REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. E085 OF 2025

ERIC NGOWA MASHA ……..……. APPELLANT

VERSUS

A.A. BAYUSUF & SONS LIMITED …….. RESPONDENT

[Being an appeal from the ruling of Hon. G. Sogmo delivered on 9 May 2025 in Mombasa CMECLRC No. E634 of 2022]

JUDGMENT

The appeal arises from the ruling delivered on 9 May 2025 in Mombasa CMELRC No. E634 of 2025. The appellant's case is that the trial court erred in law and fact in dismissing the appellant's suit for want of prosecution on account of the respondent's application dated 30 September 2024, while the respondent had not filed any response to the claim. The appellant's submissions and explanation for why the suit had not been set down for hearing were due to an inadvertent mistake by his advocates and should not have been punished, but the trial court failed to consider this.

The appeal is that the inadvertent delay in prosecuting the case was not the appellant's fault, as the appellant is an innocent litigant. The trial court failed to apply the Oxygen principle and the rules of natural justice before dismissing the suit.

The appellant seeks that the suit pending before the trial court be reinstated for hearing on the merits and that the appeal be allowed with costs. The suit was returned to the trial court for a hearing on the merits.

On appeal, the appellant submitted that, upon filing the claim on 18 August 2022 seeking compensation for the unfair termination of his employment, the respondent entered unconditional appearance on 23 November 2022 and never filed any response to the claim. The respondent then filed an application dated 30 September 2024 seeking dismissal of the suit for want of prosecution.

In reply to the application, the appellant stated that the delay in failing to prosecute his case was due to inadvertent misfiling by his advocate. The fact that the respondent never responded to the claim further delayed matters.

In a ruling delivered on 9 May 2025, the learned magistrate allowed the application by the respondent and dismissed the claim with costs. This denied the appellant a fair chance at a hearing and his right to secure justice, having properly moved the court, but, due to an inadvertent mistake by his advocates, his case was not fixed for a hearing.

The claim is weighty and based on unfair termination of employment. No payment was made of the due terminal dues. Unless the appeal is allowed, the appellant will suffer loss and damage.

The respondent did not file any written submissions.

Determination

This being a first appeal, the court is required to review the record, reassess the findings, and reach a conclusion.

The appellant filed his Memorandum of Claim on 11 November 2022.

On 23 November 2022, the respondent filed a Memorandum of Appearance.

The respondent filed an application dated 30 September 2024 seeking dismissal of the claim for want of prosecution, on the ground that, for 22 months, the appellant had done nothing to prosecute his case.

On 9 May 2025, the trial court dismissed the application dated 30 September 2024. The learned magistrate held that counsel's mistake in failing to prosecute the case should not be applied to cover the lapse in diligence on the part of the right-holder, the client.

The application dated 30 September 2024 is premised on Rule 16(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (since repealed). The rule required that:

> ***16. (1) In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.***
>
> ***(2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.***
>
> ***(3) Any party to the suit may apply for dismissal as provided in paragraph (1).***

Under the Rule, the court may dismiss a claim if the parties have taken no action for over a year. Upon notice, where the party fails to show reasonable and justified cause, the court ***may dismiss the suit.***

The respondent moved the court on the basis that the appellant had done nothing to prosecute his case for over 22 months. In reply, the appellant asserted that the delay arose out of an inadvertent mistake of his advocate, who misfiled his file and that the respondent had not filed a response to his claim.

In thus deciding, the court’s discretion is invoked. The assessment of the reasons for the delay in addressing a claim for over a year.

The court in **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] KECA 799 (KLR)** held that

> *… the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.*

In the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] KECA 674 (KLR)**, the court held that although there was an inadvertent mistake by counsel, the client had done nothing to attend or take steps to secure his rights. Indeed, clients should not rely on errors of their advocates as held in **Owino Ger v Marmanet Forest Co-operative & Credit Society Ltd [1987] KECA 1 (KLR).**

However, the reasons given for the delay in prosecuting a case must be adequate, the prejudice to the respondent considered, as well as the chances of the claim succeeding. In this particular case, there is no response to the claim before the trial court. The appellant had claimed his rights in employment were violated and thus claims terminal dues. Where the appeal was allowed and his case reinstated, the respondent would have no response unless they invoked the court's discretion to file it out of time.

In appreciating that mistakes do occur in the ordinary practice of law and curt processes, the court in **Hawkwind Corporation (The Owners of "The MV Kairos") v African Marine & General Engineering [2020] KECA 397 (KLR)** held that:

> *A mistake is a mistake. It is no less a mistake because it is an unfortunate slip.... The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...*

In the interests of justice, the suit shall be heard on merit.

That said, I exercise my discretion to reinstate the suit in Mombasa CMELRC No. E634 of 2022. For the appeal, the respondent did not file written submissions. Each party should bear its costs. Proceed before the trial court for hearing directions.

Delivered in open court at Mombasa, this 4th day of December 2025.

M. MBARŨ
JUDGE

In the presence of:

…… and ……. ……