



**Mwangi v Chege & another (Environment and Land Appeal  
E014 of 2024) [2025] KEELC 5381 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5381 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E014 OF 2024**

**A OMBWAYO, J  
JULY 17, 2025**

**BETWEEN**

**GEORGE MWANGI ..... APPLICANT**

**AND**

**BERNARD CHEGE ..... 1<sup>ST</sup> RESPONDENT**

**JOEL MWANGI & 4 OTHERS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Brief Facts**

1. The Appellant/Applicant filed the instant application dated 7th May, 2025 seeking the following orders:
  1. Spent.
  2. Spent.
  3. That the appeal herein be reinstated and the Record of Appeal and submissions on the appeal filed on 4th April, 2025 be admitted out of time.
  4. That the costs of this application do abide the outcome of the appeal.
2. The Application was based on grounds set out and supported by the Affidavit of David Gatonye the Appellant/Applicant's advocate herein sworn on 7th May, 2025. He stated that the Appellant filed an appeal against the ruling of Honorable Bildad Ochieng CM delivered on 22nd March, 2024 in Nakuru CMCELC E315 OF 2022. He further stated that following an application made for stay of execution of the said ruling, on 30th May, 2024 this court granted a conditional stay of execution which the Appellant complied with. He stated that on 4th March, 2025 albeit the typed record of proceedings had not been prepared directions were issued that the Appellant shall file a Record of Appeal with



submissions within 30 days failure which the appeal would be dismissed for non-compliance. He also stated that the said directions were given in the absence of the Appellant or himself owing to technological glitches in an attempt to join in the proceedings. He stated that there was delay in obtaining typed proceedings and it was not until 4th April, 2025 that he was able to file and serve the Record of Appeal and Submissions. He added that the said documents were filed one (1) day late and consequently the appeal stood dismissed for non-compliance with the timelines given. He also stated that the delay was not deliberate and that it would not occasion any prejudice to the Respondents. In conclusion, he urged the court in the interest of justice to allow the instant application as prayed.

## Response

3. The 1st Respondent filed her replying affidavit sworn on 7th May, 2025 where she averred that on 4th March, 2025 the court had issued a final order which directed the Appellant to file the Record of Appeal and submissions within 30 days failure to which the appeal would stand dismissed. She further averred that the Appellant failed to comply with the stipulated timelines but instead filed the documents after time had already lapsed without having sought the court's leave.
4. She averred that the Appellant's attempt to seek leave orally was objected by her advocates and also declined by the court. She also averred that the appeal was dismissed for non-compliance in the presence of both parties hence the court rendered itself *functus officio*. She averred that the present application was not a review nor an appeal but an attempt to reverse a final court's decision in violation of the doctrine of *functus officio*. She urged the court to dismiss the application with costs. The 1st Respondent also filed a Notice of Preliminary Objection dated 7th May, 2025 on the following grounds:
  1. That the present application is incurably incompetent and fatally defective, the Honourable Court having rendered itself *functus officio* by Issuing a final and substantive order dismissing the appeal on 7th May, 2025 in the presence of both parties.
  2. That the application is not founded on any known jurisdictional basis, the same not being an appeal, a review under Order 45 of the [Civil Procedure Rules](#), nor any other legally recognized recourse capable of setting aside or reopening a final determination of the Court.
  3. That the application offends the principles of finality and orderly administration of justice and amounts to a gross abuse of the court process, being a disguised attempt to resuscitate litigation that has been lawfully concluded.
  4. That the Honorable Court lacks jurisdiction to entertain or grant the reliefs sought, there being no pending appeal and no extant procedural window available for the Court to revisit its earlier determination.
  5. That the application is frivolous, vexatious, and scandalous and otherwise an abuse of the process of court, warranting immediate and summary dismissal with costs.
5. The 2nd and 3rd Respondents also filed their replying affidavit where they averred that the suit property was jointly owned by Serah Muthoni Kanyugu (deceased) and Grace Wanjiru Mwangi. They further averred Serah's (deceased) half share was subject to succession with 13 beneficiaries including the Appellant. They averred that the Appellant's claim that they were not present when the directions were given was inexcusable as it was a way of buying time. They averred that the late submission was a delaying tactic to continue occupation of the suit property and enjoy the income generated by the said business at the expense of other beneficiaries. They aver that if the application is allowed, it will serve as justice denied to the Respondents.



6. The Appellant also filed a supplementary affidavit sworn on 8th July, 2024(sic) where he reiterated the contents of his supporting affidavit. He added that the appeal stood dismissed on 4th March, 2025 by dint of the self-executing order dated 4th March, 2025. He stated that the court had jurisdiction to reinstate the dismissed appeal as the dismissal was not on merit rather on account of an inadvertent slight delay occasioning non-compliance with the timelines given.

### Submissions

7. Counsel for the 1st, 4th and 5th Respondents filed their submissions dated 8th July, 2025 where they identified two issues for determination. The first issue was whether this honorable court has jurisdiction to entertain the application dated 7th May, 2025 seeking reinstatement of an appeal already dismissed by operation of a lawful court order. It was their submission that the court was *functus officio* having rendered a final determination hence its role was discharged. They cited the Court of Appeal case of *Telkom Kenya Limited v John Ochanda* [2014] eKLR. They submit that the appeal stood dismissed by operation of the directions previously given making it a conclusive determination.
8. The second issue was whether the same was properly founded in law. They submit that the application was not premised on any known legal provision but an orphaned pleading. They relied on the Court of Appeal case in *Mae Properties Limited V Joseph Kibe & Another* [2017] eKLR. They submit that judicial authority must be exercised within the confines of the law and that the court must resist the temptation to bend jurisdictional ruled to accommodate indolence. They further submit that there was no subsisting appeal as the appeal in question stood dismissed upon lapse of the court's own deadline. They relied on the case of *Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR. They added that the application was an abuse of the court process and cited the case of *Satya Bhama Gandhi V Director of Public Prosecutions & 3 Others* [2018] eKLR.
9. It was their submission that the Appellant has misapplied the oxygen principle which was never intended to license indiscipline or procedural apathy but meant to facilitate justice. He cited the Supreme Court case in *Nicholas Kiptoo Arap Korir Salat V IEBC & 7 Others* [2014] eKLR and the case of *Harrison Wanjobi Wambugu V Felista Wairimu Chege* [2013] eKLR.
10. In conclusion, they urge the court to dismiss the application with costs. Analysis and Determination
11. This court has considered the application, replying affidavits and submissions and is of the view that the sole issue for determination is whether the appeal is merited.
12. It is not in dispute that this court on 4th March, 2025 directed the Appellant to file his Record of Appeal within 30 days failure which the same stood dismissed. The Appellant claims that there was a slight delay of 1 day in filing of the same which was not deliberate. He further contends that the said orders were issued while himself and his counsel were absent in court which his advocate attributed the same to a technical hitch in logging into the virtual court system. He also attributed the delay in compliance with filing of the record of appeal to the delay in receipt of the typed proceedings.
13. The 2nd and 3rd Respondents on the other hand contend that the Appellant's excuse was a delaying tactic in order to continue with occupation of the suit property at the expense of other beneficiaries. The 1st Respondent argues that the court was *functus officio* having already rendered its final orders that led to dismissal of the appeal.



14. The applicant's instant appeal is premised on Sections 79G and 95 of the *Civil Procedure Act* which provide for filing of appeals from the subordinate courts and for enlargement of time respectively. Section 79G provides 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.”

Section 95 further provides as follows:-

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

15. In the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR) the court held as follows:

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

16. It is a fact that the Appellants appeal and submissions stood dismissed after the lapse of the 30 days from the court's directions. It is also a fact that the same lapsed on 4th April, 2025 having been dismissed due to non-compliance with the given timelines. The Appellant now seeks extension of time to allow the appeal and submissions be admitted out of time against this court's orders of 4th March, 2025.

17. I have taken the liberty to peruse through the court record and it is a fact that the Record of Appeal and submissions were filed electronically on 4th April, 2025 at 5:38 pm. It is trite law that this court has the discretion of whether or not to allow the filing of documents out of time and it is my view that the delay by the Appellant in filing the appeal and submissions is not inordinate as it was filed just after close of business on date the 30 days was lapsing.

18. In the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) the court held that:

The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.” This court alive to the fundamental rights as enshrined under Articles 48, 50 (1) and 25 (c) of the *constitution* and the right of the Appellant to be



heard in respect of the prospective appeal before an adverse decision is reached in the same. It is my opinion that the Appellant has advanced good and sufficient cause for not filing the appeal in time

19. In the circumstance, this court shall exercise its discretion and in the interest of justice allow that the appeal and submissions as filed be admitted on record out of time.
20. Consequently, I find that the instant application is with merit and is therefore allowed as prayed. The costs of this application shall abide the outcome of the appeal. It is so ordered.

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT**

**ENVIRONMENT AND LAND COURT**

**DATE: 2025-07-17 12:35:13**

