

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC NO. E025 OF 2024

LABAN NDUVA MASAI.....1ST
PLAINTIFF
DORCAS MBELE.....2ND PLAINTIFF
-VERSUS-
MATUNDA C. B. O. THROUGH
CHAIRMAN.....1ST DEFENDANT
SECRETARY.....2ND DEFENDANT
TREASURER.....3RD DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 23rd July, 2025 in which the Defendants/Applicant are seeks the following orders:
 - 1) Spent
 - 2) That this honourable court be pleased to review the directios given on the 15th July, 2025 set them aside and allow the reinstatement of the application dated 28th May, 2025.
 - 3) Spent
 - 4) That the costs of this application be in the cause.
2. The Applicants contend that when their application dated 28th May, 2025 came up for hearing on 15th July, 2025, their advocate did not attend court as the advocate had omitted to diarize the matter. They state that non attendance in court was not intentional and that there is need for them to be allowed to file their defence to the Plaintiffs/Respondents' claim.
3. The Respondents opposed the Applicants' application based on a replying affidavit sworn on 28th July, 2025. The Respondents contend that the Applicants have not given sufficient reasons why their advocate did not attend court. They state that the hearing date was taken in the presence of Mr. Mutia for Applicants and there is no reason given why Mr. Mutia chose to attend the Auctioneers Board which is inferior to this court.

4. The parties were directed to file written submissions. The Applicants filed their submissions. The Applicants filed their submissions dated 3rd October, 2025. The Respondents filed their submissions dated 14th October, 2025. I have considered the Applicants' application as well as the opposition to the same by the Respondents. I have also considered the submissions by the parties. The only issue for determination is whether the Applicants have demonstrated that they deserve the exercise of this court's discretion to set aside the orders of 15th July, 2025.

5. In the case of **Lucy Bosire –vs- Kehancha Div Land Disputes Tribunal & 2 others (2013) KEHC 681 (KLR)** Odunga J. (as he then was) stated as follows:

“It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merit”.

6. The learned Judge went on to state as follows:

“In such matters as this court the court must take into account the principle of proportionality and sees where the scales of justice lie. The law is now that it is the business of the court, so far as possible, to secure that any transitional motions before business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory that ultimate end of justice. The court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice”.

7. In the instant case, the advocate for the Applicants has stated that failure to attend court on 15th July, 2025 was not deliberate. It was due to the fact that

the matter was not diarized. The advocate exhibited an extract from her diary which shows that this case was not in the diary for 15th July, 2025.

8. The advocate who explained the reason for non attendance stated that Mr. Mutia who was in personal conduct of this matter had attended an Auctioneers Board meeting. The advocate handled all matters which had been listed in the diary for 15th July, 2025 but did not know about this particular one as it was not diarized.
9. I find that the explanation given by the Applicants is reasonable. I therefore allow the Applicants' application by setting aside the dismissal of the application dated 28th May, 2025 as well as the directions that this case do proceed by way of formal proof. The costs of this application shall be costs in the cause.

It is so ordered.

.....
HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF JANUARY, 2026.

IN THE PRESENCE OF:

Mr. Ombati for Plaintiffs/Respondents

Ms. Ngumbau for the Defendants/Applicants

Court assistant – Steve Musyoki