REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E205 OF 2024

(Before D. K. N. Marete)

PETER MUIRURI NG'ANG'A……...……. APPELLANT

VS

ASMARA ENTERTAINMENT LIMITED…….……. RESPONDENT

RULING

This is an application dated 14th March 2025 and seeks the following orders of court;

i) That this court be pleased to review and set aside the proceedings and orders of 12th February, 2025 dismissing the matter.

ii) That this court be pleased to reinstate the appeal and set it for hearing.

iii) That the costs of this application be awarded to the Applicant.

It is grounded thus;

i) When the matter came for mention on 12th February 2025, counsel was in physical court before Justice Stephen Abongi in Kakamega for hearing.

ii) That it is not anticipated that a matter can be dismissed during a mention.

iii) That non-attendance was not deliberate and counsel is still pursuing proceedings to enable filing of record of appeal.

iv) That counsel was confident the matter would be allocated another date due to their stable record of previous attendance.

v) That it will be unjust to shut the Appellant from the seat of justice in all the circumstances and in the circumstances of this particular case considering the abundance of the unresolved issues left out by the judgment.

vi) That the Respondent will not be prejudiced given the short term between the elapse of the appeal period and the filing of this application.

The Respondent in a Replying Affidavit sworn on 27th October, 2025 opposes the application and avers that it is fatally defective, lacking in merit and made in bad faith as it seeks to set aside valid proceedings and orders that dismiss the matter for want of prosecution and non-attendance. It is their further case that the failure to attend court to prosecute the application is not excusable as a reason given for non-attendance is not backed by any evidence to show that indeed the advocate for the Applicant was in physical court.

The Respondent further avers that this matter was dismissed on 12th February, 2025 in pursuant of Order 17 Rule 2(1) and (3) of the Civil Procedure Rules, 2010 when the Respondent failed to prosecute the suit and therefore the dismissal was just and fair in the circumstances. All this time, the Applicant has not been keen on prosecuting the matter and that is why it took up to 14th March, 2025 well over a month from the date the suit was dismissed to file this application for reinstatement.

The Respondent further avers that no reasonable, sufficient or justifiable cause has been demonstrated to explain the failure to attend or prosecute the matter. This delay is therefore in ordinate, inexcusable and prejudicial to the Respondent. The Respondent has incurred costs and

suffered undue anxiety emanating from this matter and therefore a revival does not suffice. They therefore call upon this court to express its duty to serve justice by ascertaining just, effective and timely disposal of proceedings by upholding the principle that where a suit is unprosecuted, the court is duty bound to dismiss it in avoidance of backlog.

Moreover, the Respondent argues and submits that litigation must come to an end and this court should discourage inexcusable conduct or indolence by parties which is a fetter to the import of the Civil Procedure Rules. This application is a mere afterthought and should be dismissed with costs.

The Appellant/Applicant in their written submissions dated 20th January, 2026 submits in reliance of Rule 22 of the Employment and Labour Relations (Procedure) Rules which by implication provides that matters can only be dismissed for non-attendance when they were indeed set for hearing. In the circumstances of this case, this matter was set for mention and in any event, counsel was in attendance on previous mention dates.

Again, the Applicant submits that they were always aware of the mention date and that the explanation given for non-attendance is reasonable given the conflicts in the advocates diary and further that if the court was inclined on dismissing the application for whatever reason, it ought to have issued a notice to show cause in accordance with Rule 43.

The Respondent in opposition submits that the Applicant has failed to demonstrate sufficient, reasonable or justifiable cause to warrant the setting aside of the dismissal orders issued on 12th

February, 2025. They seek to buttress their case by relying on the authority of **Shah v Mbogo & Another (1967) EA, 116** where the court held that discretion to set aside ex parte orders is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake but not to assist a party who has deliberately sought to obstruct or delay the course of justice. There is no documentation proof or other explanation of the court attendance at Kakamega and this remains a bare allegation that does not sustain a finding of sufficient cause.

This matter was coming for mention and not hearing. This notwithstanding, the Applicant was under an obligation to attend court or notify the court in advance. The failure to do this demonstrates indolence on their part and not an excusable mistake. Sufficient cause as established in jurisprudence refers to credible, legally and factually justifiable explanation capable of convincing the court to exercise its discretion in favour of a defaulting party as was enunciated in the authority of **Ivita v Kyumbu (1984) KEHC 4(KLR.)**

The Respondent further submits that the Applicant delayed in prosecuting the appeal in that this application comes in well over a month after dismissal proceedings for the appeal. This is unjustifiable and inexcusable and demonstrates a clear lack of interest in its prosecution. This is further not sufficiently explained. Besides, a reinstatement of the matter would grossly occasion prejudice to the Respondent who is entitled to enjoy the benefits of a lawful dismissal order of this court.

A scrutiny of the record and proceedings of court indicate that the Appellant/Applicant had not missed out on any other attendances of court prior to the date of the dismissal of the suit. This is against a record of various non-attendances by the Respondent.

This court agrees with the Applicant that a reinstatement of this matter is opportune in that the non-attendance of court was not deliberate but was occasioned by a mis-diarisation on the part of counsel. Again, the matter was dismissed on a mention date when the court ought to have directed itself on the set-up of the matter and refrained from making an order for dismissal as provided for by Rule 22 of the Employment and Labour Relations Court (Rules) 2024. This was also done in disregard of Rule 43 of the said Rules which provides for the issue of a Notice to Show Cause in the circumstances.

Again, the Applicant acted within a reasonable time in filing this application and thoroughly explained his reasons behind non-attendance of court. Coupled with the fact that a reinstatement of this application would not unduly prejudice the Respondent, the Applicant prays for orders in their favour and for reinstatement of the appeal.

This application tilts in favour of the Applicant. Their case overwhelms that of the Respondent. It would appear that the Respondent has ably explained the reasons for non-attendance of court and also that they came out foremost to have the matter restored and reinstated. This, they argue would not prejudice the Respondent but would be in the interest of justice bearing in mind that they gone out of their way to bring up the appeal. This is by pursuing proceedings with a view to filing a Record of Appeal. Besides, a genuine mistake of counsel should not be visited upon the client.

I agree. This is a genuine case for reinstatement of the appeal. All indicators point to a case of restoring the appeal in favour of the Applicant.

I am therefore inclined to allow the application and order as follows;

(i) The Appellant/Applicant be and is hereby awarded 30 days to make, file and serve a Record of Appeal.

(ii) Each party shall bear their costs of this application.

(iii) Mention on 18th May, 2026 for confirmation of compliances and directions of this court.

Delivered, dated and signed this **17th** day of **April** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Wetaba instructed by Wetaba, Were & Associates Advocates for the Appellant/Applicant
2. Miss Kyule instructed by Laichena Mugambi & Ayieko Advocate for the Respondent