



**Mureka v Kenya Rural Roads Authority & 3 others (Environment & Land  
Petition E001 of 2022) [2024] KEELC 13990 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13990 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND PETITION E001 OF 2022  
EC CHERONO, J  
DECEMBER 17, 2024**

**BETWEEN**

**EDWARD MUREKA ..... PETITIONER**

**AND**

**KENYA RURAL ROADS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**RESIDENT ENGINEER MUSIKOMA- MUNGATSI MATEKA  
ROAD ..... 2<sup>ND</sup> RESPONDENT**

**CABINE SECRETARY-IN-CHARGE OF THE MINISTRY OF  
TRANSPORT ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application before me for determination is the Notice of Motion filed by Kenya Rural Roads Authority and the Resident Engineer, Musikoma-Mungatsi Mateka Road (1<sup>st</sup> and 2<sup>nd</sup> Respondents) dated 14/03/2024 seeking the following orders;
  1. That the Judgment entered against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants on 18<sup>th</sup> October 2023 and all subsequent orders be set aside.
  2. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondent/Applicants be granted leave to file a response to the Petition dated 1<sup>st</sup> December, 2021
  3. That this Honourable Court may grant any other orders it deems fit.
  4. That Costs of this application be provided for.
2. The application is premised on grounds shown on the face of the said application supported by the affidavit sworn by one Emily Nyangasi and Eng. Kennedy Nyakuti and a Further affidavit by Emily



Nyangasi advocate. The application is opposed with a Replying affidavit by Edward Mureka sworn on 12<sup>th</sup> April, 2024.

### **1st and 2<sup>nd</sup> defendants summary of facts**

3. According to the 1st and 2nd Defendants/Applicants, they found out about a default judgment having been entered against them after being served with a mention Notice for 7th March, 2024. They stated That the 1st Defendant/Applicant is a state corporation established under the [Kenya Roads Act](#) and headed by a Director General who is the Accounting Officer and That as per the legal framework under which the 1st Respondent/Applicant was established, That is the [Kenya Roads Act](#), 2007, service upon a state Corporation should be at its Headquarters at the office of the Director General. The Applicants stated That the 1st Respondent/Applicant's Headquarters is in Nairobi at BaraBara plaza, Block B, South Airport Road, off Mazao Road. It is further deposed That as per the affidavit of service on record by the Petitioner sworn on 5th February, 2022 and filed in court on 25t February 2022, the Petition was served upon one Eng. Nyakuti and Macharia who are not authorized officers to receive service on behalf of the 1st Respondent/Applicant. It is deposed That they are not the Director General/Accounting Officer of the 1st Respondent/Applicant and neither do they work at the legal office of the 1st Respondent/Applicant. They stated That upon perusal of the court file, it was realised That as per the court order dated 21st March 2022, the Petitioner was directed to serve the Petition and submissions upon the Respondents within 14 days which they argued That the court had some doubt over the effectiveness of service of the Petition.
4. The Respondents/Applicants further stated That despite the court issuing the directions on 21/03/2022, the court record as per the affidavit of service sworn on 5th April 2022 and filed on 15/06/2022 shows That the Petition was never served. They stated That even the alleged service of the submissions is inconsistent with the requirements of service of documents generally and service by electronic mail (e-mail).
5. The 1st and 2nd Respondents/Applicants stated That they came to know about the case in December 2022 when it was availed a mention notice from the Honourable court served upon the office of the Director-Development, Kenya Rural Roads Authority who is not a party to this suit. They stated That upon receiving the communication from court, the 1st Respondent/Applicant immediately sought instructions and entered Appearance by filing a Notice of Appointment on 6th December, 2022. They stated That between the time they came to know of this Petition and the time they filed their notice of Appointment, the Petition was pending Judgment as evidenced by the Petitioners/Respondent's supporting affidavit in the application dated 16th November, 2023. They said That in spite of filing and serving their notice of Appointment, the Petitioner never informed them of subsequent proceedings in the court case, save for the application for review. That affidavits of service on the court record on the alleged service in respect of the 1st and 2nd Respondents/Applicants point to no service and That service upon the office of the Director-Development, Kenya Rural Roads Authority was not proper as the holder of the said office is not the holder of the office of the Director General/Accounting officer of the 1st Respondent/Applicant. That the Petitioner misled the honourable court by identifying the Director-Development, Kenya Rural Roads Authority in its pleadings as the person to be served on behalf of the 1st Respondent/Applicant. They stated That at any rate, there is no evidence on record showing That the Director-Development, Kenya Rural Roads Authority was ever served with the Petition and due to lack of and/or improper service, whatever information the 1st and 2nd Respondents/Applicants could get regarding the case was through rumours and third parties and not as a result of any service effected by the Petitioner/Respondent.



6. They stated That the default judgment entered against the 1st Respondent/Applicant is irregular for lack of service and/or improper service upon the 1st & 2nd Respondents/Applicants and it is in the interest of justice That the same be set aside.
7. On his part, ENG. Kennedy Nyakuti deposed That he is an Engineer in the employ of the 1st Respondent/Applicant and has come to his knowledge and attention That the Petition relating to this case was allegedly served upon him on behalf of the 1st Respondent/Applicant. He stated That he has never been served with any court documents pertaining to this Petition and That he is not responsible for receiving any documents on behalf of the 1st Respondent/Applicant and has never presented to anyone That he has the power to act on behalf of the 1st Respondent/Applicant. He deposed That he is neither the Accounting officer and or Director General of the 1st Respondent/Applicant nor the Resident Engineer Musikoma-Mungatsi-Mateka road and That he is also not a party to this suit so That documents pertaining to the suit herein may be served upon him. He stated That he does not work at the legal office of the 1st Respondent/Applicant so That he may accept service of legal documents on its behalf.

#### **Petitioners/respondent's summary of facts**

8. The Petitioner/Respondent filed a Replying affidavit sworn on 20/03/2024 in opposition to the application and stated as follows;
  1. That from the prayers and the application, the Applicants are exercising their right of appeal through unorthodox method by taking this court on a fishing expedition with intention That this court drown in its unfounded allegations.
  2. That the Applicants have not proffered any tangible reasons to why they did not file a response and chose to file submissions, why they failed to turn up on the date of mention and alleging failure of service is not reason enough as they were duly served.
  3. That the application cannot be rendered an academic exercise as it seeks to set aside the whole judgment which the Petitioner's application only intends That special damages be computed in the judgment.
  4. That I have been advised by my counsel on record advice which I verily believe to be true That the 1st Respondent/Applicant is established under Section 6 of the *Kenya Roads Act, 2007* which does not provide Mandatory service to the Headquarters of the 1st Respondent/Applicant
  5. That the Respondents had over a year to put in any other document after they entered appearance and the application herein has been filed with inordinate delay.
  6. That the Applicants have not given any explanation as to the ordinate delay which state That they have been indolent and are only seeking to deliberately obstruct justice.
  7. That the judgment was not a default judgment as it was entered after parties had been given opportunity to be heard.
  8. That it is not true to state That the Respondents were unaware of the suit as in the letter dated 30/1/2023 and copied to the Director General and Director Development, counsel for the Respondents in his opening remarks That "we sought and received instructions from our client in respect of the amicable settlement" That is to say the 1st and 2nd Respondents.



9. That I have been advised by my counsel on record That default judgment can only be entered where a party does not enter appearance.
10. That further the Applicants have not annexed any defence or Reply to the Petition illustrating any triable issue to even warrant this court to look at the application and I pray That the application be dismissed with costs.
11. That in the present Petition, the Respondent entered appearance and even proposed to canvass the petition by way of written submissions.
12. That the Applicant has not explained why they failed to file the submissions as they promised or even a draft response to the defence.
13. That on 5/4/22 the Petitioner's submissions were sent to the Respondents (Annexed are e-mail extract EM-1.
14. That the Applicants have not renounced the used e-mails That dg@kerra.go.ke and kerra@.go.ke
15. That the application has been with undue delay as Mr. Rapando was aware of the judgment date.
16. That it is not true That the applicants were not served with the Petition. What was the basis for entering appearance if they did not know about the Petition?
17. That we agree That as required service was effected upon the Director General via e-mail kerra@kerra.go.ke which was duly confirmed by Engineer Nyakuti and a further communication from Engineer Michael Rono.
18. That the affidavit of service does not say That the Petition was served upon Nyakuti but through the e-mail which was confirmed by him and call made through his number 0722224194.
19. That they cannot speak the mind of the court as the court did not fault service of the Petition.
20. That the 1<sup>st</sup> Respondent entered appearance and chose not to file any document or inform the court of his intention to put in response but informed the court That he will file submissions a fact captured even the judgment at the last paragraph of page 5 of the judgment, a mention date was set.
21. That counsel for the Respondents provided the e-mail jmrapandoadvocate@gmail.com for all correspondences.
22. That on 5/12/2022, my Advocate forwarded the mention notice for 7/12/22 directly to Rapando who acknowledged the receipt. (annexed is printout from my advocate whatsapp marked EM-2).
23. That Mr. Rapando forwarded his notice of appointment via the same means my advocate on 6/12/22 which was acknowledged.
24. That on 7/12/22, my advocate forwarded the virtual link to Mr. Rapando who joined court and indicated That he will put in his written submissions.
25. That he acknowledged the links and the contact for one of the clerks from the registry.



26. That while was waited for submission, the counsel came up with a proposal for out of court settlement and wrote a letter dated 30/1/2023 forthwith, a fact That I was notified too.
27. That the proposal was later put into writing.
28. That via a letter dated 30<sup>th</sup> January 2023, the Respondents advocate wrote to the Petitioner's counsel seeking their position on amicable settlement. Letter was copied to all the Directors including the Director General. (annexed is EM-3 is a copy of the letter).
29. That my then counsel on record responded on the same via a letter dated 8/2/2023 indicating my willingness to amicable settle the matter. (Annexed and marked EM-4 is a copy of letter dated 8/2/2023).
30. That Mr. Rapando promised counsel That he will get a value and agree on the said amount.
31. That later on 19/4/2023, my counsel wrote to the counsel for the Respondent expressing the quantum That could settle the matter being KSHS.7,000,000/=
32. That I even followed up with my advocate on the progress of the settlement (annexed is an e-mail extract EM-5).
33. That all these events happened before judgment could be entered.
34. That the Petitioner could only serve the person who was having the matter at the time.
35. That the Petition and written submissions were served on 5/12/22 with the Petition and submission all other documents were also served upon Mr. Rapando who via a phone call acknowledged receipt.
36. That on 16/11/2022 all pleadings and documents were served upon the advocate. Judgment was almost a year later. (Annexed and marked EM-6 is a copy of the e-mail extract indicating the same).
37. That for clarity a Petition was also sent again on the same date.
38. That both the Petition and submissions were served upon the Respondent.
39. That the Judgment was lawfully entered.

**Respondents/applicants rejoinder by way of a further affidavit**

9. Emily Nyangasi filed a further affidavit and stated as follows;
  1. That I swear this further affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants in response to the Petitioner/Respondent's Replying affidavit sworn on 20<sup>th</sup> March, 2024.
  2. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants application dated 14<sup>th</sup> March 2024 to set aside judgment is not an appeal against the Judgment by the Hon. Court.
  3. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants became aware of the suit in December 2022 and immediately filed a Notice of Appointment of Advocate on 6<sup>th</sup> December, 2022.
  4. That as per the court record by this time, the Petitioner had already filed their submissions on 20<sup>th</sup> April 2022 and the Petition was pending judgment.
  5. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants did not file a response to the Petition or the written submissions as they were never served with the Petition and the court dates.



6. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants could not file a response when the case was pending judgment or file submissions where no response had been filed.
7. That after the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants found out about the case, they tried engaging the Petitioner through his then counsel to attempt amicable settlement of the case but which amicable settlement was unsuccessful.
8. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants have a proper response to the Petition which raises triable issues. ( Annexed and marked EN1 is the draft Response).
9. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants found out about judgment having been entered against them upon being served by the Petitioner's application for Review of the Judgment in march, 2024 and immediately filed the application to set aside the judgment. The application has therefore been filed without undue delay.
10. That the affidavits of service on the court record on any alleged service in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants point to no service.

### **Legal Analysis and Decision.**

10. I have considered the grounds on the face of the application, the supporting affidavits and the further affidavit, the Replying affidavit, the rival submissions and the relevant law. The singular issue for determination in this application is whether the ex-parte judgment entered herein is a regular or irregular one. If it is irregular, it renders the judgment vitiated ex-debito justicia. If the ex-parte judgment is regular, the same may be set aside upon the applicant demonstrating That he has defence on merits.
11. Order 6 Rule 1 of the Civil Procedure Rules provides for appearance of parties and states That where a party has been served with Summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons. The said appearance is to be signed by either the party or the advocate if represented. The same is to be filed and served on the plaintiff within 7 days of filing and an affidavit of service to be filed. Order 6 Rule 3 provides for address of service.
12. I have perused at the affidavit of service sworn on 5<sup>th</sup> February, 2022 by Tyson Otieno Advocate. At paragraph 2,3 & 4 thereof, the learned counsel deposed as follows;
  2. That on 04/2/2022 I received copies of the Petition from advocate Felix Oketch, an advocate of the High Court of Kenya and the Managing Partner with instructions to scan and send them via email to the Respondents.
  - 3 That I was given the emails of the respondents, and subsequently confirmed with representatives from the respective offices ( Eng. Nyakuti from kerra, Macharia the resident engineer and AG's office) and sent the scanned documents.
  4. That, the email was sent successfully.”
13. Service of Summons and other court processes is guided by order 5 Rule 22B of the Civil Procedure Rules which provides as follows;
  1. Summons sent by Electronic mail service shall be sent to the defendant's last confirmed and used E-mail address.
  2. Service shall be deemed to have been effected when the sender receives a delivery receipt.



3. Summons shall be deemed to have been served on the day which it is sent; if it is sent within the official business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day That is not a business day it shall be considered to have been served on the business day subsequent.
  4. An officer of the court who is duly authorized to effect service shall file an Affidavit of service attaching the Electronic mail service delivery receipt confirming service.”
14. The above provisions must be read together with service of summons and court processes upon corporations under Order 5 Rule 3 CPR which states as follows;
3. Subject to any other written law, where the suit is against a corporation the Summons may be served-
    - a. On the secretary, Director or other principal officer of the corporation; or
    - b. If the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)-
      - i. By leaving it at the registered office of the corporation;
      - ii. By sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or
      - iii. If there is no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or
      - iv. By sending it by registered post to the last known postal address of the corporation (Emphasis mine)”
15. Though no application was made to cross-examine Mr Tyson Otieno Advocate as to the contents of his affidavit of service, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants have denied service of the Petition and other court processes. I have looked at the said Affidavit of service by Tyson Otieno Advocate and the delivery receipt indicating That the Petition was delivered to kerra. The law requires That Summons and all court processes upon a corporation such as the 1<sup>st</sup> Applicant herein ought to be served upon the corporation Secretary or Director. Mr. Tyson Otieno Advocate who effected service of the Petition did not specify That the email he used to effect the Petition and other court documents belong to the secretary or director of the 1<sup>st</sup> Applicant or any other officer authorized to receive the petition and other court documents on its behalf. There being no confirmation That the email address no. kerra does not belong to either the Secretary or the director of the 1<sup>st</sup> Respondent/Applicant or any officer authorized to receipt court documents and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents having denied receipt of the petition, I find That the default judgment entered against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants is an irregular judgment liable to be set aside ex debito justitia.
16. The upshot of my finding is That the Notice of Motion application dated 14<sup>th</sup> March 2024 is merited and the same is allowed in the following terms;
1. That the default judgment entered against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants on 18<sup>th</sup> October 2023 and all subsequent orders be and are hereby set aside.
  2. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Applicants are granted leave to file and serve their responses to the Petition and any other compliance documents within 14 days from the date of this Ruling.



3. That since pleadings are now open, the Petitioner/Respondent shall be at liberty to file and serve a further Affidavit and any further compliance documents in accordance with the Rules.
4. The costs of this application to be costs in the cause.

**READ, DELIVERED AND SIGNED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024**

.....

**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;

Mr. Otieno for the Petitioner

Mr. Rapando for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents

