**Musyoki v Mulei (Environment and Land Case 20 of 2020)**
**[2025] KEMC 260 (KLR) (13 October 2025) (Ruling)**

Neutral citation: [2025] KEMC 260 (KLR)

**REPUBLIC OF KENYA**

**IN THE MAKINDU LAW COURTS**

**ENVIRONMENT AND LAND CASE 20 OF 2020**

**YA SHIKANDA, SPM**

**OCTOBER 13, 2025**

**BETWEEN**

**JOHN MUSYOKI ..... PLAINTIFF**

**AND**

**JONATHAN MULEI ..... DEFENDANT**

**RULING**

1. The matter came up for defence hearing on 22/9/2025 whereupon Mr. Onyancha, learned counsel for the defendant made three applications as follows:

    a. The Forensic Documents Examiner's report be deemed as duly filed and served;

    b. The defendant be allowed to file and serve his witness statement;

    c. The matter be adjourned.

2. Following the arguments by the parties, the court adjourned the matter for purposes of writing the ruling. Technically, the third prayer was granted. The applications were opposed by counsel for the plaintiff. The parties made oral submissions in support of their divergent positions.

**Main Issues for Determination**

3. In my view, the main issues for determination are:

    i. Whether the court should admit the Forensic Documents Examiner's report and allow the defendant to rely on it;

    ii. Whether the defendant should be allowed to file and serve his witness statement out of time.

**Submissions by the Defendant**

4. Counsel for the defendant submitted that no prejudice would be occasioned to the plaintiff as the plaintiff may be recalled for further examination. Counsel further submitted that when he took over the matter, there had been three other firms acting for the defendant and that at the time of pre-trial directions, he had not discovered that the defendant's witness statement was not on record. That the defendant had typed the statement and sent it to his previous counsel for filing but the same was not filed.

**Submissions by the Plaintiff**

5. Mr. Mbithi, learned counsel for the plaintiff submitted that when a party appoints and advocate, it is presumed that the advocate is fully qualified and will do his best to defend his client. That it is irrelevant the number of counsel a party may engage. The plaintiff submitted that it is not a party's right, after confirming everything is in order, to state that an error occurred due to engaging various counsel. That the error should not be visited on the opposing party. Mr. Mbithi argued that Mr. Onyancha was on record when directions were taken and that his lack of diligence to confirm that everything was on record should not be visited on the plaintiff. That lack of diligence by counsel and his client cannot be excused. The plaintiff argued that there is no provision for a document to be filed later. That if the report was not on CTS before the pre-trial directions were taken, then it cannot be accepted at this stage.

6. It was argued that bringing in a new document at this stage would be prejudicial to the plaintiff's case. That counsel for the plaintiff has been having the report but kept it so as to ambush the plaintiff. The report was served after the closure of the plaintiff's case. The same arguments applied to the application to file a witness statement. Counsel for the plaintiff urged the court to decline the application and that if the same was allowed, the defendant should be condemned to pay punitive costs of Ksh. 30,000/=.

**Rejoinder by the Defence**

7. In a rejoinder, counsel for the defendant submitted that the plaintiff had notice that the document would be filed. That as at 27/5/2025 counsel for the defendant was not in physical possession of the report. Counsel argued that the court had discretion under section 1A and 3A of the *Civil Procedure Act*. Counsel urged the court to allow the application and stated that they were willing to pay costs but not as punitive as had been suggested by counsel for the plaintiff.

**Analysis and Determination**

8. I have considered the application together with the response by the plaintiff. Order 7 rule 5 of the Civil Procedure Rules provides:

> " The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—
>
> (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;
>
> (b) a list of witnesses to be called at the trial;
>
> (c) written statements signed by the witnesses except expert witnesses; and
>
> (d) copies of documents to be relied on at the trial.

9. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11."

Order 50 rule 6 of the same rules provides:

> " Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

10. It is evident from the above provisions that the defendant ought to have filed the statement and document together with the statement of defence. It is also clear that the time for such filing has since lapsed. The court has discretion to allow late filing of documents. In dismissing an application to file and serve a record of appeal out of time, G.B.M Kariuki JA (now retired) in the case of Aviation Cargo Support Limited v St. Mark Freight Services Limited [2014] eKLR, held as follows:

> " The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vissiccitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time".

11. Similarly, in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, the Supreme Court of Kenya held as follows:

> " Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigant's legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined..... Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it".

12. The Supreme Court, in the above case, then laid down the following underlying principles that a court should consider when exercising its discretion to extend time:

    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 for 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 is a consideration to be made on a case to case basis;

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

5. Whether there will be any prejudice suffered by the respondent if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases like election petitions, public interest should be a consideration for extending time.

13. I am aware of the provisions of Article 159(2) (d) of the *Constitution*. There are various judicial pronouncements concerning Article 159(2) (d) and in particular whether the provision is a cure for all irregularities. For instance, in the case of Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR, the Court of Appeal had this to say:

> We do not consider Article 159 (2) (d) to be a panacea, nor a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation. A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 as follows;
>
> > In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the *Constitution* and the overriding objective principle under Section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases."

14. Similarly, Kiage JA in the case of Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR stated as follows:

> ... I am not in the least persuaded that Article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."

15. The above holding was quoted with approval by the Supreme Court in the case of Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR, whereas in the case of Law Society of Kenya

v Centre for Human Rights & Democracy & 12 others [2014] eKLR the Supreme Court had this to say regarding Article 159(2)(d) of the *Constitution*:

> Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the *Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis (Raila Odinga and 5 Others v. IEBC and 3 others; Petition No. 5 of 2013, [2013] e KLR)".

16. In view of the foregoing, I would confidently and comfortably state that Article 159(2) (d) of the *Constitution* cannot be invoked by a party who blatantly and without reasonable excuse circumvents the rules of procedure nor a party who has been indolent and failed to exercise due diligence. the *Constitution* is not a panacea for every legal ailment. Similarly, this court, ordained as a judicial body should not be thought of as a safe haven for lethargic litigants. The key phrase is "without undue regard". In my opinion, it simply means that courts should not pay unwarranted attention to procedural technicalities. Parties must, at all times, strive to comply with the rules of procedure and where there is default, the same must be explained to the court.

17. The nature, extent and effect of the default must also be taken into consideration. A party in default cannot claim as of right, but must earn the court's succor under Article 159(2) (d) of the *Constitution*. The same applies to the overriding objective captured under sections 1A and 1B and the inherent powers of the court under section 3A of the *Civil Procedure Act*. The applicant must satisfy the court that he is entitled to an extension of time. Is the defendant entitled to an extension of time to file the documents? I will start by addressing the issue of the Forensic Document's Examiner's report. According to counsel for the defendant, the report in issue is dated 4/10/2023. That there was a first report which was an extract. Counsel for the defendant prays that the report be deemed as duly filed and served.

18. Filing of documents is done on the Case Tracking System (CTS) and not physically. I have checked the CTS and the report filed therein is dated 16/10/2023. The same was filed on 2/2/2025. There is no report dated 4/10/2023. There were pre-trial directions that were taken on 24/6/2024. Thus implies that the report was filed after the pre-trial directions had been taken. No reason has been given to explain why the report was not served upon the plaintiff's counsel immediately or soon after it had been filed. The matter came up for hearing on 28/10/2024 but counsel for the defendant did not mention the report nor make any application concerning the same. The matter came up for hearing again on 27/11/2024 but still, there was no mention of the report. The issue of the report was raised on 27/5/2025 after the plaintiff had closed his case.

19. The report was allegedly prepared on October, 2023 after the court made orders for the same in September, 2023. Counsel for the defendant stated that as at 27/5/2025, he was not in physical possession of the report. If that is the case, which is this report that was filed on CTS on 2/2/2025? No reasons at all have been given to explain why it took almost two years for the report to be made available. If indeed there is a report dated 4/10/2023, then the same is not on record and it would therefore be impossible for the court to deem as duly filed that which is not filed. A party who wishes the court to exercise its discretion in his favour must satisfy the court that the delay is excusable. A delay of almost two years is inordinate. It is not enough for a party to simply allege that it is a land matter. In fact, it is for that reason that a party ought to be vigilant and exercise diligence.

20. The court's 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Discretion must be

exercised judiciously. In exercising that discretion, the court should ensure that extension of time does not embarrass or prejudice the opposite party. In that regard extension of time should not be allowed where it is intended to fill gaps in evidence. Further, such prayer for extension of time will be defeated by inordinate and unexplained delay. In my view, extension of time is not an impossibility but there must be cogent reasons for the extension and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by filing new documents.

21. In the case of Hashi Shirwa v Swalahudin Mohamed Ahmed [2011] eKLR, while declining an application to re-open a case, the court held as follows:

> A court has a duty to ensure parties are fair to each other and not conduct trial by ambush. The role of the court in this shroud of mystery is to be an impartial umpire ensuring that there is no rough tackle and offside play. Litigants are not in a game of chess where for every move made, there must be a counter move and re-introduction of a checkmate. If the court allowed that, litigation would never end."

22. The same reasoning would apply to the circumstances of this case.

23. It is my opinion that extension of time is an indulgence requested from the court by a party in default. He is not entitled to the indulgence. 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 judiciously in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant to provide the court with a full, honest and acceptable explanation of the reasons for failure to file and serve the documents in good time. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

24. In the case of Argan Wekesa Okumu v Dima college Limited & 2 Others [2015] eKLR, Mabeya J held that when delay has been established, unless it is well explained, it becomes inexcusable. Section 1A of the *Civil Procedure Act* provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act and that the Court shall, in the exercise of its powers under the Act or the interpretation of any of its provisions, seek to give effect to the overriding objective. It is also provided that a party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. Section 1B of the *Civil Procedure Act* enjoins the court to ensure timely disposal of proceedings, among other things. The defendant has, without reasonable cause or excuse, failed to assist the court to further the overriding objective of the Act.

25. Expeditious disposal of disputes is key to all cases and is fundamental to the administration of justice. It is a component of substantive justice as opposed to mere procedural technicalities. I would borrow the words of the Court of Appeal in the case of John Ongeri Mariaria & 2 Others v Paul Mutundura [2004] 2 EA 163, wherein the Court observed quite authoritatively that:

> Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work must fall on their shoulders ....whereas it is true that the court has unfettered discretion, like all judicial discretions, must be exercised upon reason not capriciously or sympathy alone.....

justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent."

26. In the case of Aggrey O. Obare v Telkom Kenya Limited [2011] KEHC 2161 (KLR), Kimaru J (as he then was) had this to say on the issue of delay:

> In the present application, although the proceedings were ready on 30th August 2010, (within the period in which the applicant would have lodged the appeal) the applicant did not present the present application to this court until three months later i.e. on 1st December 2010. The applicant did not give a cogent reason for this delay. It is clear that the applicant was indolent. He is guilty of laches. This court cannot exercise its discretion in favour of such indolent litigant. The justice of this case demands that this court declines to exercise its discretion in favour of the applicant".

27. In the case of Abigael Barmao v Mwangi Theuri [2013] KEELC 78 (KLR), Munyao Sila J held:

> My view of this application is that the plaintiff has been guilty of laches. If a proper explanation had been provided as to why there has been a delay of more than 4 years, then probably I would have been moved to grant the injunction. But no explanation has been given, and I can only conclude that the plaintiff is guilty of delay. There is no doubt that 4 years before seeking relief is a period that is inordinately too long. I therefore decline to grant the injunction sought but make no orders as to costs. I direct the plaintiff to set down the suit for hearing and the matter to be determined on merits".

28. The remedy sought by the plaintiff is founded in equity and one of the maxims of equity is that "delay defeats equity". In Snell's Equity, 30th Edition at p 33 para 3-16 (quoting Lord Camden L.C in Smith v Clay (1767) 3 Bro. C.C. 639n. at 640n) it is asserted that a court of equity:

> has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the court is passive, and does nothing."

29. The defendant herein is guilty of laches. He has not even explained why he could not file the documents or move the court in good time. Why wait after the plaintiff has closed his case? Counsel for the defendant stated that he filed a list of witnesses and statements but did not realise that the defendant's statement was not among the documents filed.

30. In the case of Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] KECA 674 (KLR), the Court of Appeal observed:

> 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. (See. Halsbury's Laws of England,

4th Edn, Vol 44 at p 100-101) and also Re Jones [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:

> '....I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...'

Under this duty, counsel is unequivocally obliged to exercise candor and not aid a litigant in subversion of justice. Even though the determination of whether or not counsel has failed in this obligation is dependent on the circumstances of a case, as a custodian of justice, the court must always stay alive to the interests of both parties. This is of paramount importance. Thus, there is a corollary to the hallowed maxim that mistakes of counsel should not be visited on a client. This is to be found in the case Ketteman & others v. Hansel Properties Ltd [1988] 1 All ER 38; in which an application was brought for belated amendment of the defence; an amendment which had been necessitated by mistake of counsel. In his judgment, Lord Griffith stated that:

> Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings.'

.....In determining whether to exercise the discretion in a party's favour, the court pays regard to the damage sought to be forestalled vis a vis the prejudice to be visited on the opposing party. In view of the age of this case and the timelines within which the appellant has acted, we take the view that the appellant has been less than candid with the court and that the appellant's true intentions are the derailment of the suit.

31. Similarly, in Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] KECA 284 (KLR), the Court of Appeal held:

> Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them". (Emphasis supplied)

32. What plays out from the above considerations is that the defendant must give sufficient cause for the court to exercise its discretion in his favour. The Supreme Court of India in the case of Parimal v Veena Bharti AIR 2011 Supreme Court 1150, observed that:

> Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously" (Emphasis supplied)

33. My view is that the defendant has failed to show sufficient cause why the court should rule in his favour. The case was filed in 2020 and five years later, no statement by the defendant has been filed. The report sought to be relied upon was made in October, 2023 but it was not until February, 2025 that a report was filed on CTS. The same was not even served upon the plaintiff. I have already pointed out that no reasons at all have been given to explain why the report was not made available in good time. There is also a confusion as to which report the defendant intends to rely on. For the reasons given hereinabove, I see no reason to allow the application concerning the report. As for the witness statement by the defendant, although no good reasons have been given to explain the delay in filing and serving the same, I will exercise my discretion and allow the defendant to file and serve the statement. This is because I do not wish to lock out the defendant from giving his side of the story. To deny a party a hearing should be the last resort of the court.

**Disposition**

34. The upshot of the above considerations is that the application is partially allowed. Consequently, I make the following final orders:

    a. The application to deem the Forensic Documents Examiner's report as duly filed and served is declined. In effect, the report dated 16/10/2023 and filed on CTS on 2/2/2025 without leave of court is hereby expunged from the record;

    b. The defendant to file and serve his witness statement upon the plaintiff within seven (7) days from today;

    c. Upon service of the defence witness statement, the plaintiff shall be at liberty to recall any witness including the plaintiff himself, if need be;

    d. The defendant shall pay to the plaintiff costs of Ksh. 2,100/= for causing the adjournment on 22/9/2025, court adjournment fee of Ksh. 500/= as well as costs to the plaintiff owing to the delay. The costs are hereby assessed at Ksh. 10,000/=. The costs adjudged above shall be payable before the next hearing date.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 13TH DAY OF OCTOBER, 2025.**

**Y.A. SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**