



REPUBLIC OF KENYA



**Muhoro v Maina (Appeal E003 of 2022) [2023] KEELRC 2398 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2398 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI**  
**APPEAL E003 OF 2022**  
**ON MAKAU, J**  
**OCTOBER 6, 2023**

**BETWEEN**

**ALICE WANGUI MUHORO ..... APPELLANT**

**AND**

**APOLLO MAINA ..... RESPONDENT**

**RULING**

1. The ruling relates to the appellant's notice of motion dated 2<sup>nd</sup> June 2023 brought under Order 42 Rule 21 of the *Civil Procedure Rules*. It seeks the following the orders:
  - a. That the order of January 25, 2023 dismissing this appeal be set aside and the appeal be reinstated.
  - b. That the costs be provided for.
2. The application is supported by the affidavit sworn on June 2, 2023 by appellant's Advocate Mr.Charles Macharia King'ori. In brief the affidavit deposed that he was aware that the appeal was fixed for mention on January 25, 2023 but due to poor internet connection in the whole of Nyeri town, he was unable to join the virtual court session. Further, the appeal was not yet ready for hearing as there was delay in provision of the typed proceedings from the trial court after request. He contended that the appellant stands to suffer prejudice.
3. The respondent opposed the motion by the replying affidavit sworn on July 26, 2023 by his Advocate Mr.Robert Muturi Kimunya. In brief he deposed that the appeal was dismissed on January 24, 2023 and not January 25, 2023 as alleged; that there was no internet problem on the said date as alleged because he was able to join the virtual court; that the appellant never attended court on October 19, 2022, November 10, 2022 and November 29, 2022 despite being notified; that the appellant had lost interest in the appeal and that is why it took her five (5) months to make the instant application; that the appellant has taken the appeal casually considering that she filed the appeal on March 28, 2022 and waited up to June 29, 2022 to apply for the proceedings; and that she only paid for the



typed proceedings on 2 November 9, 2022. He prayed for the application to be dismissed because the appellant has been indolent and untruthful.

4. The parties did not make any submissions but only relied on their respective affidavits. I have considered the motion and the rival affidavits. The issue for determination is where the applicant has demonstrated any sufficient cause to warrant the setting aside the impugned order.
5. The applicant blamed poor internet connectivity on January 25, 2023 which prevented him from joining the virtual court. However, the court record confirms the averment by the respondent that the appeal was dismissed on 24<sup>th</sup> January, 2023 and not January 25, 2023. To that extent, I find that the applicant has lied under oath about the reason for the failure to join the virtual court.
6. The applicant was aware of the mention date but failed to attend court. The purpose of the mention of the appeal was for the appellant to show cause why it should not be dismissed. The said action by the court followed protest from the respondent that the appellant had neglected the appeal and failed to attend court for directions.
7. A brief background is necessary. The appellant's suit was dismissed by the trial court (Hon. Okuche PM) on February 24, 2022 and she filed the appeal on March 28, 2022. Thereafter she went to slumber and failed to attend court severally for mention for directions despite being served by the Deputy Registrar of the court.
8. On June 29, 2022 she applied for typed proceedings and judgment and waited until November 29, 2022 to pay the fees for the proceedings. She never attended court on September 21, 2022, 1 October 9, 2022, November 10, 2022 and January 24, 2023 when the appeal was dismissed for want of interest in the appeal.
9. I have considered the above facts and the explanation given by the applicant. I have further considered the delay of five (5) months delay in making the instant motion. I am requested to exercise discretion in favour of the applicant. However, discretion though not fettered, it ought to be exercised judiciously and only to deserving cases.
10. In the instant case, the appellant has demonstrated persistent indolence. She has not acted with diligence from March 28, 2022 when she filed the appeal and even after the court dismissed the appeal on January 24, 2023. She cannot be allowed to park her appeal at the court registry and expect the court to let it gather dust there even after she ignored court notices summoning her severally to take action.
11. Having found that the applicant has lied that she failed to attend court due to internet connectivity, and that she has not demonstrated a good cause to warrant the discretion of the court, I dismiss the notice of motion dated June 2, 2023 with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.



**ONESMUS N. MAKAU**  
**JUDGE**

