Republic v Cabinet Secretary-State Department of Land and Physical Planning & 2 others; Rowa (Ex parte); Ngonrome & 4 others (Interested Parties) (Judicial Review E005 of 2024) [2025] KEELC 6286 (KLR) (16 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6286 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

JUDICIAL REVIEW E005 OF 2024

FO NYAGAKA, J

SEPTEMBER 16, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE CABINET SECRETARY -STATE DEPARTMENT OF LAND AND PHYSICAL PLANNING ..... 1ST RESPONDENT

THE DEPUTY COUNTY COMMISSIONER SUBA SUB-COUNTY ..... 2ND RESPONDENT

THE HONORABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

DISMAS ODHIAMBO OKELLO ROWA ..... EX PARTE

AND

SILAS OUKO NGONROME ..... INTERESTED PARTY

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

EDWIN OCHIENG AGIK ..... INTERESTED PARTY

KENNEDY ANTHONY ..... INTERESTED PARTY

KENNEDY OCHIENG OLELA ..... INTERESTED PARTY

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

RULING

The Application

1. Before me is a Notice of Motion dated 24th June 2025. The application is 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. It seeks the following Orders;

   1. ...Spent.

   2. ...Spent

   3. That the Honourable Court be pleased to extend time for compliance and allowing Counsel for the *ex-parte* applicant to file and serve his substantive Notice of Motion within a maximum of 7 days.

   4. That the Honourable Court be pleased to grant the *ex-parte* applicant leave to file the substantive notice of motion out of time.

   5. That upon hearing of this application, the Honourable Court be pleased to make orders for the maintenance of status quo ante pending the hearing and determination of the whole case.

   6. That Costs of this Application be in the cause.

2. The application is premised on the grounds that on 3rd May 2024, the *Ex Parte* applicant filed an *Ex Parte* Chamber Summons application dated 16th April 2025 in which he sought, *inter alia*, for leave to apply for orders of *certiorari* and prohibition against the 1st and 2nd Respondents, bringing and quashing the proceedings, ruling and the orders contained in the ruling delivered by the 1st Respondent on or about the 3rd day of November, 2023. Then, on the 6th May 2024, the court granted the leave with directions that the *Ex Parte* applicant commences judicial review proceedings by filing and serving the substantive motion within the next 21 days. Due to an inadvertent mistake on the part of the *Ex Parte* applicant's advocate, the said Applicant filed the substantive motion on the 13th June 2024 which was out of time and without leave of the court for extension of time. Consequently, the substantive motion was struck out with costs to the Respondents and the Interested Parties.

3. The *Ex Parte* Applicant contends that the substantive motion raises serious triable issues. It is therefore in the interest of justice that the *Ex Parte* Applicant be given a chance to file and prosecute the same to its logical conclusion. He urges that mistake of Counsel should not be visited upon an innocent party who is desirous of prosecuting his case to its logical conclusion. It is in the interest of justice that the instant application be allowed and unless that happens the *Ex Parte* applicant stands to suffer irreparable loss and damage.

4. The Supporting Affidavit sworn by learned counsel, Quinter Adoyo on 24th June 2025 is deponed along similar content in terms of facts as the grounds hence there is no need to repeat the same.

5. The Application was opposed through Grounds of Opposition dated 7th July 2025 filed by learned counsel for the Interested Parties. He filed them on 15th July 2025. They were that, the application was fatally and incurably defective for offending Order 53 Rules 1, 2 and 3 of the *Civil Procedure Rules* as read together with Section 9 (3) of the *Law Reform Act* on the basis that the leave to file the application for Judicial Review proceedings sought had already been granted by the Honourable

Court on 6th May 2024 for 21 days. The period expired on 27th May 2024 without the Applicant ever filing a substantive Notice of Motion Application as required by law. There was nothing therefore to extend. The Court had no power to grant extension of leave under Order 53 Rule 3 of the *Civil Procedure Rules*. The procedure for seeking leave in judicial review proceedings was strictly prescribed to be by way of Chamber Summons and not through a substantive Notice of Motion application. The applicant was time-barred in seeking for the leave. The application was *res judicata*. The application was brought in bad faith and constituted an abuse of the Court process.

6. At the inter partes hearing, the application was argued by way of written submissions. The Interested Parties filed their submissions dated 22nd July 2025. In them they singled out two issues, namely, whether the orders sought by *Ex Parte* applicants could be granted, and who to bear the costs of the application.

7. Regarding the first issue the Interested Parties argued that the leave granted Pursuant to Order 53 Rule 1 of the *Civil Procedure Rules* lapsed after the 21 days from 6th May 2024 and the applicants moved the Court without seeking an extension of time leading to the dismissal of their Notice of Motion hence there was nothing to extend. They reminded the Court about its reliance on the Supreme Court decision of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KECA 782 (KLR). They reproduced the contents Order 53 Rule 3(1) of the *Civil Procedure Rules, 2010* which they submitted was couched in mandatory terms and

8. They relied on the Court of Appeal decision of *Wilson Osolo v John Ojiambo Ochola & Another* [1996] eKLR (Civil Appeal No. 6 of 1995) to argue that this Honourable Court has no jurisdiction to grant the applicant leave to file the substantive application out of time.

9. On the argument of the matter being *res judicata* they did no ague on it but in regard to the application being time barred they contended that the decision sought to be challenged was made over one year and six months before the application hence it was time barred. On costs they argued that the Applicants meet the same.

10. On his part the *Ex Parte* Applicant filed submissions dated 14th August 2025. In them he singled out three issues 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* (sic), 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 such as Order 53 Rule 3 of the *Civil Procedure Rules* hence for one to succeed, 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.

14. The applicants called to their 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."

15. 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.

16. 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.

17. 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

18. 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 Parte* Applicant's application dated 24th June, 2024 is merited; and

    b. Who to bear the costs of the instant application.

19. 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. E006 of 2024, determined separately by this Court. 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.

20. 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 because by doing it, it often makes the Advocate cease to be neutral in the conduct of his client's case vis-à-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 are, 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 deposes herein that the failure to file the substantive judicial review motion was a mistake 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 that indeed it was one the advocate could not discover or commit knowingly, and was not due to inaction by his/her client. Adverted inaction could include failure to give further or sufficient instructions to the advocate at the time. This must be borne clearly by either the previous advocate's deposition over the matter or through a writing a letter owning to the lack of the instructions or the mistake on his part in not doing as required by the law. It is not enough for the new counsel to make blanket unsubstantiated allegations of mistake of counsel and get away with it.

21. In the instant application, for instance, whereas it was the same learned counsel who had been on record for the *Ex Parte* Applicant all along and she was the one who has sworn the Affidavit to say it was a mistake of counsel, the facts of the case are different. They show that indeed after the leave was granted on 6th May 2024 for the filing of the Judicial Review and both the advocate and the party took no action, or to say, went to sleep. Nowhere does the *Ex Parte* Applicant state that he took the step to act within the 21 days granted but the advocate failed to do as instructed or acted otherwise or made a mistake. If anything, the documents filed when the Applicant brought the substantive Notice of Motion which was struck out show that it was on 30th May 2024 that both the party and the advocate drew the documents they were to file. The application itself and the supporting affidavit sworn by the Applicant herein bear the said date. So, even the party/ applicant herein was busy instructing the Advocate on 30th 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? Even after discerning and committing such an error, they did not do anything until 13th June 2024. This cannot be attributed to learned counsel, as deponed in the supporting affidavit. Moreover, it is not shown when the *Ex Parte* Applicant gave his advocates the money for the filing of the substantive motion.

22. 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* Applicant, relates to the filing and service of the *ex-parte* applicant's Notice of Motion application for the substantive Judicial Review within twenty one (21) days. The *ex-parte* applicant also prays that they be granted time to file what they refer to as their substantive notice of motion out of time. The *ex-parte* applicant prays also 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.

23. 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.

24. 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."

25. 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 therein for the hearing."

26. 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.

27. As noted from the facts given by the Applicant herein, and responded to by the Respondents, the applicant moved the Court for leave to file the substantive motion as required by law. Indeed, he sought it within the prescribed time. In the court granting it, the applicant was given 21 days to file the motion. He 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* applicant filed the judicial review application, absence of leave notwithstanding.

28. In her supporting affidavit, in specifying the timelines that were in issue in the previous application, learned counsel for the *ex-parte* applicant deponed that in deed, the applicant herein had previously sought leave for judicial review orders of *certiorari* and this court granted leave to him on 6th May, 2024 to file their substantive Motion within 21 days. The *ex-parte* applicant did not comply with these orders, and after the 21 days leave had lapsed, he filed an application dated 30th May, 2024 which, in the words of the *ex-parte* applicant's counsel, was filed out of time and without leave of court.

29. 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 13th November, 2024. This court rendered itself vide a ruling on 21st January 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 State v Cabinet Secretary, State Department for Lands and Physical Planning & 2 others; Rowa (Exparte Applicant); Ngorome & 4 others (Interested Parties)*

(Judicial Review Miscellaneous Application E005 of 2024) [2025] KEELC 55 (KLR) (21 January 2025) (Ruling) at paragraph 24 in following terms:

> "It means that, indeed, the preliminary objection to the effect that instant application was filed without the leave of the court and contrary to Order 53 of the *Civil Procedure Rules* is merited. The Applicant did not even try to seek an extension of time to file it,...".

30. 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 from the provision of indemnity covers which are not utilized: they do not have to utilize them anyway.

31. 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."

32. 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?

33. 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."

34. 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 earlier, even as shown in the excerpt of the Ruling delivered on 21st January 2025. 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.

35. Besides, and in the circumstances of this case, the issues of extension of time were resolved in in this court's ruling dated 21st January 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*.

36. Furthermore, the applicant does not explain why he did not move the Court over such an application as the instant one from 21st January 2025 to 24th June 2025, a five-month period. That period is inordinately long. If needed an explanation for the inaction. It is prejudicial to the Interested Parties who have filed their Bill of Costs to tax it for purposes of realizing the fruit of their success in the matter.

37. 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* applicant 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 30th May 2024 and filed on 13th June 2024 still stands. Extension could only be source when there is room for such to be done. Consequently, the applicants' application dated 24th June, 2025 is not merited. It is hereby dismissed.

Who Should Bear the Costs the Application?

38. It is trite that costs follow the event. Section 27 of the *Civil Procedure Act* is clear on this and needs no elaboration. Therefore, in line with this provision, the *ex-parte* applicant shall bear the costs of this application.

39. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM THIS 16TH 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.