



**Kenya Union of Sugar Planation & Allied Workers v Busia Sugar Industries Limited  
(Cause 56 of 2021) [2022] KEELRC 13365 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13365 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
CAUSE 56 OF 2021  
JW KELI, J  
DECEMBER 2, 2022**

**BETWEEN  
KENYA UNION OF SUGAR PLANATION & ALLIED WORKERS .. CLAIMANT  
AND  
BUSIA SUGAR INDUSTRIES LIMITED ..... RESPONDENT**

**RULING**

1. The court on the June 30, 2022, when the suit was scheduled for hearing dismissed the same for non-attendance by the claimant. The applicant /claimant subsequently *vide* a notice of motion application dated August 11, 2022 and received in court on the August 17, 2022 seeking to set aside the order of dismissal dated June 30, 2022 and for the reinstatement of the suit.
2. The application is grounded on orders 12 rule 7, order 45 rule 1,2&3& 51 of the [Civil Procedure Rules](#) and sections 1A,1B,3A and 80 of the [Civil Procedure Act](#), article 50 and 159(2) of the [Constitution](#). The application is based on the grounds that the suit was dismissed summarily for non-attendance on the June 30, 2022. That the non-attendance was unfortunate as the applicant inadvertently diarised the matter for July 30, 2022 instead of June 30, 2022. That this was a mistake/blunder on the part of the claimant’s representative leading to their absence in court on the date of the hearing.
3. That the court decree was extracted the same day but not served on the claimant. That on knowledge of the dismissal order they filed the instant application without delay. That the claimant was ready for the hearing as demonstrated on the February 14, 2022 when they had 3 witnesses in court but the hearing was adjourned to allow the respondent to file amended response and witness statements. That the respondent will suffer no prejudice if the application is allowed.
4. The application is further supported by the affidavit of Jeremiah Akhonya the claimant’s representative which basically reiterates the ground of the application.



5. The respondent filed in response to the application notice of preliminary objection dated October 5, 2022 on the grounds that the application was an abuse of court process and that it was brought with an inordinate delay.
6. The court on the October 24, 2022 directed that the notice of preliminary objection by the respondent be canvassed together with the application through written submissions.
7. Only the applicant filed their written submissions which are dated November 4, 2022.

### **Determination**

8. Order 12 rule 6(1) provides that where a suit is dismissed for non-attendance, subject to any law on limitation of actions, the plaintiff may bring a fresh suit or may apply to the court to reinstate the suit. Where the suit is dismissed under rule 3 (where only the defendant attends) no fresh suit may be brought in respect to the same cause of action. In the instant suit only the defendant attended court on the hearing date thus no fresh suit may be filed on the same cause of action. The claimant has only one option of having the court reinstate the dismissed suit.
9. Under order 12 rule 7 of the *Civil Procedure Rules* it is provided that where a suit has been dismissed the court may on application set aside or vary order of dismissal upon such terms as may be just.
10. The foregoing is the applicable procedural rules on the instant application.
11. The order of dismissal of the suit for non-attendance by the claimant was issued on the June 30, 2022. The instant application was filed on the August 17, 2022. The respondent in their preliminary objection states that this was inordinate delay. The claimant stated that it mistakenly diarised the hearing date as July 30, 2022.
12. The applicant submits that the court was not sitting in August (recess) also the time for general elections and that they did file their application during the recess. The claimant to buttress their case that they approached the court without inordinate delays relied on the decision in *Utalii Transport Company Limited & 3 Others v nic Bank Limited & another* (2014) e KLR cited with approval in *Edward Waiguru Ngigi v County Government of Nairobi* (2020) e KLR where the High Court stated: - ‘nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to the inescapable conclusion that it is inordinate and therefore inexcusable.’
13. The court finds that the issue of inordinate delay and abuse of court process are issues of facts to be ascertained by the court hence not proper to be raised as preliminary objection applying landmark decision of the defunct Court of Appeal for East Africa decision of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 676-701 where it was stated that a preliminary objection should be in the nature of what used to be demurrer and should be raising a pure point of law in the open eye of the court that can dispose of the suit in limine. The court finds that the preliminary objection by the respondent was not properly raised. The same is dismissed.
14. The applicant to buttress its submission on the mistake of the claimant leading to the dismissal being excusable relied on the decision in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR where the Court of Appeal held: ‘[20] We are of the view that the learned judge misapprehended the reasons given for non-attendance which arose as a result of a



mistake. In the case of: *Philip Chemowolo & another v Augustine Kubede*, [1982-88] KAR 103 at 1040 Apalo, JA (as he then was), posited as follows:-

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

15. The Court of Appeal (*supra*) further held: ‘[21]. In this case, the inconvenience caused to the respondents by the delay caused by the petitioner and his counsel’s failure to attend court on the June 10, 2013, could have been compensated with costs.’ And further in paragraph 22 held:-‘The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.’
16. The court under order 12 rule 7 of the *Civil Procedure Rules* may impose terms for the reinstatement of the suit dismissed for non- attendance as it deems just. The court finds merit in the application in that it was not tainted by inordinate delay. Guided by the above Court of Appeal decision in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR the court finds that the inconvenience caused to the respondent by the failure of the claimant to attend court on the June 30, 2022 can be compensated by costs.

### **Conclusion and Disposition**

17. The court allows the application and sets aside its order of dismissal of the suit on June 30, 2022 and reinstates the suit as amended on the June 11, 2021.
18. The terms for the allowing of the application are that the claimant will pay the respondent advocate throw away costs of Kshs 10,000/- for the inconvenience caused for failure to attend court before the next hearing date.
19. The notice of preliminary objection is dismissed for being improperly raised. Costs of the objection to the claimant in the cause.
20. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 2ND DECEMBER 2022.**

**J. W. KELI,**

**JUDGE.**

**In The Presence Of:-**

**Court Assistant : Brenda Wesonga**

**For Applicant : Jeremiah Akhonya**

**For Respondent:-Ipapu**

