

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC APPEAL NO. E018 OF 2025

MUMIN AHMED
HASSAN JUMA HASSAN
FABIO STEFANINI T/A MAKUTI RESTAURANT
APPLICANTS

VERSUS

PHILLIPE MAURICE
RESPONDENT

RULING

1. The Applicants’ notice of motion application dated **29th September 2025**, is the subject of this ruling. The Applicants sought the following orders:

- 1)Spent;
- 2) **That this honourable court be pleased to set aside the orders of dismissal of this Appeal made on 23rd September 2025, and all consequential orders arising therefrom;**
- 3) **That this honourable court be pleased to set aside the orders dismissing the Applicants’ application dated 3rd March 2025;**
- 4) **That this honourable court be pleased to reinstate both the appeal and the application dated 3rd March 2025 to the active cause list for hearing and determination on their merits;**
- 5)Spent;
- 6) **That the costs of this application be in the cause.**

2. The application which is premised on the grounds enumerated therein and it is supported by an affidavit sworn by **Ms. Lucy Mwangi**, the Applicants’ counsel on record.

3. She narrated that the Applicants had filed an application dated 3rd March 2025 seeking leave to lodge an appeal out of time against the judgment delivered in Malindi CMELC No. 145 of 2019. That application was listed

for hearing on 23rd September 2025 when it was dismissed for non-appearance when she was actively engaged in another court session. She asserted that she was present in court when the session started but was compelled to attend to the other matter in a different court. She learnt of the dismissal when she logged back to this court and upon liaising with opposing counsel. Ms. Mwangi deposed that her non-appearance was neither deliberate or aimed at obstructing justice but was purely inadvertently caused by the reality of simultaneous engagements.

4. The Respondent was served but failed to respond to the application. The application is therefore unopposed.
5. One of the consequences of non-attendance provided under **Order 12** of the Civil Procedure Rules is dismissal. **Order 12 Rule 7** of the **Civil Procedure Rules, 2010** however vests this Court with discretion to set aside or vary any order of dismissal upon such terms as may be just. The principles guiding the exercise of such discretion are well settled. Firstly, the discretion has to be exercised judiciously, as was stated in the case of **Shah vs Mbogo (1979) EA 116** quoted with approval in the case of **John Mukuha Mburu v Charles Mwenga Mburu [2019] eKLR**, where that court held thus:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

6. The Court must be satisfied that sufficient cause exists to justify the failure that led to dismissal, and that the Applicant has acted with diligence and an intention to prosecute the suit without undue delay. In doing so, the Court must balance the right of the litigant to a fair hearing under **Article 50** of the **Constitution of Kenya** against the imperative of expeditious disposal of cases as provided under **Sections 1A** and **1B** of the **Civil Procedure Act** and the requirement that justice must not be delayed in Article 159 of the Constitution. It is, therefore, the Applicant's duty to demonstrate sufficient cause to justify the exercise of the Court's discretion in their favour.
7. I have considered Ms. Mwangi's explanation. It is true the application dated 3rd March 2025 was listed for hearing on 23rd September 2025, as the sixth matter in the cause list. She stated that she was present in court but had to attend to a different matter in a different court at the same time. She exhibited a copy of her personal diary to show the court the number of matters she had on that date.
8. I am satisfied that her absence was neither deliberate nor calculated to obstruct the administration of justice. The principles enunciated in **Shah vs Mbogo (supra)** guide this Court in exercising discretion to set aside dismissals caused by inadvertence or excusable mistakes. In the present matter, the Applicants have acted promptly upon learning of the dismissal and have shown diligence in seeking to reinstate both the appeal and the application.

9. Further, the Respondent has not filed any response to oppose this application. The lack of opposition, while not determinative, is a relevant factor in considering whether granting the orders sought would occasion injustice.
10. In the circumstances, I find that the Applicants have demonstrated sufficient cause to justify the failure that led to dismissal and that the exercise of this Court's discretion in their favour is warranted. The balance between the Applicants' right to be heard and the need for expeditious disposal of cases tips in favour of affording the Applicants an opportunity to have their appeal and application determined on the merits.
11. The upshot is that the application dated 29th September 2025 is hereby allowed. There shall be no orders to costs. The matter shall be mentioned on 29/1/2026 for further directions.

Dated, signed and delivered at Malindi on this 9th day of December 2025.



**MWANGI NJOROGE
JUDGE, ELC, MALINDI**