



**Khan v Begum & another (Miscellaneous Application  
E073 of 2025) [2025] KEHC 10365 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 10365 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MISCELLANEOUS APPLICATION E073 OF 2025  
SM MOHOCHI, J  
JUNE 16, 2025**

**BETWEEN**

**KARIM KHAN ..... APPLICANT**

**AND**

**ZARINA BEGUM ..... 1<sup>ST</sup> RESPONDENT**

**MOHAMMED ASLAM KHAN ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated 25<sup>th</sup> February 2025 filed pursuant to Order 40 Rules 1, 4 & 10, Order 42 Rule 6, Order 50 Rule 6, Order 51 Rules 1 & 3 of the Civil Procedure Rules, Articles 25 (c), 40 (1), 50, 159 & 165 (6) of *the Constitution* of Kenya Section 1 A, 1B and 3A 3A, 63e, 79(h) & 95 of the *Civil Procedure Act*, Section 50 (2) of the *Law of Succession Act*, Section 68(1) & (2) of the *Land Registration Act*, and all other enabling provisions of the law for the following Orders;
  - I. Spent.
  - II. That the Applicant be granted leave to file an appeal out of time and by 6<sup>th</sup> March, 2025, on the Ruling/Orders of 29<sup>th</sup> February 2024, delivered on 6<sup>th</sup> February, 2025 on E-filing Portal (CTS), of Nakuru Kadhi Court, Hon. Idris Nyamagosa, in Kadhi Court Succession Cause No.7 of 2009.
  - III. That the Ruling/Orders of 29<sup>th</sup> February, 2024 delivered, on 6<sup>th</sup> February, 2025 on the E-filing Portal (CTS) of the Nakuru Kadhi Court, Hon. Nyagamosa Idris, in Kadhi Court Succession Cause No.7 of 2009, be and are hereby stayed pending the hearing and determination of this Application.
  - IV. That the Ruling/Orders of 29<sup>th</sup> February, 2024 delivered, on 6<sup>th</sup> February, 2025, on the E-filing Portal (CTS) of the Nakuru Kadhi Court, Hon Nyagamosa Idris, in Kadhi Court Succession



Cause No.7 of 2009, be and are hereby stayed pending the hearing and determination of the intended Appeal.

- V. That inhibition Orders are hereby issued prohibiting any dealings over the Applicant's share of 11.3% in the piece of land reference LR Nakuru Municipality Block 10/79, until further orders of the Honourable Court.
  - VI. That the Nakuru Kadhi Court, presided over by Hon. Nyagamosa, be and is hereby restrained from issuing any further suo moto Summons, suo moto Orders or in any manner whatsoever from presiding over Kadhi Court Succession Cause No.7 of 2009, pending the hearing of this Application and the intended Appeal.
  - VII. That costs be in the Applicant's favour.
2. The Application is premised on the following grounds is further supported by the annexed affidavit of Karim Khan: -
- i. Some aspects of this matter comprise of unusual circumstances and have necessitated lengthy grounds of support for the Applicant to fully lay out his case and assist this Honourable Court reach an informed decision. At the hearing the Applicant will seek the Honourable Court's indulgence on this.
  - ii. The Petition in Kadhi Court Succession Cause No.7 of 2009 was seeking for a formal declaration of the final shares of the deceased owners, who were all siblings, in the piece of land LR Nakuru Municipality Block 10/79, so that thereafter their Adult children could acquire Grants over their respective successory shares.
  - iii. After encountering delays relating to impropriety on part of a Kadhi then, the Succession Cause was finally fully settled by a consent Judgment issued on 13<sup>th</sup> August, 2015.
  - iv. Later it came to be known that a Nakuru Kadhi, now retired, had on 25<sup>th</sup> February, 2021 re-opened the Cause, when the Court was functus offico and issued ex-parte Orders in finality, in a One sentence Ruling, to a Party to amend the Decree from the consent Judgment of 13<sup>th</sup> August, 2015, without setting matter for inter partes hearing and denying Applicant, the Petitioner in the Cause, opportunity to file opposition and be heard. The Application filed was incompetent, incurably defective, bad in law, abuse of the Court Process. The Supporting Affidavit averred to falsities, was scandalous. The Application stood for outright dismissal in the first instance.
  - v. Upon Appeal, the Nakuru High Court set aside the Kadhi Court Orders of 25<sup>th</sup> February, 2021, by its Orders of 21<sup>st</sup> October, 2021.
  - vi. It was also discovered that a Land Registrar Nakuru, had in complete disobedience of the Decree from the Consent Judgment of 13<sup>th</sup> August, 2015, entered false entries in the Land Register. Some successors shares were shown less, the Applicant's share of 11.3% was not specified and combined with others and name of a deceased proprietor re-entered.
  - vii. To rectify the false entries in the Land Register, Parties filed a Consent for adoption by Kadhi Court as its Orders. Orders adopting the consent were issued on 20<sup>th</sup> May, 2022.
  - viii. By an oversight the Grant Orders of a son of one of the deceased owners, issued by the High Court, Family Division, indicated a lesser share than that in the adopted Orders of 20<sup>th</sup> May, 2022. These Grant Orders of a Superior Court rendered the consent Orders of 20<sup>th</sup> May, 2022 null and void, for being issued outside jurisdiction. In addition Order No.3 was not



enforceable, by occurrence of other facts through influx of time. The High Court, Family Division was then moved and a rectified Grant was issued dated 24<sup>th</sup> July, 2023.

- ix. On 28<sup>th</sup> February, 2024, parties were heard on the Applicant's Application, seeking for adoption of the Parties second consent as Orders of the Court. Upon hearing, the acting Kadhi Nakuru, Hon. Kadhi Nyagamosa, issued Orders adopting terms of the consent with a further Order No. 3 that the matter was hereby settled.
- x. Later hurdles were encountered when the Applicant sought to obtain certified copies of the Orders. The intervention of the Head of Station was sought and later of the Kadhi Office Nairobi and its Deputy Registrar's Office then sent an Email to the acting Kadhi to have the extracted Orders verified and certified.
- xi. Subsequently, by a hitherto unknown procedure, Hon. Nyagamosa issued Summons, via Email on 17<sup>th</sup> January, 2025, to the Applicant, to attend Court on 23<sup>rd</sup> January, 2025, virtually for Directions. Surprisingly the Summons were only sent to the Applicant and not to the Advocates on record for the other Parties.
- xii. The Form of the Summons, absence of issuance date and purpose of Directions not indicated to enable a party prepare, were in contravention of Court Rules, rendering them defective. Their issuance offended the laid Judicial procedures to invite Parties to attend Court for Directions. Further they were not served by a licensed Process Server and no Affidavit of Service filed on the E-filing Portal.
- xiii. In Court on the postponed date of 6<sup>th</sup> February, 2025, at 9.35am the Applicant was informed by the Hon. Nyagamosa that the Court had set aside the Orders of 28<sup>th</sup> February, 2024, by Ruling/Orders of 29<sup>th</sup> February, 2024, for not compiling with the Court's directions on Parties attendance. His protests that Parties attendance was recorded, as appearing on the Orders and the Court was functus officio and lacked jurisdiction, were of no avail.
- xiv. It raises questions that if the Directions were an issue, why the Hon. Kadhi did not raise it with the Advocates of the other Parties at the hearing of 28<sup>th</sup> February, 2024
- xv. It was then noted that the Hon. Kadhi Posted the Ruling/Orders of 29 February, 2024 on the E-filing Portal, (CTS) at 10.25 am after the Court Session.
- xvi. On the 4 requisite grounds to file an Appeal out of time, it is contended: -Time lapse –
  - a. In normal obtaining situations the time for filing an appeal is within 30 Days from date of delivery of the Ruling/Orders, which would have been by 30<sup>th</sup> March, 2024, however in the pertaining circumstances there is a contention on the date of issue and date of Delivery and the Kadhi Court did not issue Notice of Delivery of Ruling/Orders. Reasons for delay Whereas the Ruling/Orders indicate as having been issued on 29<sup>th</sup> February, 2024, the Applicant only learnt of it in Court on 6<sup>th</sup> February, 2025 and was appraised further on 7<sup>th</sup> February, 2025 when he noted that the Hon. Kadhi had posted it on the E-filing Portal (CTS) at 10.25 am after the Court Session of 6<sup>th</sup> February, 2025.
  - b. The Ruling/Orders show the Hon. Kadhi as having set the matter before himself for Directions, with purpose not indicated, then proceeding to deliberate and arriving at the decision of setting them aside.



- xvii. There was no Notice of Directions to alert the Applicant and the opportunity to prepare his opposition. Further no Notice of Delivery of Ruling/Orders was issued and he had no knowledge of the decision which precluded from filing an appeal in time. Even whilst pursuing for certification of the Orders of 28<sup>th</sup> February, 2024, he was not aware that Orders, setting them aside, had been issued.
- xviii. Chances of success of Appeal - The intended appeal is arguable, worthy of the Honourable Court's consideration and has a good chance of success as it raises questions of violations of *the Constitution*, questions of law, jurisdiction and disregard of Superior Court precedents. Grounds intended to be raised at the Appeal include: A. Violation of *the Constitution* of Kenya:-
- xix. The Hon. Kadhi breached fundamental rights to fair hearing, equal benefit of Law and limiting fundamental rights by:-
- a. Not issuing Notice for Directions (and purpose) and suo moto proceeding to conduct an apparent appeal on the Orders of 28<sup>th</sup> February, 2024, denying the Applicant the opportunity to file his opposition and be heard.
  - b. Not issuing a Notice of Delivery of his Ruling of 29<sup>th</sup> February, 2024 and precluding Applicant's right to Appeal.
- xx. The Hon. Kadhi exercised jurisdiction not authorized by *the Constitution* and Statute by conduct of acts and decisions and imparting the Court presided over by himself with non-existent jurisdiction, by:-
- a. Setting a matter before himself for Directions, without indicating purpose of Directions nor issuing notification to inform and invite Parties.
  - b. Proceeding to suo moto conduct an apparent appeal on the Orders of 28<sup>th</sup> February, 2024 which had adopted terms of a consent.
  - c. Issuing substantive Orders, suo moto, on a Directions date.
  - d. Setting aside, suo moto, Orders adopting Parties consent, without any pleading having been filed before the Court.
  - e. Re-opening a settled matter when the Court was functus offico.
  - f. Not exercising authority consistent with the purposes and objects of *the Constitution* and implementing objectivity and impartiality in decision making;
  - g. Omitting to state the Laws in reaching the various decisions.
  - h. Omitting to weigh scales to determine prejudice upon Applicant.
  - i. Converting the Court into an inquisitorial system, Placing a condition of setting aside orders until all Parties make appearance, evidentiary of obscured motive to interrogate the consent, when Courts are required to be transparent in decision making. And appearing to cast doubts on the Bar
  - j. Acting partially by stepping into the arena.
- xxi. The Hon. Kadhi disregarded Superior Court precedents binding on the Kadhi Court:



- a. Consents by Parties cannot be varied or discharged, unless where there are specific pleadings before the Court, seeking otherwise.
  - b. Upholding litigants rights to legal representation which includes appearances through their Advocates, unless there is conduct of witness examination.
  - c. Recognition of Counsels roles to enter into consents and Courts will not delve into consent making process, unless there is formal Motion so justifying.
- xxii. That the Appeal encompasses aspects of Public Interest such as violation of *the Constitution* by a Court and Judicial Officer when presiding over a matter and the modus operandi of some Kadhi Courts, operating in realm of their own Law, over which this Honourable Court exercises a Supervisory Jurisdiction.
- xxiii. That no Party will suffer prejudice as the matter before the Kadhi was not of a succession nature, no inheritance distribution was being determined, was not contentious, there were no awards or orders of recovery enforceable and the appeal seeks to reinstate terms of a consent. In addition evidence will be adduced at the hearing, pointing to plausible culpability by parties in the matter.
- xxiv. This Honourable Court is called upon to exercise its discretion to admit the appeal.
- xxv. On the grounds seeking stay of the Ruling/Orders pending hearing and determination of the intended Appeal, it is contended on the three applicable grounds that:-
- a. Substantial loss may result to the Applicant unless the Order is granted. The decision breaches Constitutional vested rights, has fundamental errors of law and procedure that has occasioned great failure of justice and prejudice to the Applicant. The Applicant will be subjected to more losses, delays and sufferings in litigations to legally affirm his rightful share ownership of 11.3%-
  - b. By setting aside the Orders of 28<sup>th</sup> February, 2024, the Orders of 20<sup>th</sup> May, 2024 adopting terms of the initial consent come into force. These Orders, although placing the Applicant's share correctly at 11.3% (or 7/62, Islamic shares being calculated on fractions for accuracy) are null and void for being issued outside Court's jurisdiction. With no valid Orders in force, the false entries in the Register showing Applicant's share combined, not specified as per his Grant and less when calculated (8.4%) and the entry reinstating the name of late Abdul Rehman Khan, in the Land Register acquire validity. In addition the change of the Succession Cause Title, by unknown persons and bringing in late Abdul Rehman Khan, as a Party to the cause when he had demised on 2<sup>nd</sup> January, 1997, paved way for furtherance of unlawful motives.
  - c. The Applicant's 11.3% has been fraudulently acquired, by an outside party and is a matter before an E&L Court and unless inhibition Orders issue, the stratum of his cause of action case will be subverted and cause him further prejudice.
- xxvi. The application has been made without unreasonable delay: On learning of the details of the Ruling/Orders posted on 6<sup>th</sup> February, 2025, the Applicant has endeavored to file the Notice of intended Appeal and this Application, with the least possible delay.
- xxvii. The matter was non-contentious and the decision to be appealed upon did not involve any awards or recovery of losses, or in any manner effect any Parties shares in the piece of land.



- xxviii. This Honourable Court is called upon to Order for prohibition on dealings on the Applicant's 11.3%, as the decision of the Hon. Kadhi will impact on the share and complicate matters of the pending suit and there is need to preserve the current status of the share, until the intended Appeal is heard and determined.
- xxix. That if the Hon. Kadhi Nyagamosa continues presiding over the Kadhi Court Succession Cause there is all the plausibility that further Summons may issue or decisions made suo moto that would perpetrate injustice and prejudice the Applicant and require him to seek further reliefs from this Honourable Court or prompt further grounds of appeal, noting that the Hon Kadhi has re-opened the matter of adoption of the consent.
- xxx. This Honourable Court has Supervisory Jurisdiction over the Magistrates and Kadhi Courts, as conferred by *the Constitution*. This includes powers to restrain a Judicial Officer from continual presiding over a matter where this may lead to denial of justice, wastage of judicial time and public resources and loss and suffering to a litigant and this Honourable Court is called upon to exercise its supervisory jurisdiction over the lower Court.
- xxxi. There is right of appeal to the High Court from decisions of Kadhi Court and this Honourable has jurisdiction to hear this Application and the intended Appeal.
- xxxii. That it is in the interest of justice and fairness that this Honourable Court having the jurisdiction grants the prayers sought.

### **Courts Determination**

3. This Court is persuaded that the Application remains undefended despite the Applicant demonstrating service upon the Respondents and filing two Affidavits of service by a court authorized process server.
4. It is now settled that extension of time is not an automatic right. It is an equitable remedy that is only available to a deserving party at the discretion of the Court. The unfettered discretion to extend the time limited by the rules, or by any decision of the Court, is conferred by rule 4 which provides that;
 

“...the Court may, on such terms as it thinks just, by order extend the time limited by these rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of that act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”
5. In the exercise of discretion under rule 4, the Court takes into account various factors, as demonstrated in *Paul Wanjohi Methane v Duncan Gichane Mathenge* [2013] eKLR where the Court stated that :
 

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”
6. This court is bound by the settled principles that guide in the exercise of discretion to extend time by the Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR as follows:



- i. Extension of time is not a right to a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
  - ii. A party who seeks extension of time has the burden of laying basis to the satisfaction of the court.
  - iii. Whether the court should exercise its discretion to extend time is a consideration to be made on a case-by-case basis.
  - iv. Where there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
  - v. whether there will be any prejudice suffered by the Respondent if extension is granted.
  - vi. Whether the application has been brought without undue delay.
  - vii. Whether in certain cases public interest should be a consideration for extension of time.
7. I accordingly find merit with the Application dated 25<sup>th</sup> February 2025 and allow the same as unopposed on the following terms;
- i. The Applicant is granted leave to file an appeal out of time, to file the memorandum of Appeal within the next thirty (30) days.
  - ii. An order of stay of execution of Ruling/Orders of 29<sup>th</sup> February, 2024 is hereby issued, pending the hearing and determination of the Appeal.
  - iii. An order of inhibition is hereby issued prohibiting any dealings over the Applicant's share of 11.3% in the piece of land reference LR Nakuru Municipality Block 10/79, pending the hearing and determination of the Appeal.
  - iv. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIA TEAMS PLATFORM AT NAKURU ON THIS DAY OF 16<sup>TH</sup> DAY OF JUNE, 2025.**

**S. MOHOCHI**

**JUDGE**

