Maalim v Abdi (Environment and Land Miscellaneous Application E009 of 2025) [2025] KEELC 4480 (KLR) (4 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4480 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E009 OF 2025

JO MBOYA, J

JUNE 4, 2025

BETWEEN

SALIM MOHAMED MAALIM ..... APPLICANT

AND

SALAT MOHAMED ABDI ..... RESPONDENT

RULING

1. The Applicant [who was the 1st Defendant in the original suit before the subordinate court] herein has approached the court vide a Notice of Motion application dated 5th May 2025 and wherein the Applicant has sought the following relief;

    i. THAT this Application be certified as urgent and be heard Ex-parte in the first instance.

    ii. THAT the Honourable court be pleased to order stay of execution of the judgment in the environment and land case No. 14 of 2015 delivered on 14th November 2023 by Hon. E. Tsimonjero, SRM pending the hearing and determination of this Application and Appeal.

    iii. THAT this Honourable court be pleased to grant leave to the Applicant to file an appeal out of time against the judgement dated 14th November 2023 delivered by the Hon. E Tsimonjero, SRM in Environment and Land Case No. 14 of 2015.

    iv. THAT the Memorandum of Appeal annexed in the supporting affidavit filed herein be admitted at the environment and land court in Isiolo

    v. THAT the costs incidental to this application be provided.

    vi. THAT the Honourable court be pleased to issue such further orders it deems just and convenient in the circumstance of this case.

2. The instant application is premised on the various grounds which have been highlighted at the foot thereof. In addition, the application is supported by the affidavit of Salima Mohamed Malim [the applicant] sworn on the even date and wherein the deponent has annexed two documents, including a copy of the draft memorandum of appeal and the judgment intended to be appeal against.

3. The Respondent herein filed a replying affidavit sworn on the 25th May 2025 and wherein the Respondent has averred inter alia that the application beforehand has been mounted with unreasonable and inordinate delay and which delay has neither been accounted for nor explained. Furthermore, the Respondent has also averred that the Applicant herein has no right and or interest over the suit property and hence the subject application constitutes an abuse of the due process of the court.

4. The instant application came up for hearing on the 4th June 2025 where upon the advocates for the parties agreed to canvass and dispose the application by way of oral submissions. To this end, the court adopted the agreement and the matter duly proceeded vide oral submissions.

5. The Applicant herein adopted and reiterated the grounds contained in the body of the application. Moreover, the applicant also adopted and relied upon the contents of the supporting affidavit together with the annexures thereto.

6. Thereafter learned counsel for the applicant canvassed and highlighted three [3] salient issues namely; the delay attendant to the filing of the application has been duly accounted for and explained; the intended appeal has overwhelming chances of success; and thirdly that the applicant shall be disposed to suffer irreparable harm/ injury unless the application is granted.

7. Regarding the first issue, learned counsel for the Applicant contended that the applicant was duly represented by an advocate in the subordinate court. Nevertheless, it was submitted that though the Applicant was duly represented, the advocate misled the applicant into believing that the suit in the subordinate court was still pending hearing and determination.

8. Furthermore, learned counsel submitted that the Applicant's previous counsel maintained the lie and deliberate falsehood up to and including November 2024. For good measure, it was submitted that on the basis of the falsehood the applicant herein even paid to the advocate additional professional fees on the 29th November 2024.

9. To this end, learned counsel has submitted that the delay attendant to the filing of the intended appeal and by extension the subject application was informed by the failure on the part of the applicant's previous counsel to inform the applicant of the true state of the matter. In short, it was contended that the delay under reference is attributable to the misconduct of the applicant's previous counsel and not otherwise.

10. It was the further submission by learned counsel that the applicant herein failed to timeously and punctually approach the court on the basis of the mistake and or inadvertence of her previous counsel. In this regard, learned counsel has posited that the mistake of counsel ought not to be visited upon the innocent client.

11. Secondly, it was submitted that the Applicant resides and lives on the suit property. Furthermore, it was posited that if the application herein is not granted, the applicant shall be disposed to eviction and thus same [applicant]shall suffer irreparable loss/harm.

12. Learned counsel for the applicant has submitted that the intended appeal which the applicant seeks to canvass before the court subject to leave has overwhelming chances of success. In any event, it was contended that the intended appeal is indeed meritorious.

13. Arising from the forgoing, learned counsel for the applicant has therefore implored the court to consider the peculiar circumstances underpinning the application beforehand and to exercise it[s] discretion by granting the leave sought. In any event, it was posited that the grant of the leave shall enable the applicant to appropriate her rights of access to justice in terms of Article 48 of *the Constitution*, 2010.

14. The Respondent adopted and relied on the replying affidavit sworn on the 25th May 2025 and thereafter same highlighted two [2] salient issues. The issues highlighted by the Respondent are, namely; that the application has been mounted with unreasonable and inordinate delay; and the Applicant herein was privy to and aware of the Judgement but same failed to take appropriate steps towards protecting her rights.

15. Regarding the first issue, learned counsel for the respondent has submitted that the applicant herein was duly aware of the delivery of the judgment and the consequential decree of the court. Nevertheless, it was contended that the applicant did not exercise due diligence in lodging an appeal, if any was intended.

16. Moreover, it has been submitted that even assuming that the applicant was not aware of the date of the judgment, the applicant herein has admitted that same was duly served with an eviction order in August 2024 but failed to approach this Court with a view to protecting her right. To this end, learned counsel has cited and referenced paragraph 5 of the supporting affidavit sworn by the applicant.

17. In the premises, learned counsel for the Applicant has submitted that the duration that was taken by the applicant prior to and before the filing of the instant application is not only unreasonable but same is grossly inordinate. In this regard, counsel has posited that the applicant is therefore guilty of laches.

18. Secondly, it has been submitted that the Applicant herein sold and disposed of the suit property and thereafter the applicant ceased to have any rights and or interest capable of being canvassed before the court of law. In this regard, learned counsel has invited the court to find and hold that the application is equally misconceived and thus legally untenable.

19. Finally, it was submitted that equity aids the vigilant and not the indolent. In respect of the instant matter, it was submitted that the conduct of the Applicant herein does not meet the threshold to warrant the invocation of the equitable discretion of the court.

20. Flowing from the foregoing, learned counsel for the Respondent has invited the court to find that the application beforehand is not only premature and misconceived, but also devoid of merit[s]. To this end, learned counsel has invited the court to dismiss the application with cost to the Respondent.

21. Having reviewed the application and the affidavit in response thereto and upon consideration of the oral submissions that were highlighted before the court, I come to the conclusion that the determination of the instant application rests/ turns on two [2] key issues, namely; whether the application has been mounted with unreasonable and inordinate delay and if so whether the delay has been accounted for; and whether this court is seized of the requisite jurisdiction to grant an order of stay of execution pending the hearing of [sic] a non-existent appeal or otherwise.

22. Regarding the first issue, it is important to point out that the judgment which is sought to be appealed against was rendered on the 14th November 2023. Consequently, there is no gainsaying that by the

time the application was being filed, the Judgment in question [the impugned Judgment] was more than one and half years old.

23. Furthermore, it is important to underscore that the applicant herein was duly represented by an advocate. To this end, it is appropriate to highlight that the applicant exercised her right to legal representation and indeed chose an advocate of her choice.

24. Moreover, it is not lost on this court that even where a party, the applicant not excepted, has retained and engaged an advocate in a matter, such a party is still obligated to follow up with the advocate and by extension, the court to ensure that the matter is diligently prosecuted. If anything, it is the primary duty of the party to follow up on his/her own case. [See the holding of the Court of Appeal in Tana and Athi Development Authority versus Jeremiah Kimigho Mwakio and Others [2015] eklr]

25. As pertains to the instant matter, the applicant contended that same was misled by her counsel. However, the same applicant has also averred that same was served with an eviction order in August 2024.

26. Two perspectives do arise and are therefore worthy of consideration. Firstly, the applicant herein seems to be blaming and accusing her previous advocate of failing to protect her rights and or interests. In particular, the applicant contends that the advocate misled her that the matter was still proceeding up to and including November 2024.

27. It was the further contention by the applicant that arising from the information that the matter was still ongoing same [Applicant] paid to and in favour of the advocate professional fees on the 29th November 2024.

28. However, the applicant has posited that the information that was relayed to her by her previous counsel turned out to be incorrect. To this end, the applicant now seeks to deploy the misinformation and by extension, misconduct of the advocate to accrue indulgence of the court.

29. However, it is not lost on this court that despite the fact that the applicant is blaming her previous counsel for misconduct and failure to give her[applicant] correct information, the applicant has neither found it apposite to lodge any complaint as against the advocate either with the Law Society of Kenya [LSK] or the Advocates Complaint Commission.

30. To my mind, if the applicant was genuine and honest with the reason being propagated, then one would have expected the applicant to have lodged a complaint pertaining to professional misconduct. Only then would the complaint being propagated have some semblance of bona fides.

31. In the absence of any complaint that has been mounted as against the advocate who is said to have been misconducted himself, I am afraid that the reason, nay, excuse being propagated is a red herring.

32. Furthermore, it is also important to recall that it is not fashionable for litigants, the applicant herein not excepted, to merely pass the buck to their previous legal counsel[advocates] for all manner of mistakes. The applicant herein ought and must take blame for her fair share of mistakes; laxity; want of diligence; and slovenliness.

33. To buttress the foregoing exposition of the Law, it is worthy to reference the decision of the Court of Appeal in the case of Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] KECA 987 (KLR), where the Court stated thus:

> It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when

they are represented by counsel. It is true as submitted by Mr. Wambola that mistakes of counsel may be excusable.

34. I am least persuaded by the contention that the delay in the filing of the application and or taking appropriate steps was occasioned by the applicant's previous counsel.

35. The second perspective that merits consideration relates to the delay between August 2024 when the applicant was served with the eviction order to the 5th May 2025; when the instant application was ultimately filed. Suffice to state that the applicant herein was obligated to disclose the entire duration of the delay and thereafter to account for that delay to the satisfaction of the court. [See the Supreme Court holding in The County Executive of Kisumu versus The County Government of Kisumu and Others [2017] eklr [KESC].

36. Furthermore, in an endeavour to account for the delay, the applicant must not attempt to mislead the court or resort to half-truths or, better still misrepresentations.

37. Be that as it may, it is not lost on me that the applicant herein has on one hand, failed to offer plausible and cogent reasons; but has also resorted to gross misrepresentations. Such endeavours ought not to be dignified with the discretionary powers of the court.

38. Moreover, it is imperative to highlight that the law as pertains to the extension of time is now settled. The claimant must demonstrate sufficient cause and exhibit candour. In the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] KECA 701 (KLR), the Court of Appeal expounded the law as hereunder:

> (12) The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.

39. Similarly, the Court of Appeal elaborated on the ingredients that underpin the exercise of extension of time or the grant of leave to appeal out of time in the case of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) where the Court [Per Mativo, JA] stated thus:

> 12. In order to exercise its discretion whether or not to grant condonation, the court must be apprised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.
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> 13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the

court may take a dim view, absent a proper and satisfactory explanation for the further delays.

40. The Supreme Court on its part, has also expounded on the law as pertains to the extension of time and the grant of leave to file an appeal out of time. In the case of Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling) the court stated and observed as hereunder:-

> From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.
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> 85. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion: 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; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

41. Flowing from the dicta espoused in the decision[s] supra, what is apparent is that the applicant is enjoined to account for the delay before same can partake of and benefit from the equitable discretion. Furthermore, it is crystal clear that extension of time is not a right of the applicant and thus same cannot be issued for the mere asking. The Applicant must provide justification to the satisfaction of the Court.

42. In a nutshell, my answer to issue number one [1] is two-fold. Firstly, the application has been made with unreasonable and inordinate delay. To this end, the applicant is guilty of Laches.

43. Secondly, the applicant herein has failed to tender and or avail a plausible, cogent and credible explanation for her inaction. In this regard, the conduct of the applicant denotes slovenliness.

44. Regarding the second issue, namely; whether the court is seized of the requisite jurisdiction to grant an order of stay of execution when no appeal has been filed, it is instructive to observe that an order of stay can only issue during the existence of an appeal. Suffice to underscore that the existence of an appeal, including a notice of appeal [which is deemed as an appeal by dint of Order 42 Rule 6[4] of the Civil Procedure Rules] is a pre-condition to the grant of an order of stay.

45. The provisions of order 42 rule 6(1) of the civil procedure rules are apt and explicit. For ease of appreciation, the said provisions are reproduced as hereunder:-

> No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application

being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.[Underlining Supplied]

46. My understanding of the provisions [supra] above is to the effect that no appeal or second appeal operates as an order of stay; however, the existence of such appeal is a prerequisite condition to an application for stay of execution. Suffice it to state that the Order of Stay of Execution can either be granted by the Court appealed from; or the Court appealed to. Strictly speaking, there must be an existing Appeal before the Court [whichever Court] can engage with such an application.

47. Moreover, it is the existing appeal that would find a basis to determine whether sufficient cause has been established or not. Further and in addition, it is that appeal [the existing appeal] which has to be preserved and be safeguarded from being rendered nugatory during its pendency.

48. Where there is no appeal like in the instant case, no sufficient cause is established and thus the prerequisite condition[s] or better still, the foundation [fulcrum] that would anchor an application for stay of execution is missing.

49. Simply put, an application for stay of execution pending the determination of an appeal which appeal is non-existent is not only misconceived but legally unattainable. Such an application is devoid of the requisite legal foundation and or fulcrum.

50. In a nutshell, such application is made and mounted in vacuum.

FINAL DISPOSITION:

51. For the reasons which have been highlighted in the body of the ruling and taking into account the established legal principles that underpin the grant of orders for extension of time, I conclude that the application beforehand is devoid of merit.

52. Consequently, and in the premises, the Notice of Motion application dated 5th May 2025; be and is hereby dismissed with costs to the Respondent.

53. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO this 4TH day of JUNE, 2025

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE.

In the presence of:

Ms Mukami- Court Assistant

Mr. Jarso for the Applicant

Mr Muchiri for the Respondent.