



**Ivia v Mufaddal Glass Distributors Ltd (Civil Appeal E297 of 2024)
[2026] KEHC 247 (KLR) (Civ) (22 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 247 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E297 OF 2024
AN ONGERI, J
JANUARY 22, 2026**

BETWEEN

COSMAS KIEMA IVIA PLAINTIFF

AND

MUFADDAL GLASS DISTRIBUTORS LTD DEFENDANT

*(Being an appeal from the ruling of Hon. RAWLINGS LILUMA
(SRM) in Milimani CMCC No. 4688 of 2018 delivered on 26/1/2024)*

JUDGMENT

1. The appellant's suit was dismissed on 9/5/2023 for want of prosecution and non appearance by the appellant.
2. Subsequently the appellant filed an application dated 29/5/2023 seeking to reinstate the suit.
3. The trial court declined the application for reasons that sufficient notice was issued to the parties and the case was cause listed for directions on 9/5/2023.
4. The trial court also noted that the suit was filed on 17/7/2018 and dismissed on 9/5/2023.
5. The appellant's advocate stated that the reason for the delay to prosecute the case was the Chief Justice and President of the Supreme Court had made a pronouncement on WIBA matters which was published in Kenya Gazette vol. CXXV No. 99 Nairobi on 28th April 2023 and the appellant filed the application dated 29/8/2023.
6. The trial court dismissed the application dated 29/8/2023 for reasons that there was sufficient notice before the case was cause listed on 9/5/2023.
7. The appellant has appealed against the dismissal on the following grounds;



- i. That the learned magistrate erred in law and fact in finding that no sufficient explanation had been given for the plaintiff's failure to attend court on 9th May 2023.
 - ii. That the learned magistrate erred in law and fact in failing to consider and appreciate the significance and full import of the appellant's evidence and as a result arrived at an erroneous decision.
 - iii. That the learned magistrate erred in law and in fact in failing to consider the submissions by the appellant.
 - iv. That the learned magistrate erred in law and in act by failing to properly and exhaustively evaluate the evidence on record; hence he arrived at wrong inferences and conclusions.
 - v. That the learned magistrate misdirected himself by arriving at conclusions which are unsupported by evidence and/or based on no evidence;
8. The parties filed written submissions as follows: the appellant submitted that the trial court misapprehended material facts as paragraph 12 of the ruling stated that "following the publication of the Gazette Notice of 28th April 2023, the plaintiff promptly filed the application herein dated 29th May 2023".
 9. The supporting affidavit sworn on 29th May 2023 made it clear in paragraphs 3, 4, 5, and 6 that counsel discovered the listing through the judiciary e-filing system on 5th May 2023 promptly served a mention notice, filed an affidavit of service and only failed to attend on 9th May 2023 due to technical challenges in joining the virtual court session.
 10. The application of 29th May 2023 was thus filed in response to the dismissal orders owing to counsel's inability to log in not because of the Gazette Notice.
 11. The appellant submitted that the learned magistrate applied the wrong legal principles to the application. At paragraph 7 of the ruling, he invoked section 80 of the Civil Procedure Act and Order 45 Rule 1 relating to review of court orders.
 12. The appellant argued that this was a fundamental misdirection because the application was an application for reinstatement under order 12 rule 7 which is governed by different considerations.
 13. The appellant submitted that the learned magistrate failed to evaluate critical evidence which explained both the cause of non-attendance and the steps taken by counsel prior to the dismissal on 9th May 2023, detailed at paragraphs 3, 4, and 5 that counsel discovered the listing on 5th May 2023 issued a mention notice, served the respondent and filed an affidavit of service.
 14. That paragraph 7 of the same affidavit explained that on the material day, counsel attempted to join the virtual session but experienced technical challenges. It was the appellants argument that none of the said averments were evaluated in the ruling.
 15. The appellant argued that the technical difficulties in accessing virtual court sessions constitute sufficient cause for non-attendance, particularly in the post COVID era and thus the plaintiff should not be punished for technical shortcomings beyond his counsel's control.
 16. The respondent alternatively submitted that the Appellant in the Appeal beforehand filed a Memorandum of Appeal dated 28th February, 2024.
 17. A keen look at the CTS shows that the payment towards court fees of the Memorandum of Appeal dated 28th February, 2024 was equally made on 28th February, 2024.



18. This Appeal ought to have been filed by 26th February, 2024. The thirty days lapsed on 26th February, 2024. The appellant never made any application for leave to file the memorandum of appeal out of time.
19. In the absence of any such application and any orders granting the appellant leave to file the appeal out of time it follows that the appeal as currently filed is a nullity.
20. The respondent submitted that the suit that the appellant seeks to reinstate was filed on 11 May, 2018 being CMCC No. 4088 of 2018, Cosmas Kiema v. Mufaddal Glass Distributors Ltd. Apart from this suit; the Appellant has four other suits against the Respondent herein also filed at Milimani Commercial Courts.
21. The other four suits are as below: -
 - a. CMCC No. E993 of 2018 — Cosmas Kiema v Mufaddal Glass Distributors Ltd
 - b. CMCC No. 9636 OF 2018 — Cosmas Kiema v Mufaddal Glass Distributors Ltd
 - c. CMCC No. 9637 OF 2018 — Cosmas Kiema v Mufaddal Glass Distributors Ltd
 - d. CMCC No. 4063 OF 2018 — Cosmas Kiema v Mufaddal Glass Distributors Ltd
22. All the above listed suits and the one the Appellant seeks to reinstate are work injury related claims.
23. Interestingly, all suits are filed by different law firms whereby the Appellant herein alleges injury on different dates. A position that the Respondent has at all times refuted based on forged documents.
24. The respondent argued that the purport of the Respondent highlighting the existence of the other cases is to demonstrate the inconvenience the Respondent has also been taken through since the year 2018 in defending five suits from the same Claimant.
25. This coupled by the cost of legal fees that is appurtenant to each and every suit. The Appellant's claim that the failure to attend court was owing to a technical hitch cannot be therefore be allowed to stand.
26. The following issues fall for this court's determination:
 - i. Whether this appeal is competent, having been filed outside the prescribed timeline without leave of the court.
 - ii. Whether the learned trial magistrate erred in law and fact in dismissing the appellant's application dated 29th May 2023 for reinstatement of the suit.
27. The main issue is whether the trial court's exercise of discretion in dismissing the application for reinstatement was judicious.
28. The principles guiding such discretion are well articulated in Kenyan jurisprudence, which emphasizes that the court's primary aim is to do substantive justice rather than punish procedural lapses, especially where a reasonable explanation is offered.
29. The appellant's suit was dismissed for non-attendance on 9th May 2023. The subsequent application for reinstatement provided an explanation that counsel, upon discovering the listing via the judiciary's e-filing system on 5th May 2023, promptly served a mention notice and filed an affidavit of service.
30. On the hearing date, counsel experienced technical difficulties in accessing the virtual court session. The trial court, in its ruling, conflated the legal principles by referencing provisions for review under Section



80 of the Civil Procedure Act and Order 45, rather than focusing on the correct test for reinstatement under Order 12 Rule 7.

31. This was a material misdirection. As held in *Shah v Mbogo* [1967] EA 116, an appellate court will interfere with the exercise of discretion if it is shown that the judge misdirected himself in law or acted on wrong principles.
32. The explanation for non-attendance technical challenges in a virtual court setting, constitutes a sufficient cause in the contemporary judicial context.
33. The duty of the court is to serve the ends of justice, not to aid in its obstruction by a draconian reliance on procedure.
34. The appellant acted with reasonable promptness after the dismissal by filing the reinstatement application within three weeks.
35. Furthermore, the long history of the suit, while a relevant consideration, should not be used to eclipse a bona fide and plausible explanation for a single instance of non-appearance, particularly where prior steps to prepare for the hearing were demonstrated.
36. Regarding the respondent's preliminary objection on the timeline of the appeal, I note that the ruling was delivered on 26th January 2024.
37. The Memorandum of Appeal was filed on 28th February 2024. While this is technically two days outside the 30-day period under Section 79G of the Civil Procedure Act, the margin is de minimis.
38. The overriding objective of the civil procedure rules, encapsulated in Sections 1A and 1B of the Civil Procedure Act, commands courts to administer justice expeditiously, proportionately, and without undue regard to technicalities.
39. The need for expeditious disposal of cases should not supersede the greater interest of justice.
40. Striking out the appeal on this slender technicality would perpetrate a greater injustice by foreclosing a hearing on the merits of a substantive application for reinstatement.
41. In the interests of justice, I invoke the inherent power of this court to extend time for the filing of this appeal under Section 95 of the Civil Procedure Act and deem the appeal as properly filed.
42. Consequently, the appeal is allowed.
43. The ruling of the trial court delivered on 26th January 2024 is hereby set aside. In its place, the appellant's application dated 29th May 2023 is allowed, and Milimani CMCC No. 4688 of 2018 is hereby reinstated for hearing and determination on merits.
44. The appellant is directed to set down the suit for hearing within 60 days from today, failure to which the reinstatement order shall automatically lapse.
45. However, the Appellant to pay the Respondent thrown away costs of Kshs. 20,000 before the case is heard.
46. The costs of the application in the lower court and of this appeal shall be in the cause.
47. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF JANUARY, 2026.



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A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

