



**Abdalla & 6 others v National Environment Management Authority & another (Environment & Land Miscellaneous Case E034 of 2024) [2025] KEELC 4379 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4379 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E034 OF 2024**

**SM KIBUNJA, J  
JUNE 11, 2025**

**BETWEEN**

**MOHAMMED AHMED ABDALLA & 6 OTHERS ..... APPLICANT**

**AND**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 1<sup>ST</sup>  
RESPONDENT**

**KHANSA DEVELOPERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 2<sup>nd</sup> respondent filed the application dated 13<sup>th</sup> November 2024 seeking for the following orders:
  - a. That the sum of Kshs.830,073 deposited at Family Bank in the joint names of Ms. John Bwire & Associates Advocates and Ms. J.M.Makau & Company Advocates on 4<sup>th</sup> July 2024, and all accrued interests, be released forthwith to the 2<sup>nd</sup> respondent's advocates, Ms. J.M.Makau & Company Advocates.
  - b. That the costs be provided for.

The application is based on the four grounds on its face marked (a) to (d) and supported by the affidavit of John M. Makau, advocate, inter alia deposing that on 30<sup>th</sup> October 2024, the court granted the petitioners seven days to file their reference; that the seven days lapsed on 6<sup>th</sup> November 2024 without any reference having been filed and the Kshs.830,073 deposited in the joint account should be released to the 2<sup>nd</sup> respondent's counsel.

2. The application is opposed by the applicants through the replying affidavit of Griffins Timbe, advocate, sworn on the 28<sup>th</sup> November 2024, inter alia deposing that though the reference was not filed within seven days, it was filed one day outside the prescribed time, and served upon the 2<sup>nd</sup> respondent on 8<sup>th</sup> November 2024; that the one day delay in filing the reference was inadvertent and



due to circumstances beyond the applicants' control, as Friday the 1<sup>st</sup> November 2024 was declared a public holiday for the swearing in of the Deputy President vide Gazette Notice No. Vol. CXXV1-No.184 issued late on Thursday 31<sup>st</sup> October 2024; that the unexpected public holiday shortened the working period within which the reference could be filed, and left no time for the applicants legal team to adjust their filing schedule; that the reference has a mention of 3<sup>rd</sup> February 2025 and it is only fair and just it be allowed to proceed to its logical conclusion; that the one day delay was not inordinate and is curable under Order 50 Rule 6 of the Civil Procedure Rules, which empowers the court to enlarge time where sufficient cause has been shown; that the 2<sup>nd</sup> respondent's prayer for release of the funds deposited if granted would be contrary to the overriding objectives enshrined in sections 1A & 1B of the *Civil Procedure Act*; that section 3A of the said Act empowers this court with the inherent jurisdiction to make such orders as may be necessary to achieve the ends of justice and prevent the abuse of court process; that Article 159(2)(d) of the *Constitution* requires the court to administer justice without undue regard to procedural technicalities; that the application is defective in form for including grounds among the prayers contrary to the mandatory requirements of Order 51 Rule 4 of the Civil Procedure Rules.

3. The court on the 4<sup>th</sup> December 2024, directed parties to file and exchange submissions within fourteen days, and during the subsequent mention of 3<sup>rd</sup> March 2025, the applicants were granted the rest of the working hours of that day to file theirs. The learned counsel for the 2<sup>nd</sup> respondent filed their submissions dated the 16<sup>th</sup> January 2025 while that for the applicants filed theirs dated 27<sup>th</sup> February 2024 on the 3<sup>rd</sup> March 2025, which the court has considered.
4. The issues for the court's determinations are as follows:
  - a. Whether the order of 30<sup>th</sup> October 2024, on filing the reference in seven days was complied with.
  - b. Whether the money deposited in the joint account should be released to the 2<sup>nd</sup> respondent.
  - c. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, the record and come to the following conclusions:
  - a. That this proceeding was initiated by the applicants vide their application dated the 25<sup>th</sup> June 2024 among others seeking for stay of execution and leave to file a reference against the decision of National Environment Tribunal of 4<sup>th</sup> April 2024, outside the time. The court granted the stay of execution prayer on 25<sup>th</sup> June 2024, on condition the decretal sum of Kshs.830,073 was deposited in the joint names of both parties' counsel. Subsequently, the application was heard inter parties, and determined through the ruling delivered on 30<sup>th</sup> October 2024, inter alia granting the applicants leave to file and serve the reference within the next seven days. The 2<sup>nd</sup> respondent contend through the application dated 13<sup>th</sup> November 2024, that the applicants did not file and serve the reference within the time given and the decretal sum deposited in the joint account should be released to them.
  - b. The applicants have in their replying affidavit conceded that they did not file and serve the reference within the time directed by the court due to circumstances beyond their control, specifically the gazattement of 1<sup>st</sup> November 2024 as a public holiday for the swearing in of the Deputy President of Kenya, thereby reducing the working days within the seven days period given by the court. That they eventually filed and served the reference on the 8<sup>th</sup> November



2024, and contended the one-day delay was not inordinate but curable under Order 50 Rule 6 of the Civil Procedure Rules. They accused the 2<sup>nd</sup> respondent of failing to mention about the service of the reference in the application.

- c. The 2<sup>nd</sup> respondent has submitted inter alia that by the time they filed the application, they had not been served with the reference alleged to have been filed on 8<sup>th</sup> November 2024, and that no affidavit of service has been filed. That the public holiday of 1<sup>st</sup> November 2024 is not exempted when computing the seven days as under Order 50 Rule 2 of Civil Procedure Rules, it is only where the period is less than six days that public holidays, Sundays, Christmas Days and Good Fridays are not computed. That the applicants would be asking the court too much to assist them for their indolence the second time. The counsel relied on the following two cases; first that of Prof. Tom Ojienda versus Nairobi City County Misc. Appl. No. 10 of 2019 (2024) KEHC 724 (KLR), where the court stated that:

“My conclusion is that the conduct of the applicant demonstrates complete lack of commitment and vigilance despite the fact that this was a ruling in respect of its own application. It is trite law that equity aids the vigilant and not the indolent, the conduct of the applicant upon learning about a ruling concerning its application for extension of time is not inexcusable. The approach adopted by the client/applicant was half-hearted and lethargic.”

And secondly that of Shah versus Mbogo (1967) EA at pages 116 and 123B, where the court stated that:

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

The counsel further submitted that the 2<sup>nd</sup> respondent should not be stopped from enjoying the fruits of its judgement through the applicants’ constant mistakes and indolence. On this score, the counsel referred to the case of Ms. Portreiz Maternity versus James Karanga Kabia Civil Appeal No. 63 of 1997, where the court held that:

“...Litigation must come to an end. It is a rule to counter th all too human propensity to keep trying until something gives, it is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add costs. a successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”

The counsel added that the applicants have further exhibited their disregard of court orders by failing to obey the order in the ruling of 30<sup>th</sup> October 2024 to pay them costs to date. Therefore, their application should be granted.

- d. The learned counsel for the applicants submitted that the reference was filed and served on 7<sup>th</sup> November 2024, and the delay of one day, being not inordinate, should be overlooked as it was due to the shortened working days caused by the unexpected public holiday on 31<sup>st</sup> October 2024. The learned counsel relied on the case of Stephen Boro Gitihia versus Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009 which held that the overriding objective overshadows all technicalities, precedents, rules and actions which are



in conflict with it and whatever is in conflict with it must give way. The counsel asked the court to be careful not to pre-empt the applicants' pending reference by ordering the release of the deposited money to the 2<sup>nd</sup> respondent and to instead protect the applicants' rights to access justice under Article 48 of the *Constitution*. The counsel cited the case of Audio Visual Control Systems versus Naomi Nekesa Kasuti [2021] eKLR, where the court held that:

“The appeal was filed one (1) day outside the prescribed period. This court has powers to extend time. I do not think a delay of one day would warrant the court to strike out an application .....”

The counsel further submitted that the delay should not be blamed on the applicants. That an error on the part of the advocate should not be visited on the clients as was held in the case of Lucy Bosire versus Kehancha Division Land Dispute Tribunal & 2 Others [2013] eKLR, where the court stated that:

“It is true that where the justice of the case mandates, mistakes of advocates even blunders should not be visited on the clients when the situation can be remedied by costs.....”

That the funds deposited in the joint account is intended to protect the interests of both parties pending the resolution of the matter and to release it at this stage will prejudice the applicants and pre-empt the pending reference. That the funds are security for the stay order granted and should be maintained pending the determination of the reference, as to release it to the 2<sup>nd</sup> respondent would amount to a premature execution and unjust enrichment. The counsel cited the cases of Nduhiu Gitahi versus Warugongo [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100, Hyder Ntheya Musili & Another, suing as the legal representative of the estate of Collins Mumo Mbindyo versus China Wu Yi Ltd & Another [2019] eKLR, and Afitrack Investments (E.A) Limited versus Wambua & Maseno Advocates [2016] eKLR. On the issue of costs awarded to the 2<sup>nd</sup> respondent, the counsel submitted it was not assessed and no party and party bill of costs has been filed before the taxing master for the amount to be ascertained. The counsel insisted that contrary to the 2<sup>nd</sup> respondent's contention that the reference had not been served, it had been served as deposed in their replying affidavit, and the application should not be allowed.

- e. Having considered the submissions by both counsel as set out in brief above, and on perusing the record there is no doubt that through order (6)(b)(i) & (ii) on the ruling of 30<sup>th</sup> October 2024, the court granted the applicants leave to file and serve the reference on the National Environment Tribunal outside time, “...within the next seven (7) days from today.” The applicants did not comply with that clear and unambiguous court directive. They have given two different dates that they claim they filed and served the reference. In the replying affidavit, they deposed that they filed and served the reference on 8<sup>th</sup> November 2024, while submitting that they did so on 7<sup>th</sup> November 2024. Evidently, both of the two dates are outside the seven days prescribed by the court in the ruling of 30<sup>th</sup> October 2024.
- f. The 2<sup>nd</sup> respondent has disputed being served with any reference and pointed out that no affidavit of service has been filed. That even taking it that the reference was indeed filed on either of the two dates, that was outside the seven days given by the court, and there was no application made to seek for the court's discretion to enlarge it under Order 50 Rule 6 of the Civil Procedure Rules. Under Order 50 Rule 2 of the Civil Procedure Rules, it is only in situations where a “limited time of less than six days from or after any date or



event is appointed or allowed for doing any act or taking any proceedings” when “Sundays, Christmas day and good Friday, and any other day appointed as a public holiday” that are not counted in the computation of that time. Therefore, contrary to the applicants’ deposition and submissions, the computation of the seven days decreed through the ruling of 30<sup>th</sup> October 2024, could not have been affected by any of the dates/days in between being declared a public holiday. Extension of time is not a right of parties but a discretion to be exercised by the court judiciously, upon reasonable cause being shown. The time of seven days given by the court in exercise of its discretion, within which the applicants were required to file and serve the reference cannot therefore, be taken to be a procedural technicality. While it is true what is indicated as prayers (2) and (3) on the 2<sup>nd</sup> respondent’s notice of motion are actually grounds as confirmed in grounds (a) and (b) overleaf, it does not make the application defective, as it goes to the form and not substance.

- g. The court has perused the record and noted no evidence of filing and serving the reference on either of the two dates, has been availed or annexed to the replying affidavit for the court’s attention. In case the applicants filed a reference outside the seven days given by the court without obtaining extension of time, then such a reference would be incompetent, and I see no reason why the 2<sup>nd</sup> respondent should not be allowed to have access to the decretal sum. To do otherwise would be to deny the 2<sup>nd</sup> respondent from enjoying the fruits bestowed upon it by the National Environment Tribunal’s ruling delivered on 8<sup>th</sup> April 2024. Prayer (1) of the application is therefore, meritorious.
  - h. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs should follow the event unless where the court for good cause orders otherwise. As the 2<sup>nd</sup> respondent is victorious in their application, I find no reason why it should not have costs.
6. Flowing from the foregoing determinations on the 2<sup>nd</sup> respondent’s notice of motion dated 13<sup>th</sup> November 2024, the court finds it with merit and orders as follows:
- a. That the said application is allowed in terms of prayer (1).
  - b. The applicants will pay the 2<sup>nd</sup> respondent’s costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 11<sup>TH</sup> DAY OF JUNE 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Applicants : Mr. Kilumu for Bwire

Respondents : Mr. Makau for 2<sup>nd</sup> Respondent

Shitemi-court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

