



**Great Rift Valley Lodge & Resort v Masikilo (Employment and Labour Relations Appeal 44 of 2017) [2022] KEELRC 13316 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13316 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL 44 OF 2017  
DN NDERITU, J  
NOVEMBER 28, 2022**

**BETWEEN  
GREAT RIFT VALLEY LODGE & RESORT ..... APPELLANT  
AND  
PAUL KHALISA MASIKILO ALIAS PAUL DIEMA ..... RESPONDENT**

**RULING**

1. On May 15, 2015 Hon. S.N. Muchungi delivered judgment in Naivasha CMCC No. 821 of 2012. The Appellant herein was dissatisfied with the outcome in that judgment and hence appealed the same in Naivasha High Court Civil Appeal No. 50 of 2015. The appellant prepared and filed a record of appeal but on July 25, 2017 the High Court at Naivasha (Meoli J.) ordered that the matter fell in the jurisdiction of ELRC at Nakuru and as such ordered that the same be transferred to this court for hearing.
2. The appeal file and the lower court file were forwarded to ELRC at Nakuru vide a letter dated July 26, 2017. When the appeal landed at Nakuru it was allocated the above reference in the header and receipt thereof at Nakuru was acknowledged vide a letter dated July 31, 2017. The said letter was copied to counsel for both parties, Wainaina Ileri Advocates for the Appellant, and Achieng Owuor & Co. Advocates for the Respondent.
3. The matter remained dormant until December 18, 2018 when the court, suo motto, issued a notice to show cause (NTSC) for the appellant to show cause why the appeal should not be dismissed for want of prosecution. The court record indicates that the NTSC was sent to counsel for both parties by way of EMS through the Postal Corporation of Kenya. The NTSC was set for hearing on February 4, 2020.
4. On February 4, 2020 the matter came up in court (Mbaru J.) for the hearing of the NTSC. The court record is that neither of the parties appeared and the matter was hence dismissed under Rule 16 of the Rules of this court for want of prosecution.



5. It is that dismissal that the Appellant is now seeking to overturn by way of a Notice of Motion dated December 15, 2021. The application is expressed to be brought under the provisions of article 159(1) (d) of the Constitution of Kenya, Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, and 3A of the Civil Procedure Act.
6. The appellant is seeking the following orders-
  1. That this honourable court be pleased to set aside unconditionally the order issued on February 14, 2020 dismissing the appellant's appeal.
  2. That the appeal be reinstated for hearing on merits.
  3. That the costs of this application be in the cause.
7. The application is based on the grounds on the face of it and supported with two affidavits, one by W.J. Kabaiku, Advocate, sworn on December 15, 2021 and the other by John Githui, Advocate, on even date, both with several annexures attached.
8. On May 19, 2022 this court ordered that the application be heard by way of written submissions. Counsel for the Appellant served upon Counsel for the respondent the application and the written submissions dated June 2, 2022 and filed an affidavit of service on record. Counsel for the Respondent did not respond to the application. This court is satisfied that Counsel for the Respondent was properly served and hence the application is unopposed.

## II. Issues for Determination

9. From the foregoing, there is only one substantive issue for determination – Should the dismissed appeal be reinstated for hearing? Then the issue on costs.

## II. Determination

10. The appellant has demonstrated the efforts made in pursuing the appeal all the way from the High Court at Naivasha to ELRC Nakuru without success. The supporting affidavits have demonstrated that the Appellant was not indolent in pursuing the appeal for hearing.
11. However, this court is of the opinion that the actual injustice was visited upon the appellant when the appeal was dismissed for want of prosecution on February 4, 2020. There is no evidence at all that the parties were served with the NTSC. That by itself denied the parties, and more so the Appellant, an opportunity to be heard before the dismissal of the appeal. There is no affidavit of service filed in support of the service through EMS.
12. Under article 25(c) of the Constitution the right to be heard is so fundamental that it may not be taken away for any reason. This same theme is repeated in article 50 of the Constitution. The right to fair hearing is the cornerstone of the rule of law and the basis for the other rights.
13. Parties file causes in court to be heard. A court of law shall be very guarded and restrained in dismissing a cause, unless there are very sound legal grounds for such dismissal. This court agrees with the sentiments of Apaloo JA, as he then was, in Philip Chemowolo & another v Augustine Kubede (1982-88) KAR 1040 wherein the learned Judge stated “The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”
14. The discretion of the court in reinstating a cause should be aimed at disposing the matter on merits rather than getting the matter out of the court system. In any event courts exist to dispense justice in its purest form.



15. This court agrees with the submissions by Counsel for the appellant on all the material aspects of the application.
16. In the circumstances, as it is clear by now, this court finds that the appeal was dismissed without the appellant getting an opportunity to be heard. The order for dismissal is hence set aside unconditionally and the appeal is reinstated for hearing on merits.

#### **IV. Costs**

17. There is no order as to costs.

#### **V. Orders**

18. The court issues the following orders-
  - (a) The order issued by court on February 4, 2020 dismissing this appeal be and is hereby set aside unconditionally.
  - (b) This appeal is reinstated for hearing on merits on priority basis.
  - (c) There is no order as to costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2022.**

.....

**DAVID NDERITU**  
**JUDGE**

