



**Mapesa v Mapesa (Environment and Land Appeal 30 of 2023)
[2026] KEELC 1130 (KLR) (25 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 1130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL 30 OF 2023
A NYUKURI, J
FEBRUARY 25, 2026**

BETWEEN

FRANCIS MAKOKHA MAPESA APPELLANT

AND

MARY ADHIAMBO MAPESA RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion dated 2nd December 2024 filed by the appellant/applicant seeking the following orders;
 - a. That the orders dismissing this appeal for failure to file submissions be set aside.
 - b. That this appeal be listed for hearing
 - c. Any other order deemed just and fair to the court
 - d. Costs be provided for.
2. The application is based on grounds on the face of it and supported by the affidavit of the applicant. The applicant's case is that the appeal was dismissed on 2nd December 2024 on account of a technical error which should not supersede the right to a fair hearing. That the court failed to give the appellant the opportunity to have oral submissions in the event of failure to file submissions and that failure to file submissions was committed by both parties to the appeal.
3. The application is opposed. Vide a replying affidavit sworn on 30th January 2024, the respondent stated that on 18th September 2024, the Honourable court directed the appellant to file Record of appeal and submissions within 30 days, with a default clause that failure to which the appeal shall stand dismissed. That the appeal was dismissed on 2nd December 2024 for noncompliance with court directions.



4. Further, that the applicant has not demonstrated sufficient diligence or reasons for noncompliance with court directions having had ample time to do so. That if the appeal is reinstated, it will undermine the authority of the court and set a precedent for noncompliance with court orders. That the decision to dismiss the appeal was in line with principles of the law. That finality in litigation requires parties to comply with court directions. That the application is fatally defective for failure to attach the order sought to be reviewed and that the applicant has not met the threshold for review.
5. The application was canvassed by way of written submissions. The applicant filed their submissions dated 4th February 2025, which the court has duly considered. It was the applicant's submission that Article 50 of *the Constitution* of Kenya provided the unalienable right to a fair hearing and that the same overrides statutory and procedural rules which are merely technicalities.
6. It was argued for the applicant that this court watered down the provisions of Article 50 of *the Constitution* and was wrong in pointing out that the success of the appeal depended on failure to file submissions when it ought to have depended on the merits of the appeal.
7. Counsel maintained that what happened in court on 18th September 2024 and 2nd December 2024 violated the applicant's right to a fair trial and referred the court to provisions of Articles 24, 25 and 159 of *the Constitution* of Kenya and insisted that justice should be administered without undue regard to technicalities.

Analysis and determination

8. The court has carefully considered the application, the reply, the submissions and the record. The sole issue that arise for determination is whether the applicant has met the threshold of setting aside orders of dismissing the appeal herein.
9. Order 12 Rule 7 of the Civil Procedure Rules empowers the court to set aside an order of dismissal and provides as follows;

“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
10. Order 51 Rule 15 of the Civil procedure Rules grants the court jurisdiction to set aside an order made ex parte.
11. The principles to set aside ex parte orders are well settled. This court has unfettered discretion to set aside ex parte orders, on terms that are just, and the discretion clothed on the court must be exercised judiciously based on sufficient cause and not whimsically.
12. In the case of *Shah v Mbogo* (1967) EA 116, the court held that the exercise of the court's discretion in setting aside ex parte orders is to avoid injustice or hardship emanating from an accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice.
13. I have perused the record in this matter, and indeed it shows that on 10th June 2024, counsel for the appellant sought to dispose the appeal by way of written submissions and sought 21 days to file and serve Record of appeal and submissions. His prayer was allowed as sought.
14. Subsequently, the matter was then fixed for mention on 18th September 2024. Come that date, counsel for the appellant informed court that he was yet to comply as ordered and sought 30 more days. In that regard, the court pointed out that proceedings had been ready since 24th November 2023. The court



granted the appellant 30 days to file and serve Record of appeal and submissions, with a default clause that in default, the appeal shall stand dismissed with costs. The matter was then fixed for mention on 2nd December 2024.

15. On 2nd December 2024, none of the parties appeared in court and the appeal was dismissed with costs to the respondent for noncompliance. That dismissal provoked the instant application.
16. The applicant contests the dismissal order of 2nd December 2024 stating that failure to file submissions was a technical error which ought not have denied him the chance to be heard as the court should have invited him to make oral submissions.
17. I must say that I am taken aback at the stance and attitude shown by the appellant in this matter. No explanation has been given why he did not file record of appeal and submissions since 2023 to date, even when the court pointed out that the trial court proceedings had been ready since 24th November 2023. Essentially, the appellant is telling this court that he has no business complying with court orders, even in the face of a default clause therein.
18. Complying with court orders and directions is a very serious matter and central to the administration of justice. It is not a question of technicality. While the appellant dwelt on the issue of failure to serve submissions terming it a mere technicality, he did not address his failure to file and serve record of appeal as ordered. Failure to file and serve record of appeal is contrary to the mandatory provisions of Order 42 Rule 13 (4) of the Civil Procedure Rules. That failure cannot be termed as a technical error.
19. The applicant insisted that the court was wrong in its orders of 18th September 2024 and 2nd December 2024. If that is the case, then this court has no jurisdiction to interrogate the question as to whether or not this court was wrong in making those orders.
20. In the circumstances I find no reason whatsoever to allow the application dated 2nd December 2024, which I dismiss with costs.
21. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF FEBRUARY, 2026 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

No appearance for the appellant

No appearance for the respondent

Court Assistant: Delphine

