of Section 27 of the Civil Procedure Act, Cap. 21 provides that:-
 - “(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to



what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

10. The High Court in the case of: “Party of Independent Candidates of Kenya - Versus - Mutula Kilonzo & 2 others, HC EP No. 6 of 2013, had this to say on the issue of costs:

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

11. At paragraph 3 of the same, it was averred that when the matter came up for mention before court on 3rd December 2024, confusion arose at the office of the Attorney General on which counsel was dealing with the matter. That records of the matter could not be traced anywhere in the Attorney General’s system and the matter thus proceeded unattended.
12. The consequently the matter was listed for Judgement on 27th March 2025 and the Applicant was served with a notice of the the date via email by the ELC Court Kwale registry. That it was then that the Applicant’s office was able to trace the matter via CTS and found that the 1st Petitioner/ Respondent had infact amended the Petition and filed submissions but the same had not been served upon the Honourable Attorney General.
13. That the Petitioner has apparently not been serving the Applicant since the matter was transferred to Kwale Law courts from Mombasa. According to the deponent, the affidavit of service alleging service upon the Attorney General on 22nd April 2024 was falsified as a copy showing service was received was never attached to the affidavit of service.
14. The Applicant also stated that there had been difficulty reconciling the instant file after its transfer to Kwale as the case file numbers changed. Further that the Petitioner amended the Petition and completely changed the parties. The applicant states that it has not had proper time and opportunity to participate in the suit due to lack of proper service.
15. From the above assertions, the court was forced to peruse its record in order to confirm the truthfulness of the same. It found out that upon this matter being transfer to the ELC court in Kwale, it was placed for the first time before Lady Justice Dena on 22nd January 2024. From the proceedings of the said date, it is clear that Mrs. Waswa the Principal State Counsel from the Applicant’s office was present in court and even addressed court indicating that she would be holding brief for Mr. Makuto her colleague from the same office.
16. On 18th March 2024 the matter was also before court for mention and proceeded in the presence of Mrs. Wawa Advocate once more holding brief for Mr Makuto.
17. On 29th May 2025 the matter proceeded for mention in the presence of Mr Makuto.



18. On the 3rd December 2024, at around 10.30 am Mrs. Waswa informed the court that Mr. Makuto was before another court over a different matter. Infact, from the record, the Judgement date was issued in her presence.
19. I have deliberately decided to point out the above dates and facts indepth being in response to the averments raised by Ms. Opio Advocate to the effect that the Attorney General was not aware of what transpired in the file after its transfer to Kwale. The said sentiments are not truthful. As has been said time and again, as long as a party is before court for litigation of their case whether as initiators of a claim or defenders of the same, they have a duty to be proactive in the same. See the case of:- “Tana & Athi Rivers Development Authority – Versus - Jeremiah Kimogho Mwakio & 3 Others [2015] eKLR”.
20. With the above background in mind, the court will now embark on making a finding on the issue of costs and taking that the Judgement has already been arrested by consent of the parties. I will make reference to an excerpt in Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page at page 101, where the author states as follows: -

“The law of costs as it is understood by courts in Kenya, is this, that where a Plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs- the court has no discretion and cannot take away the Plaintiff’s right of costs. If the Defendant, however innocently, has infringed a legal right of the Plaintiff, the Plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course”.
21. Having interrogated the chronology of events that led to the matter proceeding to the issuance of a judgement, I can confidently state that the Applicant was not proactive in following up on the matter. The Petitioner has in my view proceeded with the matter with the full knowledge of the Attorney General. For them to now arrest the Judgement at this stage and further seek reopening of their case is to take all the parties involved back on the litigation process which is costly to say the least given the fact that they are represented by Counsel.
22. It is rather common knowledge that by the time the matter reached the judgement stage there has been effort and expenditure which normally are the events which are referred to in the principle “costs follow an event”.

III. Conclusion & Disposition

23. Bearing the above in mind, I proceed to order as follows:-
 - a. That the Notice of Motion application dated 3rd December, 2024 be and is hereby allowed.
 - b. That the costs of the instant application be awarded to the Petitioner as against the Attorney General/Applicant.
 - c. That the Honourable Court to deliver its Judgement on 24th July, 2025.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 28TH DAY OF MAY 2025

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HON. MR. JUSTICE L.L NAIKUNI,



ENVIRONMENT & LAND COURT

AT

KWALE.

Ruling delivered in the presence of: -

Mr. Daniel Disii, the Court Assistant.

Mr. Kinyanjui Advocate holding brief for Mr. Gikandi Advocate for the Petitioners.

Mr. Mtana Advocate for the 1st, 2nd, 3rd, 4th, 6th, 7th and 8th Respondents.

No appearance for the Applicant and the 9th Respondent.

