



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kalil & 3 others v Hassan (Environment and Land Appeal  
E001 of 2025) [2025] KEELC 5807 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5807 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT GARISSA  
ENVIRONMENT AND LAND APPEAL E001 OF 2025**

**JM MUTUNGI, J**

**JULY 31, 2025**

**BETWEEN**

**ADHAR KALIL ..... 1<sup>ST</sup> APPELLANT**  
**HAKIMA ZUBER ..... 2<sup>ND</sup> APPELLANT**  
**SAHARA MILE ..... 3<sup>RD</sup> APPELLANT**  
**MUHYADIN KALIL ..... 4<sup>TH</sup> APPELLANT**

**AND**

**FATUMA HUSSEIN HASSAN ..... RESPONDENT**

**RULING**

1. Before this Court is a Notice of Motion application dated 4<sup>th</sup> March 2025, brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Cap 21, Laws of Kenya, as well as Order 51 Rules 1 and 3 and Order 43 Rule 1 of the Civil Procedure Rules, 2010. The Applicant, Fatuma Hussein Hassan, seeks the following substantive reliefs:
  1. That this Honourable Court be pleased to allow the Respondent/Applicant an opportunity to respond to the application filed by the Appellants dated 20<sup>th</sup> January 2025.
  2. That the costs of the application be in the cause.
2. The application is supported on the grounds on the face of the application and by the Supporting Affidavit sworn by the Applicant, Fatuma Hussein Hassan on the same date. The Applicant deposed that the Appellants' application, dated 20<sup>th</sup> January 2025, which sought leave to file an Appeal out of time, was initially heard ex parte. Directions were given for the Respondent to be served and service was effected upon the Law Firm that represented the Applicant in the Lower Court, namely Paul Mugwe & Co. Advocates, whose engagement, the Applicant stated, had ceased with the conclusion of the Lower Court proceedings. The Applicant stated that she only became aware of this matter through a



Judicial Officer on 25<sup>th</sup> February 2025, by which time the Court had already granted the Appellants' application due to her non-attendance. She asserts that this situation denied her a fair opportunity to be heard, and unless the ex parte orders are set aside, she will suffer prejudice and violation of her constitutional right to a fair hearing.

3. The application was opposed by the Appellants on the Replying Affidavit sworn on 21<sup>st</sup> March 2025. The Appellants averred that the Applicant was properly served with the application dated 20<sup>th</sup> January 2025, along with the Memorandum of Appeal on 28<sup>th</sup> January 2025, when service was effected on the Firm of Paul Mugwe & Co. Advocates, who represented the Applicant in post-Judgment proceedings, in accordance with Order 9 Rule 9 of the Civil Procedure Rules.
4. The Appellants further averred that the applicant was physically present in Court on 25<sup>th</sup> February 2025, when the matter was called and she never responded resulting in the orders being made.
5. On 25<sup>th</sup> March 2025, the Court directed that the application be disposed of through written submissions. Both parties duly complied and their respective submissions are on record.
6. The Applicant filed her written submissions on 15<sup>th</sup> April 2025 and it is her assertion that the Appeal lacked merit and that the grounds outlined in the Memorandum of Appeal were not argued. She argues that granting an extension of time to Appeal would prejudice her, as it would delay her enjoyment of the Judgment that had been given in her favor. She averred that she intended to develop the suit property, but the ongoing litigation had resulted in both financial and time loss for her. She submitted that the Respondents delay in filing the application to set aside the Judgment was inordinate and was unexplained and had only been provoked by the Applicants application for execution.
7. The Respondents filed their written submissions on 28<sup>th</sup> April 2025. And it was their contention that the current application was an abuse of the Court process, as the Applicant was properly served through her advocates in accordance with Order 9, Rule 9 of the Civil Procedure Rules. The Respondents asserted that the delay in filing the Appeal was neither inordinate nor unreasonable and should be excused in the interest of justice. They urge the Court to allow the Appeal to proceed on its merits.
8. I have considered the application, the replying affidavit, and the parties' submissions. The issue for determination is whether the ex parte orders issued on 25<sup>th</sup> February 2025 should be set aside to allow the Applicant to respond to the application dated 20<sup>th</sup> January 2025.
9. Order 12 Rule 7 of the Civil Procedure Rules, 2010 provides for setting aside of exparte Judgments and/or orders and provides as follows:-

Where under this order Judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the Judgment or order upon such terms as may be just.
10. The above provision is amplified by Order 51 Rule 15, which provides that the Court may set aside an order made ex parte but in order to exercise the discretion to set aside, the Court must be satisfied that, either that the Applicant was not properly served or that the he/she failed to appear in Court at the hearing due to sufficient cause.
11. While considering the circumstances under which an ex-parte order may be set aside, the Court of Appeal in the case of Richard Nchapi Leiyagu v IEBC & 2 Others (2013) eKLR expressed itself as follows:-

“We agree with those noble principles which go further to establish that the Court's discretion to set aside an exparte Judgment or order for that matter, is intended to avoid



injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”

12. In the case of *Esther Wamaitha Njihia & 2 others v Safaricom Ltd* [2014] eKLR, the Court held *inter alia* that:-

“The discretion is free and the main concern of the Courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd.*) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration v Gasyali.*) It also goes without saying that the reason for failure to attend should be considered.”

13. The Respondents filed the application dated 20<sup>th</sup> January 2025, seeking stay of execution of the Judgment and for extension of time to file an Appeal out of time. Directions in regard to the application were issued *ex parte* on 27<sup>th</sup> January 2025, that the Applicant be served within five days and the application was fixed for *inter partes* hearing on 25<sup>th</sup> February 2025. On that date, the Court confirmed that the Applicant had been served with the application and had not filed a response, leading to the Respondents application being allowed. The Respondents were granted leave to file and serve the Appeal within 21 days of the date.

14. In the application by the Applicant before Court the issue is whether the Applicant was served with the application dated 20<sup>th</sup> January 2025. The record indicates that service was effected on the Firm of Paul Mugwe & Co. Advocates who represented the Applicant in the Lower Court on 28<sup>th</sup> January 2025. The Respondents assert that the firm which represented the Applicant in the Lower Court was actively involved in post-judgment matters, while the Applicant argues that her relationship with that Firm ended upon the conclusion of the trial; therefore, she believes that personal service was necessary.

15. Order 9 Rule 9 of the Civil Procedure Rules governs change of Advocates post-judgment. The provision provides that:

Change to be effected by order of Court or consent of parties When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

- a. upon an application with notice to all the parties; or
  - b. upon a consent filed between the outgoing advocate and the proposed incoming Advocate or party intending to act in person as the case may be.
16. In the case of *James Ndonyu Njogu –vs- Muriuki Macharia* (2020) eKLR the Court in buttressing the position regarding Order 9 Rule 9 of the Civil Procedure Rules, stated as follows:-

“Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should



be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.

17. In the case of *S.K. Tarwadi v Veronica Muehlemann* [2019] eKLR W. Korir J observed as follows:-

“..... the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a Judgment has been delivered and then sack the Advocate and either replace him with another Advocate or act in person. The provision is therefore an important one and cannot be wished away...”

18. The Court of Appeal in the case of *Tobias M. Wafubwa v Ben Butali* [2017] eKLR held that:-

“Once a Judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an Appeal to an Appellate Court is not a continuation of proceedings in the Lower Court, but a commencement of new proceedings in another Court, ... Parties should therefore have the right to choose whether to remain with the same Counsel or to engage other Counsel on Appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous Advocate.”

19. In the case of *Koske v Langat (Environment and Land Appeal E005 of 2021)(2022)KEEL 21958(KLR)(30 Nov 2023)(Ruling)* the Court observed as follows;

“The Applicant herein has submitted that an Appeal process represented an independent and distinct legal procedure, particularly when considering the intent and purpose behind Rule 9 of Order 9 of the Civil Procedure Rules. I am fully persuaded of the correctness of the said submissions, indeed where a Firm of Advocates had acted for a party in the Lower Court, those instructions are terminated and/or are spent or exhausted with the conclusion of the trial in the Lower Court. An appeal is different ball game; it can be filed by any other Firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. However, in the present scenario, by seeking stay of execution of the orders of the Trial Court, in effect is not related to an Independent Appeal but to a suit that was ongoing. The provision of the law envisages a situation like this one where after Judgment has been entered, a new Advocate desires to come on record for purposes of applying for stay of execution or to proceed with the execution proceedings in the previous suit. This scenario is different from one where an incoming Counsel directly files his Appeal (fresh proceedings) challenging the decision by the Lower Court.”

20. In the instant case the application brought by the Applicants dated 20<sup>th</sup> January 2025 principally was seeking stay of execution of the Judgment delivered by the Magistrate’s Court on 15<sup>th</sup> February 2024 and leave to file the Appeal out of time. As per the record the Appellants/Applicants filed a Notice of Motion application dated 11<sup>th</sup> September 2024 before the Lower Court seeking the setting aside of the said Judgment and stay of execution. The Record does not indicate what became of this application. The Lower Court had earlier vide an order given on 26<sup>th</sup> June, 2024 (annexed to the Applicant’s application and marked MK – 1(b) granted orders of execution of the Judgment against the Applicants.



21. The matter before the Lower Court had therefore been concluded and the issue of Appeal was definitely a separate matter and the Plaintiff/Respondent was at liberty to be represented by a different Counsel other than the one who represented him/her before the Lower Court.
22. Fatuma Hussein Hassan Respondent/Applicant in her application dated 4<sup>th</sup> March 2025 seeking to vary and/or set aside this Court's orders given *ex parte* on 25<sup>th</sup> February 2025 insists she was not served with the application dated 20<sup>th</sup> January 2025 as service was effected on her previous Advocates who were no longer acting for her as this was a new matter. The averments by the Respondent/Applicant are plausible as indeed the matter before the Lower Court had been finalized. There is no evidence on record that her previous Advocate notified the Applicant of the matter. That the previous Advocate did not file a Notice of Appointment and/or attend Court. It is quite probable that the Applicant had no knowledge of the application that led to the orders of 25<sup>th</sup> February 2025.
23. As observed by the Court of Appeal in the Case of Tobias M. Wafubwa –vs- Ben Butali (2017) eKLR, the Appeal process is not a continuation of the proceedings before the Lower Court but a commencement of new proceedings in the premises. I am persuaded the Respondent/Applicant was entitled to be heard on the application by the Applicants/Respondents dated 20<sup>th</sup> January 2025. I accordingly in exercise of discretion set aside the orders granted in favour of the Appellants/ Respondents on 25<sup>th</sup> February, 2025. I direct that the application dated 20<sup>th</sup> January 2025 be heard afresh. The Respondent is granted leave to file a response to the application dated 20<sup>th</sup> January 2025 within 30 days from the date of this Ruling. Mention on 24<sup>th</sup> September 2025 for further directions on disposal.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**J. M. MUTUNGI**

**ELC - JUDGE**

