

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NO.E003 OF 2025

**DANIEL KIBET KIBII (Suing as the Legal Personal
Representative of the estate of the late**

Kibii Boiyo).....PETITIONER

VERSUS

THE ETHICS AND ANTI-CORRUPTION

COMMISSION.....1ST

RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND

RESPONDENT

RULING

1. Before this court is an application dated 13/8/2025 asking this court to review and set aside the dismissal order made on 15/7/2025 dismissing the petitioner's application dated 29/4/2025.
2. The applicant seeks for reinstatement of the application on grounds that his counsel made a mistake of mis-diarizing the date scheduled for hearing and led to the application dated 29/4/2025 being dismissed for want of prosecution.

3. He asks for reinstatement so that he can have his day in court.
4. The application is supported by an affidavit of Advocate Jason Ondabu who avers that he mis-diarized the date in his diary to read 15/8/2025 instead of 15/7/2025. He has exhibited a copy of his diary indicative of his error.
5. He avers that the error was unintentional and that his mistake should not be visited on the party.
6. He has made extensive submissions on his right to be heard vide written submissions dated 27/10/2025.
7. The respondents have vehemently opposed the application vide a replying affidavit sworn by Kipruto Daniel from the 1st respondent.
8. The respondents' gist of their objection is that this court upheld their preliminary objection to the petition and dismissed the application dated 29/4/2025.
9. The 1st respondent contends that there is no order capable of being reviewed because the applicant did not extract the dismissal order sought to be reviewed and that the applicant has not invoked the powers of this court under Section 80 of Civil Procedure Act or Order 45 of the Civil Procedure Rules.
10. They contend that the error by counsel is professional negligence on his part and should not be used as an excuse. That parties were given a chance to ventilate their cases but the applicant elected not to argue his application and that they are undeserving of the court's discretion.

11. They fault the applicant's counsel for misleading the court on a supposed LSK Conference meeting on 14th to 15th August 2025 at Diani, stating that no documentary proof has been adduced to support the claim.
12. They deny that there are negotiations going on to settle this instant matter stating that the negotiations going on relate to Kitale ELC Petition No.E001/2023.
13. They aver that allowing this application will set a dangerous precedent by encouraging litigants to disregard dates given in court and relying on counsel's mistake to disrupt court process, adding that the diary exhibited could be fabricated.
14. This court has considered this application and the response made. The applicant seeks reinstatement of his application dated 29/4/2025 which was dismissed by this court on 15/7/2025 for non-prosecution.
15. I have looked at the record and note that this court on 12/5/2025 gave directions that the preliminary objection dated 9/5/2025 raised by the respondents be heard first and the hearing was fixed for 15/7/2025. Parties were given liberty to file submissions. On 15/7/2025, only the respondents' counsels Mr Mugun and Sitati were present. Mr Ondabu was absent and no explanation was forthcoming to explain his absence.
16. He has now come to court pleading that he made a mistake of mis-diarizing and has exhibited a page of diary to

prove the mistake. The 1st respondent feels that the same is a make up and could be a ploy to deceive but I find the accusation a bit hard on the applicant's counsel because he has not acted in the past to show that his conduct in this matter is not above board or that he has been guilty of indolence. This court has found severally in other cases that mistake by counsel cannot solely be used to persuade a court to exercise its discretion in favour of a party finding himself in the receiving end. However each case must be determined on its own merit and in the context of the surrounding circumstances.

17. The 1st respondent avers that the only negotiations going on is in respect to Kitale ELC Petition No.E001 of 2023 involving Daniel Kibet Kibii (suing as legal representative of estate of Kibii Boiyo -vs- ADC & 4 Others). However a look at the petition pending herein shows that it hinges squarely on that ELC Case No.E001 of 2023. The two matters are inter-related and this court is not saying that the petition herein is well grounded. Far from that. It would be premature for this court to delve into the merits or demerits of the petition at this stage.

18. This court finds that what is material herein is whether the absence of the applicant on 15/7/2025 has been explained satisfactorily to persuade this court exercise its discretion to allow the preliminary objection to be re-heard afresh and inter parties.

This court finds that the interests of justice weighs more on opening doors of justice rather than closing them particularly where good reasons are given.

In this instance this court is satisfied that the applicant's counsel has demonstrated that he made a genuine mistake of mis-diarizing and hence failing to attend court on 15/7/2025. I am not certain about Diani Conference involving LSK members and I do not wish to delve into whether or not the counsel's mistake had anything to do with the said Conference. Suffices to state that the applicant has placed sufficient evidence to persuade this court to give him a chance to ventilate his case. The respondent suffers no prejudice at all in that regard.

I will therefore allow the application dated 13/8/2025 by setting aside the orders given exparte on 15/7/2025.

In its place I will direct that the preliminary objection dated 9/5/2025 and 4/7/2025 be heard afresh.

I will extend the liberty to parties to file written submissions and come for highlights on a date to be given upon delivery of this Ruling.

The costs of this application will be borne by the applicant.

**DELIVERED, DATED and SIGNED at KITALE this13th day of
.....MAY....., 2026.**

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

***Ruling delivered in open court
No appearance for the parties
Duke/Chemosop -court assistants***