

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL APPEAL NO. E222 OF 2023**

**FREDRICK KIMANI.....APPELLANT**

**VERSUS**

**COSMAS KIPKOECH KANDIE.....1<sup>ST</sup> RESPONDENT**  
**JONATHAN MWONGELA MATIVO.....2<sup>ND</sup> RESPONDENT**

*(Appeal from the Ruling dated 24/10/2023 delivered in Eldoret Senior Principal Magistrate's Court Civil Case No. E575 of 2021 by Hon. P.N. Areri - SPM)*

**JUDGMENT**

1. This Appeal arises from the Ruling referred to above, delivered in the said lower Court suit, by which Ruling, the lower Court dismissed the Appellant's Application whereof the Appellant had sought reinstatement of the suit after it had been dismissed for want of prosecution. The Application was dated 13/07/2023 and was filed through **Messrs Wachira Wekhomba AIM & Associates Advocates**.
2. The cause of action was a claim for compensation for damage caused to a motor vehicle, and costs incurred, as a consequence of a road accident.
3. The Application was dated 13/07/2023 and was supported by the Affidavit sworn by the Appellant's Advocate, **Gatiku Teresiah Ndene**, who deponed that the matter had been fixed for hearing on 11/07/2023 on which date she appeared virtually, and indicated that she was ready to proceed with two witnesses, upon which the Court fixed the case for hearing at 10.30 am. She deponed that one of her witnesses was logged into the virtual platform waiting to be heard as the Court was still proceeding with another matter but she was perplexed when the Court, after finishing hearing of that preceding matter, immediately left the virtual platform. She deponed that together with the Respondent's Counsel, she stayed logged into the platform up to 2:00 pm when the Court rejoined the platform, but when she inquired about the hearing of the case, the trial Magistrate informed her that the case had been dismissed for want of prosecution
4. In opposing the Application, the Respondents filed the Replying Affidavit sworn on 8/08/2023 by its Counsel, **Ruth Wambani Wanyonyi** representing **Messrs Kitiwa & Partners**

**Advocates.** Counsel conceded that indeed, she was in Court on 11/07/2023 and that during the call-over, the Appellant's Counsel indicated that she was ready to proceed with two witnesses, upon which the Court allocated the hearing for 10.30 am. She however stated that when the Court was through with the Cause List for the day, the matter she inquired about was for a different file that she was also handling, and about this instant case allocated for 10.30 am, the Magistrate advised that the same would be dismissed by 11.00 am should it not be prosecuted by then. She deponed that the Appellant's Counsel did not call out the matter by 11.00 am, upon which it was dismissed.

5. As aforesaid, by the Ruling delivered on 24/10/2023, the trial Magistrate dismissed the Application. Aggrieved by the decision, the Appellant filed this Appeal on 8/11/2023. The grounds preferred are as follows:

- i) **THAT** the Learned Magistrate erred in law and in fact by dismissing the Appellant's Application dated 13<sup>th</sup> July 2023 without considering in totality the grounds in the application, supporting affidavit thereof and the appellants submissions.
- ii) **THAT** the Learned Magistrate erred in law and in fact in unreasonably and unjustifiably dismissing the Appellant's subject Application by failing to exercise his discretion judiciously.
- iii) **THAT** the Learned Magistrate erred in law and in fact by failing to consider the Appellant's right to be heard and right to a fair hearing as enshrined in the Constitution of Kenya are so fundamental that they cannot be fettered by an exercise of discretion and cannot be limited as in accordance to Article 25 of the Constitution of Kenya 2010.
- iv) **THAT** the Learned Magistrate erred in law and in fact by misapplying the principles in setting aside an order of the Court and reinstatement of a suit dismissed for want of prosecution.
- v) **THAT** the Learned Magistrate erred in law and in fact by misdirecting himself that the Appellant had not made a meritorious case which justify setting aside an order of the Court and reinstating the suit.

6. The Appeal was then canvassed by way of written Submissions. The Appellant's Submissions is dated 3/11/2025, while the Respondent's is dated 6/11/2025.

#### **Appellant's Submissions**

7. Counsel for the Appellant, apart from restating the known principles applicable in applications seeking reinstatement of cases dismissed for want of prosecution, and citing authorities, basically reiterated the matters already captured in the Supporting Affidavit referred to above. However, in a surprising change of strategy, Counsel now acknowledged that the Appellant's Counsel was not in the virtual platform when the matter was called out at the allocated time of 10.30 am and only logged-in much later at 11.00 am. Counsel acknowledged the mistake of failing to log-in in good time and urged that the same was not intentional but was inadvertent, which mistake, she prayed, should not be visited upon the client. She also observed that the Application was filed promptly.

#### **Respondent's Submissions**

8. Counsel for the Respondent, too, apart from restating the principles applicable in cases of the nature herein, and citing authorities, basically reiterated the matters already captured in the Replying Affidavit. She then urged that the Appellant's Counsel did not give any good reason why she did not attend Court at 10.30 am.

#### **Determination**

9. The issue that calls for determination in this matter is **“whether the trial Court properly exercised its discretion in declining to reinstate the Appellant's suit earlier dismissed for want of prosecution”**.
10. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court, and draw its own conclusion (see for instance, the case of **Kenya Ports Authority vs Kuston (Kenya) Ltd [2009] 2 EA 212**).
11. Regarding dismissal for want of prosecution, the Court of Appeal, in the case of **Ivita vs. Kyumbu [1984] KLR 441**, while following its earlier case of **Salkas Contractors Ltd v Kenya Petroleum Refineries Ltd [2004] eKLR**, restated the test to be applied in the following terms:

**“3. The test applied by the Courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the Court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the Court.”**

12. **Order 12** of the **Civil Procedure Rules** then deals with matters concerning non-attendance on the date fixed for hearing. While **Rule 3** empowers the Court to dismiss a suit if the Plaintiff fails to attend at the time allocated for hearing, **Rule 7** empowers the Court to set aside its orders dismissing a suit for non-attendance.

13. Regarding setting aside its own orders made as a result of non-attendance by a party, or failure to defend a case, the Court possesses a wide discretion, which discretion must however be exercised judiciously as was well-stated in the case of **Shah vs Mbogo (1979) EA 116** as follows:

**“..... this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”**

14. Similarly, the Court of Appeal, in the case of **CMC Holdings Ltd vs James Mumo Nzioka (2004) KLR 173**, guided as follows:

**“The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”**

15. In an Appeal challenging exercise of discretion, the limits within which an Appellate Court can interfere were reiterated by the Supreme Court in the case of **Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR**, as follows:

**“..... we affirm that we would only interfere with the Appellate Court’s exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court’s exercise of discretion.”**

16. When faced with the Application seeking setting aside of the dismissal of the case for non-attendance/want of prosecution, the trial Court, in exercising its discretion, the trial Court was therefore, as aforesaid, required to be satisfied that there was **“sufficient cause”** or **“reason”** to warrant such setting aside. The term **“sufficient cause”** was explained in the case of **The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (UR)**, by **Musinga, JA** as follows:

**“28. “Sufficient cause” or “good cause” in law means:**

***“..... the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See BLACK’S LAW DICTIONARY, 9<sup>th</sup> Edition, page 251.***

**Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”**

17. I have looked at the proceedings of the trial Court and observed that, as now agreed by both parties, although Counsels for both sides were present in Court when the matter was allocated the hearing time of 10:30 am, the record correctly reflects that at 10:30, the matter was called out as scheduled but there was no attendance from the Appellant’s side. The parties are also now in unanimity that the case was eventually dismissed for want of prosecution at 11:00 am. It therefore becomes clear that this is not the picture that the Appellant’s Counsel had painted in the Supporting Affidavit she swore in support of the Application that sought setting aside of the dismissal. A reading of the Affidavit portrays the false narrative that after the matter was

allocated the hearing time of 10:30 am, Counsel remained in the platform throughout waiting for the matter to be called out but until 2.00 pm the case had still not been called out. It was therefore a complete about-turn for the Appellant's current Advocate to now, at this appeal stage, finally concede that, indeed, Counsel for the Appellant, after the case was allocated the time of 10:30 am, returned much later, long after the case had already been dismissed at 11.00 am.

18. Indeed, in his Ruling dismissing the Application, the trial Magistrate stated as follows:

*“..... While it is true that the matter was allocated time for 10.30 am for hearing, it is not true that the Plaintiff's Advocate and her witnesses were logged onto the link and were present at 10.30 am when the matter was dismissed for want of prosecution. That is not true because there were other Advocates online whose matters were handled on that day and the same were not dismissed unless the Advocate wants to impute and wrongly so, bias on the part of the Court. Is that sufficient reason to set aside Judgment or order of the Court? I don't think so.”*

19. It is therefore evident that the case placed before the trial Court by the Appellant in seeking setting aside of the dismissal of the suit is markedly different from the case now preferred at Appeal. For this reason alone, this Appeal cannot succeed since proceeding in any other manner will be to proceed without jurisdiction in light of the change in the version of the case now presented before this Court.

20. Further, in declining to reinstate the suit, the trial Magistrate held that:

*“..... It is not enough for a party to simply blame an Advocate or the Court for not prosecuting the matter or attending Court or any other mistake but the party must show tangible steps taken by him in following up his matter.”*

21. By supporting his Ruling in the manner he did, it is clear that the trial Magistrate was alive to the factual threshold and the principles of law that he was required to have taken into account, and which he did.

22. As stated by the Supreme Court in the **Musa Cherutich Sirma (supra)**, this Appellate Court can only interfere with the trial Court's exercise of discretion if this Court finds that in exercise

of such discretion, the trial Court acted arbitrary or capriciously or ignored relevant facts or disregarded the principles applicable thus resulting into an unjust order. Where, as herein, it is demonstrable that the discretion was exercised judiciously, then the fact that this Court would have arrived at a different conclusion from that reached by the trial Court is not a reason to interfere with the trial Court's exercise of discretion.

**Final Orders**

23. For the foregoing reasons, this Appeal is hereby dismissed but with no order on costs noting that the Appellant has already suffered enough loss by his case being dismissed for want of prosecution.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL 2026**

.....  
**WANANDA JOHN R. ANURO**  
**JUDGE**

**Delivered in the presence of:**

**Ms. Chepchirchir for the Appellant**

**Ms. Wambani for the Respondent**

**Court Assistant: Brian Kimathi**