



**Ogenche & another v Kisii University (Cause 210 & 211 of 2018  
(Consolidated)) [2023] KEELRC 1706 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1706 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE 210 & 211 OF 2018 (CONSOLIDATED)  
MA ONYANGO, J  
JULY 6, 2023**

**BETWEEN**

**DAVIES M OGENCHE ..... CLAIMANT**

**AND**

**KISII UNIVERSITY ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**CAUSE 211 OF 2018**

**BETWEEN**

**GEORGE MORARA ONTUMBI ..... CLAIMANT**

**AND**

**KISII UNIVERSITY ..... RESPONDENT**

**RULING**

1. The consolidated suit herein was dismissed for want of prosecution on March 7, 2022 following the failure of the Claimants’ counsel to attend court pursuant to a Notice of Dismissal for Want of Prosecution dated August 3, 2022.
2. Vide application dated January 20, 2023 and filed on January 24, 2023 the Claimants seek orders that the dismissal of the claims for want of prosecution be set aside and that costs of the application be in the cause.
3. The application is premised on the grounds on the face thereof and the affidavits of the two Claimants sworn on January 20, 2023. The Claimants depone that their advocate was not notified of the intention to dismiss the suit for want of prosecution, that the parties had been engaged in negotiations with a



view to settling the claim which negotiations were successful and partial settlement had been made to George Morara Ontubi while Davies Ogenche was awaiting communication from the Respondent on the amount it was going to pay him. That they did not take steps to prosecute the suit because negotiations were going on. That had they been aware of the notice of intention to prosecute the suit they would have attended court.

4. The Claimants depone that despite the Respondent being aware that negotiations were ongoing they failed to report the same to the court.
5. The Claimants depone that they only became aware of the dismissal of their suit when they were served with taxation notice dated January 16, 2023.
6. They depone setting aside the orders of dismissal would meet the ends of justice and the Respondent would not be prejudiced.
7. The Application is opposed by the Respondent vide replying affidavit of Seth Ong’uti, the Assistant Legal Officer of the Respondent who depones that the application is an afterthought as both the Claimants and the Respondent’s counsel were served with notice of dismissal for want of prosecution dated August 3, 2022.
8. That on November 7, 2022 the suit was dismissed after the Claimants failed to attend court to oppose the dismissal.
9. The application was disposed of by way of written submissions. Both parties filed submissions.
10. The Claimants submit that no evidence has been tendered by the Respondent to prove that they were served with notice of dismissal for want of prosecution. That it is trite law that in the absence of service notice to show cause the dismissal cannot stand.
11. The Claimants rely on the decision in *Mwangi S Kaimenyi v Attorney General & Another* Misc Civil Suit No 720 of 2009 where the court stated:

“ when the delay is prolonged and inexcusable, such as it will cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties ... lest justice should be placed too far away from the parties.
12. The Claimants further relied on the decision in *Rose Makokha Mteka v Oserian Development Co Ltd* [2022] eKLR and *Utalii Transport Company Limited & 3 Others v NIC Bank & Another* [2014] eKLR. It is submitted for the Claimants that the constitutional rights of the Claimants have been taken away for no mistake on their part as the failure to serve them was inadvertence on the part of the court.
13. For the Respondent it is submitted that the notice of dismissal shows that it was served upon counsel for both the Claimants and the Respondent but the Claimants failed to respond to the notice. That in the affidavit of Davies Ogenche it is admitted that the Claimants did not take any steps to progress the matter.
14. It is further the submission of the Respondent that two months had passed from the date the suit was dismissed on November 7, 2022 to January 24, 2023 when the instant application was filed. That this is a demonstration that the Claimants were indolent. That it was upon the Claimants as litigants to keep their cases active, that the application is not merited and that negotiations do not bar a party from



- progressing its matter as negotiations continue. That the applicants have not come to court with clean hands.
15. The Respondent relies on the cases of *Mohamed Jamaa Ali v Chairman, KNUT Garissa Branch and Another* [2021] eKLR and *Fredrick Otieno Gudo v Africa Apparel EPZ Limited* [2018] eKLR.
  16. I have carefully considered the pleadings and submissions. The issue for determination is whether there is justifiable cause to grant the orders sought by the Claimants.
  17. As was stated in the case of *Mwangi S Kaimenyi v Attorney General & Another* (supra) the issues for consideration in an application for reinstatement of suit dismissed for want of prosecution or non-attendance are the following:
    - (1) whether the delay has been intentional and contumelious
    - (2) whether the delay or the conduct of the claimant amounts to abuse of the court
    - (3) whether the delay is inordinate and inexcusable
    - (4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant, and
    - (5) what prejudice will the dismissal cause to the plaintiff. By this test the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all parties.
  18. In the instant case the Claimants have explained the reason they did not fix the case for hearing which is because there were negotiations which led to partial settlement. They have produced letters which show that indeed the Respondent had agreed to pay the decretal sum which therefore meant that there was no need to fix the suit for hearing.
  19. The letter dated November 25, 2021 from the Respondent offering to settle the claim pursuant to the negotiations is reproduced below:

REF: KSU/LO/1/VOL 3/38

Anassi Momanyi & Co

Advocates

Box 7946-30100

Eldoret

Re: Elrc No 211 Of 2018

George Morara Ontumbi Vs Kisii University

I refer to our joint meeting with your aforementioned client held on November 25, 2021 at our lecturers claim office. We wish to inform you that after reconciliation of our accounts, we agreed to settle your client's in the following terms;

1. That all the Eldoret Campus pending and unpaid claims from December, 2015 to December 2016 amounts to sum of Reins 422,366.00.
2. That all the Kabarnet campus claims shall be calculated by our finance office and same be communicated to your client.



3. That the Eldoret campus claims of Kshs. 422,366.00. plus Kabarnet claims will be paid in two equal instalment;
  - a. 1<sup>st</sup> installment of 50% be paid on or before 7<sup>th</sup> December
  - b. 2<sup>nd</sup> instalment of the outstanding 50% be paid on or before February 2022.
4. The remaining •unpaid claims for Eldoret Campus for January tr December '2017 will be calculated by -the finance clearance by the university senate and same will he paid immediately such clearance is done in one instalment.

Thank you

Signed

Seth A Ong'uti.

Ass Legal Officer

Cc 1. Nyario & Co Advocates

2. George Morara Ontumbi

20. With such admission by the Respondent as is contained in the letter there was no need to fix the case for hearing.
21. The Claimants have further explained the reason why they did not attend court being that they were not served with the notice of dismissal for want of prosecution. I have perused the court record and confirmed that there is no certificate or affidavit of service or any other proof of service of the Claimants' counsel with the dismissal notice.
22. The delay in filing the instant application has also been sufficiently explained being that the Claimants were not aware that their suits had been dismissed until they were served with a notice of taxation by the Respondent.
23. It was indeed unconscionable on the part of counsel for the Respondent to withhold the fact that parties were negotiating when they attended court in response to the notice for dismissal for want of prosecution.
24. It is thus in the interest of justice to grant the orders sought in the application dated January 20, 2023.
25. The upshot is that the orders of dismissal of the claimants' suit for want of prosecution made on November 7, 2022 are hereby set aside and the suit is accordingly reinstated.
26. In view of the reprehensible conduct of the Respondent, there shall be no orders for costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 6TH DAY OF JULY, 2023**

**MAUREEN ONYANGO**

**JUDGE**

