



**Abdalla v Dzimba (Environment & Land Miscellaneous Case  
E086 of 2024) [2025] KEELC 902 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 902 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E086 OF 2024**

**YM ANGIMA, J**

**FEBRUARY 27, 2025**

**BETWEEN**

**SWALEH ABDALLA ..... APPLICANT**

**AND**

**MOHAMED JUMA DZIMBA ..... RESPONDENT**

**RULING**

**A. Applicant's application**

1. Vide a notice of motion dated 06.11.2024 expressed to be brought pursuant to Order 42 rule 6, Order 51 rule 1 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the *Civil Procedure Act* (Cap 21) and all other enabling provisions of law, the applicant sought the following orders;
  - a. That pending the hearing and determination of the intended appeal there be a stay of execution of the ruling dated 29.02.2024 in Mombasa CMCC No.1246 of 2007.
  - b. That pending the hearing and determination of the appeal there be an order stopping the respondent from evicting the applicant from the house standing on plot No.9/XVI/31.
  - c. That leave be granted to the applicant to file an appeal out of time against the ruling and order of the trial court dated 29.02.2024 in Mombasa CMCC No. 1246 of 2007.
  - d. That costs of the application be provided for.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the applicant on 06.11.2024. The applicant stated that he was aggrieved by the ruling of the trial court dated 29.02.2024 which found him in contempt of the decree of the trial court dated 23.12.2016. He stated that he was not made aware of the said decree until he was served with an eviction notice in August 2024.



3. It was the applicant's case that sometime in December 2016 he filed an application to set aside the judgment of the trial court and that the said application was still pending since no ruling thereon had been delivered. He further blamed his former advocates for having failed to timeously lodge his intended appeal against the orders made on 29.2.2024. He thus prayed for a stay of execution to prevent him from being committed to jail for contempt of court.

#### **B. Respondent's response**

4. The respondent filed a notice of preliminary objection dated 4.12.2024 objecting to the application on the following grounds;
  - a. That the application was an abuse of Sections 75G and 79G of the Civil Procedure Act (Cap 21).
  - b. That it was res judicata.
  - c. That it was frivolous, vexatious and an abuse of the court process.
5. The respondent also filed a replying affidavit sworn on 04.12.2024 in opposition to the application. He stated that the applicant had failed to prosecute his application dated 12.12.2016 for several years as a result of which he applied for enforcement of the decree of the trial court vide an application dated 29.12.2022. He further stated that in response to the said application the applicant pleaded that he had a pending appeal on the same dispute being High Court Civil Appeal No. 185 of 2016.
6. It was the respondent's contention that the said appeal was ultimately struck out by the High Court on 14.02.2023. It was his further response that the applicant's application to reinstate his appeal was unsuccessful. The respondent was of the view that the applicant's intended appeal had no chances of success and that the applicant was not a diligent litigant since he was served with an eviction notice on 06.08.2024 but did not move to file the instant application until November 2024. As a consequence, the respondent urged the court to dismiss the said application with costs.

#### **C. Directions on submissions**

7. When the matter came up for directions it was directed that the preliminary objection and application shall be canvassed together through written submissions. The record shows the applicant filed written submissions dated 15.01.2025 whereas the respondent's submissions were dated 14.01.2025.

#### **D. Issues for determination**

8. The court has perused the notice of motion dated 06.11.2024, the notice of preliminary objection, the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that respondent's notice of preliminary objection dated 04.12.2024 does not raise proper preliminary objections as known to law but merely grounds of opposition which can be considered in opposition to the application. As a result, the court shall frame the following issues for determination herein;
  - a. Whether the application is res judicata or an abuse of the court process.
  - b. Whether the applicant has made out a case for extension of time to file his intended appeal out of time.
  - c. Whether the applicant is entitled to a stay of execution of the ruling and order made on 29.02.2024 pending appeal.



- d. Whether the applicant is entitled to an injunction to restrain the respondent from evicting him pending appeal.
- e. Who shall bear costs of the application.

## **E. Analysis and determination**

### **a. Whether the application is res judicata and an abuse of the court process**

- 9. The court has considered the material and submissions on record. The respondent submitted that the application was res judicata and an abuse of court process because there was no pending appeal against the decree of the trial court dated 23.12.2016. It was submitted that the appellant's appeal was struck out and that his bid to reinstate the same was not successful.
- 10. The court agrees with the applicant's submission that the instant applicant is not res judicata since it is seeking to challenge the trial court's order of 29.02.2024 finding him in contempt of court. There is no evidence on record to show that a similar application by the applicant has previously been heard and determined by a court of competent jurisdiction. There mere fact that his earlier appeal was dismissed by the High Court does not make the instant appeal an abuse of the court process since his appeal was challenging the contempt of court proceedings against him. As a consequence, the court finds no basis for holding that the instant application is res judicata or an abuse of the court process.

### **b. Whether the applicant has made out a case extension of time to file his intended appeal out of time**

- 11. The court has considered the material and submissions on record. Whereas the applicant submitted that he had satisfied the requirements for extension of time to file his appeal out of time, the respondent contended otherwise. The applicant seemed to blame the trial court and his previous advocates for his inability to lodge his appeal within the prescribed period.
- 12. Section 79G of the [Civil Procedure Act](#) on the filing of appeals stipulates 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:

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”

- 13. The factors to be considered in granting or denying an application for extension of time to lodge an appeal out of time were summarized in the case of *Thuita Mwangi -vs- Kenya Airways Ltd* [2005] eKLR as follows:

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi*, (Civil Application No Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the



delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the Respondent if the application is granted”

14. There is no dispute that the impugned ruling of the trial court was delivered virtually on 29.02.2024. There is no dispute that the instant application dated 06.11.2024 was not filed until November 2024, about 8 months later. The applicant’s explanation for the delay was that he was not aware of the ruling even though he was represented by an advocate and that he only became aware of it when he was served with an eviction notice.
15. The court has noted that the applicant did not exhibit any letter, affidavit, or communication from his previous advocates on his alleged lack of knowledge of delivery of the ruling of 29.02.2024, or that they were to blame for the delay in lodging an appeal against it. The court has noted that the applicant was quite economical with the truth especially on when he received the eviction notice from the respondent. He completely avoided mentioning the date or month when it was served. He simply annexed a copy of the notice dated 06.08.2024 and left it to the court to guess when it was received.
16. In his replying affidavit, the respondent swore that the eviction notice was served upon the applicant on 06.08.2024. The applicant did not controvert the respondent’s allegation on the date of service. If the eviction notice was served on 06.08.2024, then the applicant has not explained the further delay of 3 months in filing the instant application, that is, between 06.08.2024 and 06.11.2024. The court takes the view that the applicant has a duty to establish sufficient cause and to give a plausible explanation for every period of delay.
17. It is also evident from the application and the supporting affidavit that the applicant blamed the trial court for some delay in availing a copy of the ruling dated 29.02.2024. The court has noted that the applicant was again completely silent on when the ruling was made available to him or his previous advocates. It was his case that the ruling of 29.02.2024 was delivered virtually because the trial court was on transfer. So, if the ruling was ready by 29.02.2024, did it take more than 8 months for the court file to be returned to Mombasa? The court is not satisfied that the applicant has demonstrated sufficient cause within the meaning of Section 79G of the [Civil Procedure Act](#) to warrant an extension of time.

**c. Whether the applicant is entitled to a stay of execution of the ruling and order made on 29.02.2024 pending appeal**

18. It is evident that the prayer for a stay and injunction were intended to serve as an interim relief pending the hearing and determination of the intended appeal. The court has already found and held that the applicant has failed to establish sufficient cause to warrant an extension of time to lodge an appeal out of time. It would, therefore, follow that the applicant is not entitled to either a stay or injunction since those interim orders cannot be granted in a vacuum where there is no subsisting or intended appeal.

**d. Who shall bear costs of the application**

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the respondent shall be awarded costs of the application.



**F. Conclusion and disposal orders**

20. The upshot of the foregoing is that the court finds no merit in the applicant’s application dated November 6, 2024. As a consequence, the notice of motion dated November 6, 2024 is hereby dismissed in its entirety with costs to the respondent.

Orders accordingly.

**RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

In the presence of:

Mr. Salim for the Applicant

Ms. Nyawira for the Respondent

Court Assistant Gillian

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**Y. M. ANGIMA**

**JUDGE**

