



**Mwandiku v National Land Commission (Petition 8 of 2016)
[2024] KEELC 3302 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 8 OF 2016
FM NJOROGE, J
APRIL 22, 2024**

BETWEEN

CAROLINE M. MWANDIKU PETITIONER

AND

NATIONAL LAND COMMISSION RESPONDENT

RULING

1. For determination is the Applicant’s Notice of Motion dated 30th November 2023 seeking the following orders;
 1. Spent
 2. Spent
 3. Spent
 4. That this honourable court be pleased to set aside the warrant of arrest issued against the Applicant on 14th September 2023 and all orders and proceedings subsequent thereto be vacated.
 5. That this honourable court be pleased to grant the Applicant leave to file his appeal of (sic) the bill of costs out of time.
2. The application is founded on the grounds set out on its face and the supporting affidavit of Brian Ikol the Director, Legal affairs and dispute resolution of the applicant. He stated that the Petition herein was heard and judgment delivered on 23rd January 2020 wherein the Respondent was directed to pay the costs of the petition which sum was awarded at Kshs. 607,162. He stated that the court issued a Notice to Show Cause against the Chief Executive Officer of the Applicant on 13th December 2022 which Notice to Show Cause was not served at the proper physical address or proper email address thus the Applicant remained uninformed of the Notice to Show Cause.



3. The Application was opposed through the replying affidavit of Benjamin Mwikya Musyoki, counsel for the Petitioner who deponed that it is not enough for the Respondent to claim that it is appealing the certificate of taxation yet it has not commenced the process one year down the line. Further, that the Applicant confirms that it is aware of the existence of the certificate of taxation and only challenges the service of the Notice to Show Cause. It was additionally stated that no order for setting aside the certificate of taxation has been sought and that the email address used to effect the service belongs to the Respondent which email address has always been used to effect service; moreover, that the Applicant has not denied the rubber stamp appearing on the Notice to Show Cause dated 16th February 2023.
4. The Application was disposed of by way of written submissions. I have considered the submissions by the parties as well as the authorities relied upon. The issues for determination are:
 1. whether the Applicant has made out a case for setting aside the warrants of arrests; and
 2. whether the leave to appeal out of time is merited.
5. Order 51 Rule 15 of the *Civil Procedure Rules, 2010* which provides:
 6. “The court may set aside an order made ex parte.”
 7. The court has the discretion to set aside orders but must be satisfied that either the applicant was not properly served with summons or that the applicant failed to appear in court at the hearing due to sufficient cause.
8. Further, Order 5 rule 8 provides:

“Service to be on defendant in person or on his agent [Order 5, rule 8.]

 1. Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
 2. A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”
9. The Applicant’s case is that the Notice to show cause was not effected through proper physical address or email address. On the other hand, the Petitioner maintains that service was effected through the email address on the Applicant’s website which was always used for previous services. The email provided by the Petitioner has not been denied by the Applicant. The only contention is that the same is a general email address whereas there is an email address for the legal department. In my opinion, service though it was through the general email address, still delivered the notice to the Applicant and the issue of having more than one email address is thus merely a housekeeping issue for the Applicant. Consequently, I am of the view that service was properly effected.
10. It would appear that the applicant is dissatisfied with the costs awarded and may want to lodge a reference. Another view that may be taken of the application is that it may be attempting to pave the way for an appeal against the award of costs in the matter. The ambivalence of the language used in the application does not assist this court much. The language employed in the application at hand relates to the filing of an appeal. If it were a reference expressly sought to be filed I would have found that the proper provisions of the law have not been cited. However, I must deal with the issue as framed.



11. Perchance it is intended to appeal against the award of costs, the applicant's plea for leave to file an appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal out of time.
12. The Supreme Court of Kenya sitting at Kisumu in the case of *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR while relying to its decision in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* Application No. 16 of 2014 [2014] EKLR, reiterated the considerations to be made in such a case to be as follows:
 - “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
13. The applicant has a duty to explain to this court why it did not file this application after judgment was delivered on 23rd January 2020. The Applicant has not provided any reason for the delay of almost three years after judgment was delivered. It follows that the prayer for leave to appeal fails and the same is hereby disallowed.
14. As I have earlier stated, perchance it is intended to file a reference, the proper law has not been cited in order to guide the court to that end.
15. The upshot is that the application dated 30th November 2023 is unclear as to what it seeks and it thus fails for want of merit and the same is hereby dismissed with costs to the Petitioner.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 22ND DAY OF APRIL 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

