



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KABARNET

ELCLA NO. E012 OF 2024

JULIUS SONGOL.....1ST
APPELLANT/APPLICANT

KIPRUTO SONGOL.....2ND
APPELLANT/APPLICANT

VERSUS

ZAKARIA YATOR
KIPKEBUT.....RESPONDENT

RULING

Introduction

1. Vide a ruling delivered on 24th February, 2025 in respect of the appellants' application dated 23rd October 2024, this court granted the appellants' stay of execution of the judgment/decreed of the lower court

appealed from, on condition that the appellants' would
within 21 days from the date of delivery of the ruling,
deposit in a joint interest earning account to be opened
in the joint names of the advocate for the appellants
and the advocate for the respondent, Kshs. 200,000/=
being security for performance of such decree or order
as may ultimately be binding on them.

2. To fastrack the hearing and determination of the appeal, I directed the appellants to, with the help of the Deputy Registrar of this court, ensure that the appeal is processed for hearing and heard within 120 days from the date of delivery of the ruling.
3. I further directed that failure to comply with the orders or direction given, would lead to automatic dismissal of the application for stay of execution and the appeal.
4. The appellants did not comply with the orders/directions of the court leading to dismissal of both the application for stay of execution and the appeal as contemplated in the directions/orders given on 24th February, 2025.
5. In a bid to revive the appeal and the orders of stay, on 19th August, 2025 the appellants filed the notice of

motion application dated 13th August, 2025 seeking the following orders paraphrased as follows:-

- i) Spent
- ii) Review with a view of setting aside the orders given on 15th July 2015 dismissing the appellants' appeal and discharging the interim orders of stay of execution pending appeal;
- iii) Enlargement and/or extension of time within which the appellants' ought to have complied with the orders or directions given on 24th February 2024;
- iv) Enlargement or extension of time in order to have the appeal fixed for hearing and determination on priority basis;
- v) The interim order of stay of execution granted by this court on 24th February 2025 and discharged on 15th July 2025 be reinstated and extended pending the hearing of the application and the appeal;
- vi) Any other and/or further order(s) as the court may deem fit and just in the interest of justice
- vii) Costs of the application be in cause.

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6. The application is premised on the grounds that owing to financial constraints arising from burning down of their house by suspected arsonists and the challenge in putting together the record of appeal, the appellants were unable to comply with the orders of the court within the timelines given; that despite the time ordered by the court having lapsed, the appellants have complied with the orders/directions of the court albeit out of time; that desirous of being afforded an opportunity to be heard in their appeal, the appellants have filed the instant application seeking the reliefs listed herein above and that the court has unfettered powers and discretion to grant the reliefs sought in the interest of justice.
7. The application is supported by the affidavit of the 1st appellant, Julius Songol, sworn on 13th August, 2025 in which the grounds on the face of the application are reiterated.
8. In reply and opposition to the application, the respondent, through the replying affidavit he swore on 1st October 2025 depones/contends as follows:-

1.“....

2.....

3.The application is bad in law, incompetent, mischievous, frivolous, misleading, an afterthought and an abuse of the court process and ought to be rightly dismissed at the earliest opportune time;

4.That on 24th February 2025, this honourable court gave clear, express and self-executing orders requiring the appellants to deposit the sum of kshs.200,000/- in court within twenty-one 21 days and to file the record of appeal within one hundred and twenty 120 days, failing which the application for stay would stand automatically dismissed.

5.That the applicant wilfully failed to comply with both the requirements by depositing the required sum and filing the record out of the prescribed time;

6.That as a result of the default, this honourable court dismissed the appeal and

discharged the orders for stay pursuant to the self-executing order;

7. That the current application seeking review, extension of time, and reinstatement of the appeal is devoid of merit and is an abuse of the process of court as the orders for deposit and filing were clear, unambiguous and self-executing.

8. That this honourable court became functus officio once the specified period lapsed;

9. That the appellants have not provided any credible, sufficient or reasonable explanation for the serious delay nor established good cause for extension or review;

10. That the present application does not satisfy the parameters for review or enlargement of time and no exceptional circumstances have been advanced warranting exercise of the court's discretion

11. The application is incompetent, misconceived and ought to be dismissed with costs...”

9. In a rejoinder, the appellants’ filed a further affidavit sworn on 4th November, 2025 in which they have deponed as follows:-

“1.

2...Characterization of our application as incompetent, frivolous or abuse of court process is wholly misconceived and intended to deflect from the real and weighty issues raised therein. the application is properly anchored in law, particularly under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules and is a legitimate invocation of the court’s review jurisdiction. The respondent’s sweeping allegations are devoid of legal or factual basis and should be disregarded;

3.....I admit that the Honourable court issued self-executing orders on 24th February 2025. However, I respectfully contend that the Respondent has failed to appreciate the exceptional and unforeseen circumstances that rendered compliance within the prescribed timelines practically impossible. The burning of my homestead on 18th February 2025 a matter under active investigation resulted in loss of essential documents and funds thereby frustrating our ability to meet the court's condition in time;

4.....I reiterate that failure to deposit the sum of Kshs. 200,000/- and to file the record of appeal within the stipulated time was not deliberate or negligent but occasioned by genuine financial hardship and logistical impediments. The record of appeal was delayed due to procedural confusion arising from consolidation of Kabarnet Elc Nos. 9 of 2017 and 26 of 2018, which necessitated careful collation

and verification of pleadings and proceedings;

5....I do not dispute that the appeal stood dismissed and the stay discharged by operation of the self-executing clause. However, I respectfully submit that dismissal occurred without affording us an opportunity to be heard on the reasons for non compliance thereby offending the principles of natural justice. The current application seeks to cure that procedural injustice and to reinstate the appeal for hearing on merit;

6.....I deny that the present application is an abuse of the court process. On the contrary, it is a bona fide attempt to seek the court's indulgence in light of substantial compliance and compelling justification. The deposit was made on 22nd april 2025, albeit late, and the record of appeal filed and served thereafter.

These acts demonstrate our unwavering commitment to prosecuting the appeal.

7.....the doctrine of functus officio does not apply in rigid and mechanical manner suggested by the Respondent. the court retains inherent and statutory jurisdiction to review its own orders under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, particularly where the orders were self-executing and the dismissal was not preceded by a hearing. The respondent's interpretation would unjustly bar access to justice.

8.....I reiterate that we have provided a credible, sufficient and reasonable explanation for the delay. the arson incident, final constraints and procedural confusion were all detailed in our supporting affidavit and are not speculative. These circumstances

constitute sufficient cause for the court to exercise its discretion in our favour.

9.....the application meets the legal threshold for review and enlargement of time. The delay was neither inordinate nor unexplained and the respondent has not demonstrated any prejudice that would outweigh our right as appellants to be heard. The overriding objective under Sections 1A, 1B of the Civil Procedure Act supports a merit-based determination of disputes, especially in land matters of this nature.

10.I assert that the prayer for dismissal is premature and unjustified. The respondent's opposition is rooted in technicality rather than substance. The issues raised in the appeal are weighty, the consequences irreversible and the appellants have shown good faith diligence in seeking to regularize the procedural lapses.

11. ...the prayer for dismissal is premature and unjustified given the emotive nature of the dispute, the historical attachment to the land and the appellants' demonstrable effort to comply with the court's directions.

12. ..the respondent has not denied the occurrence of the arson attack nor has he offered any explanation for his alleged involvement or failure to record a statement. This silence is telling and supports our claim of intimidation and interference.

13. ...the land in dispute is ancestral and historically occupied by appellants and the judgment appealed from has far-reaching consequences on their livelihood, dignity and heritage. The appeal deserves to be heard on merit.

14. That the delay in filing the record was compounded by the mix up in proceedings and documents, following the consolidation

of two suits. This was not a deliberate act but a procedural complexity that required time to unravel;

15. That the deposit of Kshs. 200,000/- was eventually made, albeit late, and the record of appeal filed and served. These acts demonstrate substantial compliance and genuine desire to prosecute the appeal.

16. That the respondent stands to suffer no irreparable prejudice if the orders are reinstated, whereas the appellants risk permanent dispossession and injustice if denied a hearing.

17. That the interests of justice demand that the appeal be reinstated and heard on merit, subject to any conditions the court may impose to safeguard the respondent's rights....."

10. Pursuant to directions given on 19th September 2025, the application was disposed of by way of written submissions.

SUBMISSIONS

Appellants submissions

11. In their submissions filed on 4th November, 2025, the appellants identified the following as the issues for the court's determination:-
- i) Whether this court has jurisdiction to review and set aside its self-executing orders issued on 15th July, 2025 dismissing the appeal and discharging the interim stay in light of the circumstances presented;
 - ii) Whether the appellants have demonstrated sufficient cause and exceptional circumstances to justify the review and reinstatement of the appeal dismissed for non-compliance with procedural timelines;
 - iii) Whether the delay in depositing the security sum of kshs. 200,000/- and filing the record of appeal

was excusable and whether the appellants are entitled to enlargement of time under the Civil Procedure Rules;

iv) Whether the reinstatement of the interim stay orders is necessary to preserve the subject matter of the appeal and prevent prejudice to the appellants pending final determination of the appeal.

12. On whether this court has jurisdiction to review and set aside its self-executing orders issued on 15th July, 2025 dismissing the appeal and discharging the interim stay in light of the circumstances presented, the appellants have submitted as follows:-

“...the doctrine of functus officio is not a rigid bar to judicial discretion. It applies only where the court has conclusively determined a matter on merit and exhausted its mandate. In this case, dismissal of the appeal was not the result of reasoned judgment it was automatic, triggered by lapse of time-bound conditions. The court did not engage with the merits of the appeal, nor did

it hear the appellants on reasons for non-compliance. In *Benjo v Republic* (2021)e KLR the High Court clarified that *functus officio* does not apply to self-executing orders where the dismissal occurred without a hearing. The court retains residual jurisdiction to review such orders to prevent miscarriage of justice.

This jurisdiction is expressly preserved under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. These provisions empower the court to review its own decisions where there is discovery of new evidence, error apparent on the face of the record or any other sufficient reason. The phrase “any other sufficient reason” has been interpreted broadly to include circumstances where procedural injustice would result from strict adherence to timelines. In *Matilda Tenge Mwachia v Kenya Industrial Estate Ltd* (2020) KEELRC 292 (KLR) the Court held that review is available where the applicant demonstrates good

faith and procedural hardship, even in the absence of error on the face of the record.

The appellants have demonstrated such hardship. Their inability to comply with the court's direction was occasioned by an arson attack on 18th February 2025 which destroyed their home, funds and critical documents. This was not a case of indolence or disregard it was a genuine crisis that disrupted their capacity to act. in *Kithuku v Mutuku (2024) KEELC 6239 (KLR)* the Environment and Land Court reviewed a self-executing dismissal where the applicant showed exceptional hardship and acted promptly thereafter. The appellants did precisely that: they deposited the required sum on 22nd August 2025 barely a month after the appeal stood dismissed.

The respondent's reliance on procedural finality must be weighed against the constitutional imperative of fair hearing. Article 50(1) of the constitution guarantees every person the right to have any dispute resolved in a fair and public

hearing before a court. that right cannot be extinguished by a procedural lapse where the applicant was denied opportunity to explain.

...In Republic v Speaker of City County Assembly & another ex parte Evans Kidero (2017) KEHC 6101 (KLR) the High Court emphasized that procedural rules are meant to facilitate justice not to defeat it. The court must interpret its own orders in a manner that promotes access to justice, especially in land matters where the consequences of dismissal are permanent and far-reaching.

The appellants are not asking the court to rewrite its ruling. They are asking the court to exercise its inherent jurisdiction to review a dismissal that occurred automatically, without judicial engagement. They seek a second chance to be heard not a shortcut to victory. The land in question is ancestral. The prejudice to the appellants is real and irreversible. The prejudice

to the respondent, if any, is procedural and compensable.

In light of the above, this honourable court retains full jurisdiction to review its self-executing orders where dismissal occurred without hearing, where exceptional circumstances are shown and where the interest of justice demand it. The appellants have met that threshold. The court is not functus officio. It is empowered and indeed obligated to ensure that justice is not sacrificed at the altar of technicality.”

13. As to whether the appellants have demonstrated sufficient cause and exceptional circumstances to justify the review and reinstatement of the appeal dismissed for non-compliance with procedural timelines; the appellants have submitted as follows: -

“...the law does not punish procedural lapses where genuine hardship is shown and the applicant acts diligently to rectify the default.

The appellants have laid bare the circumstances that impeded compliance. On 18th february 2025 just four days after the ruling the 1st appellant's homestead was destroyed by fire. This was not a minor disruption; it was a catastrophic event that wiped out funds earmarked for the deposit and destroyed essential documents. The appellants were left displaced, financially incapacitated and unable to act within the prescribed timelines. These facts are not speculative they are supported by sworn affidavits and annextures.

...we would like to associate ourselves with Joyce N. Simitu v Stephen O. Mallowah & 2 others (2013)e KLR, where the court held that review may be granted where the applicant was prevented from complying due to circumstances beyond their control and acted promptly thereafter. That principle applies squarely here. The appellants did not abandon the appeal. they deposited the required sum on 22nd April 2025 and filed the record of appeal on 25th june 2025.

The present application was filed on 13th august 2025 barely a month after the appeal stood dismissed. the conduct reflects diligence not indifference.

The respondent has not challenged the authenticity of the arson incident nor has he offered any explanation for his alleged involvement or failure to record a statement. His silence is telling.

Similarly, in Kurji & 4 others v Kurji & 3 others (2024) KECA (KLR) the Court of Appeal re-affirmed that review may be granted where procedural lapses occurred in good faith and the applicant demonstrates a genuine desire to comply. The appellants have done precisely that.

Moreover, the nature of the dispute demands judicial indulgence. This is not a commercial claim it is a land matter involving ancestral property and historical occupation. The consequences of the dismissal are permanent and far-reaching. The appellants risk eviction,

dispossession and loss of heritage. In such cases, the court must lean towards substantive justice. In Matilda Tenge Mwachia, the court emphasized that procedural rules must not be applied mechanically where the result would be unjust.

The appellants have not sought to circumvent the law. they have come to court with clean hands, disclosed their default and explained it with candour. They have demonstrated substantial compliance and a genuine desire to prosecute the appeal. the delay was not inordinate and no prejudice has been shown to have been suffered by the Respondent. the balance of justice favours reinstatement.

...The appellants have met the threshold for review under Order 45 Rule 1. They have shown sufficient cause, exceptional hardship and prompt remedial action. The court is invited to exercise its discretion in favour of justice and reinstate the appeal for hearing on merit.”

14. On whether the delay in depositing the security sum of — kshs. 200,000/- and filing the record of appeal was excusable and whether the appellants are entitled to enlargement of time under the Civil Procedure Rules, the appellants have submitted/addressed the court as follows:-

...the law recognizes that justice must not be sacrificed at the altar of technicality, especially where delay is explained and no prejudice is shown.

The power to enlarge time is expressly provided under Order 50 Rule 6 of the Civil Procedure Rules, which allows the court to extend timelines even after expiry. This discretion is not mechanical it is guided by principles of fairness, diligence and proportionality.

...In Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others (2014)e KLR the Supreme Court laid down the governing principles for extension of time: the applicant must show a reasonable explanation for the delay, act promptly upon

discovery of default and demonstrate no prejudice will be occasioned on the other party.

The appellants meet this threshold. The delay was not inordinate it was occasioned by a documented crises. ...

Moreover, the appellants have not benefit from their default. They have disclosed the lapse, explained it with candour and taken steps to regularize their position. In Llyold Masila Ltd v Stanbic Bank Ltd (2024) KECA 72 (KLR), the Court of Appeal held that extension of time may be granted where the applicant demonstrates substantial compliance and genuine desire to prosecute the matter. The principle applies squarely here.

The respondent's opposition is rooted on procedural rigidity not harm. He has not shown the delay has compromised his position or caused irreparable prejudice. The appellants, on the other hand, risk losing their home, heritage

and livelihood. The balance of convenience tilts heavily in their favour.

15. As to whether the reinstatement of the interim stay orders is necessary to preserve the subject matter of the appeal and prevent prejudice to the Appellants pending final determination of the appeal; the appellants have submitted as follows:-

“...the law recognizes that interim relief may be reinstated where appeal remains viable and the applicant demonstrates substantial compliance and risk of irreparable harm.

The subject matter in dispute is land specifically, parcel known as Baringo/Kapchomuso “A”/147 which the appellants have occupied for decades. The judgment appealed from ordered their eviction and permanently restrained them from further occupation. If the stay is not reinstated, the Respondent may proceed to evict, alienate or otherwise interfere with the land rendering the appeal nugatory.

...In Butt v Rent Tribunal (1982) KLR the Court held that stay may be granted to preserve the status quo and prevent irreparable harm. That principle applies with full force here.

The Appellants have demonstrated substantial compliance. Though late, they deposited the required sum and filed the record of appeal. they have not abandoned the appeal they have fought to revive it. In In Llyold Masila Ltd v Stanbic Bank Ltd (2024) KECA 72 (KLR), the Court of Appeal held that interim relief may be reinstated where the applicant shows good faith, substantial compliance and risk of prejudice. The appellants meet that threshold.

Moreover, the balance of convenience tilts heavily in favour of the appellants. The respondent has not demonstrated any prejudice that would arise from reinstatement of the stay. He has not shown that the delay has compromised his position or caused him harm. The appellants, on the other hand, face eviction, dispossession and permanent loss of ancestral

land. in such cases, the court must lean toward preservation.

The overriding objective under Section 1A and 1B of the Civil Procedure Act supports merit-based determination. the stay orders were granted to protect the substratum of the appeal. their reinstatement is not a favour it a procedural necessity to ensure that the appeal is not rendered academic. The appellants are not seeking to delay they are seeking to preserve...”

16. The respondent did not file submissions but opted to rely on his replying affidavit.

Analysis and determination

17. The court has discretionary power to grant the reliefs sought. The dismissal was not based on consideration of the appeal on its merit but on account of failure to comply with the timelines given by the court.
18. Under **Order 51 Rule 6** of the Civil Procedure Rules, the court has power to extend time within which its

orders ought to have been complied even after the lapse of the time.

19. The appellants have offered a plausible and believable explanation as to why they did not comply with the time given by the court. Because the order of dismissal of the appeal was not based on consideration of the appeal, this court has power to review its orders, in the interest of justice.
20. Being of the view that the appellants' deserve an opportunity to prosecute their intended appeal on its merits, I hereby set aside the order for dismissal of the appeal made on 15th July, 2025 and reinstate the appeal. The time within which the appellants ought to have filed the record of appeal is hereby extended and/or enlarged and the record of appeal filed out of time deemed to be properly on the court record.
21. Regarding the plea for revival of the interim orders of stay pending the hearing and determination of the appeal, the court is unable to grant the said order as it is not aware of the current status of the suit property.

To preserve the subject of the appeal, I order that the status obtaining as at the date of delivery of this ruling be maintained pending the hearing and determination of the appeal.

22. The costs of the application shall abide the outcome of the appeal.
23. Orders accordingly.

Ruling dated, signed and delivered virtually at Kabarnet this 16th day of December, 2025.

**L. N. WAITHAKA
JUDGE**

In the presence of:-

Mr. Lelei h/b for Mr Kibet for the Appellant/Applicant

Mr Zakaria Kipkebut – Respondent in person

Court Assistant; Ian

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ORIGINAL