



Fadhil (Suing as the Legal Administrator to the Estate of the Late Amina Mwatumbo Kongo - Deceased) v Ali & 2 others (Environment & Land Case 29 of 2018) [2025] KEELC 4428 (KLR) (11 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4428 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 29 OF 2018
FM NJOROGE, J
JUNE 11, 2025**

BETWEEN

SALIM OMAR FADHIL (SUING AS THE LEGAL ADMINISTRATOR TO THE ESTATE OF THE LATE AMINA MWATUMBO KONGO - DECEASED) PLAINTIFF

AND

ABDIQANI IBRAHIM ALI 1ST DEFENDANT

FRANCIS S.K BAYAH 2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, KILIFI 3RD DEFENDANT

RULING

1. The Notice of Motion application for determination is dated 17/3/2025. It is brought under Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 12 Rules 7, Order 45 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules 2010 and Article 159 of *the Constitution* of Kenya 2010. The Plaintiffs prays that:
 - a. The Honourable Court be pleased to review, vary and/or set aside the orders made on the 3rd February 2025 dismissing the suit filed herein together with all the other consequential orders.
 - b. That the Honourable Court be pleased to reinstate the case for hearing and determination on merit.
 - c. That the cost of this application be provided for.
2. The application is based on the following grounds:



- a. That this Honourable Court dismissed the matter when it came for hearing of the defence case on the 3rd of February for non-attendance by the Plaintiff;
 - b. That the matter did not proceed as the Advocate for Plaintiff/Applicant on record was unwell for period of time therefore could not attend the hearing;
 - c. That the said matter is part heard, the Plaintiff/Applicant closed his case and only remains the Defence/Respondents case;
 - d. That the Plaintiff/Applicant has not in any way delayed this case that in fact he moved the court by fixing mentions and hearing service upon the Defendants/Respondents thereof;
 - e. That it is manifestly clear that the Plaintiff/Applicant will suffer irreparable damage and loss if the suit is not reinstated, heard and determined on merit.
3. The first defendant filed his replying affidavit updated 16th May 2025. His response is that there is no evidence attached to the application to demonstrate that counsel for the applicant was unwell as stated in his affidavit supporting the motion.
 4. The second defendant filed his replying affidavit dated 15th May 2025, through the Nyachiro Robert Arati, his advocate. His response is that there is no evidence that counsel for the plaintiff was unwell; that neither the defendant nor his counsel was present in court during the first call-over and at 11:30 a.m. on the date that the matter was fixed for hearing; that they did not take advantage of the virtual platform to address the court even from the comfort of their homes or office; that they never bothered to inform the counsel for the opposite party regarding the plaintiff's counsel's indisposition; that the situation is made worse by the fact that on 19th November 2024 when the matter was mentioned before court for purposes of taking a hearing date, the plaintiff was absent and that he was served with a hearing notice and he was well aware of the hearing it of 3rd February 2025. It is also averred that the application should be dismissed because the proper and lawful procedures were duly followed before dismissal of the suit.
 5. The application was disposed of solely on the basis of affidavit evidence. I have considered the contents of the various affidavits filed.
 6. This is a suit that was filed in 2018 by the plaintiff. The plaintiff's case was heard and closed but the first defendant subsequently brought an application dated 19th January 2024 seeking that the suit be reopened, and that he be granted leave to file his list of witnesses and witness statements for the purpose of defending the case. This court allowed that application on 18th September 2024; the court granted the first defendant leave to file the documents he wished to file within 14 days from the date of the order. In fairness to the plaintiff, the court also issued an order allowing the plaintiff to reopen his case and call such evidence if any as he made him necessary in view of the statements filed by the first defendant. This court then set down the matter for a mention on 29th October 2024 for directions as to hearing and for issuance of a hearing date on a priority basis. The court never sat on that date, being engaged in official business elsewhere. However, the matter was listed for a mention on 19th November 2024 when, in the absence of the plaintiff's counsel, the hearing date of 3rd February 2025 was fixed in court. Neither counsel for the plaintiff nor the plaintiff appeared in court on 3rd February 2025 and the court dismissed the case for non-attendance, thus provoking the present application.
 7. It is noted that the first defendant had filed the list of witnesses as ordered as well as a bundle of documents in readiness for hearing.



8. Evidence of service of a hearing notice is by way of an affidavit of service showing what means was used to serve a litigant. A court is entitled to set aside orders made in the absence of a party if that party was not served with a hearing notice. Search orders are made *ex debito justitiae* if it is confirmed by court that there is no evidence of service.
9. I have perused through the court record and found no affidavit of service for the hearing date of 3rd February 2025 which was taken by the defendants in the absence of the plaintiff and his counsel. No affidavit of service is attached to the first defendant's replying affidavit. Neither is any affidavit of service attached to the second defendant's replying affidavit. Counsel on behalf of the first and second defendants were present at the fixing of the hearing that on 19th of November 2024. In this court view, it was incumbent upon them or any of them to serve the plaintiff's counsel with a hearing notice for 3rd February 2025 and to file an affidavit of service as evidence of that course of action. In the circumstances, it is therefore doubtful that the plaintiff and his advocate were aware of the hearing date of 3rd February 2025 at all.
10. A party is entitled to be served with a hearing notice so that they can be able to attend court for their case. Any proceedings that take place without a hearing notice usually result in an injustice to the party who has not been served.
11. In this particular case, I find that want of service is an injustice to the plaintiff who had long since closed his case before it was later reopened at the instance of the first defendant. Regardless of any other merits of the objections raised by the defendants, this court finds that to decline the plaintiff's application to set aside the dismissal order while there is no evidence that he was served with the hearing notice would amount to an injustice.
12. Consequently, I allow the application dated 17th March 2025 *ex debito justitiae*. The same is allowed in terms of prayers number 1 and 2 thereof. Costs thereof shall be in the cause. This suit shall be mentioned on 7th October 2025 for issuance of hearing date.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 11TH DAY OF JUNE 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

