

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCMISC No. E001 OF 2025

JOHNSTONE ONDONGA BOSIRE 1ST APPLICANT

JOEL NCHORE ARAKA 2ND APPLICANT

VERSUS

ALBERT MARUBE ONGERI RESPONDENT

RULING

1. The application before me is that dated 23 October 2025 filed by the applicants in this miscellaneous cause. What the applicants seek is the setting aside of the orders made on 23 October 2025 which dismissed the miscellaneous application dated 18 December 2024 for non-attendance and failure to prosecute.
2. It is not the first time that the applicants are making such application, and not the first time that the miscellaneous application dated 18 December 2024 was dismissed for non-attendance and failure to prosecute. That motion dated 18 December 2025 was earlier dismissed on 5 May 2025 again for non-attendance and failure to prosecute. Following that dismissal, the applicants filed an application dated 29 May 2025 to reinstate that dismissed application. The reason given was that Mr. Sagwe, learned counsel who appears for the applicants, had mis-diarised the case for 8 May 2025 instead of 5 May 2025. I observed that the date of 5 May 2025 was given in court in presence of Mr. Sagwe, but I nevertheless gave benefit of doubt, and in my ruling delivered on 2 October 2025, I allowed that application dated 29 May 2025 and reinstated the miscellaneous application dated 18 December 2024. Upon delivery of the ruling, I directed that the application dated 18 December 2024 be heard inter partes on 23 October 2025.
3. On 23 October 2025, I first called out the matter at 9.57am but there was no appearance on the part of Mr. Sagwe, for the applicant, and no appearance on the part of counsel for the respondent. Out of the court's own discretion, the file was placed aside. After I had completed the call-over, I again called out the file at 10.46am. There was again no appearance on the part of Mr. Sagwe or the applicants and also no appearance on the part of counsel for the respondent. My conclusion was that the applicants had lost interest in

the application thus the failure to attend to prosecute it. I proceeded to dismiss their application dated 18 December 2024 with no orders as to costs and ordered the file to be closed.

4. Subsequently, this application was filed. The application is based on the following grounds :
 - (a) That the applicants' advocate was present in court virtually on 23 October 2025; his network dropped and he managed to come to open court. Unfortunately, he found the suit has been dismissed for non-attendance.
 - (b) That in all fairness, mistake of counsel should not be visited upon the innocent client.
 - (c) That the applicants stand to suffer loss and injustice if the order sought to be set aside is left to stand.
 - (d) That the applicants have come to this court in good faith and promptly.
5. The application is supported by the joint affidavit of the applicants. They depose that their advocate was engaged before Hon. Justice Odera in HCC No.1 of 2022 and Misc. Civil Case No. E085 of 2025 (OS) and they have annexed a copy of his diary. They depose that after he finished his cases in that court, he rushed to this court and found the application dismissed. They depose that they were present in court waiting for the application but the same was done virtually.
6. I have considered the application.
7. I observe that the main motion which is dated 18 December 2024 is one seeking leave to appeal out of time against the judgment delivered on 4 December 2023 by the Chief Magistrates' Court in the suit Kisii MCELC No. E067 of 2022. It will be observed that the application was being filed more than one year from the date of the judgment. It is not very clear to me what the dispute was or what the judgment was, as the judgment is not annexed in the application dated 18 December 2024.
8. Now, it is not the first time that the application dated 18 December 2024 has been dismissed for non-attendance. I have already pointed out that it was earlier dismissed on 5 May 2025. The applicants filed an application to reinstate giving the reason that their advocate mis-diarised the matter. I gave them benefit of doubt and reinstated their application. You would now expect utmost diligence and vigilance given that the court had exercised its discretion in their favour but this was not to be. The applicant's advocate was not present on 23 October 2025 despite the file being called out twice.
9. In the grounds in support of the application, it is said that the advocate had network challenges. However, when you read the supporting affidavit, the reason now given is that

the advocate was engaged before another court. If the applicants were honest, you would expect there to be consistency in the reasons they give. The applicants also say that they were in open court but the matter was dealt with virtually. That is not true. The practice of the court is that the Court Assistant is always in court. On the day that the application was dismissed, the applicants were not present in court and I in fact noted that both the applicants and their counsel were absent. The applicants are clearly now being completely untruthful.

10. I am afraid that in those circumstances I am not convinced to set aside the orders of 23 October 2025 and not persuaded to reinstate for a second time the application dated 18 December 2024. That application remains dismissed and this file will be closed. There will be no orders as to costs.

11. Orders accordingly.

DATED AND DELIVERED THIS 9 DAY OF DECEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Sagwe for the applicants

No appearance on part of Mr. Mageto for the respondent

Court Assistant – David Ochieng.