



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Case 10 of 2003

NICHOLAS ROBERT-OTIENO RANGALLA APPLICANT

VERSUS

KENYA BREWERIES RESPONDENT

RULING

The plaintiff **Nicholas Robert Otieno Rangala** filed this suit against the defendant Kenya Breweries Limited, on the 17th December 1999, at the High Court Nairobi claiming damages, for wrongful dismissal from or termination of employment.

The plaint indicates that at all material times the plaintiff had been employed by the defendant and posted to work at Kisumu on agreed and/or established terms and conditions of employment but the employment was allegedly wrongfully terminated by the defendant on the 31st August 1998. However, notwithstanding of the termination the defendant on the 15th July 1999, rebased the plaintiff from employment and sent him on early retirement with effect from 1st August 1999. He was in the process paid an advance retirement package in the sum KSh.100,000/= on the 22nd July 1999, and was on the 23rd September 1999, issued with a cheque for the amount of KSh.211,858/90 cts., being terminal dues. He contends that he was deprived of his salary benefits and all allowances which he would otherwise had earned during the continuance of his employment. He therefore suffered loss and damage.

The defendant filed a statement of defence on the 20th November 2000, in which it is contended that the plaintiff's services were lawfully terminated and although he ought to have been dismissed with loss of all benefits his was reduced to a termination with payment of dues. The defendant further contended that the payments made to the plaintiff were all his entitlements and were accepted in full and final settlement of his dues.

The defendant therefore prayed for the dismissal of the entire suit with costs.

On the 28th August 2002, a notice of motion was filed by the plaintiff to have the case transferred from the High Court at Nairobi to the High Court at Kisumu.

The application was opposed by the defendant through a replying affidavit filed on 27th September 2002, and deponed by the defendant's Assistant Company Secretary. The defendant contended *inter-alia* that it carried on business in Nairobi and that it would be very expensive for it to meet the costs of its advocates and witnesses to attend court in Kisumu. The application was heard on the 13th November 2002, in the absence of the defendant and/on order to have the matter transferred to Kisumu from Nairobi

was made by **Mbito, J.** (*as he was then*).

On the 8th March 2004, the application at hand was filed by the defendant under Order XVI Rules 5 and 6 and Order L Rule 1 of the Civil Procedure Rules. S. 3A of the Civil Procedure Act was also involved albeit unnecessarily.

The application basically seeks to have the plaintiff's suit dismissed with costs for want of prosecution on the following grounds:-

- (a) **It is more than one year since the suit was adjourned.**
- (b) **The plaintiff has not taken any steps to prepare the suit for hearing.**
- (c) **The continued pendency of the suit is both expensive and an inconvenience to the defendant.**
- (d) **The delay in setting the suit down for hearing will prejudice the fair trial of the suit and is otherwise an abuse of the court process.**
- (e) **A period of over 3 months has lapsed since the plaintiff had this matter set down for hearing.**

The grounds are amplified by the facts contained in a supporting affidavit deponed by the defendant's advocate Patrick Lutta.

No replying affidavit or ground of opposition was filed by the plaintiff and on the 26th April 2005, the application was fixed for hearing on 21st June 2005, but was dismissed on that date for non-attendance by both the defendant and plaintiff.

Upon dismissal of the application on the 21st June 2005, the defendant filed a chamber summons on the 22nd July 2005, for orders that the dismissal order of the 21st June 2005, be set aside, varied and/or reviewed and that the dismissed application dated 8th March 2004, be reinstated.

The application vide the chamber summons was heard on the 12th July 2006, in the absence of the plaintiff who had been served with the necessary hearing notice and an order for the reinstatement of the application dated 8th March 2004, was made by Mwera - J. This is the said application and was heard on the 24th April 2008, in the absence of the plaintiff who was served through his advocates Ogero Ogeto & Co. Advocates with a hearing notice as per the affidavit of service dated 21st April 2008. As at the 24th April 2008, no replying affidavit or grounds of opposition had been filed by the plaintiff. The application thus proceeded unopposed.

Be that as it may, the test applied by the courts in an application for the dismissal of a suit for want of prosecution was restated in the cited case of **IVITA VS. KYUMBU [1984] KLR 441** and that is whether the delay in setting the suit down for hearing is prolonged and inexcusable and, if it is, whether justice can be done despite the delay.

If the delay is prolonged and the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed. The court may order that the suit be set down for hearing at the earliest opportunity. Therefore, to dismiss or not to dismiss a suit for want of prosecution is a matter in the discretion of the court.

Prior to the transfer of this case from Nairobi to Kisumu no hearing date had been set by the plaintiff.

The suit as dated was filed in court on 17th December 1999, and the order of transfer was made on 13th November 2002, as applied by the plaintiff. The statement of defence had already been filed by the defendant on the 20th November 2000. After the transfer the present application was filed on 8th March

2004.

As at the 8th March 2004, the plaintiff had not set down the suit for hearing although the original court file was received at Kisumu on the 16th January 2003, as confirmed by a letter of the same date from the Deputy Registrar Kisumu to the Deputy Registrar Nairobi. It is apparent from the foregoing that after instituting the suit the plaintiff went into a deep slumber such that he could not be awoken even by this application. How else can one explain the lack of response in this application. No attempt whatsoever has been made by the plaintiff to explain the reason or reasons for his failure to have the suit set down for hearing at any one time. The prolonged delay cannot be excused if no explanation has been made for the same.

To that extent the present application would be merited.

However, notwithstanding the prolonged delay, can justice still be done to the parties. Learned counsel for the applicant, M/s Nuthu, argued that the period of the delay is over 5 years and that the continued pendency of the suit is inconvenient and highly prejudicial to the applicant's such that the court may not arrive at a fair decision because the cause of action arose in the year 1998 and by now the applicant's potential witnesses have retired from employment and/or their memory has faded. They would therefore be of no assistance to the court in reaching a fair decision.

While it may be true that some of the potential witnesses have since retired from employment it does not mean that they cannot be located and availed in court to testify in this matter. They are still alive and not exactly beyond the reach of their former employer.

As to fading memory this is more of a subjective opinion capable of being discredited if and when the witnesses appear in court and take the witness box.

Nonetheless, in view of the unexplained prolonged delay in having the matter set down for hearing justice may not be served as required.

In conclusion it is worth quoting what Lord Denning Mr. stated in the case **FITZPATRICK VS. BATGER & CO. LTD [1967] 2 ALL LR. 657.**

He said:-

" it is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts shall be conducted with expedition. Just consider the times here. The accident was on December 13, 1961 It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."

This application by the defendant/applicant is well merited in all facets. It is allowed with the result that the plaintiff's suit be and is hereby dismissed with costs for want of prosecution.

The costs of this application shall be borne by the plaintiff.

Ordered accordingly.

Read and signed this 30th day of April, 2008.

J. R. KARANJA

JUDGE