

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT

GARISSA

ELCLA NO. E015 OF 2025

ABDI ADEN

KAIRI

APPLICANT

VERSUS

OMAR MOHAMUD DOLAL

RESPONDENT

RULING

***[NOTICES OF MOTION DATED 8TH DECEMBER 2025, 11TH
DECEMBER 2025 & 22ND JANUARY 2026]***

1. The applicant moved the court through the notice of motion dated 8th December 2025 seeking for the orders inter alia that:
 - a. The firm of Duwane & Wethrow Advocates be granted leave to come on record for him;***
 - b. Leave be granted to file an appeal out of time against the judgment delivered on 29th February 2024 in Garissa CMELC Case No. 05 of 2020;***

c. Upon leave being granted, the annexed draft memorandum of appeal be deemed duly filed un payment of requisite fees;

d. Pending the hearing and determination of the intended appeal, a temporary injunction be issued restraining the Respondent from interfering with Plot Numbers GSA/2644 A & B, measuring 0.6Ha, situated at Bulla Medina, Garissa.

On 9th December 2025, the court issued directions on service of the application and fixed it for hearing on 24th March 2026.

2. The applicant subsequently filed a second application dated 11th December 2025 seeking for inter alia, review or variation of the directions issued on 9th December 2025, which had scheduled the hearing of the application dated 8th December 2025 for 24th March 2026. In its directions of 16th December 2025, the court directed it be served for inter parties hearing on 26th February 2026.
3. The applicant filed a third application dated 22nd January 2026 seeking for among others review of the orders of 16th December 2025 scheduling the application dated 11th December 2025 for hearing on 26th February 2026. The court issued directions that the application be served for hearing on 26th February 2026.

4. In the second and third applications, the applicant in addition to seeking for review of the previous orders, sought for temporary injunction and status quo orders restraining the Respondent from entering or interfering with the suit property, as well as orders directing the Officer Commanding Station, Garissa Police Station, and the County Commissioner, Garissa Sub-County, to enforce the orders of this Court. The principal distinction between the two applications is that the second application was supported by an affidavit sworn by counsel intending to come on record for the Applicant, while the latter application was supported by an affidavit sworn by the Applicant himself. That though the three applications are related the last two can only stand to be considered if the first one succeeds especially on the prayer for extension of time to file an appeal. Conversely, should the first application for enlargement of time fail, the other two will fall by the way, and the court will not need to make any merit determinations on them. It is therefore necessary to proceed to determine the applications sequentially, by their dates.

5. The application dated 8th December 2025 is supported by the affidavit of Abdi Aden Kairi, the applicant, who deposed to among others that he is the lawful allottee and beneficial owner of Plot Numbers GSA/2644 A & B situated at Bulla Medina within Garissa County, and that he complied with all allotment requirements issued by the County Government; that due to the respondent's

interference with the said parcels of land, he instituted Garissa CMELC Case No. 05 of 2020 before the Magistrates' Court; that during the trial, he produced documentary evidence from the County Government confirming his ownership of the property; that the respondent relied on alleged ownership documents that were never verified, yet the trial court relied on them while disregarding his documentary evidence and the testimony of his witness; that the judgment in the matter was delivered on 5th March 2024, but that his previous advocate failed to inform him of the delivery of the judgment or its outcome in good time; that as a result, he was unable to lodge an appeal within the prescribed period; that the delay in filing the appeal in time was due to difficulties he encountered in obtaining typed proceedings and a copy of the judgment necessary for the preparation of an appeal; that the disputes between the parties escalated, resulting in confrontations which caused him physical harm and ill health, thereby affecting his ability to follow up the matter promptly; that the dispute between the parties also gave rise to Garissa Criminal Case No. E273 of 2025, which later proceeded to the High Court, thereby consuming considerable time and complicating the civil dispute; that the respondent continues to enter and interfere with the suit property, threatening his security and preventing him from developing or utilising the land; that the intended appeal raises arguable issues relating to the evaluation of

ownership documents and the trial court's failure to properly consider his evidence; that he should be granted leave to appeal out of time, and the court should issue interim injunctive orders to preserve the suit property pending determination of the appeal.

6. The application is opposed by Omar Mohamed Dolal, the respondent, through the replying affidavit sworn on 25th February 2026, in which he inter alia deposed that following the delivery of the judgment on 5th March 2024, the applicant filed an application for review dated 26th March 2024 before the trial court that was heard, and dismissed for lack of merit in a ruling delivered on 31st July 2024; that the Applicant had earlier filed an appeal, being Garissa ELC Appeal No. E001 of 2024 on 28th March 2024, that he failed to prosecute, and later withdrew it; that the applicant later sought to revive that appeal through an application dated 18th November 2024; that he subsequently withdrew the appeal altogether through a notice of withdrawal dated 21st March 2025, and the court marked the appeal as withdrawn; that the Applicant has been fully aware of the judgment and has actively participated in proceedings arising from it; that the present application is an abuse of the court process, particularly because the Applicant had already invoked the trial court's jurisdiction to review the judgment and prosecuted that application to conclusion; that once the Applicant elected to pursue review, he forfeited the option of appealing against the judgment and his only recourse, if

any, would have been to appeal against the ruling dismissing the review application, which he has not done; that the applicant has been using court proceedings to shield himself from criminal complaints arising from alleged acts of trespass and property destruction; that the Applicant has persistently interfered with the suit property, even setting fire to structures thereon, matters that were reported to the police, and the application should be dismissed with costs.

7. The application was heard on 26th February 2026, when the learned counsel for the applicant and respondent made their rival oral submissions which the court has considered.

8. The counsel for the Applicant submitted inter alia that the dispute between the parties concerns ownership of the suit property and that the Applicant had produced documentary evidence during the trial demonstrating his ownership. Counsel argued that the trial court failed to properly evaluate that evidence and instead relied on what he described as a questionable sale agreement produced by the Respondent. Counsel further submitted that although a review application had been filed, that step should not bar the Applicant from pursuing an appeal where justice demands otherwise. He urged the Court to exercise its discretion to extend time in order to prevent the Applicant from being unjustly deprived of his property.

9. On the other hand, counsel for the Respondent, submitted inter alia that the application is a clear abuse of the court process. He argued that the Applicant had already elected to pursue review of the judgment and prosecuted that application to conclusion. In his view, the law does not permit a party who has chosen the review process to subsequently appeal the same judgment. Counsel also pointed out that the Applicant had earlier filed an appeal, which he later withdrew, and that the Applicant has been fully aware of the judgment since its delivery. He therefore urged the Court to dismiss the application with costs.
10. The issues that arises for determination by the court in the application are as follows:
 - a. Whether the Applicant is entitled to leave to file an appeal out of time against the judgment of the trial court, having previously pursued an application for review of the same judgment.***
 - b. Who pays the costs?***
11. The Court has carefully considered the grounds on the notice of motion, affidavit evidence, submissions by the learned counsel and come to the following findings:
 - a. That one of the prayers in the application seeks leave for the firm of Duwane & Wethrow Advocates to come on record for the Applicant. In light of the fact that the said advocates are the ones through whom the application was filed, and noting that no objection to

the prayer was raised by the Respondent the Court finds it to be uncontested and is allowed.

- b. The main prayer by the Applicant is the extension of time to appeal pursuant to *Section 79G* of the Civil Procedure Act, chapter 21 of Laws of Kenya, which empowers the court to admit an appeal out of time, where the appellant demonstrates good and sufficient cause for failing to file the appeal within the prescribed period.
- c. The Supreme Court in the case of ***Nicholas Kiptoo Arap Salat versus Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR*** outlined the guiding principles governing applications for extension of time. They include the length of the delay, the reason for the delay, the chances of the intended appeal succeeding, and the degree of prejudice to the respondent. The circumstances of the present case raise a more fundamental legal question, on the legal implication of the application for review that was made previously, and dismissed.
- d. The record demonstrates that shortly after the judgment of 5th March 2024, the Applicant elected to challenge the decision through an application for review dated 26th March 2024, before the trial court. That application was heard and dismissed in a ruling

delivered on 31st July 2024. The law has long recognised that the remedies of review and appeal are mutually exclusive.

e. *Order 45 Rule 1* of the Civil Procedure Rules allows a party to apply for review of a decree or order where no appeal has been preferred. *Order 45* provides that:

“(1) Any person considering himself aggrieved –

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of

such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

- f. The Court of Appeal in the case of **Rafiki Microfinance Bank Limited versus Youth Enterprise Development Fund Board [2024] KECA 239 (KLR)** reiterated that once a party elects to pursue review of a judgment, and prosecutes that application to conclusion, that party cannot thereafter turn around and pursue an appeal against the same judgment. The Court in that case stated that:

“It is apparent from the foregoing that the review remedy is only available to a party who though has a right to challenge the decision in question by an appeal, is not appealing, or to whom there is no right of appeal. In other words, a person cannot exercise both the right of appeal and review at the same time.”

The rationale for this rule is to prevent litigants from engaging in procedural manoeuvres that would allow them to relitigate the same decision through different procedural avenues in the hope of obtaining a favourable outcome.

- g. In the present case, the Applicant not only pursued a review application to conclusion, but had also filed an

appeal which he later withdrew. Having already taken those steps, the Applicant now seeks leave to file yet another appeal out of time against the same judgment. In the Court's view, granting the orders sought would serve no useful purpose because the law does not permit a party who has already prosecuted a review application to conclusion, to subsequently appeal against the same judgment.

- h. The Applicant has attempted to explain the alleged delay by alleging that he was not informed of the delivery of judgment by his previous advocate. However, the record demonstrates that the Applicant filed a review application barely three weeks after the judgment was delivered. This fact clearly demonstrates that he was aware of the judgment, and actively participated in subsequent proceedings arising from it, contrary to his claim. In the circumstances, the explanation offered for the delay cannot be accepted, and his prayer for extension of time is without merit. Since the Court has declined to grant the prayer for leave to appeal out of time, there is therefore no competent appeal capable of supporting the prayer for interim injunctive relief, and the prayer for injunction equally fails.
- i. That having come to the conclusion that the application dated 8th December 2025 for leave to appeal out of time is without merit, it follows that the

two subsequent applications dated 11th December 2025 and 22nd January 2026 are left on quick sand, there being no appeal they could be grounded on, and they are to be struck out.

- j. *Section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya provides inter alia that costs follow the event unless where for good reasons the court orders differently. In this matter, the applicant has failed in his application and should therefore bear the respondent's costs.

12. Consequent to the foregoing conclusions, the orders that commend themselves to be issued, and which I issue are as follows:

- a. That save for prayer (2) for the firm of Duwane & Wethrow Advocates to come on record for the applicant post judgement that is granted, the rest of the application dated 8th December 2025 is without merit and is dismissed.***
- b. The applications dated 11th December 2025 and 22nd January 2026 are struck out.***
- c. The applicant is to meet the respondent's costs.***

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25TH DAY OF MARCH 2026.

**S. M. Kibunja, J.
ELC GARISSA.**

IN THE PRESENCE OF:

APPLICANT: N/A

**RESPONDENT: MR. OWINO FOR M/S ROBLE
MUHAMED-COURT ASSISTANT.**

J.

**S. M. Kibunja,
ELC GARISSA.**