



**Odongo v National Transport and Safety Authority (Cause 160 of 2017)
[2023] KEELRC 2104 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2104 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 160 OF 2017
S RADIDO, J
SEPTEMBER 20, 2023**

BETWEEN

ENOCK JAMES ODONGO CLAIMANT

AND

NATIONAL TRANSPORT AND SAFETY AUTHORITY RESPONDENT

RULING

1. On February 23, 2023, the court scheduled the cause for hearing on March 27, 2023. The court directed the respondent's advocate who was present to serve a hearing notice upon the claimant.
2. When the cause was called out for hearing on March 27, 2023, the claimant was absent. The respondent's advocate, who was present informed the court that he had served a hearing notice and that he had filed an affidavit of service.
3. The court perused the affidavit of service and being satisfied that service had been effected, ordered the cause dismissed.
4. The dismissal prompted the claimant to file a motion on May 10, 2023, seeking an order setting aside the dismissal, and the reinstatement of the cause.
5. The primary grounds advanced by the claimant in support of the motion were that the advocate then on record had failed to update him on the progress of the cause; the claimant had attended the virtual court on March 27, 2023 but he was not admitted to the session and that he did not hear the matter called and that he only learnt of the dismissal upon visiting the registry.
6. The claimant urged the court to allow the application because the respondent would not be prejudiced and that it was in the interest of justice to hear him on the merits of his case.
7. The respondent filed a replying affidavit in opposition to the motion on June 14, 2023.



8. In the affidavit, the respondent's advocate averred that the claimant did not attend the virtual court on March 27, 2023; the file was called out severally without a response from the claimant; the claimant had severally failed to attend court; that due to the claimant's indolence, the respondent had previously filed an application to have the cause dismissed for want of prosecution and that he had been given the last opportunity to prosecute the cause on 28 March 2022; there had been unexplained delay in filing the application; the respondent stood to be prejudiced because of the age of the case and that the interests of justice required the dismissal of the application.
9. The firm of Wambilianga Majani & Associates filed a notice of appointment on June 15, 2023 to come on record for the claimant.
10. On May 22, 2023, the Deputy Registry scheduled the application for hearing on June 15, 2023.
11. The court took oral submissions on June 15, 2023.
12. During the submissions, the respondent urged that the firm of Wambilianga, Majani & Co Advocates were not properly on record for failure to follow the path ordained by order 9 rule 9 of the [Civil Procedure Rules](#).
13. The court has considered record, motion, affidavits and submissions and can make the following findings.
14. One, when the cause came up for hearing for the first time on July 12, 2017, it was adjourned because the claimant was reported sick.
15. The cause next came up for hearing on February 14, 2018. However, it was adjourned because the claimant's advocate was said to be indisposed.
16. Two, from September 30, 2019 to February 3, 2021, there was no attempt made to prosecute the cause and on February 14, 2022, the respondent moved the court to dismiss the cause for want of prosecution.
17. Three, the motion was dismissed on March 28, 2022 due to the absence of the respondent.
18. Four, the court gave directions to ensure the hearing of the cause on the merits on May 31, 2022. There is nothing on record to suggest that the claimant framed draft issues for trial in anticipation of the hearing.
19. Five, on or around December 9, 2022, the court notified the parties to attend the court on January 16, 2023 for purposes of giving directions on hearing, considering the cause had been pending for more than 3 years.
20. Six, none of the parties appeared and the court directed that a notice to show cause issue with a return date of January 31, 2023.
21. Seven, on January 27, 2023, the claimant filed a notice to act in person.
22. Eight, when the notice to show cause came up on January 31, 2023, the parties indicated that they were negotiating and the court gave them time to finalise the negotiations, and report back on February 23, 2023.
23. Nine, the claimant did not attend the court on February 23, 2023. The respondent's advocate informed the court that the claimant had failed to respond to their proposals on settlement and the court directed that the hearing proceeds on March 27, 2023. The respondent was also directed to serve a hearing notice.



24. Ten, on March 24, 2023, the respondent filed its proposals in court indicating that it had resolved to reinstate the claimant to work and that the cause be marked as settled.
25. Lastly, when the cause was called for hearing, the claimant was absent. The record indicated that service had been made. The court, therefore, ordered the cause dismissed.
26. The court has anxiously considered the record and more so the proposal from the respondent to reinstate the claimant, and come to the view that the interests of justice tilt in favour of formally allowing the motion by the claimant in order to allow a mutually beneficial settlement between the parties.
27. The motion dated May 10, 2023 is allowed with no order on costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 20TH DAY OF SEPTEMBER 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Wambilianga, Majani & Associates

For Respondent Sheikh & Co Advocates

Court Assistant Chrispo Aura

