



Mary Help the Sick Mission Hospital & another v Ngung'u (Employment and Labour Relations Appeal E198 of 2022) [2025] KEELRC 147 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 147 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E198 OF 2022**

**BOM MANANI, J
JANUARY 30, 2025**

BETWEEN

MARY HELP THE SICK MISSION HOSPITAL 1ST APPELLANT

JOHN MURIMI MWANGI 2ND APPELLANT

AND

MARTIN MBUGUA NGUNG'U RESPONDENT

RULING

Background

1. This is an application to set aside the order of this court dismissing the appeal for want of prosecution and set down the matter for hearing on merit. The court record shows that the order was issued on 28th February 2024 in the absence of the Appellants/Applicants (hereafter called the Applicants).
2. Mr. Okeche for the Applicants contends that on the day that the order issued, he was logged into another virtual court session to handle a different matter. He contends that he had several matters lined up on the same day and had to keep moving from one court to the other.
3. He contends that although the court had scheduled the appeal for notice to show cause on the 28th February 2024, the matter was not included in that day's cause list. As such, it was not clear whether it was going to be called out.
4. He avers that by the time he logged into the court's virtual platform to ascertain whether the matter will be dealt with, he learned that the file had already been called out and the appeal dismissed. He further indicates that upon inquiry at the court's registry on the reasons for the order, he was informed that the court dismissed the matter for want of prosecution on account of absence of certified proceedings from the lower court.



5. Mr. Okeche avers that the Applicants are not to blame for the delay in processing the typed proceedings. He contends that the Federation of Kenya Employers (FKE) which represents the Applicants applied for the proceedings immediately the appeal was filed. However, the trial court did not act on the application expeditiously.
6. Mr. Okeche contends that FKE did all that it could to follow up the proceedings but to no avail. As such, it is his view that the delay in prosecuting the appeal lies squarely with the court and not the Applicants.
7. Mr. Okeche submits that his clients are keen to pursue the appeal. As such, he posits that it is only fair that the impugned order is set aside and the appeal admitted for hearing on merit.
8. In response, the Respondent filed an affidavit dated 25th September 2024. It avers that the appeal was filed outside time and was only validated through consent. The Respondent contends that despite accommodating the Applicants by consenting to admit the appeal out of time, they have been slow in ensuring prosecution of the matter.
9. The Respondent contends that after the appeal was dismissed for want of prosecution, the matter went through the motions of taxation of costs. He avers that all this while, the Applicants did not move the court to set aside the impugned order.
10. The Respondent contends that the Applicants were only awakened from slumber when he applied for release of the decretal sum from court. As such, he believes that the instant application is an afterthought.
11. The Respondent contends that the matter has been in court since 2018. As such, it is only fair that it is not re-opened as litigation must come to an end.

Analysis

12. The only issue for determination in the application is whether the court should set aside the order of 28th February 2024 and re-open the appeal for hearing on the merits. From the evidence on record, it is apparent that the appeal was not set down for hearing because of the absence of the Record of Appeal.
13. According to the record, the Applicants were not able to prepare the foresaid instrument because the trial court had not supplied them with typed proceedings. The record further shows that the trial court indeed issued a Certificate of Delay dated 2nd September 2024 demonstrating that certified proceedings were ready for collection on 29th August 2024, long after the appeal had been dismissed.
14. It is therefore apparent that the delay in prosecuting the appeal was not due to inaction on the part of the Applicants. Evidently, blame for this debacle lay with the trial court which delayed to supply the Applicants with typed proceedings.
15. This being the case, the court asks itself whether it is just to punish the Applicants for the inaction of the trial court in processing the typed proceedings to facilitate the hearing of the appeal. I do not think so.
16. It is true that the delay in prosecuting the appeal has caused the Respondent hardship. However, the Applicants are not responsible for it.

Determination

17. As such, I arrive at the conclusion that the instant application is merited.



18. Consequently, I hereby set aside the order of 28th February 2024 dismissing the appeal for want of prosecution.
19. Further, I hereby reinstate the appeal and cross appeal for hearing on merit.
20. Since the Record of Appeal in respect of the appeal has now been filed, it is important that the matter is fast tracked in order not to prejudice the parties any further. As such, I order as follows:-
 - a. That the appeal and cross appeal be heard by way of written submissions;
 - b. That the Appellants file and serve their submissions on the appeal and cross appeal within seven (7) working days of this order;
 - c. That the Respondent files and serves submissions in response within seven (7) working days of service of submissions by the Appellants.
 - d. That thereafter, the court will set down the matter for judgment.
21. Costs of the application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JANUARY, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicants

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

