

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELCEPA NO. E003 OF 2025**

**MURTADHA DAUD SIDIK ABDULWAHAB ..... 1<sup>ST</sup> APPELLANT/ APPLICANT**

**FAIZA YESLAM MOHAMED .....2<sup>ND</sup> APPELLANT/ APPLICANT**

**VERSUS**

**KHATIB ABDALLAH MWASHETANI ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 11<sup>th</sup> February, 2025, Murtadha Daud Sidik Abdulwahab and Faiza Yeslam Mohamed (*hereinafter "the Applicants"*) pray for orders as follows:

- 1) Spent;**
- 2) That the Appellants/Applicants be granted leave to file the Memorandum of Appeal out of time;**
- 3) Spent;**
- 4) That pending the hearing and disposal of this suit, the Respondent by themselves, their servants and or agents or otherwise howsoever be restrained by a temporary injunction from charging, leasing, selling, transferring or in any other way or manner whatsoever and howsoever interfering with the**

**parcel of land known as MN/I/20021 CR No. 60675 and MN/I/20022 CR No. 60674;**

**5) Spent;**

**6) That the Honourable Court be pleased to set aside and/or vacate the ex-parte Judgment and any consequential Decree passed on the 14<sup>th</sup> of August, 2024 against the appellants/applicants herein and this matter be heard on its merits; and**

**7) That cost of this Application be provided for.**

2. The application which is supported by the Affidavits sworn by one Mohamed Islam Saariy is premised on the grounds inter alia, that:

**i. The Applicants intend to appeal against the Judgment and Decree of the Chief Magistrates Court dated 14<sup>th</sup> and 18<sup>th</sup> August, 2024 respectively and have filed a Memorandum of Appeal;**

**ii. The Applicants were the registered proprietors of the parcels of land known as Title Numbers MN/I/20021 CR No. 60675 and MN/I/20022 CR No. 60674 situated in Nyali, Mombasa County;**

- iii. The Respondent initiated a suit before the Lower Court seeking to be registered as proprietors of the suit properties on the ground of adverse possession;**
- iv. The Applicants were unaware of the aforementioned suit as they were never served with any documents pertaining thereto;**
- v. Upon obtaining a judgment in his favour, the Respondents transferred the suit properties to his name and consolidated the suit properties into one parcel of land known as MN/I/24294 CR. No.85675;**
- vi. The Magistrates Court lacked pecuniary jurisdiction to hear and determine the suit as the properties are valued at Kshs 100,000,000/=; and**
- vii. It is therefore appropriate for the ends of justice that the orders sought be granted.**

3. Khatib Abdallah Mwashetani (the Respondent) is opposed to the application. By his Notice of Preliminary Objection dated 14<sup>th</sup> March 2025, the Respondent objects to the application on the grounds:

- a) **That the application is bad in law, misconceived and otherwise an abuse of the process of this Court;**
  - b) **That the application is supported by an Affidavit sworn by a person who lacks *locus standi* thus rendering it incompetent, null and void;**
  - c) **That the application is defective as it offends Order 51 Rule 10 of the Civil Procedure Rules, 2010 for the failure to cite the relevant laws upon which it is premised;**
  - d) **That the application offends Article 40 of the Constitution of Kenya 2010; and**
  - e) **That the annexures annexed in the Supporting Affidavit are defective, no current search has been filed and therefore the same should be expunged.**
4. In addition to the Preliminary Objection, the Respondent has filed a Replying Affidavit sworn on 18<sup>th</sup> March 2025 wherein he avers that the application is misconceived, vexatious, an afterthought and an abuse of the court process. The Respondent avers that the reasons advanced by the Appellants

to file an Appeal out of time are not sufficient as they were duly served as was directed by the trial court on 27<sup>th</sup> September 2021.

5. The Respondent further avers that the application for stay of execution is based on a deliberate ploy to delay and defeat the interests of justice. He asserts that the Appellants have not demonstrated the irreparable loss they are likely to suffer if the intended Appeal is rendered nugatory and that the prayers sought in the Appeal are negative and cannot be enforced as the suit properties are non-existent.
6. I have carefully perused and considered both the Appellants' application as well as the response thereto by the Respondent. I have similarly perused and considered the submissions placed before the court by the Learned Advocates representing the parties.
7. By their application before the court, the two Appellants have sought leave to file a Memorandum of Appeal out of time. They pray for a temporary order of injunction to restrain the Respondent from selling, transferring or charging the suit

properties and urge the court to be pleased to set aside the ex-parte judgment entered against them on 14<sup>th</sup> August 2024.

8. In opposition to the application, the Respondent has filed both a Notice of Preliminary Objection as well as an Affidavit in Reply. In his objection to the application, the Respondent asserts that the Appellants' application is incompetent null and void as the same is supported by an affidavit sworn by a person who lacks the locus standi to do so. It is further the Respondent's case that the application is defective as it offends Order 51 Rule 10 of the Civil Procedure Rules for its failure to cite the relevant laws upon which it is premised.
9. The term locus standi means the right to appear and be heard. It is trite that a person must have sufficiency of interest to sustain his standing to sue in a Court of Law. It was not clear to me the basis upon which the Respondents asserted that the Affidavit in support of the application has been sworn by a person who lacked standing. From the material placed before the court, in particular the annexure marked as Exhibit "A" in the said Affidavit, it was evident that the Appellants had donated their Power of Attorney to Mohamed Islam Saariy and

Salma Yeslam Mohamed as supported by the registered General Power of Attorney duly executed by the Appellants and dated 18<sup>th</sup> January 2012. The Affidavit in contention is duly sworn by one of the donees - Mohamed Islam Saariy and I was therefore satisfied that he had the locus to do so.

10. The second limb of the objection is based on the ground that the application offends Order 51 Rule 10 of the Civil Procedure Rules, 2010 for the failure to cite the law upon which it is premised. The said Order provides as follows:

**“51. Provision under which application is made to be stated**

- (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**
- (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”**

11. Arising from the express provisions of Order 51 Rule 10, it was self-evident that an objection cannot be founded on the mere failure to state the order or rule upon which it has been made.
12. The other ground of objection by the Respondent was that the application offends Article 50 of the Constitution of Kenya 2010. The Respondent did not elaborate on what aspect of the application offended the said Article of the Constitution and the manner in which it offended the same. The court was not persuaded that the Appellant's application offends any Article in the Constitution of Kenya.
13. Lastly, the Respondent faulted the application on the ground that the annexetures in the Supporting Affidavit were defective. The court was not persuaded however that that was a point of law which could be argued as a preliminary point. As was stated in the case of ***Oraro -vs- Mbaja (2005) 1KLR 141***:  
**“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”**

14. Arising from the foregoing, it was self-evident that the Respondent's Notice of Preliminary Objection was misconceived and without merit.

15. By their application before the court, the Appellants pray for leave to be granted to enable them to file a Memorandum of Appeal out of time. In addition, the Appellants pray for a temporary order of injunction restraining the Respondents from charging, leasing, selling, transferring or in any other manner interfering with the suit properties pending the hearing and determination of the Appeal.

16. Section 79G of the Civil Procedure Act, Cap 21 provides that:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

17. In the case of ***Thuita Mwangi -vs- Kenya Airways Ltd (2003) eKLR***, the Court of Appeal listed some of the considerations to be taken into account while dealing with an application for filing an appeal out of time as follows:

**1. The period of delay;**

**2. The reason for the delay;**

**3. The arguability of the appeal;**

**4. The degree of prejudice which could be suffered by the Respondent if the extension is granted;**

**5. The importance of compliance with time limits to the particular litigation or issue; and**

**6. The effect, if any, on the administration of justice or public interest if any is involved.”**

18. In the matter herein, the Appellants have filed the present application about six (6) months after the judgment sought to be appealed was amended on 18<sup>th</sup> August 2024. The

Appellants states that they were unaware of the suit as they were not served with the pleadings relating to the same.

19. That contention is heavily contested by the Respondent who avers as follows at Paragraphs 5 and 6 of the Replying Affidavit:

**“5. That the Applicants were duly served on 1<sup>st</sup> June, 2023 by way of substituted service through advertisement on the Standard Newspaper (annexed and marked “KAM-1” is a copy of the extract of the newspaper).**

**6. That upon service of the pleadings to the Applicants my advocates on record filed an affidavit of service (annexed and marked “KAM-2” is a copy of the affidavit of service).”**

20. In response to that position, the Appellants have sworn a Supplementary Affidavit indicating that as at the time of the said service, the Appellants were both outside the country and could not have had access to the said newspaper. In support of the position, they have annexed the passports which indicate

that the Appellants were out of the Country at certain points in time.

21. In the circumstances herein, I was persuaded that there was a possibility that the Appellants were completely unaware of the suit. While the delay in filing the application for leave may appear inordinate, there was no indication on the part of the Respondent when the judgment delivered in the absence of the Appellants was brought to the attention of the Appellants to enable them to appeal if they so desired.
22. In addition, it was clear to me that the Appeal was arguable and that the Respondent stood to suffer no prejudice whatsoever if the Appeal were heard and determined on merit.
23. In the premises, I do find merit in the Motion dated 11<sup>th</sup> February 2025. Accordingly, I hereby make orders as follows:
  - a) The Respondent's Notice of Preliminary Objection dated 14<sup>th</sup> March 2025 is hereby dismissed.**
  - b) The Appellant's Notice of Motion dated 11<sup>th</sup> February 2025 is allowed in terms of prayers 2 and 3 thereof.**
  - c) The Appellants have 21 days within which to file and serve the Memorandum of Appeal.**

**d)The costs of both the objection and the application shall be in the Appeal.**

**Ruling dated, signed and delivered in open court and virtually at Mombasa this 13<sup>th</sup> day of November, 2025**

.....  
**J.O. OLOLA  
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) No Appearance for the Appellants/Applicants
- c) No Appearance for the Respondent