

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. E164 OF 2024**

**DAVID CHIMWANI LUGONZO.....**  
**....APPELLANT**

**VERSUS**

**AL-HUSNAIN MOTORS LIMITED.....**  
**RESPONDENT**

**JUDGMENT**

**Introduction**

1. This appeal arises from the ruling of Hon. J.J. Masiga PM in the Chief Magistrate’s Court at Kakamega in CMCC No. E093 of 2024, in which the Appellant’s application dated 2nd October 2024 was dismissed for want of prosecution.
2. The Appellant is aggrieved by the dismissal, which occurred on the first scheduled hearing dates of 8th and 9th October 2024, contending that it was premature, procedurally unfair, and contrary to both constitutional and procedural safeguards.
3. The Respondent opposed the appeal through a Replying Affidavit, asserting procedural laxity and non-compliance with court orders by the Appellant.
4. While the Appellant did not file written submissions despite being granted the opportunity, the Court is obliged to determine the appeal on the record, applicable law, and principles of justice.

## **Background of the Dispute**

1. The dispute relates to a financing arrangement under which the Appellant purchased motor vehicle registration KDN 178E, with the Respondent seeking repossession following alleged default.
2. The Appellant filed proceedings in CMCC No. E093 of 2024, obtaining interim protective orders.
3. Subsequently, the Appellant filed an application dated 2nd October 2024 seeking to set aside the repossession orders and obtain a stay of execution.
4. The trial court dismissed the application for want of prosecution on the first hearing dates, without notice, opportunity to be heard, or directions from the court.
5. It is the dismissal of this application that forms the subject of the present appeal.

## **Issue for Determination**

10. The sole issue for determination is whether the dismissal of the Appellant's application dated 2<sup>nd</sup> October 2024 for want of prosecution was improper, premature, and in violation of the Appellant's constitutional right.

## **Analysis**

11. The Appellant contends that the trial court erred in law and in fact by dismissing the application on 8<sup>th</sup> October 2024, when it had been fixed for hearing on 9<sup>th</sup> October 2024, and again on 9<sup>th</sup> October 2024 for non-attendance. Such dismissal, it is argued, was contrary to natural justice, violated Articles 50 and 25 of the Constitution, and undermined the right to fair trial.
12. It is further contended that the dismissal was made in controversial circumstances, contrary to Article 159 of the Constitution, and that the court misapplied Order 51 of the Civil Procedure Rules, which does not provide for dismissal of applications for non-attendance, particularly at the first hearing.
13. The record indicates that the application was dismissed on the very first hearing date. There is no evidence that the Appellant had repeatedly failed to prosecute the application.
14. Courts have repeatedly held that dismissal for want of prosecution is a draconian remedy that should only be exercised where there is clear evidence of inordinate delay, willful neglect, or abuse of court process as held in **Ivita v Kyumbu, 1984; Kipkoech & Others v Cheruiyot, 2025**). Premature dismissal without warning amounts to an improper exercise of judicial discretion.
15. **In Sang & Another v Musani (2024)**, *the High Court emphasized that dismissal without notice or opportunity to be heard violates the right to a fair hearing under Article 50(1).*

***Similarly, in Tawazon Chemical Co (EA) Ltd v Kimungo & Another (2025), dismissal at the first hearing was deemed justifiable only where there is a history of repeated default, which is absent in the present case.***

16. ***In Chepkwesi v IG of Police (2024), the Court reiterated that courts should provide a defined opportunity to rectify procedural lapses before imposing the ultimate sanction of dismissal.***

17. Applying these principles, the trial court's dismissal of the application was premature, procedurally unfair, and inconsistent with constitutional safeguards, including Articles 50, 25, and 159. The court also misapplied Order 51 CPR and failed to exercise judicial discretion judiciously.

18. The dismissal therefore deprived the Appellant of the opportunity to be heard and to prosecute his application, contrary to the overriding objective of Sections 1A and 1B of the Civil Procedure Act, which require courts to ensure just, expeditious, proportionate, and fair resolution of disputes.

## **Conclusion**

19. In the circumstances, this Court finds that the trial court erred in law and fact by dismissing the application dated 2<sup>nd</sup> October 2024 for want of prosecution on the first hearing date.

20. The dismissal was premature, procedurally unfair, and violated the Appellant's constitutional rights.

## **Orders**

21. The Appeal is allowed.

22. The order dismissing the Appellant's application dated 2<sup>nd</sup> October 2024 is set aside.

23. The said application is reinstated for hearing and determination on merit before the Chief Magistrate's Court at Kakamega, before a different magistrate.

24. The trial court is directed to give priority to the hearing and ensure compliance with procedural fairness and constitutional safeguards.

25. Each party shall bear its own costs of the appeal.

26. Right of Appeal 30 days.

**DATED, SIGNED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF JANUARY 2026 AND DELIVERED ON 30<sup>TH</sup> JANUARY, 2026.**

**S.N MBUNGI**

**JUDGE**

**In the presence of:-**

CA: Ang'onga/Nekesa

Mr. Odhiambo for the respondent, present online.

Appellant absent though aware of the ruling.