REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC NO. E010 OF 2024

ABUBAKAR MOHAMED SWALEH …….. PLAINTIFF

VERSUS

1. **ABDULRAHIM MOHAMED SWALEH**
2. **ABDULWAHID ABDULRAHIM MOHAMED**
3. **RABIABAI HASHAM NURMOHAMED**
4. **GHALIB AHMED ALWY**
5. **THE LAND REGISTRAR, LAMU ……. DEFENDANTS**

RULING

1. By a notice of motion application dated 2nd July 2025, the plaintiff sought orders:

   a. **Spent.**

   b. **THAT, the Honourable Court do invoke its inherent powers in the interest of substantive justice to reinstate the Plaint dated 29th January, 2024, which was dismissed for non-attendance on 22nd May, 2025, be reinstated and orders that were in force then be reinstated.**

   c. **THAT, the Honourable Judge do make orders or grant relief(s) it deems necessary and expedient in the interest of justice in particular expeditious disposal of the suit.**

   d. **THAT, the costs of the Application be provided for.**

2. The application which was premised on the grounds numbered therein, was supported by an affidavit sworn by Mr. Edward Micah Gichana, the Plaintiff's counsel on record.

3. Mr. Gichana deposed that he attended the virtual court session on 22nd May 2025 when the matter was listed to be mentioned to confirm compliance of court orders made on 18th March 2025. He was in present from 9.00 a.m till past 4.30 p.m. but he never heard the matter called out. He added that he heard another matter for his co-counsel, Magolo & Co. Advocates, dismissed, but asserted that it was not the present one.
4. The application was opposed by the 3rd and 4th Defendants through a Replying Affidavit sworn on 21st August 2025 by the 4th Defendant, who deposed that the suit had been struck out on 22nd May 2025 for the Plaintiff's failure to comply with the Court's directions issued on 7th April 2025. He further averred that on the material date, the Court had spent over ten minutes issuing directions, and therefore the Plaintiff's counsel could not credibly claim that he had been on the virtual platform but did not hear the matter being called out.
5. The 4th Defendant averred that the Application had been filed more than a month after the suit was struck out, casting doubt on the Plaintiff's claim that counsel had been present during the mention. No explanation had been offered for the delay. He further deposed that the Plaintiff had two advocates on record, and it was unlikely that both failed to hear the matter being called out, noting that counsel's name had been repeated several times without response. He maintained that the Plaintiff had disobeyed the Court's directions of 7th April 2024, thereby justifying the striking out of the suit. In his view, the Application was unmerited and

ought to be dismissed, though if allowed, the Defendants sought thrown-away costs of Kshs. 50,000.

6. The application was heard through written submissions.

Plaintiff's Submissions

7. Counsel for the Plaintiff submitted that Court had clear statutory, inherent, and constitutional jurisdiction to set aside the dismissal order and reinstate the suit, under **Order 12 Rule 7** of the Civil Procedure Rules and **Section 1A, 1B, 3A** and **64 (e)** of the Civil Procedure Act. He added that **Article 159 (2) (d)** of the Constitution empowers the court to do substantive justice without undue regard to procedural technicalities. To counsel, the reason given herein was plausible sufficient within the meaning of **Order 12 Rule 7** and **Order 17 Rule 2 (2);** that the Plaintiff should not be condemned for counsel's inadvertent failure and technological mishaps.

8. Counsel relied on the cases of Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others [2014] eKLR; Patel v East Africa Cargo Handling Services Ltd [1974] EA 75; Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR; Ivita v Kyumbu [1984] eKLR; Mwangi S. Kimenyi v Attorney General & Another [2014] eKLR; Shah v Mbogo & Another [1967] EA 116; CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR,

9. Further citing **Article 50 (1)** of the Constitution and the cases of Ivita v Kyumbu [supra]; Mwangi S. Kimenyi v Attorney General & Another [supra]; Utalii Transport Company Limited & 3 Others v NIC Bank &

Another [2014] eKLR, and Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others [2014] eKLR, counsel argued that dismissal of the suit at the mention stage was unlawful, punitive and inconsistent with the overring objectives and dictates of substantive justice. He added that the replying affidavit does not disclose any irreparable prejudice that would be occasioned to the Defendants if the suit is reinstated.

10. Counsel added that it is in the interest of justice that the application is allowed and relied on the case of Richard Ncharpi Leiyagu v IEBC & 2 Others [2013] eKLR, where the Court of Appeal held that the right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if courts have inherent jurisdiction to dismiss suits, this should be exercised sparingly and with abundant caution, and only in the clearest of cases.

3rd and 4th Defendants' Submissions

11. Counsel argued that the application is incurably defective having been anchored on the wrong provisions, that is, **Order 17 rule 2** which concerns dismissal for want of prosecution where no step has been taken for at least one year, which was not the case herein. To him, this discrepancy went into the substance of the matter and was not a mere technicality. He relied on the case of Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 Others (2014) eKLR.

12. Relying on the case of Gitau vs Muriuki [1986] KLR 211, counsel further submitted that where it is shown that an Applicant has relied on a wrong provision of the law in support of an Application intentionally so as to mislead the court on the facts and circumstances that transpired; the court will not be obligated to apply **Article 159(2) (d)** in order to cure the defect. He argued that that the Applicant has deliberately sought to create an absurdity in the sense that this Honourable court acted beyond its powers in dismissing the suit for want of prosecution which assertion is strictly misleading, dishonest and mischievous so as to disentitle the Applicant from the benefit of **Article 159(2)(d).**

13. He added that the Applicant's reliance on **Order 1 rule 7** and **Order 5 rule 17** is misplaced and confusing as these provisions concern joinder and substituted service respectively which provisions are wholly irrelevant to an application for reinstatement.

14. On whether the Plaintiff had demonstrated sufficient cause, counsel cited the definition of sufficient cause discussed in Nakuru Matrimonial Cause 2 of 2021; TKR v. JMM[2021] KEHC 1054 (KLR) and Wachira Karani vs Bildad Wachira [2016] eKLR. He submitted that the Plaintiff's allegations remain unsupported by any credible evidence, as such he has failed to meet the threshold for reinstatement. He relied on the case of CMC Holdings Ltd vs James Mumo Nzioka [2004] eKLR.

15. To justify their request for thrown away costs in the event the application is to be allowed, counsel relied on the case of County

Government of Tana River & another v Hussein Fumo Hiribae [2021] eKLR.

ANALYSIS AND DETERMINATION

16. I frame the following issues for determination:

i) Whether the application is defective for being anchored on the wrong provisions;

ii) Whether the order dismissing the suit should be set aside and the Plaint dated 29th January, 2024 reinstated.

17. The notice of motion was brought under the substantive provisions of Order 1 rule 7, Order 5 rule 17, 17 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules. **Order 1 rule 7** makes provision for When plaintiff is in doubt from whom redress to be sought. **Order 5 rule 17** is on substituted service. **Order 17 rule 2** is on notice to show cause as to why a suit should not be dismissed in instances when no application has been made or step taken by either party for one year. **Order 51 rule 1** is on the procedure to move the court under applications.

18. The suit was dismissed on 22nd May 2025 for non-compliance with the Court's directions issued on 7th April 2025. On that date, the Court directed the Plaintiff's counsel, Mr. Magolo, to indicate how he intended to proceed against the 1st Defendant, it having been confirmed that the said Defendant was deceased.

19. Although the Plaintiff cited several provisions that were not directly applicable to the circumstances of the dismissal, the Court is guided by the principle that wrong citation of the law is not, in itself, fatal where the

substance of the application is clear and the Court is otherwise properly seized of jurisdiction.

20. The power to set aside a dismissal made in the absence of a party is expressly provided for under **Order 12 Rule 7** of the **Civil Procedure Rules** and is further anchored in **Sections 1A, 1B, and 3A** of the **Civil Procedure Act** as well as Article **159(2)(d)** of the Constitution. The Court shall therefore proceed to consider the application on its merits.

21. **Order 12 Rule 7** 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."***

22. The guiding principles for exercise of that discretion were well stated by the Court of Appeal in **Simon Thuo Mwangi v Unga Feeds Limited [2015] eKLR** as: -

> ***"On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice."***

23. The Court must be satisfied that there exists sufficient cause to justify the failure leading to dismissal, and that the Applicant has demonstrated diligence and an intention to prosecute the suit without undue delay. Above all, the Court must balance the right of the litigant to a fair hearing under **Article 50** of the Constitution against the need for expeditious disposal of cases as enshrined under **Sections 1A** and **1B** of the Civil Procedure Act.

24. It is thus an applicant's duty to demonstrate the existence of a sufficient cause to warrant the court to exercise that discretion in its favour, in this case, the Plaintiff. Sufficient Cause was defined in the case of **Wachira Karani v Bildad Wachira [supra]** where the court cited with approval the Supreme Court of India in **Parimal v Veena** as follows: -

> ***"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"***
>
> ***The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties***

concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

25. In the present case, counsel for the Plaintiff stated that he was logged on to the Court's platform when the matter was dismissed but did not hear it being called out. In my considered view, this explanation is insufficient. The Plaintiff was represented by two advocates, yet no explanation was given as to why Mr. Magolo also did not hear the matter, or whether he was even present. Furthermore, Mr. Gichana himself admitted in his affidavit that he heard the Court dismiss another matter handled by Mr. Magolo. This indicates that there was no hearing or technological mishap preventing him from following the proceedings.

26. Further, even assuming counsel did not hear the call-out on the material date, no explanation was offered for the delay of more than one month before bringing the present application. The absence of prompt action undermines the Applicant's claim of diligence and suggests a lack of seriousness in complying with the Court's directions issued on 7th April 2025, which had required counsel to indicate how the suit would proceed against the deceased 1st Defendant.

27. The Court also notes that the dismissal did not occur arbitrarily but followed the Plaintiff's failure to comply with clear and substantive directions. The non-attendance on 22nd May 2025 was merely the final manifestation of this non-compliance. A litigant cannot rely on alleged inadvertence to circumvent obligations that had remained unmet since early April.

28. While the right to a hearing is fundamental, reinstatement is not automatic. The Court must be satisfied that the Applicant was prevented by excusable mistake or unavoidable circumstances, and that no prejudice would be occasioned to the opposing parties. In this case, the Plaintiff did not demonstrate sufficient cause for the non-attendance or for the earlier failure to comply with directions that were central to the further conduct of the suit.

29. In the circumstances, I find no basis upon which to exercise the Court's discretion in favour of reinstatement. The application dated 2nd July 2025 is accordingly dismissed with costs.

Dated, signed and **delivered** at **Malindi** on this **18th** day of **December, 2025.**

MWANGI NJOROGE
JUDGE, ELC, MALINDI.