

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ELCLMISC NO E019 OF 2023**

**ROSE CHARO KADHENGI** .....  
**PLAINTIFF**

**VERSUS**

**VICTOR KONDE MRUU** .....  
**DEFENDANT**

**RULING**

1. The application before this court is dated 29<sup>th</sup> September 2025. It is seeking the setting aside of an orders and proceedings of 29<sup>th</sup> September 2025 dismissing the plaintiff’s suit for non-attendance and that the matter be fixed for hearing. The application is supported by the affidavit of **Paul W. Magolo** advocate. The grounds relied on are that counsel for the plaintiff tried to log into the virtual courtroom to attend its virtual proceedings but unfortunately when the matter was called out, he tried to address the court but he could not be heard because of a technical hitch; that since he could not be heard the matter was dismissed. The deponent has attached an excerpt from the system labeled “**PWM1**” as evidence of his presence on the platform. He stated that his gadget failed him that morning; that the applicant stands to suffer substantial loss and damage if the orders dismissing the suit are not set aside.
2. The application is opposed through the affidavit of **Stephen Jumbale** advocate acting on behalf of the defendant dated 11<sup>th</sup> November 2025. In that affidavit, the deponent states that it is not correct that counsel faced any technical hitches. He points out that there are no screenshots, no official court logs, and no ICT report attached to the setting aside application to demonstrate that there were such hitches, and that the claim that counsel and the plaintiff and witnesses were in attendance is incorrect because in any event, no appearance was recorded by the court.

Also, no attempt was made to reach the registry to request for a mention after the said hitches.

### **Analysis and determination**

3. This court has considered the application before me. It is true that the court has a very wide discretion to set aside judgment but it is also correct that that discretion must be exercised judiciously. It is the evidence adduced by way of affidavit that enables court to assess whether or not to set aside judgment. Therefore, when an applicant approaches the court for setting aside a dismissal order made pursuant to failure to attend a hearing, he must avail proper reasons for why he did not attend court on the day of the hearing. If he fails to do so then he may not deserve any setting aside order.
4. Having perused the supporting affidavit, I find that the only document in support of the averments of the deponent is a printout showing in summary what happened to the present matter on that particular day. I do not find attached to the application any document that shows that counsel or the plaintiff or her witnesses were present on the platform either immediately before or after the suit was dismissed for want of prosecution.
5. Without such threshold evidence, the application dated 29<sup>th</sup> September 2025 cannot succeed and it is hereby dismissed with costs.

**Dated, signed and delivered at Malindi on this 12<sup>th</sup> day of March, 2026.**



**MWANGI NJOROGE,  
JUDGE, ELC, MALINDI.**