



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 390 OF 2013**

**PAUL CHURU MWANGI & 12 OTHERS.....PLAINTIFFS**

**VERSUS**

**NATIONAL BANK OF KENYA & 8 OTHERS..... DEFENDANTS**

**RULING**

1. This ruling is the outcome of two applications. The first application is the Defendants' motion dated 11.09.2013 in which the Defendants are praying for the suit to be dismissed for want of prosecution. The second application is the Plaintiffs' motion dated 30.01.2014 in which the Plaintiffs are seeking for this suit to be withdrawn from this court and transferred to the Industrial and Labour Relations court for hearing and determination. When the aforesaid motions came up for interpartes hearing, learned counsels appearing in this suit recorded a consent order to have the applications disposed of by written submissions.
2. It is appropriate to start dealing with the Defendant motion dated 11<sup>th</sup> September 2013. The motion is supported by the affidavit of Damaris Gitonga, the officer in charge of the 1<sup>st</sup> Defendant's legal services. The Plaintiffs opposed the motion by filing the replying affidavit of Paul Churu Mwangi. The main prayer sought by the Defendants is to have this suit dismissed for want of prosecution. It is argued that it has been 18 months since the suit was filed and that's the Plaintiffs have not taken any steps to set the suit down for hearing. The Defendants further aver that due to the delay the Defendants are likely to suffer serious prejudice. The Plaintiffs filed the affidavit Paul Churu Mwangi to oppose the Defendants' motion. The Plaintiff explained that there was a delay on the part of the Plaintiff to fix the suit for hearing occasioned by the Defendants motion dated 22.11.2010 which application had sought for an order for stay of the suit pending payment of costs arising from H.C.C.C. no. 89 of 2008. The aforesaid motion was compromised on 14.02.2012. Upon recording the consent order, the firm of M/S D. Njogu & Co. Advocates, which represented the Plaintiffs is said to have moved out and changed their physical address and has since then never gotten in touch. This prompted the Plaintiff to hire the legal services of the firm of Kivuva Omuga & Co. Advocates and it is only the aforesaid firm of advocates which made the Plaintiffs know the existence of the Defendants' motion dated 30.1.2014. The Plaintiffs have argued that they are interested in prosecuting this case and that is why they have filed an application for the suit to be transferred to the Industrial and Labour Relations court. In short, the Plaintiffs have solely blamed their previous advocates for causing the delay, hence they should not be left to suffer for the mistakes of their advocate.

3. Before determining the merits or otherwise of the motion, let me set out the background of the motion. This suit was filed on 21.7.2010. Pleadings closed on 6<sup>th</sup> September 2010. The record shows that on 22.11.2010 the Defendants filed an application for stay of this suit pending the settlement of costs in H.C.C.C. no. 89 of 2008 and H.C.C.C. no. 484 of 2008 which were withdrawn on 14.2.2012. The Defendants motion dated 11.9.2013 was filed on the same date. The Plaintiffs filed a notice of change of advocates on 29.1.2014 and on 30.1.2014 the Plaintiffs filed the motion of the same date.
4. After considering the grounds set out on the face of the motion together with the facts deponed in the affidavits filed for and against the application plus the rival submissions, it is clear in my mind that there was a delay in fixing of this case for hearing on the part of the Plaintiffs. That fact is not denied by the Plaintiffs. They have however offered explanations to justify the delay. One of the grounds stated by the Plaintiffs is that their erstwhile advocate i.e M/S D. Njogu & Co. Advocates is to blame for the delay in concluding the case. They aver that the aforesaid firm of advocates had moved out of the premises housing their offices and they have never contacted the Plaintiffs. The Defendants did not file a further affidavit to controvert these assertions. I have no reason to doubt the veracity of those averments. In their submissions, the Defendants are of the view that the excuse given by the Plaintiffs show lack of diligence on their part. I am not persuaded by the Defendants' argument because it is clear that the Plaintiffs made efforts to visit the offices of their erstwhile advocate in vain. They were therefore forced to hire the services of a new firm of advocates. They cannot therefore be accused of being indolent. There are many factors which the court will take into account before exercising this discretion. Those factors include but not limited to: There was an inordinate delay on the part of the Plaintiff, whether the delay was intentional, contumelious and therefore inexcusable, the delay is an abuse of the court process, the delay causes serious prejudice to the Defendant. Whether a reasonable explanation has been offered for the delay. I have taken into account the above factors and I do not think the delay herein is so inordinate that it can be said to be inexcusable. I am also satisfied that the Plaintiffs explained themselves well. I will exercise my discretion in their favour by dismissing the Defendants' motion dated 11.09.2013.
5. The second application is the motion dated 30.1.2014 taken out by the Plaintiffs whereof they seek for this suit to be transferred to the Industrial and Labour Relations court for hearing and determination. The motion is supported by the affidavit of Paul Churu Mwangi. The Defendants filed the affidavit of Damaris Gitonga to oppose the same.
6. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival written submissions. It is the Plaintiffs' submission that the suit falls within the scope of the Industrial and Labour Relations court hence it should be transferred to the relevant court. It is pointed out that the dispute relates to employment and that it is a fresh matter which was filed before the Industrial Court was established. The Defendants aver that the Plaintiffs were their former employees. The Defendants are of the view that the dispute is not a case of employment but about the calculation of their retirement benefits which jurisdiction was donated to Retirement Benefits Authority with an Appeal to the Retirement Benefits Appeals Tribunal.
7. I have carefully looked at the Plaint and it is clear on the face of it, that, this dispute is all about the calculations of retirement benefits. Though the question of retirement benefits arise from the contract of employment, the dispute cannot fall within the ambit of the Industrial and Labour Relations court. This court is therefore seized with jurisdiction to hear and determine the dispute. I decline to grant the order sought.
8. In the end both motions are dismissed with no orders as to costs.

**Dated and delivered in open court this 3<sup>rd</sup> day of July, 2015.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant