

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

HCCC NO. 3 OF 2023 (OS)

WEMARK COMPANY LIMITED.....APPLICANT

VERSUS

JOSHUA NDERE T/A NDERE & COMPANY ADVOCATES

RESPONDENT

R U L I N G

1. Before this Court for determination is a Notice of Motion dated 20.5.24, seeking the setting aside of the orders of 6.5.24 dismissing the suit herein for non-attendance.
2. The Applicants states that on 6.5.24, when the matter was to be mentioned for directions on submissions, its counsel made several attempts to join the virtual link to no avail. It later transpired that the matter was called out and dismissed for non-attendance. The Applicant asserts that it has always attended the matter in the past and that failure to do so on 6.5.24 was not deliberate.
3. In spite of service, the Respondent did not respond to the Application. The same is thus unopposed.
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 by the Applicant 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. While it is noted that there was failure by the Applicant to attend court on the date set for directions leading to dismissal of the suit, the Court takes judicial notice of the fact that failure of technology is not an uncommon occurrence. Further, while the suit was dismissed on 6.5.24, the present Application was filed

timeously on 20.5.24. Additionally, the Application is not opposed. In the circumstances, I do find that the wider interest of justice requires that the suit be reinstated for hearing on merit.

7. 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.

8. 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.

9. The circumstances herein are such that the prejudice that will be suffered by the Applicant 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.
10. The upshot is that the Application dated 20.5.24 is merited and is allowed with the effect that the suit herein is reinstated. There shall be no order as to costs.

DATED, SIGNED and DELIVERED at Malindi this 30th day of September 2025

M. THANDE
JUDGE