



**Kalil & 3 others v Hassan (Environment and Land Appeal  
E001 of 2025) [2026] KEELC 2461 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KEELC 2461 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT GARISSA  
ENVIRONMENT AND LAND APPEAL E001 OF 2025**

**SM KIBUNJA, J**

**APRIL 30, 2026**

**BETWEEN**

**MUHYADIN KALIL ..... 1<sup>ST</sup> APPLICANT**

**ADHAR KALIL ..... 2<sup>ND</sup> APPLICANT**

**HAKIMA ZUBER ..... 3<sup>RD</sup> APPLICANT**

**SAHARA MILE ..... 4<sup>TH</sup> APPLICANT**

**AND**

**FATUMA HUSSEIN HASSAN ..... RESPONDENT**

**RULING**

1. The applicants filed the Notice of Motion dated 20<sup>th</sup> January 2025 seeking for inter alia the following orders:
  - a. That there be a stay of execution and/or implementation of the decision delivered on 15<sup>th</sup> February 2024 pending the hearing and determination of the application;
  - b. That they be granted leave to file an appeal out of time against the said judgment; and
  - c. That costs be in the appeal.

The application is predicated on the eight (8) grounds on its face and supported by the affidavit of Muhyadin Kalil, 1<sup>st</sup> applicant, sworn on 20<sup>th</sup> January 2025.

From the material placed before the Court, the Applicants' case is that judgment was entered against them on 15<sup>th</sup> February 2024 in default of appearance and/or defence, following which the matter proceeded ex parte. They contend that, as a result, they did not participate in the hearing, including the cross-examination of the Respondent and her witnesses.



2. The Applicants depose that they subsequently moved the subordinate court by way of an application dated 11<sup>th</sup> September 2024 seeking to set aside the said judgment. That application was heard and dismissed in a ruling delivered on 8<sup>th</sup> January 2025. It is their position that, following the dismissal of the application to set aside, the Respondent has taken steps towards execution of the decree.

The Applicants further attribute their failure to effectively participate in the proceedings to earlier developments in the suit. In particular, they refer to applications dated 4<sup>th</sup> November 2020 and 25<sup>th</sup> November 2020, which, according to them, resulted in the 1st, 2nd, and 3<sup>rd</sup> Applicants being committed to civil jail for a period of one month. They contend that their incarceration at the time hindered their ability to engage counsel and to coordinate their defence as co-defendants in the suit.

3. It is also their contention that, owing to those circumstances, they were unable to cross-examine the Respondent and the witnesses called in support of her case. They nonetheless maintain that they were desirous of defending the claim, and point out that some of them had filed replying affidavits in CMELC No. 013 of 2020. The Applicants aver that unless the orders sought are granted, they stand to suffer substantial loss in view of the ongoing execution process.

They further state that the intended appeal raises arguable issues and that no prejudice will be occasioned to the Respondent that cannot be compensated by an award of costs. They maintain that the present application has been brought without undue delay, particularly in light of the intervening proceedings culminating in the ruling delivered on 8<sup>th</sup> January 2025.

4. The application is opposed by the respondent through her replying affidavit, inter alia deposing that the application is frivolous, incompetent, and an abuse of the court process. Her position is that the Applicants have failed to meet the settled legal principles governing the grant of leave to appeal out of time. In particular, she contends that the Applicants have not provided a satisfactory explanation for the delay, have not demonstrated that the intended appeal is arguable, and have not shown that she will not suffer prejudice if the orders sought are granted.

5. On the issue of delay, the Respondent deposes that the judgment sought to be appealed against was delivered on 15<sup>th</sup> February 2024 in the presence of the parties and/or their advocates, and that the Applicants were therefore fully aware of it from the date of delivery. Despite such knowledge, she avers, the Applicants took no immediate steps to challenge the judgment, only filing an application for review or setting aside approximately 167 days later. That application was ultimately dismissed, and the present application was only filed over one year after the delivery of judgment. In her view, the delay is inordinate and remains wholly unexplained.

The Respondent further asserts that the Applicants cannot rely on the intervening application for review to justify the delay, maintaining that such proceedings do not suspend or extend the statutory timelines for filing an appeal. In that regard, she relies on the decision in *Otieno Ragot & Co. Advocates versus National Bank of Kenya* [2020] eKLR.

6. Turning to the merits of the intended appeal, the Respondent contends that the same is devoid of merit and raises no arguable issues. She disputes the Applicants' assertion that they were denied the right to be heard, stating that the record demonstrates that they were duly served, appointed counsel, and participated in the proceedings to the extent of filing a replying affidavit, but subsequently failed to attend the hearing. In her view, any non-participation was therefore voluntary.

7. With respect to the Applicants' reliance on their committal to civil jail, the Respondent avers that such committal arose from their disobedience of court orders and was of limited duration, while the suit itself proceeded over a period exceeding two years. She contends that the Applicants have not



demonstrated how the said committal prevented them from instructing counsel or participating in the proceedings.

The Respondent also defends the findings of the trial court, asserting that the court properly evaluated the evidence and reached its decision on a balance of probabilities. She maintains that she produced documentary evidence of ownership, which was not controverted, and that the Applicants have not demonstrated any misdirection in law or fact to warrant appellate interference. In her view, the grounds of appeal, including allegations of misapplication of the law, are vague and unsupported.

8. On prejudice, the Respondent avers that she stands to suffer substantial harm if the application is allowed, as it will delay the execution of a lawful judgment and hinder her quiet possession and development of the suit property, thereby occasioning financial and developmental loss. It is therefore her position that the Applicants have been indolent, have failed to act within the prescribed timelines, and are merely seeking to delay and frustrate the execution process. She urges the Court to dismiss the application with costs.
9. Pursuant to directions issued on 24<sup>th</sup> September 2025, the application was canvassed by way of written submissions. The learned counsel for the Applicants filed their written submissions dated 6<sup>th</sup> October 2025, in which they identified three issues for determination: whether they have demonstrated that leave to file an appeal out of time should be granted; whether they have satisfied the conditions for stay of execution pending appeal; and who should bear the costs of the application.
10. On the question of leave to appeal out of time, counsel for the Applicants relied on Section 79G of the *Civil Procedure Act*, which prescribes a 30-day period for filing appeals from subordinate courts, but allows admission of an appeal out of time where sufficient cause is shown. Counsel reproduced the provision and submitted that, while the law permits extension of time, an appeal ought to be filed either before or contemporaneously with an application for such leave. In that regard, reliance was placed on *Mugo & Others versus Wanjiru & Another* (1970) EA 482.
11. Counsel reiterated that the judgment of the trial court was entered on 15<sup>th</sup> February 2024 in default of appearance, and that the matter proceeded ex parte without the Applicants being afforded an opportunity to be heard.

It was further submitted that the Applicants subsequently moved the trial court to set aside the judgment, but their application was dismissed on 8<sup>th</sup> January 2025. Counsel maintained that the delay in filing the intended appeal was neither inordinate nor unreasonable, and urged the Court to excuse the same in line with the spirit of *the Constitution* of Kenya, 2010.

On the issue of stay of execution, counsel submitted that the applicable principles are set out under Order 42 Rule 6(2) of the Civil Procedure Rules. It was contended that the Applicants had satisfied the conditions stipulated therein, and the Court was urged to grant stay pending appeal.

Counsel concluded by praying that the application be allowed, with costs in the cause.

12. The learned counsel for the Respondent filed written submissions dated 11<sup>th</sup> August 2025 in opposition to the application. Counsel submitted that the Applicants had failed to satisfy the well-established principles governing extension of time, had not offered any credible explanation for the delay, and that the intended appeal was devoid of merit. Counsel emphasized that the power to extend time is discretionary and must be exercised judiciously, placing reliance on *Fakir Mohammed versus Joseph Mugambi & 2 Others* (2005) eKLR, *Mwangi v Kenya Airways Ltd* (2003) KLR 486, and *Wasike v Swala* (1984).



13. On the merits of the intended appeal, counsel addressed the grounds raised by the Applicants. On the alleged denial of the right to be heard, it was submitted that the record shows the Applicants were duly served, appointed counsel, and filed a replying affidavit, but failed to attend the hearing, and cannot therefore claim violation of their rights. On the contention that committal to civil jail impeded their participation, counsel submitted that such committal is limited in duration and, in the present case, the proceedings spanned over two years, with no evidence that the Applicants were denied communication with counsel.
14. Counsel further submitted that the trial court properly evaluated the evidence and reached its findings on a balance of probabilities, and that the Respondent’s documentary evidence of ownership was not controverted. The alleged misapplication of the law was described as vague and unsupported.
15. On the issue of delay, counsel submitted that the Applicants were aware of the judgment from the date of its delivery in open court, yet took no steps until approximately 167 days later, and only filed the present application 366 days after judgment. In support of the argument that the delay was inordinate, reliance was placed on *Dahir versus Board of Management Bulla College Primary School & Another* (CA E298 of 2024), where a delay of seven months was held to be inordinate, and *Githau versus Kagiri & Another* (CA No. 314 of 2013), where a delay of 13 days was found to be insufficiently explained.
16. On prejudice, counsel submitted that allowing the application would occasion substantial prejudice to the Respondent by delaying execution, hindering her use and development of the suit property, and causing financial loss not fully compensable in damages.

Addressing the Applicants’ reliance on constitutional principles, counsel submitted that while Articles 48 and 50 of *the Constitution* guarantee access to justice and the right to be heard, those rights must be exercised within the framework of the law. Reliance was placed on *Nicholas Kiptoo Arap Korir Salat versus IEBC & 7 Others* (2014) eKLR, where the Court underscored that extension of time is not a right but an equitable remedy granted at the discretion of the Court.

Counsel concluded by urging the Court to find that the Applicants had been indolent, and that the application was intended to delay the course of justice, and to dismiss the same with costs.

17. The following are the issues arising for determination by the court on the application:
  - a. Whether the Applicants have satisfied the threshold for grant of leave to file an appeal out of time;
  - b. Whether the Applicants have met the conditions for stay of execution pending appeal.
  - c. Who pays the costs?
18. Having carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior court decisions cited thereon, the court comes to the following conclusions:
  - a. On whether the Applicants have satisfied the threshold for leave to appeal out of time, the starting point is Section 79G of the *Civil Procedure Act*, which mandates that an appeal from a subordinate court be filed within thirty days from the date of the decree or order appealed against. The proviso thereto vests this Court with discretion to admit an appeal out of time where the appellant demonstrates “good and sufficient cause” for the delay. That discretion, while wide, is not to be exercised capriciously. It is an equitable jurisdiction to be invoked upon a proper and satisfactory explanation for the delay, and upon material that justifies the Court’s intervention.



b. In the present case, the judgment sought to be appealed against was delivered on 15<sup>th</sup> February 2024. The instant application was filed on 20<sup>th</sup> January 2025. The delay is therefore in the region of eleven months. The explanation advanced by the Applicants is that the judgment was entered in default, the matter proceeded undefended, and that they subsequently moved the trial court to set aside the judgment, an application which was dismissed on 8<sup>th</sup> January 2025.

c. The following two observations arise from the record:

Firstly, the proceedings before the trial court, as captured in the judgment, indicate that the suit proceeded as an undefended claim on account of the Applicants' failure to file a statement of defence, and further that, despite service, they did not tender any evidence. That position has not been displaced before this Court. The assertion that they were denied an opportunity to be heard must therefore be considered against that backdrop;

Secondly, and more fundamentally, the Applicants have not provided a satisfactory explanation for the delay in lodging the intended appeal.

d. While the Applicants rely on the filing of an application to set aside the judgment, no basis has been laid to demonstrate that such a step precluded them from complying with the timelines set under Section 79G. The law does not bar a party from pursuing an appeal while, or instead of, seeking to set aside a judgment. The election to pursue one remedy cannot, without more, constitute sufficient cause for delay in invoking the other.

Further, the Applicants have not accounted for the period between 15<sup>th</sup> February 2024 and 11<sup>th</sup> September 2024 when the application to set aside was filed, nor have they offered a cogent explanation for the delay thereafter until the filing of the present application. The explanation tendered remains general and unparticularised. In the Court's view, the delay herein is inordinate and has not been satisfactorily explained.

e. The Court has also considered the Memorandum of Appeal now placed on record. The grounds therein, in substance, challenge the manner in which the proceedings were conducted, the alleged denial of an opportunity to be heard, and the trial court's findings on ownership and evaluation of evidence.

At this stage, the Court is not called upon to determine the merits of the appeal. However, it suffices to observe that the grounds, as framed, largely invite a re-evaluation of facts in circumstances where the record before the trial court indicates non-participation by the Applicants despite service.

While that does not, of itself, render an appeal unarguable, it underscores the need for a proper foundation to be laid before this Court when seeking to reopen the matter outside the prescribed timelines. In any event, arguability, though a relevant consideration, cannot cure the absence of a satisfactory explanation for delay. The cornerstone of Section 79G remains "good and sufficient cause," and where that is lacking, the discretion of the Court cannot be invoked in favour of the applicant.

f. On prejudice, the Respondent has demonstrated that she has obtained an eviction order and stands to be delayed in enjoying the fruits of her judgment and in the use and development of the suit property. The Applicants, on their part, apprehend eviction. The Court is not insensitive to that concern. However, equity aids the vigilant, not the indolent. A party who



seeks the Court's discretion must place before it sufficient and credible material to justify such intervention.

Taking a holistic view of the matter, the Court is not satisfied that the Applicants have demonstrated good and sufficient cause to warrant the extension of time. The prayer for leave to appeal out of time must therefore fail.

- g. The prayer for stay of execution is predicated upon the existence of a competent appeal. In the absence of leave to appeal out of time, no valid appeal lies before this Court upon which an order of stay can be anchored. Even if the Court were to consider the prayer on its merits, the Applicants would still not meet the threshold under Order 42 Rule 6(2) of the Civil Procedure Rules, as the application has not been brought without unreasonable delay; no specific or demonstrable substantial loss has been established beyond general assertions; and no security for the due performance of the decree has been offered. The Applicants have therefore failed to satisfy the conditions for grant of stay.
- h. Costs under Section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya follow the event unless where otherwise ordered by the court on reasonable grounds being presented. In this instance, the applicants have failed in their application and I see no good cause why they should not pay the respondent's costs.

19. In view of the foregoing determinations, the court finds and orders as follows:

- a. That the Notice of Motion dated 20<sup>th</sup> January 2025 is devoid of merit and is hereby dismissed.
- b. The applicants to bear the respondent's costs.
- c. There being no valid appeal pending, the file be closed.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 30<sup>TH</sup> DAY OF APRIL 2026.**

**S. M. KIBUNJA**

**ELC JUDGE**

In the presence of:

Applicants – Mr. Upendo

Respondent – Mr. Chachi

Mohammed- Court Assistant

**S. M. KIBUNJA**

**ELC JUDGE**

