



**Teachers Service Commission v Akuyava (Appeal E001 of 2024)  
[2025] KEELRC 480 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 480 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
APPEAL E001 OF 2024  
DN NDERITU, J  
FEBRUARY 20, 2025**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPELLANT**

**AND**

**BENSON MUSIMBI AKUYAVA ..... RESPONDENT**

*(Being an appeal from the Ruling/order in Kakamega Chief Magistrate's Court ELRC Cause No. E012 of 2023 by Hon. J.R. Ndururi (SPM) delivered on 8th February, 2024)*

**JUDGMENT**

**I. Introduction**

1. In a ruling delivered on 8<sup>th</sup> February, 2024 the lower trial court allowed the respondent's application dated 25<sup>th</sup> January, 2024 for reinstatement of his claim dismissed for non-attendance, with no orders as to costs.
2. Dissatisfied with the ruling, the appellant, through Isaac Ochieng', Advocate, commenced this appeal by way of a memorandum of appeal dated 22<sup>nd</sup> February, 2024 raising the following grounds of appeal –
  1. That the learned trial magistrate erred in law when he granted orders of reinstatement of the suit without considering the appellant's replying affidavit which was on record.
  2. That the learned magistrate exercised his discretion in favour of the appellant wrongly when he gave orders without hearing the appellant contrary to tenets of fair hearing.
  3. That the learned magistrate erred in law when he failed to find that the respondent failed to meet the threshold for reinstatement of suits as required under Order 12 Rule 7 of the Civil Procedure Rules, 2010.



4. That the learned magistrate erred in law when he failed to find that the respondent failed to satisfy the court that there was sufficient cause or reason to warrant the court to use its discretion in setting aside the order of dismissal and subsequent reinstatement of the suit.
  5. That by determining that the application dated 25/1/2024 ought not to be heard and consequently issuing orders summarily, the learned magistrate failed to consider the appellant's evidence presented through documents and appellant's grounds which raised substantial issue of law.
  6. That the learned magistrate acted in excess of his jurisdiction and grossly erred in law relying on grounds not pleaded in the body of the application nor argued by the respondent and in so doing condemned the appellant unheard contrary to Article 50 of *the Constitution*.
  7. That the Learned Magistrate erred in law when he failed to consider the prejudice caused to the appellant by the reinstatement of the suit.
  8. That the learned magistrate erred in law in arriving at a decision which was contrary to the evidence tendered by the appellant, law, facts and binding judicial precedents.
  9. That the learned magistrate has not provided legal and reasoned justification on the orders made in favour of the respondents.
  10. That the learned magistrate grossly misinterpreted and misapplied the relevant law and arrived at an erroneous conclusion of law.
3. The appellant is seeking the following reliefs –
1. That this appeal be allowed.
  2. That the ruling/order of Hon. Joseph Karuri (sic) delivered on 8/2/2024 in the Chief Magistrate's Court of Kenya at Kakamega in ELRC case No. E012 of 2023: Benson Musimbi Akuyava V Teachers Service Commission and all consequent orders be set aside and substituted with an order dismissing the claim with costs.
  3. Costs of this appeal and those of the lower court awarded to the appellant.
4. The respondent opposed the appeal through Mukhooli & Associates Advocates.
5. By consent, the appeal was canvassed by way of written submissions. Counsel for the appellant, Mr. Mulaku, filed written submissions on 15<sup>th</sup> October, 2024 while Mr. Mukhooli, for the respondent, filed on 14<sup>th</sup> October, 2024.

## II. Submissions By Counsel

6. Counsel for the appellant condensed the grounds of appeal into three issues – Whether the decision to reinstate the suit without hearing the appellant violated the tenet of fair hearing; Whether the respondent met the threshold of Order 12 Rule 7 of the Civil Procedure Rules, 2020; and Whether the respondent satisfied the trial court that there was sufficient reason to warrant the court to use its discretionary power to set aside the order of dismissal and subsequent reinstatement.
7. On the first issue, it is submitted that the trial court acted in excess of its jurisdiction by relying on grounds not pleaded by the respondent and in so doing condemned the appellant unheard contrary to Article 50(1) of *the Constitution*.



8. It is submitted that the respondent's application was brought under a non-existent provision of law, Order 17 Rule 9 of the Civil Procedure Rules, 2020.
9. It is further submitted that the lower trial court failed to consider the appellant's pleadings before exercising its discretion to set aside the order of dismissal of the respondent's claim with no order as to costs. It is submitted that under Order 12 Rule 7 of the Civil Procedure Rules where a suit is dismissed the same may be reinstated on application by a party and the court may set aside the dismissal orders on such terms as it considers just.
10. It is submitted that the lower trial court failed to exercise its discretion soundly by failing to consider that the respondent failed to attend the hearing on 25<sup>th</sup> January, 2024, despite the many reminders from the appellant and further failed to adduce justifiable reasons for his non-attendance.
11. It is submitted that the lower trial court exercised its discretion in a manner that prejudiced the appellant as it failed to hear the parties or consider their submissions.
12. On the second issue, whether the respondent met the threshold for an order of reinstatement of its dismissed cause, it is submitted that the lower trial court failed to consider that the respondent had not met the conditions set out under Order 12 Rule 7 of the Civil Procedure Rules. It is submitted that the respondent failed to give the court a proper explanation for his non-attendance and thus the dismissal of his suit under Order 12 Rule 6 of the Civil Procedure Rules was fair and just.
13. Citing *Patel v E.A. Cargo Handling Services Ltd* (1974) E.A. 75; *Shah v Mbogo & Another* (1967) E.A. 116; and *Chris Onyancha v Francis Mburu & Another* (2012) eKLR, it is submitted that the lower trial court in exercising its discretion failed to act judiciously and in the interests of justice.
14. Further citing *Stanley Mungai Waweru v Keziah Wamaitha Waweru & Another* (2019) eKLR, it is further submitted that the discretion of the court to reinstate a suit must be exercised upon the court being satisfied that an applicant has met the threshold for exercise of such discretion in his/her favour.
15. It is submitted that the respondent failed to supply the court with sufficient cause to warrant the court to exercise its discretion in his favour in reinstating the cause in the absence of proof of an accident, a mistake, or unavoidable error that prevented the respondent from attending court.
16. It is submitted that the respondent's assertion that he arrived in court late on the hearing date is not plausible since the matter was listed at Number 31 on the cause list, and it is not explained why the respondent or his counsel did not attend the court virtually.
17. It is submitted that the lower trial court erred in reinstating the dismissed cause without considering the threshold required for such reinstatement and for failing to consider the appellant's arguments.
18. On the other hand, counsel for the respondent submitted on three issues – Whether or not the trial court exercised an abuse of discretion by reinstating the suit in the trial court; Whether or not the appeal on record has merit so that the orders sought therein be granted; and Who should bear the costs of the claim.
19. Citing a plethora of decisions – *Meme v Maroo* (2022) KEHC 15942(KLR0); *Mureithi Charles & Another v Jacob ATINA Nyagesuka* (2022) eKLR; and *Martin L. Barasa v Giza Systems Smart Solutions Ltd* (2022) eKLR, the court is urged to find that the lower trial court was right in reinstating the respondent's cause.
20. It is submitted that by dint of the provisions of Sections 1A & 1B of the *Civil Procedure Act*, Order 12 Rule 7 of the Civil Procedure Rules, and Article 159(2)(d) of *the Constitution*, a court is empowered



to make any orders without any undue regard to procedural technicalities. It is submitted that the foregoing provisions should cure any reliance on the wrong provisions of the law.

21. It is submitted that the appellant's allegation that its submissions were not considered is only a ploy to perpetuate an injustice upon the respondent whose cause was dismissed without due consideration of its merits through a fair hearing.
22. It is further submitted that under Order 12 Rule 7 of the Civil Procedure Rules an application for reinstatement of a cause or suit need not be formal and as such the rule under which the application is made is a non-issue.
23. The court is urged to uphold the decision of the lower trial court and dismiss the appeal with costs.

### **III. Issues For Determination**

24. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. The following issues commend themselves to the court for determination –
  - a. Did the trial court exercise its discretion judiciously in arriving at the decision that it did and reinstating the respondent's suit?
  - b. Who should bear the costs of the appeal?

### **IV. Discretion**

25. As the first appellate court, this court is obligated to evaluate the evidence and arrive at its own conclusions but bearing in mind that it neither heard nor recorded the trial proceedings – See *Selle V Associated Motor Boat Co. Ltd* (1968) E.A 123.
26. The background of the appeal is that the respondent's cause in the lower court was dismissed for non-attendance on 25<sup>th</sup> January, 2024 when it came up for hearing. The respondent filed an application of even date seeking that the same be reinstated.
27. In the affidavit in support of the application sworn by Mr. Vincent Owuor, the respondent's counsel, it was deponed that counsel traveled with the respondent and his witness ready to testify but they unfortunately arrived in court late and upon perusing the court file he realized that the cause had been dismissed for non-attendance (See pages 326 to 329 of the record of appeal).
28. The appellant through Isaac Ochieng' Odhiambo, Advocate, swore an affidavit in opposition to the reinstatement of the cause asserting that the same was vexatious, an abuse of the court process, and brought under non-existent provisions of the law. He deponed that the reinstatement would prejudice the appellant as the cause against it seeks for damages and reinstatement (See Pages 330 to 337 of the record of appeal).
29. The application came up for interpartes hearing on 8<sup>th</sup> February, 2024. The appellant's counsel, Mr. Langat, requested that the application be canvassed by way of written submissions, while the respondent's counsel stated that the respondent had not been served with the response by the appellant. The trial lower court proceeded and indicated that he had considered the application by the respondent and the replying affidavit by the appellant and found and held that in the interest of justice and to prevent the respondent from being locked out of court the application for reinstatement application be allowed with no order as to costs (See pages 343-344 of the record of appeal).



30. The application for reinstatement before the lower trial court was hinged on Order 17 Rule 9 of the Civil Procedure Rules and Sections 1A, 1B, 3A & 63 of the Civil Procedure Act. The procedural law in the lower trial court is the Civil Procedure Act and the Civil Procedure Rules.
31. The appellant asserts that the application was based on a non-existent rule, Order 17 Rule 9 of the Civil Procedure Rules. Indeed, no such rule exists in the law. The appellant argues that the trial court erred in allowing an application brought under a non-existent rule.
32. The court finds and holds that failure to quote the correct provisions was not fatal as Order 51 Rule 10 (1) of the Civil Procedure Order provides that no application shall be refused by reason of failure to correctly quote the order, rule, or other statutory provision upon which it is filed or founded. The omission to quote the correct provisions is a technicality that is excusable and which can be cured under Article 159 (2) (d) of the Constitution which provides that – “justice shall be administered without undue regard to procedural technicalities.”
33. Further, Sections 1A and 1B of the Civil Procedure Act relied upon by the respondents urges the court to do substantial justice rather than relying on procedural technicalities. The court finds that misquoting or quoting non-existent provisions of the law is curable under Article 159 of the Constitution and Sections 1A & 1B Civil Procedure Act.
34. On whether the trial court erred in failing to hear the parties, the appellant submitted that the trial court in failing to allow the parties to file their submissions, or hear them orally and proceeding to make a ruling was ultra vires. Order 12 Rule 7 of Civil Procedure Rules provides that –

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.
35. The application for reinstatement was made on 25<sup>th</sup> January, 2024 by the respondent and on 7<sup>th</sup> February, 2024 the appellant filed a replying affidavit opposing the application. The appellant submitted that the lower trial court did not consider its response in deciding to reinstate the cause or allow the parties to argue and file submissions. Order 51 Rule 12 of the Civil Procedure provides that – “All applications or other process shall be deemed to have been made when filed in court”.
36. Bar the misquotation of the applicable procedural provisions the application was clearly made under Order 12, rule 7 of the Civil Procedure Rules. upon filing its response, the appellant opposed the application setting out the grounds why the application should not have been allowed. The appellant’s position was articulated in the replying affidavit of Mr. Isaac Ochieng setting out the grounds in opposition to the application for reinstatement. The very nature of submissions is simply to expound on the positions already taken by the parties in the evidence in the affidavits for and against the application.
37. The Appellant has not told this court that it wished to adduce further evidence through submissions which cannot be done any way. Submissions are not pleadings in themselves and therefore new facts cannot be introduced in the submissions. The lower trial court pointed out in the ruling that it had considered the grounds in the application by the respondent and the replying affidavit filed by the appellant in arriving at its decision.
38. This court has studied the proceedings before the lower trial court and found that there were no directions on filing of submissions. Order 12 Rule 7 of the Civil Procedure Rules requires the court to consider an application and to make the appropriate orders. The appellant’s position is not that its evidence or legal issues were not addressed as raised in their replying affidavit. The appellant cannot



allege that the court did not consider its replying affidavit simply because they did not file written or even oral submissions. The mere absence of submissions does not mean or imply that the appellant was not heard considering that its replying affidavit on all issues in opposition to the application was admitted on record and considered. Failure to file or absence of submissions by parties cannot be said to amount to a violation of Article 50 of *the Constitution*. In any event, neither of the parties filed submissions and as such not prejudice was suffered by either of them.

39. The court finds and holds that the trial court duly considered the parties' pleadings before making its ruling and thus there was no violation of Article 50 of *the Constitution*.

40. On whether the trial court erred in reinstating the suit, Order 12 Rule 7 of the Civil Procedure Rules provides –

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”.  
(Emphasis added)

41. An order for reinstatement as outlined above is issued by the court on such terms as may be deemed fair and just. The use of the word “may” in the above provision donates to the court the discretionary power to make such orders on sound judicial grounds. As to whether this court should interfere with the exercise of the discretion of the lower trial court, the appellant had to demonstrate that the learned magistrate either erred in principle in his approach or, failed to take into account factors that ought to have considered or, took into account factors that should not have considered or, that the decision was wholly wrong or, that the decision was so aberrant that no reasonable judge, aware of his duty to act judicially, could have reached that decision.

42. In *Mbogo & Another V. Shah* [1968] EA 98 it was held that –

“..... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

43. Further, in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) the Court of Appeal held that –

“And as is always the case, judicial discretion has to be exercised on the basis of the law and evidence. And as was stated by this Court in the case of *Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux)* [1984] KLR 1 an appellate court may only interfere with the exercise of judicial discretion if satisfied either;(a)The judge misdirected himself on law, or(b)That he misapprehended the facts, or(c)That he took account of considerations of which he should not have taken an account, or(d)That he failed to take account of consideration of which he should have taken account, or (e)That his decision, albeit discretionary one, was plainly wrong.”

44. The appellant submitted that the lower trial court failed to meet the requirement for reinstatement of a suit under Order 12, Rule 7 of the Civil Procedure Rules. While the order does not outline any express requirements for the court to consider in allowing reinstatement, this court sitting on appeal is empowered to make a finding on the exercise of the discretion by the lower trial court.



45. However, the court should caution itself not to exercise its discretion in a manner that will result in an injustice. The Court of Appeal in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR stated that –

“We agree with those noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10<sup>th</sup> June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10<sup>th</sup> June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly, or was it meant to deliberately delay the cause of justice”.

46. The appellant has not informed the court the aspects in which the lower trial court considered extraneous matters not pleaded. Further, the appellant has not demonstrated to the court how the lower trial court exercised its discretion capriciously. In reinstating the suit the learned trial magistrate stated that ‘in the interest of justice and so that the claimant is not locked out of the court, I will allow the application with no orders as to costs.’ (See page 344 of the record of appeal).
47. The respondent filed an application to reinstate the suit on the same day his cause was dismissed, stating that he had traveled with his counsel and his witness to court for the hearing but arrived late and found that the suit had already been dismissed. The circumstances described herein are sufficient to demonstrate that the non-attendance by the respondent was not a deliberate attempt to obstruct or delay justice.
48. The appellant argued that reinstatement of the suit shall cause it to suffer prejudice as the orders sought by the respondent in its claim are reinstatement and damages. Conversely, the respondent argued that denying him the reinstatement shall amount to condemning him unheard.
49. The respondent's suit was dismissed for non-attendance and not on merits. The trial court found and held that in the interests of justice, reinstatement was appropriate to enable the respondent's cause to be heard on merits.
50. Articles 48 & 50 of *the Constitution* guarantee every Kenyan the right to access justice and a fair hearing. Article 159 of *the constitution* enjoins the courts to administer justice without undue regard to technicalities. Sections 1A, 1B, & 3A of the *Civil Procedure Act* obligates the court to always work towards substantive justice.
51. For all the foregoing reasons, the court finds no plausible or legal reason to interfere with the order of the lower trial court reinstating the respondent's cause. In my view no prejudice shall be occasioned to the appellant if the suit is heard and determined on merits. In fact, it is in the interest of both parties that the suit be heard and determined on merits.

## V. Costs

52. The respondent is awarded costs of this appeal.

## VI. Orders

53. Flowing from the foregoing, the court issues the following orders –



- a. The appeal fails in its entirety.
- b. Kakamega Chief Magistrate's Court ELRC Cause No. E012 of 2023 shall be mentioned before the DR of this court within 7 days of this judgment for the allocation of a hearing date on priority basis in view of the orders sought by the respondent including reinstatement a remedy that is time-bound.
- c. The respondent shall have the costs of this appeal.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**DAVID NDERITU**

**JUDGE**

