



**Republic v Baringo County Government & 2 others; KTK Advocates
 (Exparte Applicant) (Judicial Review Application 687 of 2017)
 [2025] KEHC 4309 (KLR) (Judicial Review) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4309 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 JUDICIAL REVIEW**

JUDICIAL REVIEW APPLICATION 687 OF 2017

RE ABURILI, J

APRIL 1, 2025

BETWEEN

REPUBLIC APPLICANT

AND

BARINGO COUNTY GOVERNMENT 1ST RESPONDENT

THE COUNTY SECRETARY BARINGO COUNTY 2ND RESPONDENT

CHIEF OFFICER, FINANCE/COUNTY TREASURER BARINGO

COUNTY 3RD RESPONDENT

AND

KTK ADVOCATES EXPARTE APPLICANT

RULING

1. The application before this court is the Respondents’ Notice of Motion dated 7th March 2025 seeking a raft of orders as follows:
 1. Spent
 2. That the honourable court be pleased to adopt the consent dated 17th February, 2025 and filed on 7th March, 2025, to allow the firm of Gordon, Ogola & Associates to come on record after judgment.
 3. That the Honourable Court be pleased to review and/or set aside the orders issued on 5th March, 2024 setting this matter for a ruling on 25th March 2025.



4. Spent.
 5. That this Honourable Court be pleased to grant leave to the Respondents to file their Replying affidavit deponed on the 24th February 2025 out of time.
 6. That this Honourable Court be pleased to enlarge time for filing the Response to the Application dated 5th July, 2024 and adopt the Applicant's Replying affidavit dated 24th February 2025 as having been filed on time and service be dispensed with.
 7. That consequently the Ex-parte Applicant be granted concurrent leave to file a Further Affidavit.
 8. That the cost of this application be in the cause.
2. The application is supported by the affidavit of Gordon Ogola Advocate sworn on even date.
 3. The Respondents' case is that on 17th February 2025 they sought for an extension of time to file their response to the ex parte Applicant's application dated 5th July 2024. It is their case that as of 24th February 2025 their response was ready but they could not file the same because of technical challenges on the Judiciary E-filing Portal. It is their case that on 27th February 2025 they served the ex parte Applicant and it was their assumption that the response had been uploaded on the system.
 4. According to the Respondents, it is only on 3rd March 2025 that counsel's office clerk realised that the response had not been uploaded and upon liaising with the High Court Civil Division Registry that the same was finally uploaded on 4th March 2025.
 5. The Respondents urge that it is due to this miscommunication that counsel inadvertently informed the court that the response had been filed and served on 27th February 2025.
 6. It is also the Respondent's case that the current firm on record Gordon Ogola & Associates separated from the initial firm on record, Gordon, Ogola Kipkoech & Co Advocates and entered a consent to come on record. However, the consent had not been uploaded at the time of uploading the response and as such during the hearing of the ex parte Applicant's application dated 5th July 2024 the Respondents remained undefended. The Respondents' replying affidavit was struck out for being filed out of time.
 7. Mr. Gordon Ogola in his affidavit depones that he has always been in conduct of this matter and that when the application was served upon his former law firm he was undergoing radiotherapy and was out of the office for about four months. Further that Ms. Olili had always attended court in the matter, even when he was hospitalised and the matter was being handled by Gordon Kipkoech & Co Advocates.
 8. The Respondents place reliance on the case of *Gitau v Kenya Methodist University Kemu* [2021] KEHC 322 (KLR) where the court observed that striking out pleadings is a drastic step which should be a measure of last resort and even then, in rare and extremely exceptional cases.
 9. They also urge that mistakes of the advocate should not be visited on the client. Reliance is placed in the cases of *Bank of Africa Kenya Limited v Put Sarjevo Gebral Engineering Co. Ltd & 2 Others* [2018] eKLR and *Philip Chemwolo & Another vs. Augustine Kubede* [1982-88] KLR 103 at 1040 where the courts observed that a court ought to do its best to rectify a mistake in the interest of justice.
 10. According to the Respondents, they stand to suffer great prejudice if the ruling of 25th March 2025 is delivered as at least Kshs.22,500,000/- of tax payers' money and the people of Baringo County would be lost yet evidence of settlement of the said amount is contained in their Replying Affidavit. In support



of this position the Respondents rely on the case of Martha Wangari Karua vs. IEBC Civil Appeal No.1 of 2017 where the court held that “The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be”.

11. The Respondents’ case is that it is fraudulent and a falsehood to claim that no amounts have been paid since the decree was issued in 2017. Further that the last payment of Kshs.5,000,000/= was made in 2023 as according to the Respondents the decretal amounts had been fully settled.
12. It is also the Respondents’ case that the ex parte Applicant has threatened the Respondents with civil jail and further execution if the exorbitant unsubstantiated sums of Kshs.31,467,132.42/- is not paid in full.
13. According to the Respondents, it is therefore crucial that the honourable court accepts tabulation of accounts by both parties in enforcement of the court order issued on 28th January 2022.
14. The Respondents further rely on the case of Gitau v Kenya Methodist University Kemu supra where the court observed that courts are constitutionally obligated to adopt an approach which prefers determination of cases on merit as opposed to procedural technicalities.
15. In conclusion, the Respondents urge that they have explained the 5 days delay in uploading their response and that they are willing and ready to file their response which is dated 24th February 2025 immediately.
16. In response the ex parte Applicant filed grounds of opposition dated 17th March 2025. It is the ex parte Applicant’s case that the Court Record of 5th March 2025 is self-evident that the Respondents’ Counsel Gordon Ogola and Ms. Olili deliberately lied to the Court.
17. It is urged that the Respondents Counsel lied on claiming to have filed a consent to come on record, and that they filed and served the Replying Affidavit. Further that there is no evidence that the lawyers on record for the Respondents were served with any application for Change of Advocates or indeed that the said Consent was forwarded to them for their signature. That there is also no evidence that the same was served on the ex parte Applicant.
18. It is also the ex parte Applicant’s case that the Respondents seek review and/or setting aside of orders of 5th March 2025 yet they haven’t exhibited the extracted the order. Further that no legal basis has been exhibited for the ruling scheduled for 25th March 2025 to be suspended.
19. The ex parte Applicant also urges that the Respondents as disclosed on the record will show a Party that has stalled completion of the matter since 2017. According to the Applicant if the application is allowed it will be a miscarriage of justice.

Submissions

20. The application was canvassed by way of oral submissions made by counsel on behalf of the parties on 18th March 2025. On the said date counsel for the Applicant Ms. Olili submitted that the Respondents admitted that they had flouted Order 9 Rule 9 of the Civil Procedure Rules by not filing the consent however they had rectified the same. Counsel relied on Article 151 of *the Constitution* and further urged that no injustice would be occasioned if the advocates were allowed to come on record.
21. In response Mr. Kipkorir submitted that the consent had only been annexed as an exhibit and not filed for adoption. To support this position, he relied on the case of Isuzu EA vs. RAA(Minor Suing through father and next friend) NRB HCCA 450/2019.



22. He further submitted that mistakes of a lawyer are excusable only if they are reasonable as was held in the cases of Christopher Mureithi Ngugi vs. Eluid Ngugi Evans and Tanda vs. Jeremiah K Mwakio [CA 41/2014](#).
23. According to Mr, Kipkorir the adverse party cannot be denied justice because of negligence of the other party as justice cuts both ways. Further that in the case of Bakaari Abdalla Tunya vs. Modern Coast Ltd Mombasa ELR Cause No.19/2017 the court struck out an affidavit supported by falsehood.
24. Counsel also submitted that both the client and the advocate are to blame for the delay as Mr. Ogola had claimed that his client was not responding to correspondence.
25. In response Ms. Olili submitted that in S.K. Tawadi vs. Veronicah the court expanded for purposes of Order 9 Rule 9 of the Civil Procedure Rules. On the issue of falsehoods alluded to by counsel for the ex parte Applicant she stated that a copy of the email elaborating the difficulties faced in the e-filing system had been annexed as 'G.02'.

Analysis and determination

26. I have considered the application, supporting affidavit and annexures. I have also considered the grounds of opposition and oral submissions together with case law cited by both counsel for their respective clients.
27. The main issue for determination is whether the Respondents merit the orders sought in their application.
28. I will begin by addressing the issue of setting aside/reviewing this court's orders of 5th March 2025 striking out the Replying Affidavit dated 24th February 2025 and allowing the Applicant to proceed with the application dated 5th July 2024.
29. Section 80 of the [Civil Procedure Act](#) Cap 21 provides as follows: -
 - “ Any person who considers himself aggrieved—
 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
30. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -
 - “ 1 (1) Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed,
and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order,



may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

31. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR it was held that:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

32. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR John M. Mativo Judge (as he then was) culled out the following principles from a number of authorities: -

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.



- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”
33. The Respondents’ case is that the Replying Affidavit dated 24th February 2025 was not uploaded due to technical challenges on the Judiciary E-filing Portal. Despite their assumption that the affidavit had been successfully uploaded, a subsequent review by their office clerk revealed the error, which they promptly sought to rectify. According to them the delay in filing was not deliberate but occasioned by unforeseen technological constraints.
34. Further, that the Respondents have provided compelling reasons for the miscommunication regarding their legal representation. That their lead counsel, Mr. Gordon Ogola, was undergoing radiotherapy treatment and was out of the office for approximately four months. During this period, the matter was being handled by another law firm, Gordon, Ogola Kipkoech & Co. Advocates, which later separated from the current firm on record, Gordon Ogola & Associates. That due to this transition and the failure to upload the requisite consent for change of advocates in a timely manner, the Respondents were effectively left unrepresented at the time the ex parte Applicant’s application was heard. The Respondents argue that this procedural misstep should not be used to deny them the opportunity to be heard on merit.
35. In line with the principles enunciated in *Gitau v Kenya Methodist University Kemu* [2021] KEHC 322 (KLR) eKLR, this court acknowledges that striking out pleadings is a drastic measure that should be exercised sparingly and only in exceptional cases. The court is further guided by the principle that mistakes of counsel should not be visited upon a litigant where the interests of justice demand otherwise, as reiterated in *Philip Chemwolo & Another vs. Augustine Kubede* [1982-88] KLR 103.
36. Once the court is satisfied that enlarging time is in the interest of justice, it will exercise its discretion in favor of the applicant. However, it may impose terms and conditions to ensure fairness. In the proviso to Order 50 Rule 6, this may include an award of costs to the respondent, thereby safeguarding the respondent’s legitimate expectation that they will not be unfairly prejudiced by the enlargement of time.
37. The Court in *United Arab Emirates V Abdel Ghafar & Others* 1995 IR LR 243 cited with approval in *Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others* (2014) e KLR that :

“.....the grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively, or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the appeal tribunal. The result of the exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses.”

2. As Sir Thomas Bingham M.R. pointed out in *Costellow V Somerset CC* (supra) at page 956 C, times problems arise at the intersection of two principles, both salutary, neither absolute.....The first principle is that the Rules of court and the associated rules of practice, deserved in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met.....” (Emphasis added).

The second principle is that:



“.....a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of cost cannot compensate.....”

3. The approach indicated in these two principles is modified to the stage which the relevant proceedings have reached. If for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice, to the other party, justice will usually favour the action proceeding to a full trial on the merits.

The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine the case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. An extension may be refused even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.

4. An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with it full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.”

38. The above principles espouse discretion of the court and how it should be applied in enlargement of time.
39. In my view, it has not been demonstrated to the satisfaction of this court that the Respondents are abusing the process of the court. To my mind, the Respondents have demonstrated a desire to be heard. They have also approached the court expeditiously and without delay. The right to be heard and to be accorded justice is guaranteed by Article 50(1) of *the Constitution*. In my view, they have demonstrated sufficient cause to warrant discretion of this court being exercise in their favour.
40. On the other hand, the exparte applicant is not to blame for the misstep and the contradictory communication by counsel for the respondents to court on the issue of representation and filing of the consent as well as the replying affidavit. Neither can the court take blame for the confusion.
41. In the case of Philip Kelpto Chemwoto & Another V Augustine Kubende (1986) KLR 492, the Court of Appeal held that errors, unless caused by fraud or intent to overreach, should not automatically bar a party from having their case heard on its merits. Instead, such mistakes can often be rectified by payment of costs.



42. Similarly, in *Mwai v Murai No. 4 (1982) KLR*, Madan JA reinforced this principle, stating that mistakes whether made by junior or senior counsel should not necessarily close the doors of justice. Instead, courts should take steps to rectify errors where necessary to uphold justice.
43. The court underpins that the primary objective of litigation is to hear and resolve disputes, not to punish litigants for errors or lapses. Mistakes which are owned by the parties who have approached the court in an honest manner and expeditiously should not automatically prevent a party from pursuing their legal rights or the court excluding them from the judicial process. In this case, justice can still be served despite the delay, as the decretal sum if owing will be secured for settlement.
44. There is also the issue of the consent being adopted to allow the firm of Gordon, Ogola & Associates to come on record after judgments.
45. It is not in dispute and the advocates for the respondents have conceded that they initially failed to comply with Order 9 Rule 9 of the Civil Procedure Rules, which requires either a formal application or a consent between the outgoing and incoming advocates when changing representation after judgment.
46. In *Nelly Wanjiru Njenga v Robinson Maina & 3 others [2021] eKLR* the court reaffirmed that compliance with Order 9 Rule 9 is mandatory to protect outgoing advocates from being unfairly sidelined. However, in exceptional circumstances, courts have allowed some level of procedural flexibility, as seen in *Samuel Mathenge Ndiritu v Martha Wangare Wanjira & Another [2017] eKLR*, where partial compliance was deemed sufficient.
47. In the instant case, the Respondents' counsel, the firm of Gordon Ogola & Associates Advocates failed to file the consent at the time of submitting their response, meaning their firm was not properly on record when filing. This rendered the Replying Affidavit improperly filed, leading to it being struck out, not only on that ground but also on the ground that it was, in any event, filed out of time without leave of court.
48. Order 9 Rule 9 of the Civil Procedure Rules requires that once judgment has been delivered, a party seeking to change advocates must either obtain the consent of the outgoing advocate or file a formal application seeking the court's leave.
49. The Respondents conceded that they initially did not comply with this requirement, thereby raising procedural concerns. However, they have since annexed the consent as an exhibit and also filed the same before this court, and as no objection has been raised by the previous advocates, in the interest of justice and to avoid unduly prejudicing the Respondents, I find that the omission should not be fatal, provided that the consent is formally adopted by the court.
50. Consequently, I exercise discretion in favour of the respondents in order to meet the ends of justice and make the following orders;
 - a. The consent dated 17th February, 2025 and filed on 7th March, 2025, is hereby adopted and the firm of Gordon, Ogola & Associates are hereby allowed to come on record after judgment, to represent the respondents, in the place of the former law firm of Gordon, Ogola Kipkoech & Co Advocates.
 - b. This Court order issued on 5th March, 2025 striking out the Respondents' Replying Affidavit is hereby set aside and the Respondent's Replying Affidavit sworn on 24th February 2025, is deemed to have been duly filed. The same shall be served upon the exparte applicant, in the event that it was not served, by close of business today.



- c. Consequently, the Ex parte Applicant is granted leave to file and serve their Further Affidavit within five (5) days of service.
- d. Parties shall appear before court for oral submissions on 30th April, 2025.
- e. Costs follow the event and, in any case, to the successful litigant. However, in this case, the inconvenience was occasioned by the Respondents' counsel's law firm whom this court has power to order to pay costs to the exparte applicant. Nonetheless, in view of the explanation that the situation was occasioned by illness of counsel for the respondents, which cannot be attributed to brazen negligence, I order that each party shall bear their own costs of the application.
- f. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF APRIL 2025

R.E. ABURILI

JUDGE

