**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC MISC. APPLICATION NO. E013 OF 2025**

**NAOMI ALUDI OSIEKO.....1ST APPLICANT**

**JARED RABET OSIEKO.....2ND APPLICANT**

**GODFREY ODHIAMBO.....3RD APPLICANT**

**=VERSUS=**

**ELIUD OGESO.....1ST RESPONDENT**

**CHARLES OGUTA DENGE.....2ND RESPONDENT**

**MIGORI COUNTY LAND REGISTRAR.....3RD RESPONDENT**

**MIGORI COUNTY SURVEYOR.....4TH RESPONDENT**

**RULING**

**On whether the court should set aside its order issued on 7th July 2025 and reinstate the Applicants' application dated 12th may 2025)**

## The Application

**1.** The Applicants filed a Notice of Motion dated 11th July 2025 under a Certificate of Urgency. The application is brought under Section 3A of the Civil Procedure Act (Cap 21), Order 12, rule 7 and Order 51, Rule 1 of the Civil Procedure Rules 2010.

**2.** The Applicant sought orders that:

1. **…Spent**
2. **The Honourable Court be pleased to set aside its order made on 7th July 2025 dismissing the Applicant's miscellaneous Application dated 12th May 2025 for non-attendance.**
3. **The Applicant's miscellaneous Application dated 12th May 2025 be reinstated for hearing and determination on its merits.**

**3.** The application is premised on grounds set out on the application as well as the affidavit deponed by Wilson Odhiambo Odhiambo, advocate for the Applicants. Counsel stated that his non-attendance on 7th July 2025 was not intentional but was rather occasioned by a technical issue or delay in his admission to the virtual Court Session, through the Microsoft Teams video conferencing platform. He added that he logged into court 8:58 AM but was admitted on 9:02 AM hence his absence when the matter was called out.

**4.** The Applicants counsel further stated that the Applicant is an elderly widow suffering from ill-health and who stands to suffer harm and prejudice by way of losing a portion of her land should the application not be reinstated. Counsel further submitted that his mistakes should not be visited upon Applicants. He also submitted that the Respondent will not suffer any prejudice should the application be allowed.

**5.** Counsel concluded that the application had been brought without inordinate delay and that it was in the interest of

justice that the application be allowed so as to enable the court to determine the issues on dispute on merits.

**6.** In his replying affidavit counsel deponed that there was a delay in admitting him to virtual court, and when he was finally admitted into the session, the court informed him that directions had already been given on his clients' matter. He soon after received an SMS notification informing him that the matter had been dismissed for want of prosecution.

**7.** Counsel invited the court to take judicial notice of the internet slow down on 7th July 2025, which slowdown also affected the court. To this end, counsel reiterated that the Applicants will suffer great injustice should the application not be reinstated as they risk being dispossessed from their land.

**The Response**

**8.** The Respondents filed a ground of opposition dated 7th October 2025. They opposed the application on grounds that the Application is grossly incompetent as the same offends the express provisions of Order 51 Rule 1 of the Civil Procedure Rules and that the said Application had been bought after an inordinate delay which was not explained.

**9.** The Respondents also stated the Application is frivolous, vexatious, lacks merit and is fatally and incurably defective. Lastly, the Respondents asserted that the Applicant is a waste of judicial time as the application sought to be reinstated in

fatally and incurably defective and prayed that the said application be dismissed with costs.

**Issues, Analysis and Determination**

**10.** The main issue that arises for determination in the instant application is whether the application is merited as to cause this court to set aside its orders made on 7th July 2025 and reinstate the Applicants' application dated 12th May 2025 for hearing. Attendant to it is whether who to pay the costs of the application.

**11.** I have carefully considered the Applicants' application as well the Respondents 'response in totality. The Applicant's counsel's plea to this court is that the Applicant's application dated 12th may 2025 be reinstated. He acknowledged that the Applicants' application dated 12th May 2025 was dismissed by this court account of a mistake that has nothing to do with the Applicants. Rather, the maintained that he experienced technical challenges when attempting to log into virtual court session. He stated that he attempted to log into court at 9:58 AM but was unable to do so owing to internet slow down. As a consequence, counsel maintained that when he finally logged into court at 9:02 AM, his matter had already been called out and directions given. Subsequently, counsel stated that he realized that the application had been dismissed.

**12.** Counsel implored upon the court to overlook his mistake and instead and consider the interest of justice by setting aside the

order of the court and allow the Applicants' application to heard on merit.

**13.** The Respondents objected to the application citing non-compliance to **Order 51 Rule 1 of the Civil Procedure Rules, 2010**. They also maintained the application was frivolous, vexatious and waste of the court process and the same was brought after inordinate delay that had not been accounted for.

**14.** It is important to state here that under ordinary usual court sessions, and unless it has been communicated in advance to the parties that it is not, this court begins its sessions at exactly 08:30 AM. Thus, as I see it from the deposition of applicant's counsel, he attempted to log into the court session quite late: twenty eight (28) minutes into the beginning of the court session. That delay is not explained, but granted that the application the applicant was intent on prosecuting the application on the material date, this court proceeds to consider the merits of the cause that prevented him from being heard. But before then, this court states further that at no point in time does it dismiss any matter or application before confirming that, indeed, there is no party waiting "in the Lobby" to be admitted into the court session. Thus, it would be an exception that the allegations that the counsel was waiting in the lobby when his client's matter was dismissed.

**15.** Be that as it may, the power of the court to reinstate an application dismissed for want of prosecution is discretionary

as was held by the Court of Appeal in **Imbochi v Leopard Beach Resort & Spa (Civil Application E081 of 2023) [2024] KECA 726 (KLR) (21 June 2024) (Ruling).** The court in this matter proceeded to state that an Applicant who wishes to have his application reinstated must demonstrate good faith in approaching the court for such a prayer.

**16.** The Applicant's counsel averred that he had challenges logging into virtual court and when he finally did, the court informed him that directions had already been given in the matter. He urged this court not to punish his client on account of his mistake and continued to argue that the said client risks losing part of her property should the application not be reinstated.

**17.** The court is alive to the position adopted by various courts that litigants have an obligation to follow up on their matters and ensure that the same are prosecuted expeditiously. In **Habo Agencies Limited v Wilfred Odhiambo Musingo 2015KECA 987(KLR)**, the Court of Appeal stated as follows:

> *''It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. It is true as submitted by Mr. Wambola that mistakes of counsel may be excusable...''*

**18.** However, the court also appreciates that, it is not fair to punish a litigant for the mistakes of counsel where the litigant had no control over the actions of their counsel. This position aligns with the finding of the court in **Patrick Mutunga Mwilu & 10 Others v Mary Katua & 2 Others [2012] eKLR** the court stated that:

> *"Finally, I come to the question whether the indiscretions of counsel should be visited upon a client. The general principle and which I agree with is that a litigant should not be punished for the sins of his counsel. The court must guard against undue hardship or irreparable loss being caused to a litigant due to his counsel's negligence and or inadvertence, particularly when he had no hand or role to play in matters leading to his advocate's omissions. He should in the circumstances not be punished for such omissions."*

**19.** I have considered the explanation given by the Applicant's counsel. While I find it inconsistent with the factual daily court sessions as I have stated above in paragraph 14, I find the same somehow plausible, and if I did not give counsel the benefit of doubt on this as an exception, it would appear to the whole world that the court was unfair. The reason is that apart from my word as the Judge who made the orders impugned and the counsel's deposition, there is no independent evidence even through the Teams Platform system to verify that indeed the counsel attempted to be admitted into the court session

but was kept waiting. This calls for the system developers, and I have elsewhere previously given this advice to the relevant office in charge of the ICT, to improve the Teams Platform to include features that show, at a click, when and how a party attempted to log into the court session but was prevented by such others factors beyond his control, for instance, power or internet failure, or inaction on the officer in charge of the Court session so that it is easier to get the information and verify the truthfulness or otherwise of anyone alleging anything.

**20.** That said, counsel tried to log into court and his non-admission to the court had nothing to do with the Applicants who had diligently instructed counsel to act on their behalf. The order which the Applicants seek to set aside was made on 7th July 2025 and the Applicants made the instant application on 11th July 2025. Contrary to the argument made by the Respondents, this period does not constitute inordinate delay. The instant mistake, as an isolated case, is one of those errors of counsel that should not be visited on a client.

**21.** Whereas the Respondents contended that the application offends Order 51 rule 1 of The Civil Procedure Rules, they did not elaborate how the said provision was offended. In any event that would have been a technicality which the law, including Article 159(2)(d) of the Constitution provide a cure for. Thus, I do not find the instant application frivolous, vexatious and an abuse of the court process as contended by the Respondents.

**22.** Accordingly, prayers 2 and 3 of the Applicant's application are hereby allowed. Since the failure to be in court at the right time was on the part of the applicant's counsel, the applicant shall bear the costs of the application.

**23.** The application dated 12th May 2025 is thus fixed for hearing on **14th May 2026**. Hearing Notice to issue, by Ms. Opiyo, State Counsel.

**24.** Orders accordingly.

**Ruling Dated, Signed and Delivered virtually via the Teams Platform this 9th day of April 2026.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

**In the presence of,**

Ms. Opiyo, State Counsel, for 3rd and 4th Respondents

No Appearance for other parties