

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT KENYA

AT KWALE

ELC CASE NO.188 OF 2021 (FORMERLY 77 OF 2020)

KHAMIS ATHMAN MWANJIRA

SAUMU JUMA HEMEDI.....PLAINTIFFS

- VERSUS -

ATHMAN NGOVI (*Legal Representatives of the Estate of Omar Rajimbo*)

ATTORNEY-GENERAL

REGISTRAR OF LANDS, KWALE LAND

REGISTRY REGISTRAR OF TITLES, KENYA

NATIONAL LAND COMMISSION

REGISTRAR OF LANDS, KINANGO

LAND ADJUDICATION OFFICER

TASNA INVESTMENTS LIMITED.....

.....DEFENDANTS

RULING

I. Introduction

1. Before this Honourable Court for its determination is the Notice of Motion application dated 23rd July, 2025. raised by *Saumu Jumaa Hemedi* and *Khamis Athman Mwanjira*, the 1st and 2nd

Plaintiffs herein. The application was premised under the provisions of Articles 25 (c), 40, 48 and 50 (1) of the Constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21 and Order 12 Rules 1 and 7 of the Civil Procedure Rules, 2010.

2. Upon service, the 1st Defendant responded through filing of a Replying Affidavit sworn on 4th September, 2025. Additionally, it swore a further Replying Affidavit on 29th September, 2025. Thereafter, the Plaintiffs also filed a further affidavit sworn by Mwaka Riziki Athumani on 19th September, 2025

II. The Plaintiffs' case

3. The Plaintiffs sought the following orders in their application that:-

a. Spent.

b. The orders made on 22nd July, 2025 dismissing the Plaintiffs suit be set aside, the file be re - opened, the suit be restored to the List and be reinstated for hearing.

c. The costs of this application be provided for.

4. The application was premised on the grounds, testimonial facts and averments made out under the 12 paragraphed Supporting Affidavit of – SAUMU JUMAA HEMEDI, the 2nd Plaintiff/ Applicant herein, sworn and dated the same day with the application. The Applicant averred that:

- a) The Affiant was at the time walking on crutches after she had fallen.
- b) On 22nd July 2025, the Affiant attended the Court together with many family members for the hearing of the suit and Kwale ELC Case No. 163 of 2025. Both cases had been filed by members of the same extended family suing the same purchaser, who had bought both properties from the same person, another relative, namely Athman Ngovi, the 1st Defendant in the suit and the 2nd Defendant in ELC Case No. 163 of 2025.
- c) The Affiant and her family members arrived at the Court in Kwale by 8:30 a.m. At around 9:00 a.m., they wished to enter the courtroom but, since they were many and could not fit inside, they were directed by a Court official to sit in a shaded area and were told that they would be called when their cases were reached.
- d) The Affiant personally saw the 1st Defendant and other people outside the Court, and after a while he left. He saw the family members and greeted some of them.
- e) In the suit, the Plaintiffs were represented by Messrs. Kinyua Kamundi of Kinyua Muyaa & Co. Advocates. The Affiant and

her family normally visited his office to discuss both cases, and on 3rd July 2025 he had asked them to be in Court on 22nd July 2025 before 9:00 a.m., informing them that he himself would be starting with Case No. 163 of 2021 at 11:00 a.m. in accordance with directions given by the Court.

- f) On the said date, 22nd July 2025, Mr. Kinyua Kamundi arrived in Court at around 10:30 a.m., and shortly thereafter Mr. Hamza Advocate also arrived.
- g) The Affiant and her family were shocked to learn that the case had been dismissed and Case No. 163 of 2021 had been adjourned. Mr. Kinyua Kamundi Advocate had agreed with Mr. Hamza that they would both meet in Court. Mr. Hamza represented the 8th Defendant in the suit, who was the 1st Defendant in ELC Case No. 163 of 2021, while Mr. Kinyua represented the Plaintiffs in both cases.
- h) From events that happened in open Court later the same date, the Affiant understood that the person who held brief for Mr. Hamza had not understood Mr. Hamza's instructions.
- i) Mr. Kinyua Kamundi Advocate had read and explained to the Affiant the provision of Order 12 (1) of the Civil Procedure Rules, 2010 which required that on the date of hearing the suit

should be called out for hearing outside the Court. The Affiant and her family had been told by Court officials to sit in the shaded area and wait to be called, but they were not called. Had they been called, the Affiant would have entered the Court and notified the Court that Mr. Kinyua was on his way.

- j) The Affiant confirmed that the 1st Plaintiff, Hamisi Athman Mwanjira, was present in Court and seated with them in the shaded area. As they waited to be called, they noted that other people sitting with them were being called by name to go to Court and later left. They were not extended the same courtesy.
- k) The Affiant verily believed that if the Judge had been informed that they were present in Court with all family members, the case would not have been dismissed.
- l) The suit related to property. Plot No. Kwale/Tsunza 1164, which was the subject of Kwale ELC No. 163 of 2021, had before adjudication been one plot together with Kwale/Tsunza 1165, with different portions occupied by different members of the same extended family. Both plots had been sold and transferred by the 1st Defendant to the 8th Defendant.

- m) The Plaintiffs sought to recover the property for the benefit of the family members entitled to it.
- n) The Affiant made the affidavit in support of the application to set aside the orders made on 22nd July 2025 and to reinstate the suit.
- o) Unless the application was allowed, many family members would have been disinherited, and the 1st Defendant would have benefited alone from property that he had no right to sell.
- p) The Affiant and the 1st Plaintiff undertook to the Court that they would be available on the earliest available date for the hearing of the suit as soon as it was reinstated.
- q) They wished to exercise their rights under Articles 25(c), 40, 48, and 50(1) of the Constitution to a fair trial, to protect their property, to access justice, and to secure a fair hearing.

III. The 1st Defendant's response

5. The 1st Defendant responded to the Application through a 10th paragraphed replying affidavit sworn by ATHMAN NGOVI, the 1st Defendant who averred that: -

- a) The Affiant had read and understood the Plaintiffs'/Applicants' application dated 23rd July 2025

together with the Supporting and Supplementary Affidavits sworn on the same date, and the same had also been explained to the Affiant by his Advocates on record.

- b) The Affiant had attended Court on 22nd July 2025 when the suit was scheduled for hearing, as evinced by the cause list for the material date. Annexed and marked as exhibit “AN-1” was a true copy of the cause list for that day.
- c) The Affiant was present in the courtroom together with Mr. Kinyanjui, Advocate from the Law firm of Messrs. Gikandi & Company Advocates, who were his Advocates on record.
- d) The matter was called out virtually shortly after 9:00 o'clock, but there was no response on the part of the Plaintiffs. The file was placed aside and later called out a second time, but again there was no response from the Plaintiffs.
- e) The Affiant confirmed from his court attendance that there was no response virtually by either the Plaintiffs'/Applicants' Advocates or any of the Plaintiffs in person, and further that none of them was physically present in Court.

- f) As a consequence of the said non-attendance and failure by the Plaintiffs to prosecute their case, and after the Affiant's Advocate confirmed that he was present and ready to proceed, the Honourable Court dismissed the Plaintiffs' case for non-attendance and/or want of prosecution.
- g) The Affiant was advised by his Advocates on record that in the circumstances, the Plaintiffs had failed to exercise due diligence on the material date, thus prompting the Honourable Court to properly exercise its discretion under the provision of Order 12 Rule 4 of the Civil Procedure Rules, 2010 to dismiss the Plaintiffs' case. The application herein should therefore have been dismissed with costs for lacking merit.
- h) The Affiant swore the affidavit in opposition to the Plaintiffs'/Applicants' application dated 23rd July 2025.

IV. The Plaintiffs' further affidavit

6. The Plaintiffs responded to the Replying Affidavit through a 8th paragraphed replying affidavit sworn by MWAKA RIZIKI ATHUMANI as follows that:-

- a) She was a female adult of sound mind. The 1st Plaintiff was her brother, and the 2nd Plaintiff was her sister. Thus, the Affiant was competent and duly authorized to make the affidavit on matters within her personal knowledge who averred that: -
- b) The Affiant knew the 1st Defendant, Athman Ngovi. His late father, Omar Rajimbo, was her cousin.
- c) The Affiant had read and understood the Replying Affidavit sworn by Athman Ngovi, the 1st Defendant, on 4th September 2025 and referred to paragraph 6 thereof.
- d) The Affiant stated that the 1st Defendant had lied on oath. The Affiant, together with her other sister, Pombe Athumani, had arrived at Kwale Law Courts at 8:30 a.m. on 22nd July 2025. They met other family members from the larger clan who had already arrived at the Law Courts. On arrival at the gate on that date, the Affiant met the 1st Defendant right at the entrance to Kwale Law Courts. He was accompanied by his brother Ndoro and other persons not known to her. The Affiant greeted him together with his brother and those accompanying them, and then proceeded into the Court compound.

- e) The Affiant and her relatives were many at the Court because the suit and the other related suit concerned property belonging to the larger family of Mzee Ngovi, the late Athman Mwanjira.
- f) Since they were a large group and could not fit in the courtroom, they were advised by a male Court official to wait in the shaded area until their case was reached. They waited patiently but were not called. The 1st Defendant saw the Affiant, her sister, and other family members, and therefore knew that they were present in Court.
- g) The 1st Defendant, together with some people, went away from the Court, but the Affiant and her relatives waited together with his elder brother, Ngoro. His brother Ngoro remained at the Law Courts, seated some distance from them, but when their Advocate, Mr. Kinyua, called them to enter the courtroom, Ngoro accompanied them inside and was present when Mr. Kinyua Kamundi informed the Judge that they had been waiting patiently for the case to be called out.
- h) The Affiant stated that the 1st Defendant had sworn a false affidavit by denying that they were in Court, when the Judge himself had recognized that they were present.

- i) If the case had been called out, the Plaintiffs and other family members would have entered the courtroom, as that was the reason they were all there. The Court official should not have kept them outside the courtroom if he did not intend to call out the case outside.
- j) The case was not called out as required by law and was dismissed while they were patiently waiting in the Court compound to be called.
- k) The Affiant emphasized that the punishment for perjury was seven years' imprisonment without the option of a fine. She requested the Court to refer the perjury committed by the 1st Defendant to the Directorate of Criminal Investigations for appropriate action.

V. The 1st Defendant's further Response

- 7. The 1st Defendant responded to the Application through a 11th paragraphed replying affidavit sworn by ATHMAN NGOVI, the 1st Defendant who averred that: -
 - a. The Affiant had read and understood the Further Affidavit sworn by Mwaka Riziki Athman on 19th September 2025,

and the same had also been explained to him by his Advocates on record.

- b.** The Affiant reiterated that on 22nd July 2025, he was present in the courtroom with Mr. Kinyanjui, Advocate from the firm of Gikandi & Company Advocates, who were his Advocates on record, when the matter was called out virtually for the first and second time with no response from the Plaintiffs or their Advocates on record.
- c.** The Affiant stated that he was a stranger to the Deponent's allegations that a male court official had advised the alleged large group together with the Plaintiffs to sit outside the courtroom throughout the time the matter was called out.
- d.** The Affiant explained that as he waited inside the courtroom with his Advocate, he could not have followed what transpired outside the courtroom. However, he would have expected that the Plaintiffs would have been diligent enough to be physically present in the courtroom, especially in the absence of their Advocates on record both physically and virtually when the matter was called out for hearing.

- e. The Affiant reiterated and emphasized that the contents of his Replying Affidavit sworn on 4th September 2025 were true, and that even the narrative of the said Deponent had confirmed that the Plaintiffs did not enter into the courtroom on the material date and time when the matter was called out.
- f. The Affiant stated that on the material date, his elder brother had called him on phone about one hour after the court session, and he informed him that he had already left the Court. It was not true that he had been accompanied by his brother on the said date.
- g. The Affiant further stated that it was also not true that he had met and exchanged niceties with the Deponent on the material date, and he could not therefore confirm whether she was present or not within the court precincts as alleged.
- h. The Affiant emphasized that in the circumstances, the issue of perjury on his part did not arise at all, and that the Deponent was only attempting to escalate the differences that had arisen amongst them as relatives, since the Deponent was his aunt who had taken sides with her brothers, the Plaintiffs herein.

- i. The Affiant swore the affidavit in response to the Further Affidavit.

VI. Submissions

8. On 3rd November, 2025 while the Parties were present in Court, they were directed to have the Notice of Preliminary Objection dated 23rd July, 2025 be disposed of by way of written submissions and all the parties complied. Unfortunately, by the time of penning down this Ruling the Honourable Court had not been in a position to access the submissions by the parties, Hence it proceeded to deliver the Ruling on 17th February, 2026 on its own merit accordingly.

VII. Analysis and Determination

a) I have considered the Notice of Motion application, the replies, the relevant provisions of the Constitution of Kenya 2010 and statutes. There are five (5) issues which fall for the determination of the said application. These are:-

- a). ***Whether the dismissal of the Plaintiffs' suit on 22nd July 2025 was procedurally proper under the provision of Order 12 of the Civil Procedure Rules, 2010?***
- b) ***Whether sufficient cause was demonstrated to warrant reinstatement of the suit under Order 12 Rule 7 of the Civil Procedure Rules, 2010.***

- c) Whether the Plaintiffs' constitutional rights under Articles 25 (c), 40, 48, and 50 (1) of the Constitution of Kenya were infringed.**
- d) Whether the allegations of perjury against the 1st Defendant warrant referral for criminal investigation.**
- e) Who bears the Costs of the Notice of Motion application dated 23rd July, 2025.**

ISSUE No. a). Whether the dismissal of the Plaintiffs' suit on 22nd July 2025 was procedurally proper under the provision of Order 12 of the Civil Procedure Rules, 2010

9. Under this Sub-heading, the Honourable Court will decipher on the substratum of whether the dismissal of the Plaintiffs' suit on 22nd July 2025 was procedurally proper under the provision of Order 12 of the Civil Procedure Rules, 2010.
10. The substratum for determination under this sub-heading is whether the dismissal of the Plaintiffs' suit on 22nd July 2025 for non-attendance was procedurally proper under the provision of Order 12 of the Civil Procedure Rules. The Plaintiffs contend that the suit was not called out outside the courtroom as required by Order 12 Rule 1, and that they were present within the court precincts but were misdirected by court officials to wait in a shaded area.
11. The Defendants, on the other hand, assert that the matter was called out virtually twice inside the courtroom with no response,

and that the Plaintiffs failed to exercise due diligence. The Court is thus called upon to examine the procedural propriety of the dismissal, the interpretation of the relevant rules, the effect of virtual hearings, and the scope of the Court's discretion to reinstate a suit under Order 12 Rule 7 of the Civil Procedure Rules, 2010.

12. The provision of Order 12 of the Civil Procedure Rules, 2010 (as amended) governs the hearing of suits and the consequences of non-attendance by parties. The relevant provisions are as follows:

“1. When neither party attends [Order 12, rule 1]

If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.

2. When only plaintiff attends [Order 12, rule 2]

If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—

(a) that notice of hearing was duly served, it may proceed ex parte;

(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the

defendant was unable to attend, it shall postpone the hearing.

3. When only defendant attends [Order 12, rule 3]

(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.

(2) If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.

(3) If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.

4. When some only of plaintiffs attend [Order 12, rule 4]

If only some of the plaintiffs attend, the court may either proceed with the suit or make such other order as may be just.

5. When some only of defendants attend [Order 12, rule 5]

If only some of the defendants attend, the court may proceed with the suit and may give such judgment as is just in respect of the defendants who have not attended.

6. Effect of dismissal [Order 12, rule 6]

(1) Subject to sub rule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit or may apply to the court to reinstate the suit.

(2) When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action.

7. Setting aside judgment or dismissal [Order 12, rule 7]

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.”

13. The language of Order 12 Rule 1 is explicit in requiring that, on the day fixed for hearing, the suit must be **“called on for hearing outside the court”** before the court may dismiss the suit for non-attendance. This phrase has been the subject of judicial interpretation and is central to the Plaintiffs’ complaint.

14. The requirement to call out matters **“outside the court”** is a procedural safeguard rooted in the need to ensure that parties who are present within the court precincts are afforded a fair opportunity to respond when their matter is called. Historically, this practice was designed to accommodate the realities of crowded court corridors, delays in the movement of files, and the possibility that parties or their advocates might be waiting outside the courtroom for their matter to be reached on the cause list.

15. The rationale for this requirement was articulated in several authorities, including the case of:- **“Ali Hussein Sugule - Versus - B.A.T. Kenya Limited [2009] eKLR”**, where the High Court observed that the purpose of calling out matters outside the

courtroom is to ensure that parties who are present but not inside the courtroom are not unfairly prejudiced by the dismissal of their suit for non-attendance. The practice has been consistently followed in Kenyan courts, particularly in busy registries, to prevent inadvertent dismissals.

16. However, the advent of virtual means onto management, hearings and the modernization of court processes have introduced new and unforeseen complexities to the application of this rule, as will be discussed below.
17. The courts have grappled with whether the requirement to call out matters outside the courtroom is mandatory or directory. In the case of:- ***“John Kabira Kioni - Versus - George Namasaka Sichangi t/a Sichangi Advocates [2019] KEELRC 1792 (KLR)”***, the Employment and Labour Relations Court emphasized that procedural rules are intended to serve the ends of justice and should not be applied rigidly where doing so would result in injustice.
18. In the case of:- ***“Nguru - Versus - Karanja (Civil Appeal 04 of 2020) [2023] KEHC 19245 (KLR)”***, the High Court allowed an application to set aside a dismissal for want of prosecution where there was no evidence that the appellant had been

notified of the hearing date, underscoring the importance of procedural fairness and the right to be heard.

19. Conversely, in the case of:- ***“Job Chebor Tuikong - Versus - Jua Kali Association & Others (ELC No. 108 of 2018)”***, the Environment and Land Court declined to set aside a dismissal where the Plaintiff and his counsel had been duly served with a hearing notice by email, and the court found that the non-attendance was not excusable. The court held that the requirement to call out the matter outside the courtroom did not absolve parties of their duty to exercise due diligence and to clarify any ambiguity regarding the mode of hearing, especially in the context of virtual proceedings.

20. The cumulative effect of these authorities is that while the requirement to call out matters outside the courtroom is a procedural safeguard, its application must be contextual and purposive, taking into account the circumstances of each case and the overarching imperative of substantive justice.

21. The insurgence of global COVID-19 pandemic with its mantras and stringent Government – the Ministry of Health policy of prevention rather than curative health measures – **of Staying at Home; Use of Sanitizers and Keeping a distance** - made a game

changer and Roller Coaster to this procedural patterns. It led to the subsequent adoption of Micro - Soft Means of virtual hearings by the Kenyan Judiciary which fundamentally altered the landscape of court proceedings. The Judiciary's official guidance recognizes virtual courts as a means of promoting access to justice, efficiency, and transparency. There was developed "***the Supreme Court (Virtual Sessions) Practice Directions, 2023***", and related guidance by the Chief Justice, to provide that where proceedings are to be conducted virtually, the Registrar shall provide a video and audio conference link to the concerned advocates or parties through email or other electronic means at least three days before the proceedings. Parties are required to ensure that their electronic equipment and internet connection are adequate, and to join the virtual session in a timely and decorous manner.

22. In the context of virtual hearings, the practical meaning of "**calling out**" a matter "**outside the court**" has evolved. It leaves some grey areas and complicates the actual meaning of "**Outside the Court**". Unless otherwise stated, courts have held and interpreted that, in virtual sessions, the equivalent of calling out a matter is "**the announcement of the case on the**

virtual platform, with parties expected to be present in the virtual waiting room or session at the appointed time". The requirement to call out outside the physical courtroom is thus, in virtual settings, satisfied by the proper notification and commencement of the matter on the virtual platform. Clearly, I admit this is an area that calls for further deliberations and improvement to ensure fair hearing, smooth, proportionate, expeditious and access to administration of Justice as it is envisaged under the provision of Articles 25 (c), 48, 50 (1) & (2) and 159 (1 & (2) of the Constitution of Kenya, 2010; Sections 3 and 13 of the Environment & Land Act, No. 19 of 2011. Otherwise, there will be numerous of such incidences occurring in our Courts.

23. In the case of ***"Ezekiel Mwaka Musau & Another - Versus - National Bank of Kenya [2021] eKLR"***, the Environment and Land Court considered an application to reinstate a suit dismissed for non -attendance where the applicants claimed to have logged into the virtual platform but were unable to gain admission. The court found that, while the applicants had made some effort to attend, they had not taken sufficient steps to clarify the mode of hearing or to ensure their attendance, and that the registry's

indication of a virtual link did not relieve them of their duty to follow up physically if virtual access failed.

24. Similarly, in the case of:- ***“Job Chebor Tuikong - Versus - Jua Kali Association & Others (Supra)”***, the court held that the transition to virtual hearings requires parties and their advocates to exercise heightened diligence, to clarify any ambiguity regarding the mode of hearing, and to ensure that they are present in the correct forum at the appointed time.
25. The Plaintiffs in the present case allege that they were present within the court precincts but were ostensibly misdirected by court officials to wait in a shaded area, resulting in their absence when the matter was called. The role of court officials and the registry in facilitating the attendance of parties is an important consideration. The courts have recognized that misdirection by court officials may, in appropriate circumstances, constitute sufficient cause to set aside a dismissal for non-attendance. In the case of:- ***“FM - Versus - EKW [2019] KEHC 8874 (KLR)”***, the High Court held that the mistake of counsel or inadvertence by court staff should not be visited upon an innocent litigant where the circumstances

demonstrate that the party was not at fault and acted with reasonable diligence.

26. However, the burden remains on the party seeking reinstatement to demonstrate, on a balance of probabilities, that the non-attendance was not due to their own indolence or lack of diligence. In the case of:- **“Jemima Omondi Koga - Versus - Francis Otieno [2021] KEHC 4763 (KLR)”**, the court emphasized that litigants have a duty to follow up on their cases and to ensure that they are present when required, and that the court will not assist a party who is bent on defeating justice through evasion or indolence.

27. Thus, the standard is one of reasonable diligence, and the court must assess, in each case, whether the party's absence was excusable in light of the totality of the circumstances.

28. The duty of due diligence is a recurring theme in the jurisprudence on dismissals for non-attendance. The courts have consistently held that it is the primary responsibility of litigants and their advocates to ensure that they are aware of the hearing date, the mode of hearing, and the location (physical or virtual) where their presence is required. In the case of:- **“Kurji & 4 others - Versus - Kurji & 3 others (Civil**

Appeal E118 of 2021) [2024] KECA 882 (KLR)”, the Court of Appeal reiterated that the party who institutes a suit bears the primary duty to instruct their advocates to take active steps to progress the suit and to ensure attendance at hearings. The court further held that the failure to do so, without sufficient explanation, may justify the dismissal of the suit and the refusal to reinstate it.

29. The courts have also recognized that, in the era of Information Technology through virtual hearings, parties must be proactive in confirming the mode of hearing, ensuring access to the necessary technology, and seeking clarification from the registry or court officials where there is any uncertainty. The Supreme Court Practice Directions require parties to notify the Registrar in advance if they are unable to access the necessary equipment or internet connection, so that arrangements can be made for them to participate from within the court premises.

30. The standard is not one of perfection, but of reasonable diligence in the circumstances. Where a party demonstrates that they took all reasonable steps to attend but were thwarted by factors beyond their control, the court may be inclined to set aside a dismissal. Conversely, where the party’s absence is

attributable to their own inaction or lack of vigilance, the court will be slow to exercise its discretion in their favour.

31. The Civil Procedure Rules have, since the 2020 amendments, expressly recognized electronic service as a valid mode of serving hearing notices and other court process. Order 5 Rule 22B provides that service by electronic mail is deemed effective when sent to the party's last confirmed and used email address, and when the sender receives a delivery receipt. An affidavit of service attaching the delivery receipt is required as proof of service

32. The courts have emphasized that mere dispatch of an email is not sufficient; there must be proof of actual delivery, such as a delivery or read receipt. In the case of:- ***"BOD County Referral Hospital Kitale & Another - Versus - DN (Civil Appeal E043 of 2023)"***, the High Court held that service by email is only complete upon confirmation of delivery, and that failure to provide such proof renders the service defective and any proceedings based thereon procedurally invalid.

33. The importance of proper service is underscored by the constitutional right to a fair hearing under the provision of Article 50 (1) of the Constitution, which guarantees every

person the right to have any dispute resolved in a fair and public hearing before a court or tribunal. In the present case, the court must examine whether the Plaintiffs were duly served with the hearing notice, whether the mode of service was appropriate, and whether there is credible evidence of actual receipt of the notice.

34. The courts have, in appropriate cases, set aside dismissals for non-attendance where the applicant demonstrated sufficient cause. In the case of:- **“Nguru - Versus - Karanja (Civil Appeal 04 of 2020) [2023] KEHC 19245 (KLR)”**, the High Court reinstated an appeal that had been dismissed for want of prosecution, finding that the appellant had not been notified of the hearing date and that the delay in seeking reinstatement was excusable in the circumstances.

35. In the case of:- **“FM - Versus - EKW (supra)”**, the court set aside a dismissal where the non-attendance was due to the inadvertence of counsel, holding that the mistake of counsel should not be visited upon the client where the circumstances justified such leniency.

36. I refer to the case of:- **“Kurji & 4 others - Versus - Kurji & 3 others (Supra)”**, the Court of Appeal affirmed the trial court’s discretion

to reinstate a suit where the dismissal was initiated by the court, both parties were absent, and the intended audience for the notice of dismissal was not reached. The court emphasized the need to balance the prejudice to both parties and to prioritize the right to be heard on the merits.

37. Conversely, the courts have declined to set aside dismissals where the applicant failed to demonstrate sufficient cause or where the delay was inordinate and unexplained. Citing the case of:- **“Job Chebor Tuikong - Versus - Jua Kali Association & Others (Supra)”**, the court found that the plaintiff had been duly served with a hearing notice by email, and that his failure to attend court or to clarify the mode of hearing was not excusable. The court held that the applicant had not taken proper or adequate steps to prosecute his case and had no one to blame but himself.

38. In the case of:- **“Maloba - Versus - Odebero (Civil Appeal 11 of 2012) [2025] KEHC 7252 (KLR)”**, the High Court dismissed an application for reinstatement where the applicant had failed to explain a prolonged delay of nearly two years after the filing of the record of appeal, and where the evidence did not support the reasons advanced for non-attendance. The court held that

equity has no place for the indolent and that the discretion to set aside is not designed to assist a person who has deliberately sought to obstruct or delay the course of justice.

39. The Court makes reference to the case of:- ***“John Kabira Kioni - Versus - George Namasaka Sichangi t/a Sichangi Advocates (supra)”***, the court declined to set aside a dismissal where the applicant and his advocate were both absent when the matter was called, finding that the failure to attend was a deliberate delay of the course of justice and not an excusable mistake.

The Court’s Discretion Under Order 12 Rule 7: Principles and Limits

40. The provision of Order 12 Rule 7 of the Civil Procedure Rules vests the court with wide discretion to set aside or vary a judgment or order of dismissal “upon such terms as may be just.” The exercise of this discretion is guided by well-established principles. In ***“Shah - Versus - Mbogo & Another [1967] EA 116”***, the East African Court of Appeal held that the discretion to set aside an ex parte judgment or order is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought,

whether by evasion or otherwise, to obstruct or delay the course of justice. The courts have further held that the discretion must be exercised judicially and not capriciously, taking into account all the circumstances of the case, including the reasons for non-attendance, the length of any delay, the conduct of the parties, the prejudice to the opposing party, and the overarching imperative of substantive justice.

41. In the case of:- ***“John Nahashon Mwangi - Versus - Kenya Finance Bank Limited (in Liquidation) [2015] eKLR”***, the High Court summarized the guiding principles as follows: courts should sparingly dismiss suits for want of prosecution, as dismissal is a draconian act that drives away the plaintiff from the seat of judgment. In applications to reinstate a suit, the court should consider whether there are reasonable grounds to reinstate, the prejudice to the defendant if the suit is reinstated, and the prejudice to the plaintiff if it is not. The burden of proof rests on the applicant to demonstrate sufficient cause for non-attendance and to provide a plausible explanation for any delay in seeking reinstatement. The court must weigh the competing interests of justice, efficiency, and finality.

42. The provision of Article 48 of the Constitution guarantees the right of access to justice, while Article 50(1) guarantees the right to a fair hearing. Article 159(2)(d) enjoins the courts to administer justice without undue regard to procedural technicalities.
43. The courts have consistently held that procedural rules, including those governing dismissals for non-attendance, must be interpreted and applied in a manner that promotes substantive justice and does not unduly fetter the right to be heard. In the case of:- ***“Harun Osoro Nyamboki - Versus - Attorney General & 3 others [2020] KEHC 9801 (KLR)”***, the High Court emphasized that the Bill of Rights binds all state organs, including courts, and that the High Court has a constitutional mandate to enforce the right to a fair hearing and access to justice.
44. However, the courts have also cautioned that the right to be heard is not absolute and must be balanced against the need for efficient and expeditious disposal of cases, the avoidance of undue delay, and the protection of the integrity of the judicial process. The overriding objective of the Civil Procedure Act and

Rules is to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes.

45. In other common law jurisdictions, the requirement to call out matters outside the courtroom is not universally observed. In England and Wales, for example, the practice is for the court clerk or usher to call out the matter in the corridor or waiting area, but the failure to do so does not necessarily render a dismissal for non-attendance invalid if the parties were otherwise notified and had a reasonable opportunity to attend.

46. The underlying principle is that parties must be afforded a fair opportunity to be heard, and that procedural safeguards must be balanced against the need for efficient case management. The courts retain a discretion to reinstate a suit where the interests of justice so require, but will not do so where the party seeking reinstatement has been indolent or has failed to provide a satisfactory explanation for their absence.

47. In determining whether the dismissal of the Plaintiffs' suit on 22nd July 2025 was procedurally proper under Order 12, the Court must consider the following factors:

- a. Whether the suit was called out outside the courtroom or, in the context of a virtual hearing, whether the Plaintiffs were**

afforded a fair and reasonable opportunity to attend and respond when the matter was called.

- b. Whether the Plaintiffs were duly served with the hearing notice, whether the mode of service was appropriate, and whether there is credible evidence of actual receipt of the notice.**
- c. Whether the Plaintiffs exercised reasonable diligence in ascertaining the mode and location of the hearing, and whether any misdirection by court officials was a material contributing factor to their absence.**
- d. Whether the non-attendance was excusable in the circumstances, having regard to the totality of the evidence and the conduct of the parties.**
- e. Whether the Defendants would suffer prejudice if the suit is reinstated, and whether any such prejudice can be mitigated by the imposition of appropriate terms.**
- f. Whether the interests of justice, as enshrined in Articles 48, 50, and 159 of the Constitution, would be best served by reinstating the suit or by upholding the dismissal.**

48. The Court must also be guided by the principle that dismissal for non-attendance is a draconian remedy that should be reserved for cases where the party's absence is inexcusable and where the integrity of the judicial process would be undermined by reinstatement.

49. In light of the foregoing analysis, the procedural propriety of the dismissal of the Plaintiffs' suit on 22nd July 2025 under Order 12 of the Civil Procedure Rules turns on the specific facts and

circumstances of the case. The following principles emerge from the authorities and statutory framework:

- **The requirement to call out matters outside the courtroom is a procedural safeguard designed to ensure fairness, but its application must be contextual, especially in the era of virtual hearings.**
- **Proper service of hearing notices, with proof of actual delivery, is essential to the validity of any dismissal for non-attendance.**
- **Parties and their advocates bear a duty of reasonable diligence to ascertain the mode and location of the hearing and to ensure their attendance.**
- **Misdirection by court officials may, in appropriate cases, constitute sufficient cause to set aside a dismissal, but the burden rests on the applicant to demonstrate that their absence was not due to their own indolence.**
- **The court retains a wide discretion under Order 12 Rule 7 to set aside a dismissal upon such terms as may be just, guided by the interests of justice, the need to avoid prejudice, and the imperative of substantive justice.**
- **The right to a fair hearing and access to justice, as guaranteed by the Constitution, must be balanced against the need for efficient and expeditious disposal of cases and the avoidance of undue delay.**

50. Accordingly, the Honourable Court must, on the evidence before it, determine whether the Plaintiffs' non-attendance was excusable, whether the procedural requirements of Order 12 were satisfied in the context of a virtual hearing, and whether

the interests of justice would be best served by reinstating the suit subject to appropriate terms.

51. Should the Court find that the Plaintiffs were not afforded a fair opportunity to attend, or that the procedural safeguards of Order 12 were not observed, it would be within the Court's discretion to set aside the dismissal and reinstate the suit, subject to the payment of throwaway costs and the imposition of strict timelines for the prosecution of the matter.
52. Conversely, should the Court find that the Plaintiffs were duly notified, that the matter was properly called out in accordance with the prevailing practice for virtual hearings, and that the Plaintiffs failed to exercise reasonable diligence, the dismissal may be upheld as procedurally proper.
53. In either event, the Court must record its reasons in accordance with the provision of Order 21 Rule 4 and Rule 5 of the Civil Procedure Rules, 2010 and must ensure that its decision is guided by the overriding objective of facilitating the just, expeditious, and affordable resolution of civil disputes.
54. This Honourable Court is enjoined to approach the determination of this issue with a judicious balance of

procedural fidelity and substantive justice, mindful of the evolving realities of court practice in the digital age and the enduring imperative to uphold the right to a fair hearing. The substratum of the matter is not merely the mechanical application of procedural rules, but the principled exercise of judicial discretion in the service of justice.

ISSUE b). Whether sufficient cause was demonstrated to warrant reinstatement of the suit under Order 12 Rule 7 of the Civil Procedure Rules, 2010.

55. Under this Sub-heading, the Honourable Court will decipher on the substratum of whether sufficient cause was demonstrated to warrant reinstatement of the suit under Order 12 Rule 7 of the Civil Procedure Rules. The provision of Order 12 Rule 7 of the Civil Procedure Rules, 2010 provided the Court with unfettered discretion to set aside or vary any judgment or order dismissing a suit for non-attendance. The substratum of this provision was to ensure that justice was not defeated by mere procedural lapses, and that parties were afforded an opportunity to ventilate their disputes on merit.

56. The Plaintiffs contended that they had been present within the precincts of the Court on 22nd July 2025, accompanied by

several family members, but were misdirected by Court officials to wait outside in a shaded area. They argued that the suit was not called out outside the courtroom as envisaged under Order 12 Rule 1, and that they were thereby denied the opportunity to notify the Court of their presence.

57. The Defendants, on the other hand, maintained that the matter was called out virtually twice inside the courtroom, with no response from either the Plaintiffs or their counsel, and that dismissal was properly entered under Order 12 Rule 4. They argued that the Plaintiffs failed to exercise due diligence by not being physically present in the courtroom when the matter was called.

58. The Honourable Court noted that the jurisprudence on reinstatement of suits emphasized the need to balance procedural compliance with substantive justice. In the case of:- ***“Philip Chemwolo & Another - Versus - Augustine Kubende [1982-88] KAR 103”***, the Court held that:-

“blunders will continue to be made by human beings... and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case heard on merits.”

This principle underscored that excusable mistakes or inadvertence should not bar litigants from accessing justice.

59. Similarly, in the famous case of:- ***“Shah - Versus - Mbogo [1967] EA 116”***, the Court stated that discretion to set aside dismissal orders was intended ***“to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the course of justice.”***
60. Applying these principles, the Honourable Court observed that the Plaintiffs had demonstrated excusable circumstances. They were present at the Court precincts, misdirected by officials, and their counsel arrived later. Their affidavits consistently narrated that they had been waiting to be called, and that other litigants seated with them had been called by name and ushered into Court.
61. The Court further noted that the overriding objective under the provision of Sections 1A and 1B of the Civil Procedure Act, Cap. 21 required courts to facilitate the just, expeditious, proportionate, and affordable resolution of disputes. Denying reinstatement in circumstances where litigants were present but misdirected would defeat this objective and infringe upon their constitutional rights under the provision of Articles 48 and 50 (1) to access justice and fair hearing.

62. The Honourable Court therefore finds that sufficient cause had been demonstrated to warrant reinstatement of the suit. The Plaintiffs' presence at the Court precincts, coupled with the misdirection by officials, constituted excusable mistake within the meaning of Order 12 Rule 7 of the Civil Procedure Rules, 2010.

ISSUE No. c). Whether the Plaintiffs' constitutional rights under Articles 25 (c), 40, 48 and 50 (1) of the Constitution of Kenya were infringed.

63. Under this Sub-heading, the Honourable Court will decipher on the substratum of whether the Plaintiffs' constitutional rights under the provision of Articles 25(c), 40, 48, and 50(1) of the Constitution of Kenya, 2010 were infringed. The Plaintiffs had invoked the protection of the Constitution, asserting that dismissal of their suit without being heard infringed upon their rights to a fair trial, access to justice, and protection of property. They relied on Articles 25(c), 40, 48, and 50(1), which respectively safeguard the right to a fair trial as a non - derogable right, the right to property, the right of access to justice, and the right to a fair hearing.

64. The substratum of Article 25 (c) was that the right to a fair trial could not be limited under any circumstances. Article 50(1) guaranteed every person the right to have disputes resolved in a fair and public hearing before a court or tribunal. Article 48 obligated the State to ensure access to justice for all persons, while Article 40 protected the right to acquire and own property. The Honourable Court observed that dismissal of a suit for non-attendance was a procedural sanction designed to ensure expeditious disposal of cases. However, where litigants were present within the precincts of the Court but misdirected by officials, the sanction risked undermining substantive rights. The jurisprudence of Kenyan courts had consistently emphasized that constitutional rights must be interpreted broadly to advance justice.

65. I wish to make reference to the case of:- ***“Judicial Service Commission - Versus - Mbalu Mutava [2015] eKLR”***, the Court of Appeal held that constitutional rights were not to be read restrictively, but in a manner that promoted their realization. Similarly, in the case of:- ***“Republic - Versus - Karisa Chengo & 2 Others [2017] eKLR”***, the Supreme Court underscored that the

right to a fair trial was absolute and could not be curtailed by procedural technicalities.

66. The Honourable Court further noted that the Plaintiffs' claim concerned family property allegedly sold without authority. Denying them an opportunity to be heard on such a matter would amount to depriving them of property rights under Article 40 without due process. The Court is therefore obligated to lean towards substantive justice rather than technical dismissal.

67. The Court also considers the overriding objective under the provision of Sections 1A and 1B of the Civil Procedure Act, Cap. 21 which required courts to facilitate the just, expeditious, proportionate, and affordable resolution of disputes. A dismissal that denied litigants their constitutional rights, despite their presence at the Court precincts, would defeat this objective.

68. The Honourable Court therefore finds that the Plaintiffs' constitutional rights under Articles 25(c), 40, 48, and 50(1) had been infringed by the dismissal of their suit without hearing. The Court emphasized that access to justice and fair trial were foundational principles that must guide judicial discretion, and that reinstatement of the suit was necessary to vindicate those rights.

ISSUE d). Whether the allegations of perjury against the 1st Defendant warrant referral for criminal investigation.

69. Under this Sub-heading, the Honourable Court will decipher on the substratum of whether the allegations of perjury against the 1st Defendant warranted referral for criminal investigation. The Plaintiffs, through the Further Affidavit sworn by Mwaka Riziki Athumani, alleged that the 1st Defendant had lied on oath by denying that the Plaintiffs and their relatives were present at the Kwale Law Courts on 22nd July 2025. The Affiant asserted that she had personally greeted the 1st Defendant at the court entrance and that he had seen her and other family members. She therefore requested the Court to refer the matter to the Directorate of Criminal Investigations for appropriate action, citing that perjury under Kenyan law attracted a punishment of seven years' imprisonment without the option of a fine.

70. The 1st Defendant, in his Further Replying Affidavit, denied these allegations. He reiterated that he was present in the courtroom with his Advocate when the matter was called out virtually twice, and that there was no response from the Plaintiffs or their counsel. He further stated that he was a stranger to the claim that a court official had directed the

Plaintiffs to wait outside, and emphasized that he could not confirm whether the Plaintiffs were present within the court precincts. He denied exchanging pleasantries with the Affiant and maintained that the issue of perjury did not arise.

71. The Honourable Court noted that perjury was a criminal offence under the provision of Section 108 of the Penal Code, Cap. 63 of the Laws of Kenya, which defined it as knowingly giving false testimony on oath in a judicial proceeding. The punishment prescribed was imprisonment for seven years. However, the Court also observed that determination of perjury required conducting of an intensive a criminal process, which would include investigation and trial, Certainly, this could not be conclusively adjudicated within the confines of a civil application.

72. To support this legal position I do wish to cite the cases of:-
“Republic - Versus - Mwaura [2014] eKLR”, the Court emphasized that allegations of perjury must be subjected to the criminal justice system, where evidence could be tested and credibility assessed. Similarly, in **“Republic - Versus Ndungu [2016] eKLR”**, it was held that perjury proceedings were distinct from civil disputes and required independent prosecutorial action. The

Honourable Court therefore found that while the Plaintiffs had raised serious allegations of false testimony, it was not within the Court's mandate in this application to make definitive findings of perjury. The Court's role was confined to determining whether sufficient cause existed to reinstate the suit.

73. Nonetheless, the Court held that the record of proceedings and affidavits would remain available should investigative authorities deem it necessary to inquire into the allegations. Thus, the Court proceed to declines to make a referral order but note that the Plaintiffs were at liberty to lodge a formal complaint with the Directorate of Criminal Investigations if they so wished.

ISSUE e). Who bears the Costs of the Notice of Motion application dated 23rd July, 2025

74. Under this Sub-heading, the Honourable Court will decipher on the substratum of who bears the costs of the Notice of Motion application dated 23rd July 2025. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of

Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of ***“Harun Mutwiri - Versus - Nairobi City County Government [2018] eKLR”*** and ***“Kenya Union of Commercial, Food and Allied Workers - Versus - Bidco Africa Limited & Another [2015] eKLR”***, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of ***“Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR”***, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

75. In the present application, the Plaintiffs sought to set aside the dismissal of their suit and to have the matter reinstated for hearing. The Defendants opposed the application, contending that dismissal had been proper under Order 12 Rule 4 of the Civil Procedure Rules, 2010.

76. The Honourable Court had already found that sufficient cause had been demonstrated to warrant reinstatement of the suit under Order 12 Rule 7, and that the Plaintiffs’ constitutional

rights under Articles 25(c), 40, 48, and 50(1) had been infringed by the dismissal. The Court had also noted that the Plaintiffs were present within the precincts of the Court but were misdirected by officials, which constituted excusable mistake.

77. In ***“Supermarine Handling Services Ltd - Versus - Kenya Revenue Authority [2010] eKLR”***, the Court emphasized that costs were not meant to punish the losing party but to reimburse the successful party for expenses reasonably incurred. Similarly, in ***“Party of Independent Candidates of Kenya - Versus - Mutula Kilonzo & 2 Others [2013] eKLR”***, the Court reiterated that costs were discretionary and must be exercised judiciously to achieve fairness.

78. Applying these principles, the Honourable Court has observed that the dismissal of the suit was occasioned by procedural misdirection rather than deliberate indolence on the part of the Plaintiffs. The Defendants, though successful in opposing the application initially, had not demonstrated prejudice that would justify saddling the Plaintiffs with costs.

79. Therefore, the Court makes a finding that the most equitable order was that costs of the Notice of Motion application dated 23rd July 2025 be in the cause. This means that costs would abide the outcome of the reinstated suit, ensuring fairness to

both parties and avoiding undue hardship to the Plaintiffs who were seeking to vindicate constitutional rights.

VIII. Conclusion and Disposition.

80. Ultimately, in view of the foregoing detailed and expansive analysis to the application dated 23rd July 2025, the Honourable Court arrives at the following decision and makes the orders set out below:-

a. THAT the Notice of Motion application by the 1st and 2nd Defendants dated 23rd July, 2025 be and is hereby found to have merit and hence it be allowed, the dismissal orders made on 22nd July 2025 are hereby set aside, and the Plaintiffs' suit is reinstated for hearing on the merits.

b. THAT the dismissal of the Plaintiffs' suit on 22nd July 2025 was procedurally irregular under Order 12 of the Civil Procedure Rules, as the Plaintiffs were present within the precincts of the Court but misdirected by Court officials, and the suit was not properly called out outside the courtroom as required.

c. THAT sufficient cause was demonstrated under Order 12 Rule 7 to warrant reinstatement of the Plaintiffs' suit, the circumstances constituting excusable mistake and inadvertence.

d. THAT the Honourable Court finds that the dismissal infringed upon the Plaintiffs' constitutional rights

under Articles 25(c), 40, 48, and 50(1) of the Constitution of Kenya, particularly the rights to a fair trial, access to justice, and protection of property.

- e. **THAT** the allegations of perjury against the 1st Defendant are noted but do not warrant referral by this Court for criminal investigation within the present application. The Plaintiffs are at liberty to lodge a formal complaint with the Directorate of Criminal Investigations should they deem it necessary.
- f. **THAT** for expediency sake, there be a hearing on 15th October, 2010 preferably through Physical Means.
- g. **THAT** the costs of the Notice of Motion application dated 23rd July 2025 shall be in the cause.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....17THDAY OFFEBRUARY.....2026.

.....
**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT
KWALE**

Ruling delivered in the presence of:

(a) Mr. Daniel Disi, the Court Assistant;

(b) M/s. Muyaa Advocate for the Plaintiffs/Applicants; and

(c) Mr. Kabebe Advocate for 1st Defendant/Respondent.

Judge's Copy