

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
JUDICIAL REVIEW NO. 1 OF 2021

REPUBLIC.....APPLICANT

VERSUS

**PRINCIPAL SECRETARY, STATE DEPARTMENT FOR
INTERIOR & COORDINATION OF NATIONAL GOVERNMENT.....1ST
RESPONDENT**

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

SIMON NJAGI KAREKE

JOSEPH MACHARIA WANYOIKE

**PAUL MBURU NJIHIA.....EX-PARTE
APPLICANTS**

RULING

1. Before this Court for determination is a Notice of Motion dated 29.7.24, seeking the setting aside of the orders of 17.7.24 dismissing the matter herein for non-attendance. Also sought is the reinstatement of the application dated 19.2.24 for hearing.
2. It is stated that on 17.7.24, Bwanaadi Amina Said advocate for the Ex-parte Applicants tried to log in to the online platform but that the system took time to admit her. When she was finally admitted, she waited for the matter to be called out but that at around 11 am, the system went down. There was clearly something wrong with the system and she only managed to get back online after 11am when she discovered that the application had been dismissed for non-attendance. The Respondents were also not present despite having been served with the mention notice. It is urged that failure to attend court was not deliberate or negligent but that the reason was genuine.
3. Although the Respondent indicated that response and submissions had been filed, none was availed to the Court.
4. The law relating to setting aside judgment or dismissal is found in Order 12 Rule 7 of the Civil Procedure Rules, which provides:

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.

5. The Orders sought in the Application are discretionary. The rule does not provide the conditions that must be met for reinstatement of dismissed suits. The Court thus has wide discretion to grant orders on terms. The terms must however be just.
6. I have considered the circumstances of the case. The reasons for non-attendance are that counsel had challenges joining the virtual link and after joining, the system went down. It is asserted that the non-attendance was not deliberate.
7. While it is noted that there was failure by the Ex parte Applicant's advocate to attend court on the date set for directions leading to dismissal of the matter, the Court takes judicial notice of the fact that failure of technology is not an uncommon occurrence. Further, while the matter was dismissed on 17.7.24, the present Application was filed timeously on 29.7.24. In the circumstances, I do find that the wider interest of justice requires that the application dated 19.2.24 be reinstated for hearing on merit.
8. In this regard, I associate with Odunga, J. (as he then was) who in **Robert Kimani Ndungú v Kenya Deposit Insurance Corporation (Being sued in its capacity as the receiver manager of Chase Bank Limited (In Receivership) [2022] eKLR**, stated:
 44. ***In these circumstances, what the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.***
9. I am also guided by the holding in **Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA 75 at page 76 C and E** where the Court of Appeal stated:

There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.

10. The circumstances herein are such that the prejudice that will be suffered by the Ex parte Applicants should the orders sought not be granted, will be immense. In exercise of its discretion therefore, the Court opts for the lower rather than the higher risk of injustice, namely to reinstate the application for hearing on merit, on terms that are just.
11. The upshot is that the Application dated 29.7.24 is merited and allowed with the effect that the application dated 19.2.24 is reinstated for hearing on merit. There shall be no order as to costs.

DATED, SIGNED and DELIVERED at Malindi this 26th day of September 2025

M. THANDE
JUDGE