



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyabochwa v Kisii County Public Service Board & another (Appeal E046 of 2023) [2024] KEELRC 78 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 78 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**APPEAL E046 OF 2023**  
**S RADIDO, J**  
**JANUARY 31, 2024**

**BETWEEN**

**FRANCIS ONDIEKI NYABOCHWA ..... APPELLANT**

**AND**

**KISII COUNTY PUBLIC SERVICE BOARD ..... 1<sup>ST</sup> RESPONDENT**

**KISII COUNTY GOVERNMENT ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Ruling delivered in the Magistrates Court at Kisii Law Courts by Hon C.A. Ocharo (SPM) dated 11 July 2023)*

**JUDGMENT**

1. In a Ruling delivered on 11 July 2023, the Senior Principal Magistrate declined to review an order dismissing a Cause filed by Francis Ondieki Nyabochwa (the Appellant) on 14 September 2022, and this prompted the Appellant to lodge a Memorandum of Appeal with the Court contending:
  - i. That the trial Magistrate erred in failing to allow the application dated 14<sup>th</sup> day of September 2022 seeking to reinstate the claim of the Claimant.
  - ii. The trial Magistrate erred in fact by failing to appreciate the Claimant will be prejudiced and condemned un heard which is against Article 50 of the [Constitution of Kenya](#) 2010.
  - iii. The trial Magistrate erred in law and fact when he dismissed the application bearing in mind the matter concerns an employment dispute and or matter.
  - iv. That the trial Magistrate erred in law while making and arriving at the decision not taking into consideration the provisions of Article 159 of the [Constitution of Kenya](#) 2010 which is supreme.



- v. That the Magistrate erred in law and in fact by considering the typing errors when he arrived at the decision dismissing the application dated 24<sup>th</sup> day of September 2022.
  - vi. The trial Magistrate erred in law and in fact by not being considerate with the other laws in arriving at the erroneous decision therein.
  - vii. That the trial Magistrate's ruling was bad in law and against the weight of the *Constitution of Kenya*, 2010.
  - viii. That in the circumstances, the trial Magistrate's ruling was erroneous and oppressive and amounted to aiding the wrongdoer.
2. When the Appeal came up for directions on 17 October 2023 and 28 November 2023, the Appellant was not represented, and the Court directed that a Notice to Show Cause should Issue.
  3. The Notice prompted the Appellant to attend the Court on 14 December 2023. The Appellant informed the Court that he had filed and served the Record of Appeal but there was no evidence of service.
  4. The Court directed the Appellant to serve the Record of Appeal and also file and serve submissions before 31 December 2023. He was also directed to notify the Respondent of the directions. The Record of Appeal was filed on 11 December 2023, but there is no affidavit of service that it was served.
  5. The Appellant's submissions were filed on 30 January 2024 (should have been filed and served on or before 31 December 2023).
  6. Nevertheless, the Court has considered the Record of Appeal.

#### **Role of the Court in First Appeal**

7. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR, the Court of Appeal stated as follows regarding the duty of a first appellate Court:  
This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
8. This Court will keep the interdict in mind.

#### **Errors of law and fact**

9. The Appellant sued the Respondents before the Senior Principal Magistrates Court on 8 October 2021.
10. On 13 May 2022, the Respondents' advocate applied to have the Cause dismissed because the Appellant had not taken any steps to prosecute it. The Appellant was not represented during the session, and the Senior Principal Magistrate dismissed the Cause for want of prosecution.
11. On or around 14 September 2022, the Appellant filed a Motion seeking an order setting aside the dismissal order and reinstating the Cause.
12. The Senior Principal Magistrate declined the invitation and in dismissing the Motion noted that there was no explanation for the 5 months' delay in filing the application and that the affidavit in support of the Motion had not been sworn by the Appellant but by one Jemiah Kemunto Simi, a stranger to the Cause.



13. The Court has looked at the record. The affidavit in support of the Motion to set aside the dismissal order was sworn by one Jemiah Kemunto Simi. She referred to herself as the Claimant/applicant. She did not disclose her relationship with the Appellant.
14. Before this Court, there was an allegation that there was a typing error. The Senior Principal Magistrate was not informed of any typing error.
15. The conclusion, therefore, that the Motion was lacking substance was not an error of either law or fact.
16. The Court would also have dismissed the Appeal on the ground of failure to prosecute the Appeal since the Appellant did not file and serve his submissions within the agreed timelines despite the clear and express orders of the Court.

#### Conclusion and Orders

17. This Appeal lacks merit and it is dismissed with costs to the Respondents.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

**For Appellant S.M. Sagwe and Co Advocates**

**For Respondents County Attorney**

**Court Assistant Chrispo Aura**

