



**Njoroge v Kanyoro & 2 others (Civil Appeal E001 of 2025)
[2026] KEHC 2644 (KLR) (20 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2644 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E001 OF 2025
PJO OTIENO, J
FEBRUARY 20, 2026**

BETWEEN

PATRICK MWAURA NJOROGE APPELLANT

AND

SOLOMON MWOGE KANYORO 1ST RESPONDENT

EQUITY BANK LIMITED 2ND RESPONDENT

NGUGI JOHN 3RD RESPONDENT

*(Being an appeal against the Ruling of Hon. J. Ndeng'eri (SRM)
in Naivasha MCCC/762/2014 delivered on 6th December, 2024)*

JUDGMENT

Background of the Appeal

1. By the ruling dated 6/12/2024, the trial court declined to reinstate the suit it had had dismissed for want of prosecution on 13/02/2024. The Appellant, who was the plaintiff in the dismissed suit, was aggrieved by that and brought the instant appeal through the memorandum of appeal dated 6th January 2025.
2. The four grounds of appeal fault the trial court for failure to recognize that the Appellant was physically present and ready to proceed at the time of dismissal, the unreasonable nature of the timelines provided for service, and the misapplication of the doctrine of abuse of process.
3. From the onset, the historical background of the litigation as captured in the record availed is essential for a contextual understanding of the controversy. The appeal traces its origins to a decade-old personal injury claim that has navigated a tumultuous path through the subordinate court. The Appellant initiated Naivasha Civil Case No. 762 of 2014 against the Respondents herein claiming damages



arising from a motor vehicle accident on 25th March 2013, which the Appellant attributed to the negligence of the Respondents.

4. Following the filing of the plaint on 06/06/2014, the 1st Respondent filed a defense in February 2015. The 2nd Respondent was later removed from the suit through a notice of discontinuance. The 3rd Respondent, despite service of summons, failed to enter an appearance, leading to the endorsement of an interlocutory judgment against him on 25/02/2020.
5. The suit was first dismissed for want of prosecution on 31st July 2018, following a motion by the defendants citing inordinate delay. This dismissal was subsequently set aside on 16/10/2019, allowing the suit to proceed. Between 2021 and 2023, the matter stalled again due to an application by the 1st Respondent's advocates seeking leave to cease acting for their client. This application was eventually allowed in January 2023, and the matter was set for mention to confirm compliance with Order 11 of the Civil Procedure Rules.
6. In late 2023, the trial court directed that the matter must be heard and concluded before the end of the year and a hearing date was set for 08/02/2024. On that day, the Appellant alleges to have experienced transport challenges and was running late, prompting his counsel to request an adjournment. The court granted what it termed a last adjournment and stood over the matter to the 13/02/2024.
7. When the matter came up on 13/02/2024, the Appellant was present and was sworn in to adopt his witness statement. However, the trial magistrate inquired about the proof of service of the hearing notice on the 1st Respondent. Although the Appellant's counsel explained that service had been effected through the 1st Respondent's insurer (AMACO) but the affidavit of service was not yet in the court file due to registry difficulties, the court summarily dismissed the suit for want of prosecution.
8. The Appellant then moved the trial court by way of a notice of motion dated 07/03/2024, seeking to vacate the dismissal and reinstate the suit. In a ruling delivered on 06/12/2024, the trial magistrate dismissed the application for reinstatement, finding that the suit was characterized by lethargy and that the Appellant's conduct amounted to an abuse of the court process. It is this ruling that forms the subject of the present appeal.
9. The four grounds of appeal challenge the trial court's decision on both factual and legal bases. First, the Appellant contends that the learned magistrate erred in fact and law in dismissing the application dated 7th March 2024, thereby failing to exercise judicial discretion in a manner that favours the determination of disputes on their merits. The Appellant argues that the trial magistrate misdirected herself by focusing on the historical milestones of the suit rather than the specific and justifiable reasons provided for the absence of the affidavit of service on the hearing date.
10. Second, the Appellant asserts that the trial court failed to consider that the absence of a filed affidavit of service was a procedural technicality. The Appellant maintains that such a technicality should not have been used as a basis to dismiss a suit where the plaintiff was physically present in court and had already taken the oath to testify.
11. Third, the Appellant grounds his appeal on the argument that the timeline provided by the trial court for service was unreasonably short. The Appellant points out that the adjournment from Thursday, 08/02/2024, to Tuesday, 13/02/2024, effectively left only two working days, Friday and Monday, to effect service on the Respondent's insurer and file a return of service in the Naivasha registry. The Appellant contends that the short notice placed him in a nearly impossible position, especially given the distance between Nairobi where service was effected and Naivasha where the registry is located.



12. Finally, the Appellant alleges that the learned magistrate failed to appreciate his seriousness and intent to prosecute the suit. The Appellant submits that his presence in court on the hearing day and his readiness to be sworn in were irrefutable indicators of his commitment to concluding the litigation. He argues that the trial court's finding of lethargy was contradicted by the actual events in the courtroom on the day of dismissal.
13. The court directed that the appeal would be canvassed by way of written submissions. However, on perusal of the court's file, the court only sees the written submissions for the Appellant's dated 19/05/2025 which emphasizes on the Oxygen Principle and the constitutional right to a fair hearing and that the trial court misapplied the law on dismissal for want of prosecution. It is on record that even though served, the respondent never attended court on the date appointed for hearing of the appeal.

Appellant's Submissions

14. It is submitted that the dismissal on 13/02/2024 was contradictory because a suit cannot be said to be wanting in prosecution when the plaintiff is actively participating in the trial. He emphasizes that the act of taking an oath is the most significant indicator of a party's readiness to prosecute their case. The Appellant contends that the trial magistrate focused on the past instead of the present, using previous dismissals which had already been resolved to justify a new and final dismissal for a minor procedural lapse.
15. Further, the Appellant's submissions detail the administrative hurdles faced in the days leading up to the hearing. He explains that the short notice of effectively two working days made it physically challenging to serve a party in Nairobi and file the return in Naivasha. He points out that his process server had attempted to file the affidavit on Monday, 12th February, but the court file was missing from the registry, a fact that was communicated to the trial magistrate but ignored. The Appellant argues that a litigant should not be condemned unheard due to the inefficiencies of the court registry.
16. The Appellant also challenges the trial magistrate's reliance on *Muchanga Investments Limited v Safaris Unlimited (Africa) Limited & 2 others* [2001] KECA 242 (KLR) and submits that his conduct did not meet the definition of an abuse of process because he was not acting in bad faith, but was rather struggling with procedural timelines and administrative delays. He cites *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] KECA 799 (KLR) to urge that the mistakes of an advocate or process server should not be used to drive a litigant from the seat of justice. The Appellant concludes that the interests of justice, as mandated by Article 159(2)(d), require that he be given his day in court, especially since the 1st Respondent did not even oppose the reinstatement application.

Issues, Analysis and Determination

17. Having perused the trial records at trial, including the proceedings of 13.02.2024 when the suit was dismissed for want of prosecution, the impugned ruling, and the appellant's submissions, the Court identifies only one pertinent issue for determination being whether the trial court judiciously exercised its discretion in dismissing the suit for want of prosecution on 13th February 2024.
18. The power to dismiss a suit for want of prosecution and the subsequent power to reinstate it are discretionary in nature. Under Order 12 Rule 7 of the Civil Procedure Rules, a court may set aside a dismissal order on such terms as may be just. However, this discretion is not absolute and an appellate court will interfere with the exercise of a judge's discretion if it is satisfied that the judge misdirected himself, or that the decision was plainly wrong.¹

¹ Mbogo v Shah EA 93.



19. In the instant, the trial court dismissed the suit on 13/02/2024 for want of prosecution at a moment when the plaintiff was physically present and ready to proceed. This Court finds it difficult to reconcile the term want of prosecution with the presence of a plaintiff who has been sworn and ready to testify.
20. The primary justification and rationale for dismissal for want of prosecution is that a defendant should not be held in suspense by an indolent plaintiff. However, when a plaintiff is in the witness stand, the indolence has clearly ceased. That is not to say that a litigant's mere presence in court gives him an immunity from scrutiny by the court. The court still has the tools to protect its processes from abuse and to protect the other litigants from an outright prejudice. The repercussion for against such a litigant is the due application and enforcement of the overriding objectives of the court and the duty imposed upon litigants and counsel to help achieve such objectives.
21. In this matter, if the trial court took the view that the appellant had behaved in a way that invited being removed from the seat of justice by dismissal of the case before trial, then the court was bound to seek an explanation from the party or counsel on the failures and to record such explanation on the file. The record before the court does not show that the appellant was given that inalienable right to be heard. That failure on the trial court demonstrates an error in exercise of judicial discretion in that the decision flies in the face of the principles of natural justice.
22. Had the explanation been sought there would not have been the allegations that the affidavit was indeed ready. Maybe there could have been a request for a short time to file it or indeed a candid owning up to lack of service.
23. While the tenure of the litigation in court is indeed reprehensible, that alone justifies not the summary manner the trial court dealt with it. Furthermore, a significant portion of the delay between 2021 and 2023 was caused by the 1st Respondent's own advocates seeking leave to withdraw. In *Ivita vs Kyumbu* [1975] KEHC 4 (KLR), the court held that the test as to whether a suit should be reinstated is whether there is delay that is prolonged and inexcusable and if justice will be done despite the delay. The court thus finds that despite the long delay, giving to the appellant a chance to explain the lack of the affidavit of service in the court file should have served the interests of justice more.
24. The court considers service of process including hearing notices to be a core cog in the right to a fair hearing and dispels the argument that the absence of a stamped affidavit of service in the court file is a mere procedural lapse. The appellants counsel ought to have known better and done everything to demonstrate service even within the constricted timelines. He was however denied the chance to offer an explanation.
25. In upshot, this Court finds that the appeal is determined merited and thus allowed. The trial court's dismissal of the suit on 13th February 2024 was erroneous for the use of the expression, want of prosecution just as it was bad for failure to hear the appellant on the absence of the affidavit of service in the court file. The appeal is hereby allowed in that the ruling and orders of the of the trial court delivered on 06/12/2024 are set aside in their entirety.
26. The suit, Naivasha CMCCC No. 762 of 2014 is reinstated to be heard on the merits and expeditiously. It is directed that the plaintiff must fix the matter for hearing and give evidence to closure not later than 30.09.2026. For that to be realised, it is directed that the matter be mentioned before the head of station on the 09.03.2026 for purposes of fixing a hearing date.
27. Because the appellant is not completely innocent for the delay leading to the dismissal, he cannot benefit from the costs of this appeal. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY, 2026.



PATRICK J O OTIENO
JUDGE

