

4. The advocate annexed a copy of an extract from her diary for 23rd January, 2025 to confirm that this appeal was not diarized for mention on 23rd January, 2025. The counsel pleads that a mistake on her part should not be visited upon her client and that the setting aside of the orders of 23rd January, 2025 will not prejudice the Respondent.
5. The Applicant's application was opposed by the Respondents through a replying affidavit sworn by the 1st Respondent on 30th September, 2025. The Respondents contend that the Appellant had been granted stay of execution of the lower court and that thereafter, the Appellant did not take any step to prosecute the appeal forcing the court to issue a notice to show cause. When the Appellant failed to show cause, the Appellant's appeal was dismissed on 18th December, 2022.
6. The Respondents state that the Appellant filed an application under certificate of urgency and the dismissed appeal was reinstated. The appeal was listed for mention on 23rd January, 2025 when the Appellant or his advocate did not attend court. The Appeal was again dismissed for the second time. The Respondents state that the Appellant is not acting in good faith and is not committed to expeditious disposal of the appeal.
7. The Respondents further stated that following the judgment delivered by the lower court, the court stated that the matter be referred to the National Land Commission to determine the documents tendered in the suit in relation to parcel Nos. 300A and 300B Emali but due to the conduct of the Appellant, that is not possible. The Respondents opposed the lifting of the orders of 23rd January, 2025 to pave way for the investigations by the National Land Commission.
8. The parties were directed to file submissions. The Applicant filed submission dated 18th August, 2025. The Respondents filed submissions dated 30th September, 2025. The Applicant filed further submissions dated 10th October, 2025.

9. The Applicant submitted that sufficient cause has been shown why the counsel did not attend court on 23rd January, 2025. The Applicant relied on the case of **Philip Chemwolo & Another –vs- Augustine Kubende (1982 – 88) KAR 103 at 1040** where it was held as follows:

“Blunders shall 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 merit. 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 the purpose of imposing discipline”.

10. The Respondents submitted that the Applicant had been indulged by the court reinstating the appeal which had been dismissed and that the Applicant should not be indulged for the second time.

11. The Respondent submitted that this court can only exercise its discretion to set aside a dismissal order if sufficient cause is shown. The Respondent relied on the case of **Shanzu Investment Ltd –vs- The Commissioner of Lands** which quoted **Wanjiku Kamau –vs- Tabitha N. Kamau & 3 others (2014) eKLR** where it was stated as follows:

“The court has a wide discretion to set aside judgment and there are no limits and restrictions on the discretion of the judge except if the judgment is varied, it must be done on terms that are just”.

12. In the Applicant’s further submissions dated 10th October, 2025, the Applicant submitted that his appeal was not dismissed early on as alleged. He submitted that the court in its ruling of 16th October, 2024 found that the appeal had never been dismissed and that the application for reinstatement was improperly before the court.

13. The Applicant submitted that the stay orders which were granted lapsed as the Appellant did not comply with the conditions granted therein. He submits that nothing prevents the Respondents from executing the decree or going ahead with investigations by the National Land Commission.
14. On the issue of dismissal of the appeal during the first time, the Applicant submitted that it is a mystery that the Respondents are averring to the issue as if it was the true position when the court found that the appeal had not been dismissed and therefore the application for reinstatement was unnecessary.
15. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondents. The only issue for determination is whether the Applicant has met the threshold for grant of the orders sought.
16. This court has a wide discretion to set aside its orders. This exercise of discretion has to be made judiciously. This was the finding in the case of **Wanjiku Kamau (Supra)**. In the instant case, the Applicant's counsel failed to attend court on 23rd January, 2025 because she was on leave and the matter had not been diarized in her diary. The counsel provided an extract from her diary for 23rd January, 2025 in which it is clear that appeal No. E004 of 2021 was not among the matters listed in her diary.
17. As the matter had not been diarized and the advocate was on leave, no one in her office would have known that the matter had been listed for mention on 23rd January, 2025.
18. The appeal was not being dismissed for the second time as the Respondents claim. A look at the ruling of 16th October, 2024 clearly shows that the judge noted that the appeal herein had not been dismissed and therefore there was no basis for filing notice of motion dated 24th May, 2023 which sought reinstatement of an appeal which had not been dismissed.
19. The Applicant was ordered to file a Record of Appeal within 45 days from 16th October, 2024. The Applicant did not comply with this directive. The

Applicant filed a Record of Appeal on 21st February, 2025. As at this time the counsel did not know that the appeal had been struck out on 23rd January, 2025.

20. The Applicant has given a reason why there was non attendance on 23rd January, 2025. As the Applicant has already filed a record of appeal albeit outside the time given, the Applicant should be allowed to urge his appeal. As was said in the case of **Philip Chemwolo (Supra)**, blunders will continue to be made by advocates and that should not be used as a bar for the party at fault not to be heard.

21. I therefore find that this is a deserving case where this court should exercise its discretion in favour of the Applicant. Consequently, I allow the Applicant's application dated 25th March, 2025 in terms of prayers 2 and 3. The appeal filed herein is admitted to hearing. The Appellant shall file and serve written submissions within 21 days. The Respondents to file their submissions within 21 days of being served. Mention on 4th February, 2026. The costs of this application shall be costs in the cause.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 27TH DAY OF NOVEMBER, 2025.**

IN THE PRESENCE OF:

Mr. Kiluva for Respondents.

Court assistant – Steve Musyoki