

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELC MISC. E054 OF 2025

SAMUEL W. MUINDI - **1ST APPLICANT**
MATTHWE MUTUKU MUINDI - **2ND APPLICANT**

VS

NICHOLAS MAWIA MBALUKA - **RESPONDENT**

AND

KONZA RANCHING & FARMING
COOPERATIVE SOCIETY LYD - **INTERESTED PARTY**

RULING

(In respect of the 1st Applicant's application dated 27/3/2025)

1. The 1st Applicant moved this Court vide the Notice of Motion dated 27/3/2025 brought under the provisions of Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 15 of the Civil Procedure Rules. The 1st Applicant substantively prays for the following orders:
 - a. That the Honourable Court be pleased to review/set aside and vary the Orders of Lady Justice Grace Kemei dated the 27/3/2025 dismissing the 1st Applicant's Application dated 17/3/2025 and to have the said application reinstated.
 - b. That costs of this application be in the cause.
2. The application is premised on the grounds on its face, and supported by an Affidavit of **Eunice Njeri Wachira**, an Advocate working with the firm of Koki Mbulu & Company, Advocates sworn on even date. Counsel avers that when the main application was slated for hearing, the Registry

inadvertently listed the matter before both Justice Oscar Angote and this court. Counsel has attached a copy of the Cause Lists for 27/3/2025 for both courts.

3. She avers that she logged into Justice Angote's Court for the hearing of the application only to learn that the matter had proceeded before this court and the application dismissed. That consequently, the main application on stay of proceedings in Tribunal Case No. E090 of 2024 was not determined thus condemning the applicant unheard. She therefore seeks that the dismissal order of 27/3/2025 be reviewed and set aside and the application dated 17/3/2025 be reinstated for hearing and determination on merits. That the application has been filed promptly having been filed just a day after the dismissal of the application.

Respondent's Replying Affidavit

4. The application is opposed by the Respondent, Nicholas Mawia Mbaluka, through a Replying Affidavit sworn on 24/4/2025. The Respondent contends that, aside from this miscellaneous cause, there is also Appeal No. E213 of 2024, both lodged by the Applicant herein against the Tribunal's Ruling delivered on 21/11/2024. He argues that the Court risks issuing contradictory orders which would undermine the Court process. The Respondent criticises the Applicant for failing to disclose to this court that he has filed both an appeal and an application for review against the same Ruling of the Tribunal.
5. Regarding the dismissed application, the Respondents argue that the Applicant has not adduced evidence proving that Counsel was indeed before Justice Angote's Court. He asserts that the Applicant has come to court with unclean hands as no sufficient reasons have been provided to justify setting aside the dismissal orders. He urges the court to dismiss the application with costs.

Interested Party's Replying Affidavit

6. The Interested Party opposed the application through the Replying Affidavit sworn by David Katu Yaitha, its elected official, dated 2/5/2025.

The deponent argues that the application is incompetent and intended to waste time and resources, as the Applicant has filed offshoot applications. The deponent states that the Applicant filed both an appeal and a review application in an attempt to delay the progress of the claim pending at the Co-operative Tribunal. The Interested Party contends that the application is unmerited and should be dismissed with costs.

The Written Submission

7. On 5/5/2025, parties elected to canvass the application by way of written submissions. Parties compiled. The Applicant's submissions are dated 30/5/2025, whereas the Respondent's and Interested Party's submissions are dated 21/7/2025 and 25/7/2025, respectively. I have had the opportunity to read through the submissions and consider them in the Ruling.

Analysis and Determination

8. Having read and considered the instant Application, Affidavits and the annexures thereto as well as the rival submissions. I find that the issues for determination are;
 - a. Whether this court should set aside its dismissal order and reinstate the 1st Application dated 17/3/2025;
 - b. Who should bear the costs of the application?

Whether this court should set aside its dismissal order and reinstate the 1st Applicant's application dated 17/3/2025;

9. Order 12 rule 7 of the CPR provides that;

“Where under this order judgement has been entered or the suit has been dismissed, the court on an application, may set aside or vary the Judgement or order upon such terms as may be just.”
10. The orders sought by the 1st Applicant are therefore at the court's discretion. The 1st Applicant urges the court to exercise its discretion in his favour. In exercising judicial discretion, the court must exercise caution, as the Court of Appeal stated in the case of **Murtaza Hussein**

Bandali t/a Shimoni Enterprises Vs P.A Willis (1991) KLR, 469,
that:

“This being an exercise of judicial discretion, like any other judicial discretion, must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence, but deservedly and not arbitrarily, whimsically or capriciously.”

11. The discretion of this court is intended to ensure that no party suffers injustice or hardship, including, among others, excusable mistake, inadvertence, accident, or error (**CMC Holdings Ltd. -vs- Nzioki (2004) eKLR, 173**).

12. A party seeking reinstatement of an application or a suit dismissed for non-attendance must explain their absence on the day of the hearing and how they would be prejudiced if the application or suit is not reinstated. In the present case, counsel for the applicant has accepted personal responsibility for their non-attendance, which resulted in the application being dismissed. They have also outlined the circumstances that led to their failure to attend court on that day. In the case of **Philip Chemwolo & Another -vs- Augustine Kubende (1986) eKLR**, where the Court of Appeal held that: -

“...Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter is that unless there is fraud, or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

13. I have considered the reasons provided by the 1st Applicant’s Advocate for his absence from the virtual court session on the specified date. I am satisfied that the failure to attend was not intentional. I also

observe that the current application was submitted without undue delay, as it was filed on the same day the main application was dismissed.

14. The court's finding is that the 1st Applicant's application dated 27/3/2025 is merited. It is allowed as prayed.

15. Regarding the claim that the Applicants have lodged both an appeal and a review, I hesitate to state that the Respondent is at liberty to raise these issues in a formal application to enable the opponent to respond.

16. **Disposal orders;**

a. Accordingly, the application dated 17/3/2025 is hereby reinstated and shall be set down for hearing forthwith.

b. The costs of this application shall be in the cause.

17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF NOVEMBER 2025 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

1. Ms Koki Mbulu for the Applicants
2. N/A for the Respondent
3. N/A for the Interested Party
4. C/A - Ms. Yvette Njoroge