

effective and proportionate resolution of disputes. Additionally, that the Appellant has not demonstrated that he has an arguable appeal. The Respondent urged that the Application be dismissed with costs.

5. 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.

6. 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.

7. 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 appeal, the Court takes judicial notice of the fact that failure of technology is not an uncommon occurrence. Further, while the order dismissing the appeal was issued on 14.10.24, the present Application was filed timeously on 19.10.24. Additionally, the Appellant has demonstrated efforts made to obtain typed proceedings *vide* letter dated 26.3.24 and a follow up email dated 11.10.24. In the premises, I do find that the wider interests of justice require that the appeal 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 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.

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 Appellant should the orders sought not be granted, will be immense. More so because the Appellant has since filed the record of appeal. In exercise of its discretion therefore, the Court opts for the lower rather than the higher risk of injustice, namely to reinstate the appeal for hearing on merit. The interests of justice also require that the substratum of the appeal is preserved pending the hearing and determination thereof, noting that an order for stay of execution of the judgment and decree of the lower court had been granted by this Court on 22.10.24.
11. The upshot is that the Application dated 18.10.24 is allowed as prayed, with the effect that the appeal herein is reinstated for hearing and determination on merit. The Respondent shall have costs.

DATED, SIGNED and DELIVERED at Malindi this 21st day of November 2025

M. THANDE
JUDGE

