

want of prosecution and not for non-attendance as alleged by the Plaintiff; that not being mapped is not enough to excuse the Plaintiff's failure to attend Court and that there is no evidence of efforts made by the Plaintiff to be mapped. The defendant urged that the Application be dismissed with costs.

5. It is necessary to state from the outset that the subject of this ruling is a notice of motion application dated 12.8.24 seeking the setting aside of the order dismissing the suit and not a chamber summons application seeking leave to be heard during the Court's vacation. As such, the contention by the Defendant that the application has been overtaken by events is without basis. Additionally, contrary to the Defendant's claim, the suit was dismissed for non-attendance and not for want of prosecution.
6. 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.
7. 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.
8. I have considered the circumstances of the case. The record shows that the matter had been referred to court annexed mediation which failed. On 13.3.24, the Hon. Deputy Registrar fixed the matter for mention on 6.5.24. On that date, there was no appearance by either party and the matter was stood over to 18.7.24. When none of the parties attended Court on that date, the matter was dismissed for non-attendance.
9. The reason proffered by the Plaintiff for non-attendance is that the date was not communicated to the parties. Further that none of the parties was mapped on the e-filing portal and hence the Plaintiff was unable to keep up with updates.
10. While it is noted that there was failure by the Plaintiff to attend court on 18.7.24, the Court finds that it is possible that none of the parties was aware of that date, more so because the same was taken in their absence. Further, the Court takes judicial notice of the fact that failure of technology is not an uncommon occurrence and there are instances when parties have not been mapped on the e-filing portal. Additionally, while the suit was dismissed on 18.7.24, the present Application was filed timeously on 12.8.24. In the circumstances, I do find that the wider interests of justice require that the suit be reinstated for hearing on merit.

11. In this regard, I associate with Odunga, J. (as he then was) who in **Robert Kimani Ndungú v Kenya Deposit Insurane 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.

12. 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.

13. The circumstances herein are such that the prejudice that will be suffered by the Plaintiff 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 suit for hearing on merit.

14. The upshot is that the Application dated 12.8.24 is merited and is allowed with the effect that the suit herein is reinstated. Costs in the cause.

DATED, SIGNED and DELIVERED at Malindi this 14th day of November 2025

M. THANDE
JUDGE

