



**Mwinzi v Kalima & 3 others (Environment and Land Miscellaneous Application  
E007 of 2023) [2024] KEELC 1568 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1568 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2023  
LG KIMANI, J  
MARCH 7, 2024**

**BETWEEN**

**DOMINIC MUSYA MWINZI ..... APPLICANT**

**AND**

**NGATI KALIMA ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL  
PLANNING THRO' SUB-COUNTY COMMISSIONER MWINGI CENTRAL  
SUB COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant herein filed an Application under Notice of Motion dated 26<sup>th</sup> September 2023 seeking the following orders:
  1. Spent.
  2. That leave be granted for the applicant to file the substantive notice of motion out of time as per the court order dated 12<sup>th</sup> July 2023.
  3. That the applicant being a layman did not understand the court order and due to financial crisis, he took more time to get the filing fees, hence he did not meet the target of filing duration.
  4. That during the mention date for confirmation of filing the substantive notice of motion by the applicant due to non-filing of the application and upon leave of 21 days from 12<sup>th</sup> July 2023 the oral application the oral application was declined and file closed.



2. The application is supported by the affidavit of the applicant who deposed that being a layman he did not understand the court order dated 12<sup>th</sup> July 2023 that directed him to file the substantive judicial review application within 21 days. He stated that he took time to file the application due to financial constraints and thus found himself out of time.
3. He stated that during the mention date to confirm filing of the substantive notice of motion the applicant, stated that he made an oral application for more time which was declined by the Court and the Judicial Review Miscellaneous Application E008 of 2023 file was closed.
4. He therefore prays that this leave to file the judicial review out of time be allowed.

#### **The 1st Respondent's replying affidavit**

5. Mwendwa Ngati, the 1<sup>st</sup> Respondent swore a replying affidavit in response, stating that the applicant had all the time to file required documents. He complained that the matter dragged on for too long and it was determined by the Deputy County Commissioner Mwingi Central on 3<sup>rd</sup> April 2023 and certified by the land adjudication officer Mwingi on 17<sup>th</sup> April 2023.

#### **The 2nd, 3rd and 4th Respondents' grounds of opposition**

6. State Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed grounds of opposition dated 1<sup>st</sup> November 2023 stating that the *Law Reform Act*, the substantive law governing prerogative orders does not provide for enlargement of time within which a party should file the substantive notice of motion and the Honourable Court is divested of jurisdiction to grant the applicant sought. They further stated that there was an inordinate and inexcusable delay and that the applicant failed to demonstrate plausible reasons for the failure and/or delay in filing the application within the period allowed.
7. The Respondents stated that the application was misconceived, a non-starter, abuse of the court process, frivolous and unmerited since there is no suit upon which the purported application can be founded.
8. It was also stated that the Honourable Court in its ruling of 20<sup>th</sup> September 2023 declined the applicant's application for an extension of time within which to file the substantive notice of motion and the applicant has not demonstrated a change of circumstances to warrant a review of the orders so issued.

#### **The Applicant's submissions**

9. Counsel for the Applicant reiterated the contents of the application, highlighting that the Applicant was not represented in court and lacked the proper knowledge and understanding of the law and procedure.
10. He also submitted that he lost his son the same month via a tragic road accident in the same month he was given leave to file the judicial application. He further submits that he has been living on the suit land since 1995 and has built permanent structures, relying on Article 159 of *the Constitution* and prays that he be given an opportunity to challenge the decision of the Minister.

#### **2nd, 3rd and 4th Respondent's written submissions**

11. State counsel submitted that the grounds for enlargement of time within which to file judicial review proceedings were laid down in the Supreme Court case No.50 of 2014: *Aviation and Allied Workers Union v Kenya Airways Ltd & 3 others*[2015]eKLR, stating that the Applicant's leave to file the



substantive judicial review application lapsed on 10<sup>th</sup> August 2023 and when the matter came up for mention on 20<sup>th</sup> September 2023, the ex-parte applicant had not complied, making the delay inordinate and inexcusable.

12. It is also submitted that the law governing prerogative orders does not envisage the enlargement of time for filing of the substantive notice of motion application as it was held by Angote J in the case of Malindi Judicial Review Application NO. 3 OF 2013 vs *Kabindi Nyafula & 3 others ex parte Kilifi South East Farmers Co-operative* (2014) eKLR and *Njeru Njagi v Gabriel Njue Joseph & another* [2015] eKLR.
13. Their submission therefore is that the instant application is unmerited and a waste of the Court's time and thus be dismissed with costs to the Respondents.

### **Analysis and determination**

14. The Applicant seeks leave to file the substantive Notice of Motion out of time as per the court order dated 12<sup>th</sup> July 2023. The Applicant was on 12<sup>th</sup> July 2023 granted leave to bring judicial review proceedings of certiorari, prohibition and mandamus against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents within 21 days from the said date. The matter was set for mention to confirm the filing of the said application on 20<sup>th</sup> September 2023 but on the said date he informed the Court that he had not filed the application. He made an oral application seeking an extension of time, which was denied by the Court.
15. The Applicant's explanation for the delay in filing is that he is a layman and did not understand the fullness of the court order and that the delay was caused by financial constraints.
16. The Applicant has based his application on Order 50 Rule (6) 9 (1) and Order 51 Rule (1) of the *Civil Procedure Rules* [2010]. Order 50(6) provides that:

“The time for delivering, amending, or filing any pleading, answer or other document of any kind whatsoever may be enlarged by consent in writing of the parties or their advocates without application to the court.”
17. The Applicant in submissions relies on Article 159 (d) of *the Constitution* of Kenya 2010 in seeking orders of setting aside the dismissal of the application dated 21<sup>st</sup> September 2021. Article 159 (d) provides that;

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles— justice shall be administered without undue regard to procedural technicalities.”
18. State Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents relied on the Supreme Court case of *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR which was on extension of time to file an appeal where the court quoted from the case of: *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others*, Sup Ct. Application 16 of 2014:
  1. “Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of the Courts which litigants have to lay a basis [for] where they seek [grant of it.].....”
19. State Counsel also relied on Angote J's decision in the case of *Republic v Kabindi Nyafula & 3 others Ex Parte Kilifi South East Farmers Co-operative* [2014] eKLR where he found that Order 50 rule 6



does not apply to extend the 21 days to file a substantive notice of motion for judicial review orders where the Court held that:

“The law provides that the substantive Motion seeking prerogative orders must be filed within 21 days. The *Law Reform Act*, which is the substantive law dealing with prerogative orders, does not provide for the enlargement of time within which a party should file the Motion. In the case of *AKO v Special District Commissioner Kisumu & Another* [1959] KLR 163, the Court of Appeal held as follows:

“The Prohibition is statutory and absolute and is not therefore challengeable under procedural provisions of the Civil

Procedure Rules, more specifically order 49 Rule 5 (now order 50 Rule 6) which makes provision for the enlargement of time.”

Consequently, the provisions of Order 50 Rule 6 of the Civil Procedure Rules which allows the enlargement of time by the court for doing a particular act does not come to the Ex-parte Applicant's aid, neither does Article 159 (2) of *the Constitution*.”

20. The court also notes that the application for enlargement of time within which to file the substantive application was made orally by the Applicant on 20<sup>th</sup> September, 2023 and the same grounds advanced in the present application were advanced when he appeared before the court in JR. Misc. Application E008 of 2023. The court considered the application and declined to grant the orders sought and ordered that the file be closed. The Applicant filed the current application which seeks the same orders of extension of time to file the substantive Notice of Motion relying on the same grounds. The court finds that the application herein has been heard and determined and the same is res judicata under Section 7 of the *Civil Procedure Act* which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

21. The Applicant ought to have appealed the decision or applied for review of the same if he was dissatisfied. Filing of a similar application is in the Court's view, an abuse of the court process.
22. On the merits of the application, the Applicant states that he was unrepresented and that because he is a layman he did not understand the meaning of the court order. However, the court has translators available in the Court and the Court registry and the applicant could have had the order explained to him if he did not understand it. Nothing has been stated to show that he did this and was denied an explanation or translation. Further, the Applicant had made an application for leave in person and the court is of the view that he had a high level of understanding of the court process. In filing the application for leave the Applicant knew that the process involved filing the substantive application.
23. Further, it is the Court's opinion that there was undue delay in filing the application. The 21 days given lapsed on 10<sup>th</sup> August 2023 and when the case was slated for mention on 20<sup>th</sup> September 2023, he had not filed the application and neither had he filed any application.
24. For the foregoing reasons, the court thus finds that the application herein lacks merit and the same is dismissed with costs to the 2<sup>nd</sup> to 4<sup>th</sup> Respondents. The 1<sup>st</sup> Respondent is said to be deceased.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 7<sup>TH</sup> DAY OF MARCH, 2024.**



**HON. LADY JUSTICE L. G. KIMANI**

**ENVIRONMENT & LAND COURT**

**The Ruling is read virtually and in open court in the presence of-**

**J. Musyoki Court Assistant**

**Kioko holding brief for Kabwere for the Applicant**

**M/S Mumo for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents**

**Mwendwa Ngati the Interested Party present in person**

