



Kisaji v Top Lodge Limited (Employment and Labour Relations Appeal E026 of 2023) [2025] KEELRC 1388 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1388 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E026 OF 2023**

MA ONYANGO, J

MAY 9, 2025

BETWEEN

ANNA IMBUGA KISAJI APPELLANT

AND

TOP LODGE LIMITED RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrates Court by Hon. P.N. Areri, Senior Principal Magistrate in Eldoret CMELRC No. E111 of 2021 delivered on 5th September 2023)

JUDGMENT

1. The Appellant herein is the Claimant in Eldoret CMELRC No. E111 of 2021 which was dismissed for want of prosecution on 6th June, 2023. She applied for setting aside of the orders dismissing her claim vide her application dated 15th June 2023 but the application was also dismissed on 5th September, 2023.
2. Being dissatisfied with the Ruling of Hon. P.N. Areri dated and delivered on 5th September 2023 the Appellant filed a Memorandum of Appeal dated 14th September 2023 in which she raises the following grounds of appeal: -
 - i. That the learned trial magistrate erred both in law and fact in holding that the Appellant had failed to establish grounds for reviewing or setting aside the orders made on 6th June 2023
 - ii. That the learned trial magistrate erred both in law and fact in holding that the Appellant had failed to establish grounds of reviewing or setting aside the orders made on 6th June 2023
 - iii. That the learned trial magistrate misapprehended the Appellant's case and relied on unproved evidence of the Respondent to dismiss the Appellant's case



- iv. That the learned trial magistrate erred in law and in fact by taking into account irrelevant factors and failing to take into account relevant factors thereby arriving at an erroneous ruling.
 - v. That the learned trial magistrate erred in law and fact in failing to analyze and consider all the issues raised before him both in the Appellant's application dated 12th June 2023 and submissions and thus arrived at a ruling that was erroneous.
3. The Appellant prayed for orders as follows: -
- i. That the appeal herein be allowed and the ruling dated and delivered on 5th September 2023 be set aside and substituted with an order allowing the Appellant's claim be reinstated
 - ii. Costs of the appeal be awarded to the Appellant
4. Pursuant to directions of the court issued on 8th October 2024, the appeal was canvassed by way of written submissions. The Appellant filed her submissions on 4th November 2024 while the Respondent filed its submissions on 2nd December 2024 in opposition of the Appeal.

The submissions

5. The Appellant in her submissions identified the issues for determination to be: -
- i. Whether the court should set aside the order issued on 5th September 2023 dismissing the application
 - ii. Whether this court should reinstate the suit for determination on merit
 - iii. Costs
6. On the first issue, the Appellant submitted that her conduct had not raised any doubts regarding prosecution of the matter prior to the dismissal of the suit, that since both parties had complied, the Appellant ought to be given a chance to prosecute her case.
7. While citing the decision in *Investment Limited v G4S Security Services Limited* (2015) eKLR, the Appellant submitted that dismissal of a suit should be a last resort as it permanently removes a party from the seat of justice. It is contended that every party has a right to be heard which right is protected under the *Constitution*, and if there is a delay in prosecuting a suit and justice will still be served if such suit is prosecuted, then a party should be heard.
8. On the issue whether the court should reinstate the suit for determination on merit, the Appellant submitted that since the laid down principles for dismissal for want of prosecution had not been met, it is in the interest of justice that both parties are granted their day in court.
9. In the end, the court was urged to exercise its discretion by setting aside the orders issued on 5th September 2023 dismissing the application dated 12th June 2023 and reinstate the Appellant's suit for hearing on merit.
10. On its part, the Respondent while opposing the Appellant's appeal submitted that the trial magistrate did not err in law in dismissing the claim and not reinstating it for hearing. According to the Respondent, there was no evidence placed before the learned magistrate to show that the Appellant's advocate tried to log into the court's Tims Link nor to show that the Claimant has ever taken any steps to have the matter heard for two years.



11. Further, the Respondent submitted that the Appellant did not establish any grounds for review or setting aside the orders of the court made on 6th June 2021 in prosecuting the application dated 25th August 2023 which is the subject of this appeal.
12. The Respondent prayed that the Appeal be dismissed with costs.

Analysis and Determination

13. This being a first appeal, this court is obliged to re-assess, re-evaluate and re-examine the evidence adduced before the trial court and arrive at its own independent conclusion bearing in mind the fact that it neither heard nor saw the witnesses as they testified and therefore giving an allowance for that [See *Selle & another v Associated Motor Boat Co. Ltd. & others* (1968) EA 12].
14. The application which was before the trial court was for setting aside orders made by the trial court dismissing the Claimant's suit for want of prosecution.
15. The grounds in support of the application were that the matter was slated for hearing on 6th June 2023 and on the said date, it was dismissed for want of prosecution for non-attendance by the advocates on record. The Claimant asserted that the non-attendance was regrettable as counsel's call dropped prior to addressing court and efforts to have the file recalled bore no fruits.
16. That application was opposed by the Respondent vide grounds of opposition dated 4th July 2023 wherein it was pleaded that the Claimant was not interested in pursuing the claim as neither the Claimant nor her advocate attended court on several occasions being, 20th September 2022, 15th November 2022, 17th January 2023 and 6th June 2023. The Respondent further averred that the Claimant's application was based on the allegation that the counsel on record was unable to attend court due to network challenges but had not provided any proof to substantiate her claim.
17. The trial court delivered the impugned ruling on 5th September 2023 dismissing the application wherein it stated that there was no evidence to show that on 6th June 2023, the Claimant or his advocate had logged into the Team's link for the court. The trial court was of the view that the Claimant had not presented evidence to show that she had taken any steps to have the matter heard since she filed the suit and in that regard, the court found that the Claimant had not established any grounds for review or setting aside the orders of 6th June 2023 and went ahead to dismiss that application vide the ruling delivered on 5th September 2023.
18. It is this ruling which is the subject of this appeal.
19. I have considered and analyzed the pleadings and the proceedings before the trial court, the grounds of the memorandum of appeal and the submissions in this appeal. The main issue for determination is whether the trial magistrate erred in law and fact in dismissing the appellant's application dated 12th June 2023
20. Order 12 Rule 7 of the [*Civil Procedure Rules*](#) provides for setting aside as follows: -

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



21. In *Abdirahaman Abdi v Safi Petroleum Products Ltd. & 6 others* [2011] eKLR, the Court of Appeal while discussing the input of article 159 of the Constitution in dispute resolution held:-
- “... Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its documents. The court in that regard exercise judicial discretion”.
22. In the instant case, the Claimant in her application dated 12th June 2023 sought to set aside the orders issued by the trial court on 6th June 2023 dismissing her suit for want of prosecution. In her supporting affidavit, she stated that on the material day her advocate on record attended court but due to network connectivity issues, his call dropped prior to addressing the court.
23. The reason given by the Appellant for non-attendance of her counsel on the hearing date is in my view justified. It is not clear what kind of evidence a party can supply to a court to prove that their call dropped. That is evidence that is more easily available to the court which keeps a log of all persons on the Teams platform. Dropping of calls during proceedings is very common and in most cases is not the fault of the litigant or counsel, but a problem from the internet provider. The Appellant was entitled to the benefit of doubt.
24. The Respondent argued that neither the Appellant nor her advocate attended court on several occasions being, 20th September 2022, 15th November 2022, 17th January 2023 and 6th June 2023. Order 17 Rule 2(1) of the Civil Procedure Rules, provides as follows:
- “In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”
25. According to the court record, on 17th January, 2023 the suit was fixed for mention when both parties were absent. The court (Hon N. Wairimu) fixed the suit for further mention on 6th June, 2023. On the said date the suit was mentioned before Hon. Peter M. Areri when again both parties were absent. Hon. Areri then dismissed the suit for want of prosecution.
26. A perusal of the proceedings of the trial court shows that the matter was actively in court and there is no notice to show cause on record indicating that the Claimant was required to show cause why the suit should not be dismissed for want of prosecution. A suit cannot be dismissed for want of prosecution when it is not slated for hearing. The trial court therefore erred in dismissing a suit for want of prosecution on a mention date and without a notice to show cause.
27. Consequently, the ruling delivered by the trial court on 5th September 2023 in Eldoret CMELRC No. E111 of 2021 is hereby set aside, the orders issued by the trial magistrate on 6th June 2023 are set aside and the suit reinstated.
28. The matter is referred back for hearing before a different Magistrate other than Honourable P.N. Areri. Each party will bear its own costs of the appeal.
29. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 9TH DAY OF MAY 2025



MAUREEN ONYANGO
JUDGE

