



Naiberi River Campsite and Resort v Jomo (Employment and Labour Relations Appeal E012 of 2022) [2024] KEELRC 804 (KLR) (12 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 804 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E012 OF 2022**

MA ONYANGO, J

APRIL 12, 2024

BETWEEN

NAIBERI RIVER CAMPSITE AND RESORT APPELLANT

AND

ANDREW INJENDI JOMO RESPONDENT

RULING

1. The Appellant herein filed the application dated 12th September 2023 seeking to set aside the orders of this court made on 31st July 2023 dismissing the appeal herein.
2. The grounds upon which the application is made are contained at the foot of the application. Briefly, they are; that upon the Appellant's Advocate being served with a notice of taxation of the Respondent's bill of costs, he proceeded to peruse the court file and found that the appeal had been set down for mention on 31st July 2023 on which day, it was dismissed for the Appellant's non-attendance. The Appellant avers that its advocate never received the email notifying them of the mention date of 31st July 2023 and as a result, did not attend court for the mention. The Appellant further contends that its advocates have all along been ready to prosecute the appeal but due to the fact that the lower court file has been missing, they have not been able to prepare and file the record of appeal. It is the Appellant's case that the failure to prosecute the appeal is there prayed that the instant application be allowed. It stated that it is desirous of having the appeal determined on merit.
3. The application is opposed. The Respondent filed an undated Replying Affidavit on 4th October 2023. His main response is that the Appellant has never filed any Record of Appeal since the filing of the Memorandum of Appeal, a period of 18 months and no credible reason has been given for the said failure; that the Appellant's Advocates having represented the Appellant at the trial court have in their custody copies of all pleadings of the trial court and ought to prepare a Record of Appeal with pleadings; that the Appellant has never bothered to check on the progress of the appeal since filing the Memorandum of Appeal showing laxity to prosecute the Appeal; that the instant application has only



been prompted by the intention of the Respondent to begin execution proceedings and lastly, that the Respondent stands to suffer irreparable damage if the instant application is allowed.

4. The application was disposed of by way of written submissions. The Appellant's submissions were filed on 27th October 2023 while the Respondent's submissions were filed on 15th November 2023.
5. The court has very wide discretion in respect of setting aside of orders or judgements. It may not be fettered at all in the exercise of this discretion. In the case of *Pitbon Waweru Maina v Thuku Mugiria* 1983 eKLR, the Court cited the case of *Patel v E.A Cargo Handling Services Ltd* [1974] E.A. at P.76 in which the Court stated as follows:-

“There are no limits or restriction on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just..... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. Secondly, Harris J said in *Shah v Mbogo*, [1967] E.A 116 at 123 (B) observed: this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice”.

6. In the instant case, it is not in dispute that the trial court's file has been missing since judgment was delivered in this matter. There is evidence through correspondences that the Appellant's counsel has actively been following up on the proceedings with the trial court's registry. There is no evidence that the Appellant has attempted to delay or obstruct the course of justice.
7. The explanation given for the non-attendance of the Appellant's counsel in court when the matter was scheduled for mention on 31st July 2023 is that counsel was never served with the mention notice. This explanation in my view is justified.
8. More fundamentally, the court notes that the appeal was dismissed on a mention date which was an error on the part of the court. No suit can be dismissed for non-attendance or want of prosecution unless it is on a hearing date or parties have been notified of the intention through a notice to show cause.
9. Consequently, I allow the application and make the following orders:
 - i. The Appellant's Application dated 12th September 2023 is hereby granted in terms of prayer (e) and (f). the orders of this court dismissing the appeal made on 31st July, 2023 herein are set aside and the appeal reinstated.
 - ii. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 12TH DAY OF APRIL 2024 .

MAUREEN ONYANGO

JUDGE

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