



**Republic v Cabinet Secretary-State Department of Land and Physical Planning & 2 others; Otieno & 4 others (Ex parte Applicants); K'obil & 4 others (Interested Parties) (Judicial Review E006 of 2024) [2025] KEELC 6193 (KLR) (16 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6193 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
JUDICIAL REVIEW E006 OF 2024  
FO NYAGAKA, J  
SEPTEMBER 16, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CABINET SECRETARY-STATE DEPARTMENT OF LAND AND  
PHYSICAL PLANNING ..... 1<sup>ST</sup> RESPONDENT**

**THE DEPUTY COUNTY COMMISSIONER, SUBA SUB-  
COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**THE HONORABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**SAMWEL L. OTIENO ..... EX PARTE APPLICANT**

**TIMSON O. OTIENO ..... EX PARTE APPLICANT**

**ERASTUS O. OTIENO ..... EX PARTE APPLICANT**

**MICHAEL O. OTIENO ..... EX PARTE APPLICANT**

**WYCLIFFE O. OJWANG ..... EX PARTE APPLICANT**

**AND**

**HEADMONDS JAMES K'OBIL ..... INTERESTED PARTY**

**CHARLES ADAMO OJWANG ..... INTERESTED PARTY**

**JOSEPH OKOTH OJWANG ..... INTERESTED PARTY**

**MICHAEL OTIENO OJWANG ..... INTERESTED PARTY**

**BENERD OUMA ODERO ..... INTERESTED PARTY**



## RULING

(On whether to extend time to file and serve a Judicial Review Application)

### The Application

1. The Ex - Parte Applicants herein brought, under Certificate of Urgency, an application dated 24<sup>th</sup> June 2025. It was filed soon after the Interested Parties filed their Amended Bill of Costs on 17<sup>th</sup> June 2025 and fixed it for hearing. It was brought under Articles 48, 50 and 159 of *the Constitution* of Kenya, 2010; Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya; Order 51 of the Civil Procedure Rules, 2010; and “all other enabling provisions of the law”. The application seeks orders;
  - a. ....Spent;
  - b. That the honorable court be pleased to make orders for maintainable of status quo ante pending the hearing of this application;
  - c. That the honorable court be pleased to extend time for compliance and allow counsel for the ex-parte applicants to file and serve their substantive notice of motion within 7 days;
  - d. That the honorable court be pleased to grant the ex-parte applicants leave to file the substantive notice of motion out of time;
  - e. That upon hearing of this application, the court be pleased to make orders for maintenance of status quo ante pending the hearing and determination of the whole case; and
  - f. That costs of this applications be in the cause.
2. The application was supported by an Affidavit sworn by Quinter Odhiambo Aoyo, learned counsel for the Ex-parte Applicants, on 24<sup>th</sup> June 2025.
3. Learned counsel deponed that on 6<sup>th</sup> May, 2025, this Court granted leave to the applicants to file their substantive Motion within twenty-one (21) days. However, the Ex-parte Applicants did not file their Motion within the timelines as directed by the court. Instead they filed the Motion on 13<sup>th</sup> June 2024. Counsel blames the failure to file the substantive motion in time on an inadvertent mistake on the Ex-Parte Applicants’ counsel. The applicants thus aver that the mistake of counsel should not be visited upon a party who is desirous of prosecuting his case to its logical conclusion.
4. Learned counsel for the ex-parte applicants also acknowledged that the application dated 13<sup>th</sup> June, 2024 was filed out of time, and without leave of court to do so. Further, as a consequence the said application was struck out by this court.
5. In the instant application, the Ex-parte Applicants state that they are desirous of pursuing their case to its logical conclusion. Further, they aver that they will suffer irreparable loss and damage should their instant application be dismissed.

### The Response

6. On 15<sup>th</sup> July 2025, the Interested Parties filed Grounds of Opposition dated 7<sup>th</sup> July 2025 in which they averred that pursuant to the provisions of Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010 as well as section 9(3) of the *Law Reform Act* the Ex-Parte applicants’ application dated 24<sup>th</sup> June 2025 was fatally and incurably defective. They deponed that the leave being sought in the latter application



dated 24<sup>th</sup> June, 2025 could not be granted as the same had been granted on 6<sup>th</sup> May, 2024 and it was never utilized as directed by the court. As such, the Interested Parties contend that there is nothing to extend.

7. It is the Interested Parties' further averment that the instant application is time-barred, res judicata, brought in bad faith and constitutes an abuse of the due process of the court.

### **Submissions**

8. The Interested Parties filed submissions dated 22<sup>nd</sup> July, 2025 on 23<sup>rd</sup> July 2025. The gist of his submissions is that the applicant's application dated 24<sup>th</sup> June, 2025 is not meritorious and as such, the same should not be allowed as it is fatally defective and constitutes an abuse of the court process. The Interested Party argues that the application dated 24<sup>th</sup> June, 2025 offends Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules which provide for the manner of applying for judicial review orders of mandamus, certiorari and prohibitions, including the strict timelines set therein. Further, the interested parties fault the application for being time-barred pursuant to the section 9 (3) of the *Law Reform Act*.
9. In addition to the foregoing, the Interested Parties argue that the issue of extension of time was extensively addressed by this court. As such, the instant application is a waste of the due process of court and should be dismissed with costs.
10. On his part the Ex Parte Applicant filed his submissions dated 14<sup>th</sup> August 2025 on the same date. He contended that three issues lay for determination. These were, whether the Court has jurisdiction to enlarge time within which the substantive notice of motion ought to have been filed; whether there was inordinate delay which was prejudicial to the respondents; and what orders the Court should make.
11. On the first issue they relied on the case of *Aviation and Allied Workers Union vs KQ Ltd*, regarding the principles of extension of time, where the Supreme Court stated that these principles in the exercise of discretion are;
  - “ 1. 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;
  2. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the court.
  3. Whether the court should exercise the discretion to extend time, a consideration to be made on a case to case basis.
  4. Where there is (good) reason for the delay, the delay should be explainable to the satisfaction of the court;
  5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain causes, like election, petitions, the public interest should be a consideration for extending time”.
12. They then argued that there was no specific provision for enlargement of time in a procedural rule like Order 53 Rule 3 of the Civil Procedure Rules hence the court should satisfy itself that there is no



demonstrable prejudice cause to the adverse party because of delay and whether the refusal to enlarge time would occasion hardship and result in an injustice to the applicant.

13. They also relied on the case of *Raval v The Mombasa Hardware Ltd* [1968] EA 392 the court considered inherent jurisdiction of the court and held that the reason always given by the court resorting to its inherent jurisdiction which is not conferred by any statute or constitutional provision is to prevent a miscarriage of justice, especially where the adverse party is not prejudiced in any way if the court extended time. They called to aid Article 159 (2) of *the Constitution* which requires the Court to do justice without undue regard to procedural technicalities. They also relied on the case of *Bremer Vulcan Schiffbar and Maschinen Fabrick vs South Indian Shipping Corporations Ltd* [1981] AC 909 on the inherent powers of the court which should be to take necessary actions to maintain its character as a court of justice, and the case of *Equity Bank Limited v West Link MBO Ltd Civil Application (Appeal) no 78 of 2011* wherein it was held that

“Courts of law exist to administer justice and in doing so, they must of necessity balance between the competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from *the constitution* or statute.”

14. They concluded that the court had jurisdiction to enlarge time within which an application under Order 53 Rule 3 of the Civil Procedure Rule is to be filed, upon leave of court being granted.
15. Regarding delay in bringing the application, the Ex Parte Applicant argued that there was no delay following the date of delivery of the Ruling and when it was brought.
16. Regarding the mistake of counsel, he relied on the cases of *Belinda Murai & Others v Amos Wainaina* (1978) KLR 278; *Philip Chemwolo & Another Vs Augustine Kubende* [1982-1988] KAR at 1040, *Apallo J* (as he then was) the court relied on *Nyeri CA 18/2013 Richard Ncharpi vs IEBC*.

### **Issues, Analysis and Determination**

17. This Court has carefully considered the application, the law and the submissions by the parties. The issues that arise out of this application are:
  - a. Whether the ex-partes’ application dated 24<sup>th</sup> June, 2024 is merited; and
  - b. Who to bear the costs of the instant application.
18. At this point, it is worth noting that the facts in the instant application are virtually similar (in all respects) as those in *Homabay ELCJR No. E005 of 2024*. Thus, the format, analysis and conclusion hereunder may be so similar to that in the said other Judicial Review matter that it may confuse one who is not a keen reader. I now turn to the substance of the determination.
19. To begin with, I must say that the practice of learned counsel swearing the affidavits on behalf of their clients often disturbs courts. This should be the last resort for any counsel to do as doing it often makes the Advocate cease to be neutral in the conduct of his client’s case vis a vis the duty they owe to court, in terms of Section 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and even the Ethics of the legal profession. Learned counsel should only depone to facts which are within his or her knowledge in relation to a matter. It means that only those that come to his knowledge in the course of executing the instructions by the client should be the ones to depone to. Anything that was in regard to acts of a previous learned counsel or counsel who previously was on record can be, at best, inadmissible hearsay and cannot be deposed to as factual by the subsequent counsel unless they are backed with documentary evidence or apparently obvious on the record as such. For instance, when learned counsel



to deposes that the failure to file the substantive judicial review motion was a mistake by the said counsel and should not be visited on the client, it has to be pretty apparent from the record that indeed there was such a mistake and it was not as a result of inaction by the client. Inaction could include failure to give further or sufficient instructions to the advocate at the time. This must be borne clearly by either the advocate deposing to the fact or writing a letter owning to the lack of the instructions or the mistake on his part to do act as required by the law. It is not enough for the counsel to make blanket unsubstantiated allegations of mistake of counsel and get away with it.

20. In the instant application, for instance, whereas it was the same learned counsel who has been on record for the Ex Parte Applicant all along and she is the one who has sworn the Affidavit to say it was her mistake, the facts of the case are different. They show that indeed after the leave was granted on 6<sup>th</sup> May 2024 for the filing of the Judicial Review, both the advocate and the party took no action, or to say, went to sleep. Nowhere do the Ex Parte Applicants state that they took the step to act within the 21 days granted but the advocate acted otherwise or made a mistake. If anything, the documents filed to bring about the substantive Notice of Motion which was struck out show that it was on 30<sup>th</sup> May 2024 that both the party and the advocate drew the documents they were to file. So, the Ex Parte Applicants were busy instructing the Advocate on 30<sup>th</sup> May 2024 to file the application outside of the time. That was three days after the expiry of the period for the leave. Where then was the advocate's mistake as an individual to the exclusion of the client as to justify the contention by the learned counsel that it was her mistake? Even with such an error being noted that early, they did not do anything until 13<sup>th</sup> June 2024 when they purported to file the application. This cannot be attributed to learned counsel, as deponed in the supporting affidavit.
21. Turning now to the first issue, the instant application, as can be seen from the face of the application, seeks orders of maintenance of status quo pending the hearing and determination of the application as well as an extension of time for compliance. The compliance, according to the Ex-parte Applicants, relates to the filing and service of the ex-parte applicants' Notice of Motion application for the substantive Judicial Review within twenty-one (21) days. The Ex-parte applicants also pray that they be granted time to file what they refer to as their substantive notice of motion out of time. The Ex-parte applicants also pray for orders of maintenance of the status quo ante pending the heading of the whole case; and upon the same being granted, orders of maintenance of status quo pending the hearing and determination of the whole case. For that reason, this Court considers it important to, first, consider how applications for judicial review are brought before Courts for determination.
22. The law regarding applications filed under Order 53 of the Civil Procedure Rules, particularly, Rules 2 and 3(1) when it relates to timelines. The said provisions stipulate as below.
23. Order 53 Rule 2 is to the effect that,

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”
24. Order 53 Rule 3 (1) provides that

“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight



clear days between the service of the notice of motion and the day named therein for the hearing.”

25. The two provisions are to the effect that one has to seek leave for an application for certiorari within six months of the decision impugned. Once the leave is granted the substantive application is to be filed within twenty one (21) days of the order or leave being granted. The Court may, at the time of granting the leave, also order that the leave acts as a stay of execution of the decision impugned or the maintenance of the status quo at the time in order to preserve the subject matter.
26. As noted from the facts given by the applicants herein, and responded to by the Respondents, the applicants moved the Court for leave to file the substantive motion as required by law. Indeed, they sought it within the prescribed time. In the court granting it, they were given 21 days to file the motion. They did not. Thus, and this Court duly found when considering judicial review application that was filed after the lapse of the period granted, that the leave granted expired. It was not extended nor was a fresh one sought, if at all, it was appropriate to do so. Instead, the ex parte applicants filed the judicial review application, absence of leave notwithstanding.
27. In her supporting affidavit, in specifying the timelines that were in issue in the previous application, learned counsel for the ex-parte applicants deponed that in deed, the applicants herein had previously sought leave for judicial review orders of certiorari and this court granted leave to the ex-parte applicants on 6<sup>th</sup> May, 2024 to file their substantive motion within 21 days. The ex-parte applicants did not comply with these orders, and after the 21 days leave had lapsed, they filed an application dated 30<sup>th</sup> May 2024 which, in the words of the ex-parte applicant’s counsel, was filed out of time and without leave of court.
28. This application is premised on the background that as a consequence of the antecedent developments above mentioned, the interested parties filed a Preliminary Objection dated 13<sup>th</sup> November, 2024. This court rendered itself vide a ruling on 23<sup>rd</sup> April 2025 concerning the issue of lack of extension of time wherein the applicants had been granted leave to file a substantive Motion but failed to do in the stipulated timelines. For the avoidance of doubt, this court elaborately rendered itself in the said Ruling reported in the Kenya Law Reports as Republic v Cabinet Secretary-State Department for Lands & Physical Planning & 2 others; Otieno & 3 others (Ex parte Applicants); Ojwang & 4 others (Interested Parties) (Environment and Land Judicial Review Miscellaneous Application E006 of 2024) [2025] KEELC 3575 (KLR) at paragraph 32 in following terms:

“The Respondents’ preliminary objection dated 13th November, 2024 is merited. It is allowed with costs to the parties that raised and supported it. The Judicial Review Application is dismissed with costs to the parties who supported the Objection”.
29. Learned counsel blames the failure by the applicants to act in time, on a mistake by the previous learned counsel. It is apt to say here at this point that courts have time without number discussed on mistake of counsel in relation to its impact on a client’s matter. The matter is now settled, and it should be borne in mind, that not all mistakes of counsel are excusable. If they were to be of avail to the applicant, such mistakes have to be honest or bona fide or genuine, not adverted to, and not prejudicial to the adverse party. Furthermore, in my humble view, they should not be of professional negligence since such have their own realm of redress in terms of damages payable by counsel to the client: after all, why do lawyers take insurance covers for their practices. It is time everything was looked at from a genuine perspective. Insurance companies are rocking profits from legal practitioners due to provision of indemnity covers which are not utilized.
30. The Applicants herein blame the failure to file the substantive motion on the error of their advocates. They state that it was inadvertent and that mistake of counsel should not be visited on the client.



Indeed, as the Court of Appeal held in *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] KECA 485 (KLR),

“It is not unheard of for lawyers, even experienced ones, to overlook or fail to file appeal on time and in this case, I would not condemn unheard the applicant’s former advocates on record. The issue before me is not to determine whether the applicant’s former advocate on record was professionally negligent or not or whether they made a mistake or failed in their duty.”

31. Thus, cries about mistakes of counsel are not a thing of the past in our legal practice and there is nothing to suggest that they will soon subside. Courts will hear of such from time to time since counsel are human. But does their humanity found excuses of all nature of mistakes of counsel?

32. In *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR, the Court of Appeal held

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel’s duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.”

33. This Court would be ready and willing not to visit counsel’s mistake on the client, if only it is shown to be genuine or honest and not adverted to, and if counsel is not being disingenuous. Thus, the Court has carefully considered the factual statements made by the applicant’s counsel in the instant application. It is clear from the record that the issue of the delay in filing the substantive motion was raised in the Replying Affidavit sworn by the Respondents herein and also therein on 31<sup>st</sup> October 2024. If indeed the mistake was that of counsel, it should have been raised, even before the preliminary objection was heard, through a Supplementary Affidavit, in response to the Replying Affidavit that counsel had made a mistake. It was not. The previous learned counsel did not own to the mistake, through an affidavit or even a letter annexed to the affidavit sworn herein in support of this application. How can the Court believe such an allegation which is unsubstantiated or at best inadmissible hearsay? That mistake is being raised now, way after the court crossed the hurdle by considering both the Preliminary Objection and that same issue and the pleadings which based the bringing up of the Objection when it rendered itself in the Ruling that followed the preliminary objection. This Court is convinced that the alleged mistake of counsel is an allegation which is an afterthought aimed at going around the decision made on the Objection.

34. Besides, and in the circumstances of this case, the issues of extension of time were resolved in in this court’s ruling dated 23<sup>rd</sup> April 2025. That decision still stands. It has never been set aside. A decision on the same is thus final at the level of this Court, that is to say, this Court is *functus officio*. That means the Court is *functus officio* on the issue of time or extension thereof regarding the motion. Actually, the same issue as to whether there was leave or not as was raised through the Preliminary Objection and determined is now the same one before, wherein the applicant wants this Court to consider the time that lapsed and extend it. If this Court were to do so while the finding it made on the same still stands it would mean the Court shall have given life to that which it considered dead. Such an issue having been decided by this Court, on its merits in relation to the preliminary objection raised earlier and determined is *res judicata* to that extent. Hence, I agree with the Interested Parties contention that it is *res judicata*.



35. Since this Court is functus officio, only an appeal could have been appropriate for the applicants to file against it, or a review if merited. The ex-parte applicants cannot now purport to seek to extend time to file what they call a substantive Notice of Motion which I understand to be a substantive motion yet the decision that dismissed their application dated 30<sup>th</sup> May, 2024 filed on 13<sup>th</sup> June, 2024 still stands. Extension could only be sought when there is room for such to be done. Consequently, the applicants' application dated 24<sup>th</sup> June, 2025 is not merited. It is hereby dismissed.

**Who should bear the costs the application?**

36. It is trite that costs follow the event. Section 27 of the *Civil Procedure Act* is clear on this. Therefore, in line with this provision, the Ex-parte applicants shall bear the costs of this application.

37. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM  
THIS 16<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

In the presence of,

Court Assistant: Ms. Fiona Mutiva

Ms. Quinter Adoyo Advocate for the Ex Parte Applicants

Mr. Owino Advocate for the Interested Parties.

