



**Ikambi v Revital Healthcare (EPZ) Limited (Appeal E111 of 2023)
[2024] KEELRC 398 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 398 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E111 OF 2023
M MBARŪ, J
FEBRUARY 22, 2024**

BETWEEN

SAMUEL MWANYALO IKAMBI APPELLANT

AND

REVITAL HEALTHCARE (EPZ) LIMITED RESPONDENT

*(Being an appeal from the ruling and order by Hon. Desderias Orimba
in Mombasa CMELRC No.112 of 2018 delivered on 20 September 2023)*

JUDGMENT

1. The appeal herein arises from the ruling delivered in Mombasa CMELRC No.112 of 2018 where the appellant's Notice of Motion dated 20 June 2023, was dismissed and aggrieved, the appellant filed this appeal on the grounds that the learned magistrate erred in finding that the appellant was not desirous of prosecuting his claim dated 6 August 2018 and that the failure by the advocate on record to appear for the hearing of the claim on 26 April 2023 was occasioned by the court assistant who on 7 December 2022 when the court was not sitting issued the appellant with a hearing date for 10 May 2023. Other grounds of appeal are that the trial court failed to appreciate that the advocates on record for the appellant were not aware that the suit was scheduled for hearing on 26 April 2023. The delay in hearing the suit within 2 years was occasioned by the Covid-19 pandemic and thereafter the transfer of the suit from Mombasa to Lodwar as an effort by the judiciary to decongest the cases that were pending hearing and determination in stations such as Mombasa.
2. The appellant is seeking for hearing of his claim in Mombasa CMELRC No.112 of 2018 on the merits and that the dismissed suit be reinstated.
3. Parties attended and addressed the appeal by way of written submissions.
4. The appellant submitted that his case was dismissed by the lower court for not attending court on 26 April 2023 whereas his advocate had been informed by the court assistant that the hearing would be



on 10 May 2023. Since 2018 when the matter was filed, there has been no hearing due to the Covid-19 pandemic and the file being moved to Lodwar from Mombasa.

5. Upon the dismissal of the claim, the appellant filed an application dated 20 June 2023 seeking to reinstate the suit but this was dismissed on 20 September 2023. The appellant was not aware that the matter had been scheduled for hearing on 26 April 2023, because when the matter came up in court on 7 December 2022 the learned magistrate was not sitting and the court assistant issued another hearing date for 10 May 2023.
6. In the case of *Gideon Sitela Konchellar v Julius Lekakeny Ole Sunkuli & others* [2018] eKLR the court held that when an application is unopposed, the court ought to allow the same. The delay in concluding the hearing in CMELRC No.112 of 2018 was due to factors beyond the appellant and his advocate and should not be denied justice as a result. On 16 March 2020, a Notice was issued with judiciary lockdown due to the Covid pandemic and upon resumption of operations, to decongest operations, Mombasa Law Courts undertook a decongestion exercise and the file was taken to Lodwar for hearing and determination. The appellant did not fail to attend court since the allocated date was in error and should not be punished. The advocates were not aware of the hearing date on 26 April 2023.
7. The respondent submitted that the ruling and orders of the court on 20 June 2023 should be confirmed and the appeal dismissed with costs. The learned magistrate properly analyzed the application dated 20 June 2023 and although unopposed, there was no good basis to allow it as held in *Gideon Sitela Konchellar v Julius Lekakeny Ole Sunkuli & others* [2018] eKLR. failure to file a reply to an application does not entitle the applicant to the orders sought. the court must address the issues addressed and apply the law as held in *Trust Bank Limited v Amalo Company Limited* [2002] eKLR. The court was justified to dismiss the subject application for want of merit. The appellant failed to demonstrate a justified cause why there was no attendance in court when the matter came up for hearing as allocated.
8. This is a first appeal. The court is allowed to re-evaluate the evidence before the trial court as well as the judgment and arrive at its independent judgment on whether or not to allow the appeal. A first appellate court is allowed to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand as held in the case of *Mursal & another v Manese* (suing as the legal administrator of *Delphine Kanini Manesa*) (Civil Appeal E20 of 2021) [2022] eKLR. Such mandate is defined to include jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable opportunity for the parties to open for rehearing both on questions of fact and law.
9. The sole issue that emerges for determination is whether the learned magistrate erred in disallowing the application dated 20 June 2023. The appellant filed the subject application seeking for orders that;

The court be pleased to set aside and/or vary the Orders made on 26 April 2023 dismissing this suit suo motu.

The court be pleased to reinstate this suit and allocate it a hearing date on a priority basis given the age of the matter.
10. The appellant's grounds for this application were that the order dismissing the suit for want of prosecution on 26 April 2023 was made through no fault on his part. He attended court on 7 December 2022 and the learned magistrate was not sitting. The court assistant allocated a hearing date for 10 May 2023. He was not aware that the matter had been scheduled for hearing on 26 April 2023 when the suit was dismissed for non-attendance and want of prosecution.

This application was not opposed.



11. On 20 September 2023, the learned magistrate noted that the matter had been filed way back in the year 2018 and had remained pending for 5 years. There were several mentions and for want of prosecution, the suit was dismissed on 26 April 2023 when the appellant failed to attend court.
12. On the record, the parties first attended court on 7 August 2018 and hearing directions were issued. After several other mentions, a hearing date was allocated for 27 June 2019. On the due date, the appellant advocate stepped down his witness to file another Verifying Affidavit which was allowed, and the hearing was allocated for 9 December 2019.
13. On the due date, the appellant indicated that the matter was part of a series of other cases in ELRC 409 and 410 of 2019 and asked for a stay of proceedings pending determination.
14. The matter was mentioned on several occasions for different reasons including that the parties were negotiating the settlement and preliminary objections.
15. All the court attendances were virtual through Microsoft Teams. On 1st September 2022, a hearing date was allocated by consent for 7 December 2022. There is no account/record for the allocated hearing date.
16. The record is that, on 1st March 2023 the matter was before court and both parties were absent. A hearing date was allocated for 26 April 2023 and on the due date, there was no attendance and the suit was dismissed for want of prosecution.
17. From 1st September 2022 when the matter was allocated a hearing date for 7 December 2022 by consent, there is proper account. The allocation of dates for 1st March and 26 April 2023 is without the involvement of the parties. The record does not indicate what transpired on 7 December 2022. The appellant's case is that the file was moved to Lodwar in the court decongestion exercise but fails to give an account as to what he did to ensure that he was given a hearing date.
18. On the record, without a proper account as to whether the appellant and the respondent were informed of the allocated dates on 1st March and 26 April 2023, the application seeking to set aside the orders of dismissal of the suit ought to have been allowed.
19. The appellant is not innocent. The averments that he attended court on 7 December 2022 and was allocated a hearing date for 10 May 2023 by the court assistant is not truthful. Hearing dates are ordinarily allocated at the registrar and in any event, where dates are allocated in court, he ought to have served the respondent. no hearing notice was issued for 10 May 2023 based on the alleged error.
20. In the balance of rights, to allow the appellant to have his day in court, the appeal herein is allowed and his suit is reinstated in Mombasa CMELRC No.112 of 2018. As noted by the learned magistrate, this is an old case going back to the year 2018 and for one reason or another other largely related to the appellant, the matter has not proceeded.
21. The suit in Mombasa CMELRC No. 112 of 2018 is hereby reinstated on condition that the appellant will secure a hearing date within the next 30 days' failure to which, the Order of reinstatement shall lapse as of 21st March 2024. The respondent is awarded costs assessed at Kshs. 10,000.

DELIVERED IN OPEN COURT AT MOMBASA THIS 22 DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:



Court Assistant: Japhet Muthaine
..... and

