



**Kitur v National Land Commission & another (Environment & Land
Case 4 of 2019) [2025] KEELC 531 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 4 OF 2019
LA OMOLLO, J
FEBRUARY 13, 2025**

BETWEEN

SYLVIA CHEPKORIR KITUR PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY 2ND DEFENDANT

RULING

Introduction

1. This ruling is in respect of the 2nd Defendant/Applicant's Notice of Motion application dated 15th May, 2024. The application is expressed to be brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The application seeks the following orders;
 - a. That this Honourable Court be pleased to set aside its ruling and/or order dated 25th April, 2024 dismissing the 2nd Defendant's Chamber Summons application dated 25th April, 2023 for want of prosecution, and in its place, the matter be fixed for delivery of the Court's ruling on the said application on the basis of the written submissions filed by the parties herein.
 - b. That the costs of this application be borne by the Plaintiff.
3. The application is based on the grounds on its face and the supporting affidavit of one Jude Ragot counsel for the 2nd Defendant/Applicant sworn on 15th May, 2023.



Factual Background.

4. The Plaintiff/Respondent commenced the present proceedings vide the Plaint dated 24th January, 2019 wherein she sought the following orders;
 - a. An order that the 1st Defendant's offer of Kshs. 18,643,575/= dated 4th October, 2018 being compensation for the compulsory acquisition of the portion of the land parcel known as Title No. Kericho/Municipality Block 2/2 previously known as LR No. Kericho Municipality 691/694 in Kericho measuring 0.1000 hectares, be set aside.
 - b. An order that the Plaintiff be awarded the sum of Kshs. 31,385,085/= as compensation for compulsory acquisition of the portion of the land parcel known as Title No. Kericho Municipality Block 2/2 previously known as LR No. Kericho Municipality 691/694, in Kericho, measuring 0.100 hectares.
 - c. Damages for breach of constitutional and statutory duty by the Defendants.
 - d. Costs of this suit.
 - e. Interest on (b), (c) and (d), above.
5. The 1st Defendant/Respondent entered appearance and filed its Statement of Defence on 5th April, 2019 wherein it urged the Court to find the suit statutory incompetent and dismiss with its costs.
6. The 2nd Defendant/Applicant filed its Statement of Defence on 3rd June, 2019 where it stated that it would no longer be compulsorily acquiring a portion of the Plaintiff/Respondent's parcel of land and it therefore sought that the suit be dismissed with costs.
7. On 30th May, 2022 the suit was marked as withdrawn with costs to the Plaintiff/Respondent.
8. The application under consideration first came up for hearing on 5th June, 2024. The Court directed that it be heard by way of written submissions.
9. On 8th October, 2024 the application was mentioned to confirm filing of submissions and reserved for ruling.

The 2nd Defendant/Applicant's Contention.

10. The Affidavit in support of the application is sworn by Jude Ragot counsel for the 2nd Defendant/Applicant.
11. He contends that the 2nd Defendant/Applicant filed and served its Chamber Summons application dated 25th April, 2023 where it had sought for an order to set aside the taxation done by the Deputy Registrar on 12th April, 2023.
12. He also contends that in the said application the 2nd Defendant/Applicant further sought for among other orders the determination of who between the Plaintiff/Respondent and the 1st Defendant/Respondent and itself was to bear costs of the suit.
13. He further contends that the application dated 25th April, 2023 first came up for mention on 20th July, 2023 but the Court was not sitting.
14. It is his contention that the application was placed before the Court for directions on 24th October, 2023 and the Court granted the Plaintiff/Respondent four days within which to file her response. The



Court also directed the parties to file their submissions within 21 days and granted an order of status quo.

The matter was to be mentioned on 23rd November, 2023.

15. It is also his contention that on 23rd November, 2023 he logged onto the Court via the provided link but he was not admitted and he remained in the lobby until 11 am. Upon inquiry from the registry, he was informed that the Court was not sitting and fresh dates were to be communicated to the parties.
16. It is further his contention that he had never been served any new dates to date.
17. He contends that on 11th March, 2024 the online filing system was established. He adds that he sought to file the 2nd Defendant/Applicant's submissions on 13th May, 2024 in the judiciary online portal and made a request for mapping of his firm of Advocates.
18. He also contends that he noted from the system that the matter had come up on 23rd November, 2023, 19th December, 2023 and 25th April, 2024. The system indicated that on 25th April, 2024 a ruling was delivered and the case closed.
19. He further contends that he was shocked to learn that there were ex parte proceedings and a ruling delivered without any notice to him as the Advocate on record for the 2nd Defendant/Applicant. He adds that he was not afforded the opportunity to protect the interests of his client.
20. It is his contention that he wrote a letter of inquiry on 13th May, 2024 seeking clarification and also filed submissions but to date he has not received any response.
21. It is his contention that on 15th May, 2024 he perused the Court file and found out that the matter proceeded on 23rd November, 2023 in the presence of both counsel for the Plaintiff/Respondent and the 1st Defendant/Respondent. The Court gave fresh directions on the filing of the responses to the 2nd Defendant/Applicant's application and directed that the matter be mentioned on 19th December, 2023 for compliance.
22. It is also his contention that on 19th December, 2023 only counsel for the Plaintiff/Respondent appeared before Court.

The ruling on the application was delivered on 25th April, 2024 when the Court dismissed the application for want of prosecution on account of failing to file submissions in support of the application.
23. It is further his contention that from the Court record it is clear that on 23rd November, 2023, 19th December 2023 and on 25th April, 2024, the 2nd Defendant/Applicant was indicated to be absent. He adds that the Court did not seek any proof from the Plaintiff/Respondent who was present on the said days on whether the 2nd Defendant/Applicant was aware of the dates and/or the directions issued by the Court.
24. He contends that the foregoing circumstances demonstrate that the 2nd Defendant/Applicant was condemned without being given a fair opportunity to prosecute its application by filing submissions.
25. He also contends that the 2nd Defendant/Applicant's application was dismissed for want of prosecution and yet it had not been served with the directions of the Court that required it to file its submissions within seven days from 19th December, 2023.
26. He further contends that the 2nd Defendant/Applicant's rights to a fair trial and access to justice were violated as it was condemned unheard. He adds that the said rights are inalienable and are provided for



under Articles 24, 25, 47 (1), (2), (3), 48 & 50(1) of the Constitution of Kenya and Sections 2, 3(1)(b) & (c), 4(1), (3), (4), (5) & 6 of the Fair Administrative Actions Act, 2015.

27. It is his contention that the Plaintiff/Respondent should be condemned to bear the costs of the application for failing to inform the 2nd Defendant/Applicant of the directions given by the Court on 23rd November, 2023 and 19th December, 2023.
28. It is also his contention that the 2nd Defendant/Applicant has demonstrated diligence and commitment in pursuing the hearing and determination of its application dated 25th April, 2023 by following up with the Court severally, fixing the application for hearing and serving it upon all the parties. He adds that the 2nd Defendant/Applicant had also filed its submissions on 13th May, 2024 before it discovered the aforementioned developments.
29. He ends his deposition by stating that it is in the interest of justice that the present application be allowed as prayed.

The Plaintiff/Respondent's Response.

30. The Plaintiff/Respondent filed a Replying Affidavit sworn on 4th June, 2024.
31. She deposes that this Court dismissed the 2nd Defendant/Applicant's application dated 25th April, 2023.
32. She also deposes that she is advised her advocates on record that counsel for the 2nd Defendant/Applicant attended Court on 24th October, 2023 when the Court gave directions that the application dated 25th April, 2023 be disposed of by way of written submissions. The Court fixed the matter for mention on 23rd November, 2023.
33. She further deposes that she is advised by her advocates on record that they attended Court on 23rd November, 2023 where they confirmed that they had filed a reply and the submissions in respect to the 2nd Defendant/Applicant's application.
34. It is her deposition that the 2nd Defendant/Applicant's counsel failed to attend Court on the said date despite the date being taken by consent.
35. It is also her deposition that the 2nd Defendant/Applicant and its counsel failure to attend Court on the said date speaks volumes about their commitment to prosecute the application.
36. It is further her deposition that it was the responsibility of the 2nd Defendant/Applicant and its counsel to diligently follow through with its application as the Court is not tasked with the duty of updating parties on procedural developments.
37. She deposes that the 2nd Defendant/Applicant's contention that its counsel logged onto the link for virtual Court but was not admitted is unsubstantiated. She adds that due diligence would have prompted counsel to engage with the Court officials via email or the other counsel on record for guidance or an update on the Court's directives.
38. She also deposes that her advocates on record attended Court on 19th December, 2023 when the Court extended leave for the 2nd Defendant/Applicant to file its submissions despite the fact that counsel had failed to attend Court on the said date. It is on this date that the Court reserved for ruling the said application for 25th April, 2024.



39. She further deposes that the 2nd Defendant/Applicant's counsel cannot in good conscience cast aspersions on his counterparts for lack of updates when the imperative was to be vigilant and prosecute the application.
40. It is her deposition that the Court should consider the span of time that lapsed between the date counsel for the 2nd Defendant/Applicant was last in Court to when it filed the application under consideration.
41. It is also her deposition that a period of six months had lapsed which period was ample for any party exercising due diligence to confirm the status of their application and make right their omissions if any. She reiterates that the 2nd Defendant/Applicant should have used the period of six months to seek necessary directions or inquire on the status of their application.
42. It is further her deposition that the protracted delay is not indicative of a party striving to uphold the tenets of diligence but rather suggests a disregard for the efficient administration of justice.
43. She deposes that it is important to note that the 2nd Defendant/Applicant only filed and served its submissions on 13th May, 2024 long after the Court had already dismissed its application which underscores a pattern of procrastination and a lack of urgency in having their application determined.
44. She ends her deposition by urging the Court to dismiss the instant application as it is intended to delay and/or frustrate her enjoyment of the fruits of the impugned judgement of this Court.

Issues for determination.

45. The 2nd Defendant/Applicant filed its submissions on 13th July, 2024 while the Plaintiff/Respondent filed her submissions on 8th October, 2024.
46. The 2nd Defendant/Applicant reiterates its Counsel's averments in the affidavit in support of the application and submits that even though the Plaintiff/Respondent disputes that its counsel was not admitted to virtual Court on 23rd November, 2023, she was not present in Court on the said date and she cannot therefore speak with credibility.
47. The 2nd Defendant/Applicant submits that counsel for the Plaintiff/Respondent who attended Court on the said date has not sworn any affidavit to express any doubt as to the veracity and/or legitimacy of the explanation given by its counsel. That being case, its counsel's explanation for failing to attend Court on the said date should be considered as sufficient.
48. The 2nd Defendant/Applicant reiterates that its counsel wrote a letter to Court on 13th May, 2024 which was not responded to and submits that the Plaintiff/Respondent has not denied that she was the only party that was present in Court on 23rd November, 2023 and 19th December, 2023.
49. The 2nd Defendant/Applicant also reiterates that as a result of the failure to be informed of the subsequent dates when the matter was placed before Court, its right to a fair hearing was infringed. It adds that its rights under Articles 24, 25, 47 (1), (2) & (3), 48 and 50 (1) of *the Constitution* was infringed together with Sections 2, 3(1)(b) & (c), 4(1), (3)(b), (4), (5) and (6) of the Fair Administrative Actions Act, 2015.
50. The 2nd Defendant/Applicant relies on the judicial decision of Patriotic Guards Ltd vs James Kipchirchir Sambu [2018] eKLR and submits that it has all along acted diligently save for the proceedings of 23rd November, 2023, 19th December, 2023 and 25th April, 2024 as it has explained above.



51. The 2nd Defendant/Applicant urges the Court to allow its application and for the Plaintiff/Respondent to bear the costs of the application for failure to serve it on the aforementioned dates.
52. The Plaintiff/Respondent in her submissions submits on whether the 2nd Defendant/Applicant has raised reasonable grounds to warrant setting aside of the ruling and order of this Court made on 25th April, 2024.
53. The Plaintiff/Respondent relies on the judicial decision of Thathini Development Company Limited v Mombasa Water & Sewerage Company & another [2022] eKLR and reiterates that the 2nd Defendant/Applicant has attempted to shift blame on her counsel for failure to inform him of the Court's directions when the record clearly shows that he was present in Court on 24th October, 2023 when directions on submissions were issued.
54. The Plaintiff/Respondent also reiterates that counsel for the 2nd Defendant/Applicant did not produce any evidence of any efforts that he made to reach out to the Court and neither did he identify the person who he called at the registry.
55. The Plaintiff/Respondent submits that if at all counsel for the 2nd Defendant/Applicant was unable to log into virtual Court, he ought to have immediately reached out to her counsel or reach out to Court to inquire of the Court's directions.
56. The Plaintiff/Respondent relies on the judicial decision of Utalii Transport Company Limited & 3 Others vs NIC Bank & another [2014] eKLR and urges the Court to consider the delay in bringing the application under consideration. She reiterates the conduct of the 2nd Defendant/Applicant and its counsel is indicative of indolence and it cannot therefore cry foul that its application was dismissed.
57. The Plaintiff/Respondent relies on the decision in Josphat Oginda Sasia v Wycliffe Wabwile Kiiya [2022] eKLR and urges the Court to dismiss the 2nd Defendant/Applicant's application.

Analysis and Determination.

58. Having considered the application, the response thereto and the rival submissions filed, my view is that the single issue that arises for determination is whether the Court should set aside its ruling delivered on 25th April, 2024 which dismissed the 2nd Defendant/Applicant's application dated 25th April, 2023.
59. The 2nd Defendant/Applicant contends that it filed the Chamber Summons application dated 25th April, 2023 which came up for directions on 24th October, 2023.
60. The 2nd Defendant/Applicant also contends that on the said date, the Plaintiff/Respondent was granted time to file her response and the parties were directed to file their submissions upon service of the response by the Plaintiff/Respondent.
61. The 2nd Defendant/Applicant further contends that the matter was given a mention date for 23rd November, 2023 and on the said date, its counsel on record was not able to log into virtual Court and that when he made inquiries, he was informed that the Court was not sitting and that a new date would be communicated.
62. It is the 2nd Defendant/Applicant's contention that its counsel was never served with any new dates but when he tried to file submissions sometime in May, 2024 he found out that the Court had delivered a ruling on 25th April, 2024 where its application was dismissed for want of prosecution.
63. The 2nd Defendant/Applicant contends that its counsel found out that the matter had proceeded on three occasions to wit 23rd November, 2023, 19th December, 2023 and 25th April, 2024 on which dates



it was not served. It is on this basis that the 2nd Defendant/Applicant is seeking that the Court sets aside its ruling delivered on 25th April, 2024.

64. On the other hand, the Plaintiff/Respondent submits that the 2nd Defendant/Applicant was not diligent as it failed to follow up and find out the progress of the hearing of its application.
65. The Plaintiff/Respondent points out that the 2nd Defendant/Applicant's counsel was last in Court on 23rd November, 2023 and yet he did not make any follow up until May, 2024 after a period of six months had lapsed.
66. The Plaintiff/Respondent also submits that Counsel for the 2nd Defendant/Applicant should not blame her Advocates on record for failure to serve him with the directions of the Court when he had a duty to follow up.
67. Upon perusal of the Court record, it shows that on 24th October, 2023 the 2nd Defendant/Applicant's application dated 25th April, 2023 came up for hearing. Counsel for the Plaintiff/Respondent and the 2nd Defendant/Applicant were present. The Court granted the Plaintiff/Respondent four days to file her response and the other parties were directed to file their submissions within twenty-one days upon service of the response. The matter was given a mention date for 23rd November, 2023.
68. The Court record shows that on 23rd November, 2023 counsel for both the Plaintiff/Respondent and the 1st Defendant/Respondent were present. Counsel for the 2nd Defendant/Applicant was absent. Counsel for the Plaintiff/Respondent informed the Court that a response to the application had been filed on 27th October, 2023 and served upon counsel for the 2nd Defendant/Applicant.
69. The Court gave the following directions;

“The 1st Defendant is granted leave of seven days to file and serve both their response and submissions to the application dated 25th April, 2023. Leave is also extended for the Applicant herein. This matter shall further be mentioned to confirm compliance, take a date for ruling and/or further directions on the 19th December, 2023.”
70. On 19th December, 2023 the Court record shows that it was only counsel for the Plaintiff/Respondent who was present in Court. The Court gave the following directions;

“Ruling shall be delivered on the 25th April, 2024. The Applicant is granted further leave of 7 days to file and serve their written submissions.”
71. On 25th April, 2024 neither of the parties were present in Court and the Court held as follows;

“The application dated 25th April, 2023 is dismissed for noncompliance by the Applicant pursuant to directions that the same be disposed of by way of written submissions.”
72. As per the directions of the Court issued on 24th October, 2023, the 2nd Defendant/Applicant was to file its submissions within twenty-one days of service of the response by the Plaintiff/Respondent.
73. A perusal of the pleadings shows that the Plaintiff/Respondent filed her response to the 2nd Defendant/Applicant's application on 27th October, 2023. There is no affidavit of service on record to show when the said response was served upon counsel for the 2nd Defendant/Applicant but it is also important to note that counsel for the 2nd Defendant/Applicant has not addressed the issue of service of the said response upon him.



74. A further perusal of the court record shows that the Plaintiff/Respondent filed her submissions on 23rd November, 2023. There are no other pleadings filed between the said date and 14th May, 2024 when the 2nd Defendant/Applicant filed submissions to the application dated 25th April, 2023.
75. I note that there are no affidavits of service on record that show that Counsel for the 2nd Defendant/Applicant was served with the directions issued by the Court on 23rd November, 2023 and 19th December, 2023 when time was extended for it to file its written submissions.
76. In the judicial decision of Phillip Mutiso Mulalya v Samuel Dominic Muathe & 2 others [2022] eKLR the Court held as follows;

“23. The right not to be condemned unheard is a cardinal principle of natural justice, without which the rule of law would be without equilibrium. This principle, like a golden thread, must be seen to run throughout all Court processes even as the Court strives to uphold the law and other legal principles. The legitimacy of Court decisions and the rule of law find their bearing on this principle. In my view, denying any person the right not to be condemned unheard, is a grave matter that ought not to be taken lightly. The Court is under duty to ensure that every party to a suit, is accorded an opportunity to be heard. This opportunity starts with being made aware of any Court processes filed against parties to a suit. In the case of Mandeep Chauhan vs. Kenyatta National Hospital & 2 Others (2013) eKLR, the Court cited with approval the holding in the case of The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Miscellaneous Application No. 18 of 2010, where the Supreme Court of Uganda aptly captured the centrality of this principle of natural justice as follows;

‘It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice is null and void and of no effect. The rule as captured in the Latin phrase ‘audi alteram partem’ literally translates in to ‘hear the parties in turn,’ and has been appropriately paraphrased as ‘do not condemn anyone unheard.’...”

77. From the Court record it is evident that the 2nd Defendant/Applicant was not served with the directions of the Court issued on 23rd November, 2023 and 19th December, 2023 when time within which to file submissions was extended.
78. In the circumstances, I find that the 2nd Defendant/Applicant has made a case for the setting aside of the orders issued by this court in its absence.

Disposition.

79. Consequently, the application dated 15th May, 2024 is hereby allowed in the following terms:
- a. The ruling and/or order dated 25th April, 2024 dismissing the 2nd Defendant’s Chamber Summons application dated 25th April, 2023 for want of prosecution is hereby set aside.



- b. This matter shall be mentioned on 20th February, 2025 for submissions on the application dated 25th April, 2023.
- c. Each party shall bear own costs of the application.

80. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 13TH DAY OF FEBRUARY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Kipkorir for the Plaintiff/Respondent

The firm of Owit,Otieno & Ragot for 2nd Defendant - Absent

No appearance for the 1st Defendant/Respondent.

Court Assistant; Mr. Joseph Makori.

