



**M'Amiru v Kirathi (Environment and Land Case E006 of 2023)
[2025] KEELC 5166 (KLR) (9 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5166 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE E006 OF 2023**

**JO MBOYA, J
JULY 9, 2025**

BETWEEN

JACOB KARUMANI M'AMIRU PLAINTIFF

AND

GIDEON GITONGA KIRATHI DEFENDANT

RULING

1. What is before me is the Notice of Motion application dated 30th May 2025; brought pursuant to Sections 1A 1B and 3A of the [civil procedure act](#); order 9 Rule 9; Order 12 Rule 7; Order 51 Rule 1 of the Civil Procedure Rules; Section 68 of the [Land Registration Act](#); and Article 159 of the [Constitution](#) 2010 and wherein the defendant/ applicant has sought the following reliefs;
 - i. That this Application be certified urgent and be heard ex-parte in the first instance.
 - ii. That the firm of M/S Bundi Muthamia & Co. Advocates be granted leave to come on record as advocates for the defendant/applicant herein in place of M/S Bebo & Mose Advocates post judgment.
 - iii. That the Honorable court be pleased to set aside the interlocutory injunction judgment entered on 8th May 2024 against the defendant/ applicant and other consequential orders made thereto in the matter.
 - iv. That this Honorable court be pleased to issue an order of inhibition inhibiting any dealings with LR No. Njia/Kiegoi/869 until this suit is heard and determined or until further orders of the court.
 - v. That leave be granted to the defendant/applicant to be allowed to defend this suit on merit.
 - vi. That the Honorable court be pleased to make and/or issue such orders as it may deem fit to grant.



- vii. That the costs of this application be provided for.
2. The instant application is premised on the various grounds which have been enumerated on the body thereof. Furthermore, the application is supported by the affidavit of the applicant sworn on the even date and wherein the deponent has annexed three [3] documents, including a copy of the judgment that is sought to be set aside as well as a copy of the complaint to the advocates' complaints commission [ACC].
 3. The plaintiff/ respondent filed a replying affidavit sworn on 30th June 2025 and wherein the deponent has highlighted various issues. The issues highlighted at the foot of the replying affidavit include, the judgment and the consequential decree of the court has since been executed; the application has been made with unreasonable and inordinate delay which has neither been accounted for nor explained; the conduct of the applicant is not befitting in the eyes of equity; and the court ought not to exercise its discretion in favour of the applicant.
 4. The subject application came up for hearing today, the 9th July 2025, and whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of oral submissions. Suffice it to state that the submissions ventilated on behalf of the respective advocates form part of the record of the court.
 5. Learned counsel for the applicant adopted the grounds at the foot of the application and thereafter reiterated the contents of the supporting affidavit. Moreover, learned counsel proceeded to and highlighted three key issues, namely; the applicant was not aware of the judgment of the court; the applicant was misled by his erstwhile advocate; and the applicant is desirous to be heard by the court before the judgment can be rendered.
 6. Regarding the first issue, learned counsel for the applicant has submitted that the applicant herein duly engaged and retained counsel to defend his interest in the suit. Furthermore, it was submitted that the erstwhile counsel was duly paid his professional fees/charges for purposes of offering services to the applicant.
 7. Be that as it may, it was posited that despite having been duly paid, the erstwhile advocate failed to appraise and or update the applicant of the status/ progress of the suit. In particular, it was contended that the applicant herein only got to know of the judgment when the respondent threatened to execute same.
 8. Secondly, learned counsel for the applicant has submitted that in so far as it is the advocate who failed to discharge his professional duty, the applicant herein ought not to be punished for the lapses and or infraction on the part of his [applicant's] counsel.
 9. Thirdly, learned counsel for the applicant has submitted that the applicant herein is desirous to be afforded an opportunity to be heard. To this end, learned counsel for the applicant invited the court to find and hold that the applicant is entitled to be afforded an opportunity to be heard in accordance with the provisions of Article[s] 50 and 159 of the Constitution 2010.
 10. Flowing from the foregoing, learned counsel for the applicant has submitted that the applicant has established and or proven credible basis to warrant the intervention of the court. In this regard, the court was implored to grant the reliefs sought.
 11. The respondent duly filed the replying affidavit sworn on 30th June 2025 and which replying affidavit learned counsel for the respondent adopted and reiterated. Furthermore, learned counsel for the respondent proceeded to and highlight four [4] key issues for consideration and determination.



12. Regarding the first issue, learned counsel for the respondent has submitted that the judgment and consequential decree of the court has since been implemented and or executed. To this end it was posited that upon the issuance of the judgment, the applicant herein duly extracted the decree and thereafter same was implemented. In this regard, learned counsel posited that the respondent has since been issued with a certificate of title in accordance with the decree of the court.
13. Secondly, learned counsel for the respondent has submitted that the order that is sought to be set aside and or varied is non-existent. In particular, it was submitted that the Honorable court did not grant and or issue any interlocutory injunction judgment on 8th May 2024. In the absence of the order sought to be reviewed and or set aside, it was contended that the jurisdiction of the court has been approached albeit in vain.
14. Thirdly, it was submitted that the application before hand has been filed and mounted with unreasonable and inordinate delay; furthermore, it has been submitted that the delay in question has neither been accounted for and or explained.
15. Lastly, learned counsel for the respondent has submitted that the applicant herein was availed the requisite opportunity and or latitude to file own documents and pleadings. Nevertheless, it has been submitted that the respondent failed to take advantage of the window that was granted to him to file pleadings. To this end, it was posited that the antecedent conduct of the applicant does not satisfy the requisite threshold for setting aside or at all.
16. Based on the foregoing submission[s], learned counsel for the respondent has invited the court to find and hold that the application is not only premature and misconceived but same constitutes an abuse of the due process of the court. In view of the foregoing, learned counsel for the respondent has invited the court to find and hold that the subject application is untenable and thus same ought to be dismissed.
17. Having reviewed the application, the response thereto and upon taking into account the oral submissions filed by/ on behalf of the parties, I come to the conclusion that the determination of the subject dispute turns on four [4] key issues, namely; whether [sic] the interlocutory injunction judgment which is the basis of the instant application does exist or otherwise; whether the application has been made and mounted with unreasonable delay and if so whether same [delay] has been duly accounted for or explained; whether the applicant herein is entitled to the exercise of the discretion of the court or otherwise.
18. Regarding the first issue, it is imperative to recall and reiterate that the applicant herein is [sic] seeking to set aside and or quash what has been described as interlocutory injunction judgment entered on 8th May 2024. To this end it is instructive to underscore that a party, the applicant not excepted can only call upon the court to engage with and to adjudicate upon a live issue. For good measure, the court cannot be called upon to address and determine hypothetical, anticipative, speculative and or non-existent court orders and or judgment.
19. Suffice it to state that the only judgment which the court [differently constituted] granted was a final judgment which concluded the matter and essentially entered judgment in favor of the plaintiff/respondent. Simply put, the court did not [sic] grant any interlocutory injunction judgment either as alleged or at all.
20. The question that does arise is whether a court of law can proceed and engage with an issue pertaining to and concerning a non-existent judgment; decree; and or order.



21. I beg to state that a court of law must only indulge in and or engage in the setting aside of a live and existent order. Where such an order does not exist, the court is divested of jurisdiction to entertain and engage with such an application.
22. It is pertinent to observe that a court of law cannot issue an order in vain and or futility. A court order must be procured and obtained as pertains to a designated order which is not the case in the instant matter. [See *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR where the court of appeal underscored that court like nature does not act in vacuum.]
23. I am afraid that the applicant herein is merely seeking to abuse the due process of the court in so far as the impugned order does not exist in the eyes of the law or at all. In the premises, there is no way a court can proceed to [sic] set aside such an order.
24. Turning to the second issue, namely; whether the application has been mounted with unreasonable and inordinate delay, it is worthy to underscore that the final judgment in respect of the instant file was delivered on 8th May 2024. Furthermore, the contents of paragraphs 2 and 3 of the judgment confirm that the applicant's previous counsel was duly knowledgeable of and privy to the facts of the previous matter.
25. Additionally, there is no gainsaying that the applicant's previous counsel was also duly served with the requisite pleadings and same sought indulgence. However, the indulgences under reference were declined by the court.
26. Essentially, the advocate for the applicant knew and was privy to the status of the proceedings and, in particular, the judgment of the court.
27. Other than the foregoing, it is not lost on this court that the applicant himself [the party] was under statutory obligation to keep track of his matter. In fact, it has been held times without number that a party, the applicant herein not excepted, has the primary obligation to follow up on his/her case and thereafter ensure that the proceedings are conducted with due diligence and or timeously. [See *Habo Agency limited vs Wilfred Odhiambo Misingo* 2015 eKLR]. [See also *Tana And Athi Development Authority versus Jeremiah Kimigho Mwakio and Others* [2015] eklr].
28. Back to the question of whether the subject application has been mounted with unreasonable delay. I have pointed out that the final judgment on record was rendered on 8th May 2024; and yet the current application was not filed up to and including 30th May 2025.
29. My humble arithmetic drives me to the conclusion that the application has been mounted after more than 12 months from the date when the judgment was rendered. Has the application been filed timeously; with due promptitude; and without delay?
30. It is instructive to highlight that the law does not define what constitutes unreasonable and inordinate delay. In any event, the determination of what is unreasonable and or what is inordinate delay is dependent on the reasons, explanation and or justification [if any] supplied by the claimant.
31. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] KECA 701 (KLR) the court stated thus
 - (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 have to be valid and clear reasons upon which discretion can be favourably exercisable.



32. Bearing in mind the exposition of the law highlighted in the decisions [supra], I come to the conclusion that the application before hand has been filed with unreasonable and inordinate delay. For good measure, no reason was ever adverted to and or referenced by the applicant in an endeavour to account for the delay.
33. Further and in any event, there is no gainsaying that it is the reasons[if any] availed by the applicant that would open the door of discretion to an applicant. In the absence of reasons, the court is enjoined to infer slovenliness, dilatoriness, want of diligence; negligence and or flagrant lethargy, none of which should accrue favourable treatment by a court of law. On the contrary, the Court ought to frown upon such conduct. [See the provisions of Section 1A and 1B of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya].
34. Before concluding on this issue, it is apposite to take cognizance of the holding in the case of Njoroge v Kimani (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling) where the court of Appeal [per Mativo JA] stated thus:
 12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised 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.
 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.
35. Next is the issue of whether the application beforehand is a disguised appeal and an invitation to this court to sit on an appeal on the decision of a court of concurrent/ coordinate jurisdiction. It is instructive to note that following the filing of the instant suit, the applicant was duly served with the requisite pleadings and bundle of documents. Furthermore, the applicant thereafter proceeded to and retained counsel to act on his behalf.
36. Additionally, it is imperative to state that the applicant's counsel did not timeously file the responses. To this end, the applicant's previous counsel procured and obtained indulgences from the court within which to file and serve the requisite responses. Suffice it to state that the applicant's counsel was afforded due indulges and accommodation. However, the applicant's previous counsel failed to comply. On the return date, counsel sought for an adjournment, but which application was declined. Thereafter, the matter proceeded for hearing and thereafter for judgment.
37. It is worth highlighting that the judgment that was rendered and or delivered by the court, [differently constituted], was a final judgment on merits of the case. Further and in any event, there is no gainsaying that the proceedings underpinning the resultant judgment were not ex parte or at all.
38. The question that does arise is whether this court can engage with an application for setting aside of a final judgment made by a court of concurrent jurisdiction. Suffice it to underscore that this court can only deal with the setting aside of ex parte proceedings, judgments and rulings arising out of non-



appearance, non-attendance or such other default that brings the dispute within the realm of Order 12 Rule 7 of the Civil Procedure Rules.

39. I am afraid that the proceedings underpinning the judgment beforehand and by extension the judgment itself do not lend themselves to setting aside. Suffice it to posit that any endeavour to set aside the said judgment would amount to sitting on appeal on the decision of a court of concurrent jurisdiction. Such an endeavour is antithetical to the rule of law.
40. In the case of Kenya Hotel Properties Limited *v Attorney General & 5 others (Petition 16 of 2020)* [2022] KESC 62 (KLR) (7 October 2022) (Judgment) at par 55 where the supreme court stated thus;
- “As was thus rightly noted by the High Court and the Court of Appeal, the rule of thumb is that superior courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those court higher than themselves. Again, we take cognizance of our finding in the Samuel Kamau Macharia case where we held that: “A court jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in In the Matter of the Interim Independent Electoral Commission (applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.” (emphasis supplied).
41. Regarding the fourth issue, it is instructive to underscore that the respondent herein contended that the judgment and decree of the court have since been implemented. In particular, it was posited that the suit property or the portion thereof that was spoken to by the judgment has since been transferred to and registered in the name of the respondent.
42. Moreover, it has been submitted that even though the applicant has sought [sic] set aside some non-existent interlocutory judgment, same has not sought any orders to impeach the transfer and the consequential certificate of title in favour of the respondent.
43. Arising from the foregoing, it was contended that the orders being sought cannot be issued. I do agree with the submissions of learned counsel for the respondent. The orders sought would be in vain and or superfluous to say the least.
44. As pertains to the antecedent conduct of the applicant, it is imperative to recall that the applicant herein was afforded several indulgences and accommodations by the court. The contents of paragraphs 2, 3 and 4 of the judgment highlight the indulgences that were given to the applicant. Nevertheless, it is not lost on me that the applicant and his legal counsel spurned the opportunity.
45. It appears that the applicant herein was keen to delay, obstruct and or defeat the due process of the court. No wonder, the applicant has no reason why the requisite pleadings and or documentation were not timeously filed or at all.
46. I am alive to the fact that the applicant herein has laid a blame on his erstwhile advocate. However, what the applicant has not told the court is the effort, [if at all] that same put in place to superintend



- the proceedings and generally the manner in which his own case was being prosecuted. The primary duty lies at the doorstep of the applicant.
47. Having failed to display due diligence, the applicant is now before this court seeking to partake of and benefit from the equitable discretion. I must say that he who seeks equity must do equity. In addition, such an applicant must act with due promptitude in so far as equity aids the vigilant and not the indolent.
48. I am afraid that the antecedent conduct of the applicant herein does not meet the threshold of equity and thus, equity cannot come to the aid of the applicant. In any event, the applicant needs to be reminded that exercise of discretion does not accrue as of right. [See the holding of the court in the case of *Southern Empire Traders v Nakuru Players Theatre Club* [2018] KEELC 3610 (KLR)]
49. Before concluding on this issue, it is apposite to state that the slovenly approach deployed by the applicant and his legal counsel cannot find favour with this court during this era, where Article 159 (2) (b) of the *Constitution*, 2010; calls for just; proportionate; and expeditious disposal of legal business. [See also sections 1A and 1B of the *Civil Procedure Act*].
50. Finally, the Court of Appeal in the case of *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR highlighted the need for expedition, diligence and proactiveness in the discharge of professional duties and delivery of legal services.
51. For coherence, the court stated thus:

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases.

The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge’s conclusion that the suit in the High Court was not properly handled by the appellant’s advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed, cannot be visited upon them.

52. The applicant herein did not exercise the due diligence, the promptitude, the reasonableness and the desire to vindicate his interest in the matter. He can only blame himself for the lapses, inaction and failures that are now being complained of.
53. Flowing from the foregoing analysis, it must have become evident that the application by the applicant herein does not merit the exercise of equitable discretion of the court. If anything, the application is defeated by the doctrine of Laches.

Final Disposition

54. For the reasons that have already been highlighted in the body of the ruling, I come to the conclusion that the subject application is devoid and bereft of merit. Same courts dismissal.
55. In the premises, the orders that commend themselves to me are as hereunder: -



- i. The application be and is hereby dismissed.
- ii. Cost of the application be and are hereby awarded to the plaintiff respondent
- iii. The cost in terms of clause (ii) shall be agreed upon and in default to be taxed by the deputy registrar.

56. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF JULY 2025.

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

JUDGE

In the presence of:

Mutuma – Court Assistant

Mr. Muthamia for the Applicant/ Defendant

Mr. Kiogora Arithi for the Respondent/ Plaintiff.

