



**Republic v County Secretary, County Government of Uasin Gishu & 2 others; Wanjau (Exparte Applicant) (Judicial Review 14 of 2024) [2025] KEHC 283 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 283 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
JUDICIAL REVIEW 14 OF 2024  
JRA WANANDA, J  
JANUARY 24, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY SECRETARY, COUNTY GOVERNMENT OF UASIN  
GISHU ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER FOR FINANCE, COUNTY  
GOVERNMENT OF UASIN GISHU ..... 2<sup>ND</sup> RESPONDENT**

**THE CHIEF OFFICER FINANCE, COUNTY GOVERNMENT OF UASIN  
GISHU ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**WANGARI WANJAU ..... EXPARTE APPLICANT**

**RULING**

1. Upon obtaining leave, by the Notice of Motion dated 16/08/2024, the Ex Parte Applicant, Wangari Wanjau, sought the Judicial Review order of Mandamus compelling the Respondents to satisfy the Judgment made or Decree issued in Eldoret ELC Case No. 286 of 2013 on 28/09/2019 comprising of the sum of Kshs 300,000/-, plus interest at Kshs 2,310/- and costs at Kshs 172,203.70. In the alternative, the Ex Parte Applicant sought that the Respondents be summoned to appear in Court to explain non-payment of the said sums. The Application was filed through Messrs Marube & Co. Advocates,
2. The Motion came up for hearing on 26/09/2024. The Respondents did not attend Court and upon being satisfied that service had been duly effected, I allowed prayer 1 of the Motion and thus granted the order of Mandamus as aforesaid and closed the file. The physical file seems to have at that point



- been “misplaced” as what I have before me appears to be only a skeleton file as it commences with the proceedings. I have therefore resorted to the Judiciary Case Tracking System (CTS) to access the portions of proceedings “missing”.
3. Be that as it may, the Respondents have now approached the Court with the Notice of Motion dated 17/10/2024 filed through the Office of the County Attorney, County Government of Uasin Gishu, seeking prayers as follows:
    - i. [.....] Spent
    - ii. That this Honourable Court be pleased to set aside the ex parte orders obtained by the Respondent herein on 26.11.2024 and all the consequential orders and/or proceedings arising therefrom.
    - iii. [.....] Spent
    - iv. [.....] Spent
    - v. That the ex parte orders issued against the Applicants together with all consequential orders made thereto be set aside and the Applicants be granted unconditional leave to file its response and the Replying Affidavit annexed to this Application be deemed as properly filed.
    - vi. Costs of this Application be on course.
  4. The Application is premised on the grounds set out on the face thereof and is supported by the Affidavit sworn by Loyce Kebenei, the Advocate having the conduct of this matter on behalf of the Respondents.
  5. In the Affidavit, Ms. Kebenei deponed that the Respondents’ Counsel’s efforts to address the Court on 26/09/2024 were unsuccessful following a technical hitch occasioned by poor network connections during the process of logging-in virtually hence the reason why she was unable to participate in the proceedings. She deponed that she tried getting an Advocate within Eldoret town to hold her brief but by the time that she did, the matter had already been dealt with. She contended further that the Respondents will suffer irreparable loss and damage unless the orders sought are granted, that the Application has been made without unreasonable delay and that the Ex Parte Applicant shall not suffer any prejudice if the same are granted. I also note in the grounds set out in support of the Application, it is alluded that the reason why Counsel failed to attend Court on 26/09/2024 was because on that date, all County Officials were away on official duties, including Counsel.
  6. Counsel also deponed that this Court lacks the jurisdiction to entertain the proceedings since the orders in issue were issued by the Environment & Land Court and the Ex Parte Applicant therefore ought to have sought redress from that same Court. She also deponed that the Respondent was never served with a notice of invitation by the Ex Parte Applicant to open a joint account as directed by the Environment & Land Court (ELC) which issued the Decree.

### **Ex Parte Applicant’s Response**

7. In opposing the Application, the Ex Parte Applicant swore a Replying Affidavit on 11/11/2024. On the issue of jurisdiction, she deponed that this Court has the mandate to hear and determine this matter as these are essentially execution proceedings which may and can be handled either by the ELC or the High Court. She deponed that if the Court uses the “pre-dominant purpose test”, it will come to the conclusion that this is about payment of money and not a dispute about “use of land”. In respect to the Respondent’s Counsel’s failure to attend Court on 26/09/2024, she contended that the Respondents were served on 27/08/2024 and therefore had more than 3 weeks to file any responses.



## Determination

8. The issue that arises for determination herein are evidently the following:
- i. Whether the Court should excuse the non-attendance in Court by the Respondent's Counsel on 26/09/2024 and on that basis, set aside the orders made on that date.
  - ii. Whether this Court has the jurisdiction to hear and determine this matter.
9. It is not in doubt that the Court possesses a wide discretion in deciding whether to allow an application seeking the setting aside of orders granted in the absence of a party who failed to attend Court. This discretion must however be exercised judiciously as was well-stated in the case of *Shah vs Mbogo (1979) EA 116* as follows:

“..... this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

10. For the Court to exercise its discretion in favour of the Applicant, it must be satisfied that there is “sufficient cause” or “reason” to warrant such setting aside. The term “sufficient Cause” was explained in the case of The Hon. *Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011* (UR), by Musinga, JA as follows:

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“28. . “Sufficient cause” or “good cause” in law means:

“..... the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See Black's Law Dictionary, 9<sup>th</sup> Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.”

11. Similarly, the Court of Appeal, in the case of *CMC Holdings Ltd vs James Mumo Nzioka (2004) KLR 173*, guided as follows:

“The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”

12. Lastly, in the case of *Belinda Murai & 9 Others -Vs- Amos Wainaina [1982] KLR 38*, the indefatigable C.B. Madan, JA (as he then was) pronounced himself in the following manner:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not forgive or condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate. The



courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule.”

13. In the instant Application, I am not satisfied that the Respondent’s Counsel has given sufficient explanation for her non-attendance in Court on 26/09/2024. First, she contradicts herself by claiming on one hand that the reason for her non-attendance was because all County Officials, including herself were away on official duties (which duties the nature thereof she does not even disclose) on 26/09/2024, and on the other hand, she claims that her failure to address the Court was because of network connection challenges. Which is which?
14. Without in any way making a determination that this is the case herein, it has not escaped my attention that since the time that the Judiciary adopted the conduct of its proceedings via online virtual proceedings, the ground of network challenges seems to have become the default “excuse” for most instances of non-attendance by litigants and/or their Advocates. The popularity of this “excuse” is obviously because, unlike other grounds normally advanced, it is difficult to prove or disprove its truthfulness. Whether true or not, due diligence dictates that is upon litigants and/or Advocates to always ensure that as they prepare to participate in virtual proceedings, they also have in place or access to proper working and reliable internet connection. The excuse of poor connectivity can no longer be accepted as a proper reason for failing to address the Court. Accordingly, I reject this ground.
15. Further, it has not been disputed that the Respondent was served with the Application in issue on 27/08/2024. About 1 month had already lapsed by 26/09/2024 when the Application came up for hearing in Court yet the Respondents had not yet filed any response. The Respondents did not bother to explain this aspect of the matter.
16. For the said reasons, I am not persuaded that proper explanation for the non-attendance by the Respondent’s Counsel has been presented. The fact that it took the Respondents about a whole month to file the Application seeking to aside the orders lends credence to the conclusion that the Respondents have not been diligent and that the allegation of “poor network connectivity” on 26/09/2024 is nothing but a “red-herring”.
17. I would have therefore concluded this Ruling at this juncture by swiftly dismissing the Application. There is however the issue of jurisdiction that has been raised by the Respondents.
18. In respect to the issue of jurisdiction, it is not in dispute that the judicial review orders of Mandamus sought herein arise from and are meant to serve as execution of the Judgment entered or Decree passed in Eldoret Environment & Land Court (ELC) Case No. 286 of 2019 on 21/02/2019. The “Certificate of Order Against the County Government of Uasin Gishu” which serves as the foundation for these Judicial Review proceedings was also issued by the same ELC. Although I would not term it technically as “lack of jurisdiction” within the strict legal meaning of that phrase, I would state that it is just the correct, tidy and orderly manner of conducting proceedings for the Ex Parte Applicant to conclude the execution process already commenced at the ELC by moving that same Court. The mandate to deal with execution of orders clearly lies with the same Court from which the orders in question emanate, in this case, the ELC. For these reasons, I find that the fairest course to resort to is to transfer this matter to the ELC as I hereby do.

### **Final Orders**

19. In the premises, I order as follows:



- i. The Respondents' Notice of Motion dated 19/10/2024 is hereby allowed and the orders made on 26/09/2024 set aside, not on the basis of existence of sufficient cause for the non-attendance on that date by Counsel for the Respondent, but on the basis of the mandate for execution of the Decree the subject herein being with the Environment and Land Court (ELC).
- ii. Consequently, this matter is transferred to the Environmental and Land Court (ELC) for hearing and determination.
- iii. The costs of the Application shall be in the Cause.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 24<sup>TH</sup> DAY OF JANUARY 2025**

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

Mr. Marube for the Ex Parte Applicant

N/A for the Respondents

Court Assistant: Mr. Kuto

