



Global Hope Network International v Boru (Employment and Labour Relations Appeal E006 of 2024) [2025] KEELRC 2429 (KLR) (12 September 2025) (Judgment)

Neutral citation: [2025] KEELRC 2429 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E006 OF 2024
ON MAKAU, J
SEPTEMBER 12, 2025**

**BETWEEN
GLOBAL HOPE NETWORK INTERNATIONAL APPELLANT
AND
HELLEN DIRAMU BORU RESPONDENT**

(Being an appeal from the Ruling and Orders of the Chief Magistrate’s Employment and Labour Relations Court at Meru in MCELRC Cause No.E001 of 2021 by Hon.D.W.Nyambu delivered on the 20th August, 2024) (Before Hon.Justice Onesmus N Makau on 12th September, 2025)

JUDGMENT

Introduction

1. By a Notice of Motion dated 15th March 2024 the appellant urged the lower court to dismiss the respondent’s suit for want of prosecution. The motion was brought under Order 17 Rule 5 of the Civil Procedure Rules and all other enabling provisions of the law. It was opposed by the respondent. After considering the evidence and submissions by the two sides, the trial court (Hon.Nyambu CM) dismissed the motion and directed that the suit be set down for pre-trial conference within six weeks and subsequently be fixed for hearing.
2. The appellant was aggrieved and filed the instant appeal urging this court to set aside the said orders of the trial court and make its own orders in respect of the evidence on the trial court record. The appeal stands on the following 9 grounds:
 1. That the learned trial Magistrate erred in law and fact by failing to address and properly identify issues for determination and therefore reached the wrong conclusion.
 2. That the Learned trial Magistrate erred in law and in fact by making a finding without putting into consideration the Further Supporting affidavit in support of the claimant’s Ex-parte



Originating Summons Application dated the 29th of September 2023 in Meru Employment and Labour Relations Cause No.E009 of 2023 adduced as evidence by the Respondent in its Notice of Motion Application dated the 15th of March, 2024 in Meru Magistrate's ELRC Cause No.E001 of 2021.

3. That the Learned trial Magistrate erred in law and in fact in failing to consider the legal principles guiding affidavit evidence in court proceedings.
4. That the Learned trial Magistrate erred in law and in fact by finding the Respondent guilty of laches in its ruling delivered on the 20th day of August, 2024 in Meru Magistrate's ELRC Cause No.E001 of 2021.
5. That the Learned trial Magistrate erred by not appreciating the legal tenets that any failure of the Respondent's lack of participation in a suit does not preclude a claimant from rightfully prosecuting her claim and/or hindering the Respondent from filing an Application for dismissal of a suit for want of prosecution when circumstances warrant such.
6. That the Learned trial Magistrate erred in law and in fact in failing to consider the insufficient evidence adduced by the claimant in explaining the inordinate delay to prosecute her claim for a period of over 3 years.
7. That the Learned trial Magistrate erred in law and in fact by failing to give due weight and consideration to the documents in support of the Respondents Notice of Motion Application dated the 15th of March, 2024.
8. That the Learned trial Magistrate erred in law and in fact by ordering the claimant's suit in Meru Magistrate's ELRC Cause No.E001 of 2021 to proceed to pre-trial and thereafter, to hearing.
9. That the Learned trial Magistrate erred in law and in fact by finding that the Respondent's Notice of Motion Application dated 15th of March 2024 lacked merit.

Background

3. The appellant employed the respondent in October 2009 as a Transformative Community Worker and worked until 9th January 2019 when her services were terminated by the appellant. The respondent lodged complain at the Labour Office in Isiolo and the appellant was charged in Labour case No.1 of 2019 which culminated in conviction and sentencing to a fine of Kshs.10,000 for each count on 3rd July 2023.
4. While the Criminal case was going on, the respondent filed suit in the lower court challenging the termination and forgot about it. After the conclusion of the criminal case in Isiolo, she even filed an application seeking leave to file suit out of time against the appellant in this court but it was dismissed.
5. Subsequently, the appellant brought the Notice of motion dated 15th March 2024 seeking dismissal of the respondent's forgotten suit for want of prosecution. The basis for the motion was that the respondent had not taken any steps to prosecute her suit since 12th March 2021 when it was filed. The respondent acknowledged that she inadvertently forgot about the suit while pursuing the Criminal proceedings in Isiolo. She apologized to the court and successfully urged the court to allow her a chance to prosecute the suit.



Submissions in the Appeal

6. The appeal was disposed of by written submissions. It was submitted for the appellant that, owing to the respondent's inaction to prosecute her suit for a period of three years from the date of filing, the appellant filed application for dismissal of the suit under Order 17 of the Civil Procedure Rules which is just like Rule 16 of this Courts' Rules of Procedure.
7. It was further submitted that the burden of prosecuting a suit rests with the party who has instituted it. It was further submitted that the respondent was indolent as her pursuit of her criminal case did not prevent her from prosecuting the civil claim in the lower court. Consequently, the trial court was faulted for appreciating that the respondent was disorganized and indolent but then went ahead to allow her proceed with the suit.
8. In view of the foregoing matters, the appellant prayed that the appeal be allowed with cost. To fortify the appeal, several precedents were cited including Kenya Plantation and Agricultural Workers Union v Uniliver Tea Kenya Limited (2021) eKLR.
9. On the other hand, it was submitted for the respondent that the appellant was guilty of laches since it never filed defence to the claim after service. It was argued that the trial court was right in dismissing the appellant's motion since it had no basis for seeking dismissal of the suit as it had not filed any defence after service. Consequently, it was urged that the appellant was precluded from participating in the suit since it had failed to file defence after service.
10. Finally, it was submitted that the appellant did not demonstrate how it was prejudiced by the delay in prosecuting the suit. It was argued that the appellant brought the motion for dismissal of the suit to escape liability after the lower court convicted it and three others of the Criminal case.
11. This being a first appeal, the mandate of the court is to re-evaluate the evidence on record and make its own independent conclusion. I seek guidance from Kenya Ports Authority v Kunston (Kenya) Limited (2009) 2EA 212, where the Court of Appeal held that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”
12. Guided as above, I have perused the record of appeal and the following issues fell for determination: -
 - a. Whether the appellant was precluded from filing the motion for dismissal of the suit.
 - b. Whether the delay to prosecute the suit was inordinate and inexcusable.
 - c. What orders are appropriate in this appeal.

Appellant's locus standi

13. The respondent argued that the appellant was precluded from filing the motion for dismissal of the suit since it never filed defence after being served with court papers. Trial court alluded to the same in the impugned ruling. However, having carefully considered the respondents Replying Affidavit, I noted that she never deposed that the appellant was served with summons and pleadings after the suit was filed on 12th March 2021. The said allegation was only made by the respondent in his written submission.



14. If the alleged service was done, the respondent should have filed an Affidavit of service as proof. Without such evidence, allegation of service of court process upon the appellant, the court finds that the appellant was never served and it was therefore not expected to respond to proceedings which were not served on it
15. Having said that, there is nothing precluding the appellant from applying for dismissal of the sit as it is a party to the suit with or without any defence filed. I gather support in Rule 16(3) of the ELRC Procedure Rules, 2016 provides that: -

“ Any party to the sit may apply for dismissal as provided in paragraph (1).” [emphasis added]

Inordinate and inexcusable delay

16. Rule 15 of the ELRC Procedure Rules 2016,(now repealed), provided that within 14 days after close of pleadings in a suit, the parties shall move the court to hold a scheduling conference otherwise called pre-trial conference to take directions. Rule 16(1) then provided that where no application was made under Rule 15 or no action was taken by either party within one year from the date of filing, the court had the mandate to issue notice to the parties to show cause why the suit should not be dismissed and if no reasonable cause was shown, the court had the discretion to dismiss the suit.
17. Paragraph (3) allowed any party to the suit to apply for dismissal as provided under paragraph (1) above. The provision of this paragraph is in similar to Order 17 Rule 2(5) of the Civil Procedure Rules.
18. The legal threshold for seeking dismissal is the failure to move the court for pre-trial directions under Rule 15 of the ELRC Procedures Rules or if no action has been taken by either party within one year from the date of filing the suit. It is now trite law that it is the party who has instituted a suit to pursue a remedy, who should take the necessary steps to ensure that his suit is expeditiously heard and determined.
19. Courts have come up with principles for dismissing suit for want of prosecution. In Anthony Kaburi Kario & 2 others v Ragati Tea Factory Company Limited & 10 others (2014) eKLR, the court held that: -

“ In sum, the court should ask itself whether there has been inordinate delay which has not been explained and, therefore, inexcusable.”
20. In the instant case, the respondent acknowledged that she took no steps towards disposal of the suit for three years from the date of filing the suit. Her explanation for the delay to prosecute her suit was given in paragraph 5 of her Replying Affidavit thus: -

“ 5. That honestly this matter inadvertently fell off my mind.”
21. The above explanation, in my view does not amount to an excusable reason for the delay. If anything, it demonstrates lack of due diligence and indolence on the part of the respondent and he Advocate. She just filed a suit and took no further steps towards prosecuting it including service of the court summons and pleadings upon the appellants, moving the court for pre-trial directions and finally fixing the suit for hearing.
22. As it appears from the record, the respondent was reminded of the existing suit by the appellant in 2023 after she filed the application before this court seeking leave to file suit out of time. During the said leave proceedings, she denied ever filing any suit in court as alleged, only to change her mind when the appellant applied for dismissal of the suit for want of prosecution.



23. Having considered the circumstances of this case, I find that the delay in prosecuting the suit was inordinate and no credible or sufficient reason for the delay has been explained. Therefore, the delay is inexcusable.
24. In dismissing the motion by the appellant, the trial court stated that the motion was brought under the wrong provisions of the law; both parties were guilty of laches as the appellant had also failed to enter appearance and file its Response to the claim; and finally, that pre-trial directions had not been taken three years after the date of filing the suit.
25. I have already made a finding of fact that there was no proof of service of summons and pleadings upon the appellant. By blaming the appellant for failure to enter appearance and file defence, or failure to secure pre-trial direction, the trial court fell into error as the said finding was not supported by evidence. Any finding of fact made by a trial court on a point of fact not supported by evidence is amenable to interference by an appellate court.
26. Having said that, I am satisfied by the appellant's case that there is an inordinate delay by the respondent to prosecute her suit and the delay is inexcusable because she has failed to show any credible or sufficient reason for the delay. I gather support from *Ivila v Kyumbu* [1984] KLR 441, the Court of Appeal held that:

“Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such they may be dismissed.”

Reliefs

27. Having found that the appellant has demonstrated an inordinate and inexcusable delay by the respondent to prosecute her suit, I must hold that the appeal has merits and it is allowed as prayed. The respondent was evidently indolent and slept on her right.
28. The appellant would also be exposed to the prejudice of having to mount a defence against a cause of action that arose in January 2021 about six years ago. In the end, I allow the appeal, set aside the Ruling and orders made by the trial court on 20th August 2024, and substitute therewith an order dismissing the respondent's suit (Meru CM ELRC No. E001 of 2021). The appellant is awarded costs of the appeal and the Notice of Motion dated 15th March 2024 in the lower court.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF SEPTEMBER, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

