Abdikarim v Mohamed & another (Environment and Land Appeal E033 of 2025) [2025] KEELC 7574 (KLR) (5 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7574 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E033 OF 2025

SM KIBUNJA, J

NOVEMBER 5, 2025

BETWEEN

ABDIWAHAB ABDIKARIM ..... APPLICANT

AND

ABDULKADIR ABUBAKAR MOHAMED ..... 1ST RESPONDENT

KHADIJA KIPROP IDI ..... 2ND RESPONDENT

RULING

1. The applicant filed the application dated 13th May 2025 seeking for the following orders:

   i. "Spent.

   ii. Spent.

   iii. The Honourable Court be pleased to grant leave for the firm of Edwin Yose & Co. Advocates to come on record for the applicant/intended appellant post judgment.

   iv. The Honourable court be pleased to extend time within which the applicant can lodge an appeal before this court.

   v. In alternative to prayer (4) above and without prejudice, the Honourable Court be pleased the appeal already filed to be properly on record and admit it officially to form part of the court's record.

   vi. There be temporary stay of execution pending the full hearing of the appeal.

   vii. Costs of this application be provided for."

   The application is premised on the twenty one (21) grounds on its face marked (a) to (u) respectively, and supported by the affidavit of Abdiwahab Abdikarim, the applicant, sworn on 13t May 2025, in

which he among others deposed that he has been served with a decree dated 17th August 2023 and order dated 26th February 2025 directing the police to assist in execution; that the said Decree is for demolition of his structures and his eviction from the suit property; that the judgment herein was obtained by the 1st respondent by default yet, he had instructed an advocate who never represented him; that he is the bonafide purchaser of the suit property for value without notice of any other rights over it; that the communication between him and his then advocate had irreversibly broken down and did not appear in court; that the hearing proceeded without his representation leading to adverse orders against him being made, and delay in lodging an appeal; that the mistakes of his advocate should not be visited upon him, and that this application obliges the court to preserve the subject matter; that the 1st respondent will not suffer any prejudice in the event the orders sought are granted.

2. The application is opposed by the 1st respondent through his replying affidavit sworn on 3rd June 2025, in which he deposed inter alia that the trial court's judgment was not a default one as the applicant's advocate attended court save that he failed to call any witnesses to adduce evidence; that this application has been brought with undue delay for over 3 years and the reason offered are not sufficient; that the appellant has not presented any evidence of his attempts to reach his advocates on record; that a litigant has a duty to check on his case to ensure that there is no delay, and he will suffer great prejudice as his constitutional right to the suit property is being infringed while he remains the registered owner of MOMBASA/MS/BLOCK V/550 & 551; that the appellant has not satisfied the condition for stay of execution and that this application is a gimmick to delay his enjoyment of the fruits of the judgment.

3. The learned counsel for the applicant and the 1st respondent filed their submissions dated 24th June 2025 and 8th July 2025 respectively, which the court has considered.

4. The application raises the following issues for the court's determinations:

    a. Whether the applicant has met the threshold for the court to extend the time to file an appeal out of time or alternatively, to deem the appeal filed as properly filed.

    b. Whether the applicant has satisfied the conditions for stay of execution pending the hearing and determination of the appeal for the order to issue.

    c. Who bears the costs of the application?

5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior court decisions cited thereon, and come to the following findings:

    i. The application herein is based on an appeal that was apparently filed out of time. It is therefore prudent to consider the prayer of extension of time first, and thereafter deal with that for stay of execution pending determination of the appeal. Section 79G of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides for appeals from the subordinate courts as follows:

        > " 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.."

        The trial court's judgment was delivered by Hon. Maureen Nabibya, SPM, on 17th March 2022, while the memorandum of appeal herein is dated and filed on 13th May

2025, which is over three years later. The appeal is therefore manifestly out of time. The said section 79G has a proviso that:

> " 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."

ii. In the case of Salat versus Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)) the Supreme Court laid down the following as the underlying principles that a court should consider in exercise of discretion to extend time:

i. Extension of time is not a right of a party. It is equitable remedy that is available to a deserving party at the discretion of the court;

ii. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

iii. As to whether the court should exercise the discretion to extend time, is a consideration to be made on a case-by-case basis;

iv. Where there is a reason for the delay; the delay should be explained to the satisfaction of the court;

v. Whether there will be any prejudice to be suffered by the respondents if the extension is granted;

vi. The application should have been brought without undue delay; and

vii. In certain cases, like election petitions, public interest should be a consideration for extending time."

What comes out clearly from the above principles from the apex court is that extension of time is a granted at the discretion of the court, and that the applicant has an obligation to explain the delay to its satisfaction. The applicant does not offer sufficient explanation on the three years delay, other than stating that his then counsel failed him by not attending court and not informing him of the trial dates.

iii. It is apparent that the trial suit was filed in 2018, and the applicant appear to be telling the court he was unable to communicate with his advocate from that year up to the time he was served with the decree and letter for police assistance early this year. Though the court may understand that the applicant is a layman and might not have been aware that it was his duty to follow up on his case after filing it, his long delay without checking on the progress from his advocates on record, or the court, can only lead any reasonable person to believe he had lost interest in the suit. Any reasonable person would have sought help from another advocate if the one he had was not acting on the instructions given or responding to his inquiries. The court is of the opinion that the appellant was simply indolent in not pursuing the matter, and only took action after the said decree and order were served upon him in early 2025. The application therefore ought to be dismissed prima facie based on the above findings, but considering the disputes between the parties is over land, which is always an emotive issue, the court finds this to be a proper case to exercise its discretion and allow the prayer for extension of time to file an appeal.

iv. Going to the prayer for stay of execution pending the appeal, the court has referred to the decision in the case of Jaber Mohsen Ali & Another versus Priscillah Boit & Another [2014] KEELC 132 (KLR) where the court held as follows:

> " The applicant needs to demonstrate three elements. There must be demonstration that substantial loss will result if stay is not granted; secondly, the application must be made without unreasonable delay; and finally, there needs to be security for the due performance of the decree. Much has been said about the respective strengths of the cases of the parties but that is not a consideration under Order 42 Rule 6. Apart from the three elements, the essence of an application for stay pending appeal is aimed at preserving the subject matter of litigation to avoid a situation where a successful appellant only gets a paper judgment. That said, it must be appreciated that the respondent is a successful litigant who is entitled to benefit from the fruits of the judgment. The interests of both parties therefore needs to be balanced as was stated by the Court of Appeal in the case of Reliance Bank vs Norlake Investments Ltd (2002) 1 EA 227."

It is apparent once again, that the application was made with unreasonable delay, which delay the applicant has not sufficiently addressed. The applicant has also not particularized the substantial loss likely to be suffered or sustained if the stay order was not granted. What the court gathers from the supporting affidavit that speaks to the element of substantial loss is the fear that he will be evicted, and his structures demolished. Indeed, the trial court's judgement does confirm that there are structures on the suit property, albeit temporary. There is nothing presented to show that the respondent would not be in a position to compensate the applicant should he emerge victorious on appeal. Although the applicant has attempted to show the strength of his intended appeal, I do not find reasonable basis to stop the respondent from enjoying the fruits of his judgement.

v. On the prayer for the firm of Edwin Yose & Co. Advocates to come on record for the applicant, the guiding provision of the law is Order 9 Rule 9 of the Civil Procedure Rules. In the case of Lalchand Fulchand Shah v Investments & Mortgages Bank Limited & 5 others [2018] eKLR the court held that:

> " Order 9 Rule 9 is not intended to lock out a litigant who was previously unrepresented from instructing an advocate after judgment without leave. The mischief it cures is the mischief of changing advocates behind the back of an advocate who has already rendered services."

I have perused the trial court proceedings, and it is clear the appellant who was one of the two defendants in the trial suit was represented by Munyale for Abubaker during the proceedings of 3rd March 2020, when the ruling on the application dated 9th July 2019, was delivered. The trial court inter alia made a finding that the "respondent is already in occupation.." and ordered that "the current status to be maintained. That means that there should be no further constructions, selling and transfers." The record also show that the defendants advocates were absent in the subsequent proceedings including the hearing of 15th February 2022, and 17th March 2022, when the judgement was delivered by the trial court. However, the defendants did not attend court throughout the proceedings before the trial court, and they have not exhibited any enquiries they may have made to their advocates on record, or the court on the status of

the suit. They only claim that there was a breakdown of communication between them and their advocates without offering more.

vi. I have noted that the 2nd respondent has filed a memorandum of cross appeal dated the 30th May 2025 through the firm of Aboubakar Mwanakitina & Co. Advocates, which firm had appeared for both defendants in the trial court matter. It would without much ado appear that the said firm did not deem itself as advocates for the 1st Defendant, and prayer for change of advocates should be allowed.

vii. That under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless otherwise ordered. In this instance, I find as the respondents cannot be blamed for the delay in filing the appeal that precipitated this application, the costs will abide the outcome of the appeal, notwithstanding that the applicant has substantially succeeded in the application.

1. From the foregoing determinations on the application dated 13th May 2025, the court finds and orders as follows:

    i. That the firm of Edwin Yose & Company Advocates is granted leave to come on record for the applicant/intended appellant.

    ii. That the time for filing an appeal is extended by fourteen (14) days from today.

    iii. Consequently, the record of appeal be filed and served in thirty (30) days from today.

    iv. That the prayer for stay of execution pending hearing and determination of the appeal is rejected.

    v. The costs of the application to abide the outcome of the appeal.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF NOVEMBER 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Applicant : Mr Yose

Respondents : Mr. Isika for 1st Respondent

Kalekye-court Assistant.

S. M. KIBUNJA, J.

ELC Mombasa.