



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
JUDICIAL REVIEW CASE NO. E002 OF 2025

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF CERTIORARI AND PROHIBITION (JUDICIAL REVIEW)**

AND

IN THE MATTER OF ARTICLES 22 (1), 23 (3), (f), 47 & 50 OF THE CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

**IN THE MATTER OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA
SECTIONS 8 & 9**

BETWEEN

FORTUNE SACCO SOCIETY LIMITED.....APPLICANT

-AND-

THE PRINCIPAL MAGISTRATE COURT, WANGÚRU.....1ST RESPONDENT

AGNES WAENI.....2ND RESPONDENT

RULING

[1] By a Notice of Motion under certificate of urgency dated 29/5/2025 pursuant to sections 1A, 1B and 3A and 95 of the Civil Procedure Act, the Applicant seeks that:

1. *Spent*
2. *This Honourable Court be pleased to set aside and/or review the Orders of the Court made on 26th May 2025 and extend the time for filing the substantive Notice of Motion Application for Judicial Review.*
3. *This Honourable court be pleased to order stay of execution against the Applicant in respect of the ex-parte Judgment and the Decree of the Honourable Principal*

Magistrate Court at Wang'uru in Wang'uru MCCC/E136/2023 dated 18th July 2024 and all the consequential orders pending inter-partes hearing and determination of this Application.

4. *This Honourable court do grant the Applicant leave to file its Notice of Motion Application for Judicial Review forthwith for determination on merit.*

5. *Costs of this application be in the cause.*

[2] The application is premised on the grounds on the face of it and supported by an affidavit sworn by Eric Kibue, the Applicant's Advocate on even date. He avers that aggrieved by the trial court's decision in Wang'uru MCCC/E136/2023, the Applicant successfully obtained leave of this court to apply for judicial review orders of prohibition and certiorari. However, when the matter came up for mention in court on 26/5/2025, the Applicant was yet to file the substantive application for judicial review, for the reason that the Advocate handling the matter abruptly left the Applicant's firm of advocates on record. The said application was ready for filing on 26/5/2025, and unless the prayers sought herein are granted, the Applicant's arguable Judicial Review application will abate unheard, entirely prejudicing its rights to justice and fair hearing. It is only fair and in the interest of justice that the Applicant be allowed to vindicate its substantive Judicial Review Application in this suit. The application was filed promptly, and if there has been any delay, any prejudice caused to the 2nd Respondent can be sufficiently compensated by way of costs.

[3] The 2nd Respondent swore a Replying Affidavit on 3/6/2025 in opposition to the application. The 2nd Respondent equally filed grounds of opposition dated 3/6/2025 that:

1. *The application is incompetent and should be struck out by the court on the ground that Eric Kibue advocates who has drawn the application and the supporting affidavit does not have a valid practicing certificate for the year 2025 and is therefore disqualified by Section 9 (c) of the Advocates Act from acting as an advocate, LSK has issued a letter to that effect and is attached to the replying affidavit.*

2. *The application is flawed in that the exparte applicant has not attached in its application a copy of the order which is alleged to have been made on 26th May 2025 and which it's seeking to set aside or review because to the best of our knowledge there were no specific orders that were made on 26th May 2025 what*

the Honorable Judge indicated on that day was that “there was nothing before him to determine”.

3. *The applicant is in contempt of the Court in that it willfully disobeyed lawful orders of this court issued on 24th April 2025 which required the substantive motion to be filed within 21 days but failed to comply and therefore, the Honourable court should not entertain this application.*
4. *The ex parte applicant’s counsel Mr. Kibue advocate who is the proprietor of Kibue Mugiira & Mbagara Advocates has failed to disclose to this court that Wanjehia Advocate who held his brief, informed the court on 26/5/2025 that the previous Advocate who was handling the matter (Mr. Kamau) left employment 7 days ago which meant that he left employment on 20th May 2025 which was 7 days outside the prescribed period of 21 days.*
5. *The Application is defective and should be dismissed with costs on the ground that the applicant has not presented to court any evidence of either a resignation letter or a handing over report to prove that Mr. Kamau advocate left employment before the lapse of the prescribed period of 21 days on 14th May 2025.*
6. *The prayer for stay of execution being sought by the applicant is misplaced in that Order 53 (1) (4) of the Civil Procedure rules clearly states that, stay of the proceedings can only operate once leave has been granted by the court, and therefore in this particular case leave which was granted by the court on 24th April 2025 and which served as a stay of proceedings lapsed on 14th May 2025 and therefore the stay of execution being sought cannot be granted in the absence of a leave.*
7. *The ex parte applicant’s prayer for enlargement of time is misplaced in that Order 53 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act which deals with Judicial review proceedings does not have any provision for enlargement of time to file substantive motion outside the prescribed period of twenty-one (21) days.*
8. *The application is incompetent, misconceived and improperly before the court and should therefore be struck out with costs to the 2nd respondent.*

Applicant’s Submissions

- [4] The Applicant attributes its failure to comply to the leaving of its erstwhile counsel, who was in conduct of this matter. It urges that the instant application was filed without inordinate delay, and the explanation for it is reasonable and excusable. It urges that the court has jurisdiction to enlarge the time within which to file the Notice of Motion, and cites *Mwangi v Attorney General & Another (Judicial Review Miscellaneous Application E020 of 2022 (2023) KEHC 2023 (KLR) (Judicial Review) (28th September 2023) Ruling, George Kangethe Waruhiu v Esther Nyamweru Munene & Another (2021) eKLR and Wilson Osolo v John Ojiambo Ochola & another (41996) KECA 217 (KLR).*
- [5] The Applicant further urges that Advocate Eric Kibue is competent to practice law and submits that it has demonstrated sufficient cause for the exercise of this court's discretion to enlarge time. It urges that any prejudice that the Respondents stand to suffer if the application is allowed, can be compensated by an award of costs. It urges the court to consider the weighty issues, to wit, the decree was issued in excess of jurisdiction by the trial court, and grant an order for maintenance of the status quo. It urges that it can deposit the decretal sum in court pending the determination of the matter, as a show of good faith.

The 2nd Respondent's Submissions

- [6] The 2nd Respondent urges that the law does not permit the grant of the orders being sought, and only Sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules apply to these kind of proceedings. She urges that the Applicant's advocate is negligent, indolent and in contempt of the court orders of 24/4/2025 and should not shift blame to the associate, and cites *Mativo v Kenya Commercial Bank [K] Limited (Cause E001 of 2021) [2023] KEELRC 326 (KLR) (9 February 2023) (Ruling) and Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti [2018] eKLR.* She cites *Republic v Inspector General National Police Service & 2 others Ex-Parte Linda Okello & 2 others [2016] KEHC 846 (KLR)*, where the court held that, "... *The court cannot ignore its order stipulating the period within which the exparte applicant was supposed to file the substantive motion. Where there was no compliance with the court order, that failure cannot be a technicality curable under Article 159 of the Constitution.*"

[7] The 2nd Respondent urges that no convincing reason has been given why the court should exercise its discretion in favour of the Applicant, and prays for the dismissal of the application with costs. She urges that Mr. Eric Kibue advocate does not have the Practicing Certificate for the year 2025 and is therefore prohibited and barred from drawing, taking instructions or preparing any documents or instrument, as provided for under section 9 (c) of the Advocates Act, and cites *National Bank of Kenya v Wilson Ndolo Ayah [2009] eKLR, Musiara Ltd v Ntimama [2004] 2 KLR, Mohamed Ashraf Sadique & Another v Mathew Oseko t/a Oseko & Co. Advocates [2009] eKLR, Belgo Holdings Ltd v Esmail (2005) 2 E.A 28 and Daniel Ogera Obonyo v Edwin Akach Okinda [2017] KEHC 8962 (KLR).*

Analysis and Determination

- [8] Upon consideration of the application, the responses thereto and the submissions on record together with the cited authorities, the sole issue for determination is whether the Applicant has established sufficient cause to warrant the grant of the orders sought.
- [9] With respect, while the time for bringing an application for orders of certiorari may be limited by section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules providing that applications for an order of *mandamus*, prohibition or certiorari shall, in specified proceedings, be made within six months, the filing of the Notice of Motion upon grant of leave may be extended in the usual way as permitted by the provisions of section of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, which applies to all proceedings under the Civil Procedure Rules.
- [10] Order 50 Rule 6 of the Civil Procedure Rules provides for the power to enlarge time as follows:

“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.”

[11] The explanation proffered by the Applicant for the delayed filing of the substantive application within the prescribed time is the leaving of the advocate previously seized of the matter.

[12] When the matter came on 26/5/2025 for direction on the Notice of Motion which should have been filed 21 days after grant of leave, Mr. Wanjihia Counsel holding brief for Counsel for the applicant sought an extension of time to file the Notice of Motion explaining that “we have not filed the Notice of Motion as the Counsel Mr. Kamau left the firm abruptly last week. I pray for an extension of time to file Notice of Motion.” Counsel Ms. Wangari who held brief for Ms. Njeri Ngunjiri for the respondent objected to the extension of time and directed the counsel to file a formal application which the Counsel for the respondent could formally respond to and mention was set for 10/7/2025 for directions as to its hearing.

[13] While the explanation of counsel leaving may not be entirely factual, as that counsel is said to have left the firm on 5/5/2025, which was 10 days before the 21-day window within which the Applicant was required to file the motion closed, this court deems it fit to grant the extension sought, in the interests of justice.

[14] This Court considers that the issue of lack of a practising certificate on the part of an advocate may be cured by a filing by proper filing by an advocate with a current practising certificate and the default should not be used to defeat an otherwise valid application on behalf of the applicant, as the applicant may well have approached the court in person. In the interests of justice, the Court shall allow the extension of time to file the application, and the parties shall all be heard on the substantive application on its merits.

[15] The Applicant will, however, in terms of Order 50 rule 6 of the Civil Procedure Rules, be mulcted in costs.

ORDERS

[16] Accordingly, for the reasons set out above, the Applicant’s application dated 29/5/2025 is allowed in the following terms:

1. The Applicant is granted seven (7) day's leave to file and serve the substantive Notice of Motion application for Judicial Review.
2. The Applicant shall pay to the 2nd Respondent the costs of this application to be agreed or taxed in default of agreement.
3. In the event of default, the leave herein granted shall lapse and be of no effect.

Order accordingly.

DATED AND DELIVERED THIS 16TH DAY OF DECEMBER 2025.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Mr. Magee for the Applicant.

Ms. Wangari for Ms. Njeri Ngunjiri for the 2nd Respondents.