



REPUBLIC OF KENYA



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**Angatia v Truck City Limited (Employment and Labour Relations Appeal
E019 of 2024) [2025] KEELRC 1642 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1642 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E019 OF 2024**

MA ONYANGO, J

MAY 30, 2025

BETWEEN

DAVID ATAKO ANGATIA APPELLANT

AND

TRUCK CITY LIMITED RESPONDENT

*(Being an appeal against the orders/ruling of Honourable Peter Areri
– Senior Principal Magistrate delivered on 5th June 2024 in Eldoret
CMCC No. 51 OF 2016 – David Atako Angatia v Truck City Limited)*

JUDGMENT

1. This Appeal arises from a ruling delivered by the trial court in Eldoret Eldoret CMCC No. 51 OF 2016 on the 5th June 2024.
2. A brief background is that vide a Plaint dated 27th January, 2016, the Appellant sued the Respondent seeking compensation for alleged injuries sustained in the course of employment on 17th July, 2014. The Respondent filed a reply to the suit and hearing commenced with the Appellant and the doctor who prepared his medical report testifying. Thereafter the suit was stayed pending the disposal of suits contesting the judgement on jurisdiction of courts to hear work injury claims which went all the way to the Supreme Court. It is the averment of the Appellant that following the determination of the Appeal by the Supreme Court and the Practice Directions issued by the Chief justice thereafter, his counsel went to court to fix the case for hearing only to find that it had been dismissed on 28th March, 2023 for want of prosecution.
3. According to the Appellant there was no notice to show cause served upon his counsel before the dismissal for want of prosecution. His application for reinstatement of the suit was dismissed by the trial court hence this appeal.



4. In the Memorandum of Appeal dated 10th June, 2024 the Appellant raises the following grounds of appeal:
 - a. That the Learned Magistrate erred in law and fact in failing to find that the appellant had been condemned unheard in breach of article 50 of *the Constitution* of Kenya, 2010 as the suit was dismissed for want of prosecution without notice to show cause being served.
 - b. That the Learned Magistrate erred in law and fact in failing to find that the appellant's suit having been substantially prosecuted it ought to have been fixed for the hearing of the respondent's case as opposed to dismissal for want of prosecution and ought to have exercised his discretion by setting aside the order.
 - c. That the Learned Magistrate erred in law and fact in failing to find that the dismissal was an error on the part of the court as the appellant's suit had been held in abeyance awaiting the formulation of guidelines by the Chief Justice on how work injury claims were to proceed in view of the pronouncement of the Supreme Court in Nairobi Petition No. 4 of 2019 — Law Society of Kenya v The Hon. Attorney General & Central Organization of Trade Unions.
 - d. That the Learned Magistrate erred in law in finding that the order dismissing the suit for want of prosecution was a judgment which ought to have been impugned on appeal while failing to have regard to the fact that the appellant had not been heard and he was entitled to a review of the decision by the court which made the decision as opposed to the appellate court.
 - e. That the Learned Magistrate erred in law and fact in finding that grounds of opposition had been filed while failing to appreciate that the same would not challenge the deponed facts on record.
5. The Appellant prays for orders that the Appeal be allowed, the order of the lower court dismissing the application dated 23rd February, 2024 be set aside and substituted with an order allowing the application with costs. The Appellant further prays for costs of the appeal.
6. On 11th November, 2024 the Court directed that the Appeal be disposed of by way of written submissions. The Appellant filed submissions dated 2nd December, 2024. The Respondent did not participate in the appeal.

The Appellant's submissions

7. In his submissions, the Appellant states that the suit was substantially prosecuted as he had testified, called his witness and closed his case. That the suit was stayed awaiting disposal of many other suits of similar nature on appeal at the Supreme Court and formulation of directions for disposal of work injury benefits claims. That after directions were formulated the Appellant moved to court only to find that the suit had been dismissed for want of prosecution.
8. The Appellant submits that prior to the dismissal of the suit on 28th March, 2023 the court did not issue notice to show cause as provided under Order 17 rule 2(1) of the Civil procedure Rules.
9. It is further submitted that Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 also mandates the court to give notice to show cause in writing to the parties before dismissing a suit for inaction.
10. It is submitted that the dismissal of the suit was in breach of the guarantee of a fair hearing under Article 50 of *the Constitution* of Kenya.



11. For emphasis the Appellant relied on the decision in *Unga v County Government of Meru (Cause E031 of 2021)* [2022] KEELRC 13577 (KLR) in which the court held that dismissal of a suit for want of prosecution without giving the parties notice to show cause why the suit should not be dismissed for want of prosecution was prejudicial to the Claimant who was banished forever from the seat of justice.
12. The Appellant further cited and relied on the decision of Ainley J. in *Jamnadas Sodha v Gorchandas Hemraj* (1952) 7 U.L.R. 11 where he stated “...it should always be remembered that to deny the subject a hearing should be the last resort of the court...”
13. The Appellant further invited the court to be guided by the decision in *John Nahashon Mwangi v Kenya Finance Bank Limited (In Liquidation)* (2015) eKLR where the court stated:

‘Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial ‘sword of the Damocles’ which should only draw blood where it is absolutely necessary.’
14. With respect to ground 3 and 4 of appeal the Appellant submitted that the trial court converted itself into an appellate court in error, citing the decision in *JMK v MWM & another* [2015] eKLR where the Court of Appeal interpreted the review jurisdiction of this court.
15. It was submitted that the Appellant was entitled to move the trial court for review of its order as he did and the trial court ought to have reviewed the decision it made in error.
16. It was further submitted that the court ought to have taken into account the reasons why the Appellant did not move the court for hearing the suit. That the dismissal order was made prematurely and ought to have been set aside. The Appellant relied on the decision in *Vishva Builders Ltd v Moi University* [2016] eKLR.
17. On ground 5 of the grounds of appeal the Appellant submitted that the trial court erred in law in failing to find that the facts deposed in the Appellants affidavit in support of his application were not contested by the Respondent. For emphasis the Appellant cited and relied on the decision in *Kennedy Otieno Odiyo & 12 others v Kenya Electricity Generating Company Limited* (2010) eKLR.
18. The Appellant submitted that in the absence or lack of contest the court ought to have allowed the Appellants motion.

Analysis and Determination

19. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
20. Having considered the grounds of appeal, the submissions on record and the trial court’s record, the only issue that present itself for determination is whether the learned trial Magistrate erred in dismissing the Appellants application for setting aside of the order dismissing the suit for want of prosecution.
21. Rule 16 of the Employment and labour Relations Court (Procedure) Rules 2016 which were applicable at the time material to this suit provides as follows:
 16.
 - (1) In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the



Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.

- (2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
- (3) Any party to the suit may apply for dismissal as provided in paragraph (1).
- (4) The court may dismiss the suit for non-compliance with any direction given under this rule.

22. In the application filed by the Appellant for setting aside orders made on 23rd March, 2023 dismissing the suit for want of prosecution, the Appellant's Advocate in his supporting affidavit stated that the suit had been stayed by an order or on the initiative of the court awaiting disposal of the petition of appeal on work injury claims then pending in the Supreme Court being Nairobi Supreme Court Petition No. 4 of 2019 -Law Society of Kenya v The Hon. Attorney General & Central Organization of Trade Unions.

23. In the impugned ruling it is clear that the trial court did not take into account the grounds in support of the application or the matters deposed in the supporting affidavit of counsel. In the ruling the trial court stated:

“I hold similar view that it is not enough for a party to simply blame an advocate for not prosecuting the matter or attending court or any other mistake but the party must show tangible steps taken by it in following up his matter.

Even though the court has discretion to set aside judgment or order to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake (see *Shah v. Mbogo & another* [1967] E.A. 116) and I find no evidence of accident, inadvertence or excusable mistake. There is no that the plaintiff/applicant or his advocate took any tangible steps to prosecute the suit. The plaintiff was indolent and cannot blame anybody for the dismissal of the suit for want of prosecution. It is for these reasons that I find that the applicant has not met the test for review of judgment or order set out under section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of Civil Procedure Rules.

It is trite that litigation must come to an end and that informed the letter and spirit behind the overriding objective of the [Civil Procedure Act](#) and the Rules made thereunder. It will be a travesty of justice for the court to exercise its discretion in favour of the plaintiff who has been blatantly indolent I find that the instant application dated 23rd February 2024, lacks merit and is otherwise an abuse of the process of the court. In any event as held by the court of appeal in the Njagi case supra the dismissal was a judgment and the plaintiff if aggrieved ought to have preferred an appeal against the said judgment or order. I proceed to dismiss the instant. application with costs to the defendant/respondent. It is so ordered.”

24. No mention is made of the fact that parties were not invited to show cause why the suit should not be dismissed for want of prosecution as provided in Order 17 rule 2 of the Civil Procedure Rules which was cited in the application and in the supporting grounds and affidavit. Further, no mention is made of the fact that the reason why the suit was not prosecuted was the confusion regarding jurisdiction of the trial court and other courts to determine claims under the [Work Injury Benefits Act](#). Further, the court did not take into account the deposition in the supporting affidavit to the effect that the stay of proceedings was at the initiative of the court and not the Appellant.



25. From the foregoing it is clear that the trial court determined the application on grounds that were not raised by the Appellant in his application and ignored the grounds in support of the application as set out on the face thereof and in the supporting affidavit.
26. The trial court further did not make any reference to the fact that the application was not opposed.
27. For the forgoing reasons I find merit in the appeal and make the following orders:
 - a. The decision of the trial court dismissing the Appellant's application dated 23rd February, 2024 is hereby set aside and substituted with an order allowing the application.
 - b. The Appellants suit is reinstated and will be heard and determined on merit by a court differently constituted.
 - c. The costs of this appeal shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 30TH DAY OF MAY 2025

MAUREEN ONYANGO

JUDGE

