

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**MISC. CIVIL APPLICATION NO. E007 OF 2024**

**KIPCHIMCHUM WHOLESALERS LIMITED.....1<sup>ST</sup>  
APPLICANT**

**STANLEY CHEPKWONY.....2<sup>ND</sup>  
APPLICANT**

**VERSUS**

**MERCY CHEPKEMOI LANGAT & RICHARD KIBET LANGA**

***(Suing as the Legal Representatives of the***

***Estate of the late SIMON KIPKIRUI LANGAT).....***

**RESPONDENTS**

**RULING**

1. Before this Court for determination is the Applicants' Notice of Motion dated 31<sup>st</sup> July 2025. The application seeks following orders;

***a) Spent.***

***b) Spent.***

***c) THAT this Honourable Court be pleased to review/vary and/or set aside its orders of 30<sup>th</sup> July, 2025 dismissing the Applicant's Application dated 28<sup>th</sup> March, 2024, seeking leave to Appeal out of time for want of prosecution, on such terms as are just.***

***d) THAT upon grant of prayer 3 above, the Honourable Court be pleased to re-instate the aforesaid Application for hearing and determination on merits.***

***e) THAT the costs of this application be provided for.***

2. The application is supported by the affidavit of SCHOLASTICA ACHIENG', learned counsel for the Applicants, and is brought under Order 17 Rule 2(6), Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, and Articles 50 and 159(1)(d) of the Constitution of Kenya, 2010.

3. The Respondents have opposed the application through the Replying Affidavit of MERCY CHEPKEMOI LANGAT, the 1st Respondent herein, sworn on 12<sup>th</sup> September 2025.

4. The thrust of the Applicants' argument, as deposed by their counsel, is that the failure to attend court on 30<sup>th</sup> July 2025, and on previous dates, was not intentional but arose from a combination of technological misadventure and miscommunication.

5. Learned counsel, Ms. Achieng', depones that on several occasions, that is ,26th February 2025, 25th June 2025, and 2nd July 2025, she logged into the virtual court link provided in the cause list (<https://bit.ly/3VK3gRY>) but was never admitted into the virtual court session.

6. She further depones that upon making follow-ups with the registry, she was assured that the court conducted hybrid sessions. It was not until 2<sup>nd</sup> July 2025 that she was informed the court was only conducting physical sessions.

7. On the fateful day of 30<sup>th</sup> July 2025, she states that she travelled from Kisumu to Kericho by public means in a bid to attend court physically. However, due to unforeseen delays on

the road, she arrived at 8:45 a.m., only to find that the Judge had already called out the matters and dismissed their application.

8. Counsel contends that the Applicants have always been desirous of prosecuting their application and that justice demands that the matter be heard on its merits. She invokes the constitutional principles of fair hearing under Article 50 and the duty of the court to administer substantive justice without undue regard to procedural technicalities under Article 159(2)(d).

9. The Respondents view the matter through a different lens. The 1<sup>st</sup> Respondent, Mercy Chepkemai Langat, depones that the Applicants' application is an abuse of the court process, designed to delay the Respondents from enjoying the fruits of their judgment.

10. She points out that judgment was delivered on 24<sup>th</sup> January 2024, and to date, the Applicants have not satisfied the decree. Instead, they have filed multiple applications to frustrate the process.

11. On the issue of attendance, she argues that the Applicants' counsel's own admission that she travelled to Kericho on 30<sup>th</sup> July 2025 confirms that she was fully aware that the court was conducting physical sessions. Her late arrival, the Respondents contend, is a clear demonstration of laxity and negligence on the part of the Applicants' legal team.

12. The Respondents submit that they stand to be greatly prejudiced if the application is allowed, as they continue to be denied the compensation lawfully awarded to them.

13. I have carefully considered the application, the rival affidavits and the relevant law. The main issue for determination is whether the Applicants have met the threshold for the setting aside of the dismissal orders and reinstatement of their application.

14. The principles guiding the exercise of this Court's discretion in an application for reinstatement are well settled. The Court has an unfettered discretion, which must be exercised judiciously and in the interests of justice. The key considerations are;

*a) The reason for the failure to attend court on the material date;*

*b) Whether the application has been brought without unreasonable delay;*

*c) Whether the opposing party can be adequately compensated by costs; and*

*d) The prejudice that each party stands to suffer.*

15. The explanation offered by the Applicants' counsel is twofold. First, she states that she was under the impression that the court was conducting virtual sessions and made several unsuccessful attempts to log in. Second, when she finally realized the court was sitting physically, she travelled to Kericho but arrived moments after the matters had been called out.

16. This Court must observe that the explanation, while detailed, reveals a degree of miscommunication and perhaps a lack of diligence on the part of counsel. The cause list is the primary tool of communication between the court and litigants. If a cause list contains a virtual link, it is reasonable for an advocate to assume that virtual attendance is possible. However, when an advocate repeatedly logs in and is not admitted, it behooves that advocate to take more proactive steps to clarify the position with the registry, long before the dismissal date of 30<sup>th</sup> July 2025.

17. Be that as it may, the court is also cognizant of the challenges that continue to attend the transition from the post-COVID-19 pandemic era of virtual hearings to the current hybrid or physical sessions. There appears to have been a genuine, albeit unfortunate, breakdown in communication between the Bar and the Bench regarding the mode of hearing on the relevant dates.

18. Importantly, the advocate did make an effort to attend court physically on the dismissal date. While her late arrival is regrettable, it is not indicative of a deliberate or contumelious disregard for the court's process. It speaks more to the unforeseen vagaries of travel by public means from Kisumu to Kericho, a reality this court cannot entirely ignore.

19. The Respondents argue that the advocate's travel to Kericho proves she knew the court was sitting physically. With respect, this argument cuts both ways. It proves she made an effort. The question is whether that effort was sufficient. In the

circumstances, while it fell short, I am not persuaded it was a deliberate act of negligence intended to scuttle the matter.

20. The dismissal order was issued on 30<sup>th</sup> July 2025. The current application is dated 31<sup>st</sup> July 2025. There has been no delay whatsoever. The Applicants moved with the celerity expected of a party aggrieved by a court order.

21. This is perhaps the most critical balancing act. The Respondents argue that they will be greatly prejudiced if the application is allowed, as they have waited since January 2024 to enjoy the fruits of their judgment. This is a weighty argument. The court must always be vigilant against litigants who use procedural maneuvers to delay justice.

22. However, it is equally true that the Applicants' original application (for leave to appeal out of time) has never been heard on its merits. It was dismissed on a technicality. The Constitution, under Article 50, guarantees every person the right to a fair hearing. Article 159(2)(d) commands this court to administer justice without undue regard to procedural technicalities.

23. The prejudice to the Respondents, while real, is quantifiable. They have a decree in their favour. If the Applicants are genuinely desirous of appealing, they must be prepared to meet the conditions for stay, including the provision of security or even part-payment of the decretal sum. This court can frame orders that protect the Respondents' position while allowing the Applicants their day in court.

24. On the other hand, if the application is dismissed and the Applicants are shut out, they will have lost their constitutional right to be heard on their application for leave to appeal. That is a prejudice that cannot be compensated by costs.

25. In the celebrated case of ***Philip Chemwolo & Another v Augustine Kubede [1982-88] KAR 103***, the Court of Appeal held that the court's discretion to set aside a dismissal order is 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, whether by evasion or otherwise, to obstruct or delay the course of justice.

26. Applying that principle here, I do not find that the Applicants' conduct rises to the level of deliberate obstruction or delay. Their counsel made an error of judgment in relying on virtual links and a logistical error in arriving late. These are excusable mistakes, though they border on negligence.

27. I am guided by the even more profound statement in ***Shah v Mbogo [1967] EA 116***, where the court held that the discretion to set aside ex parte orders is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, and that "to do justice to the parties, the court is entitled to look at the whole circumstances of the case."

27. Having considered the totality of the circumstances, I find that this is a proper case for the exercise of this court's discretion in favour of the Applicants. However, such discretion must be

exercised on terms that protect the interests of the Respondents, who are innocent parties awaiting the fruits of their judgment.

29. Accordingly, the notice of motion dated 31<sup>st</sup> July 2025 is found to be meritorious giving rise to the issuance of the following orders;

***a) The orders of this Court made on 30<sup>th</sup> July 2025 dismissing the Applicants' application dated 28<sup>th</sup> March 2024 be and are hereby set aside.***

***b) The application dated 28<sup>th</sup> March 2024 is hereby reinstated for hearing and determination on merit on priority basis.***

***c) As a condition for the reinstatement, and taking into account the delay occasioned, the Applicants shall pay to the Respondents throw-away costs of KES 20,000 (Twenty Thousand Shillings) within 14 days from the date hereof.***

**Dated, signed and delivered at Kericho this 10<sup>th</sup> day of March, 2026.**

.....  
**J. K. SERGON  
JUDGE**

In the Presence of:-

C/Assistant - Rutoh

Miss Songok holding brief for Gikong'a for Respondent

No Appearance for the Applicants

