



Were v Laborex Kenya Limited (Employment and Labour Relations Cause E6460 of 2020) [2024] KEELRC 1829 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1829 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6460 OF 2020**

**AN MWAURE, J
JULY 10, 2024**

BETWEEN

PHILIP ONYANGO WERE CLAIMANT

AND

LABOREX KENYA LIMITED RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 5th March 2024 seeking the following orders that:
 1. this Honourable Court be pleased to dismiss this suit for want of prosecution.
 2. costs of this application and the entire suit be borne by the claimant/Respondent.

Respondent/Applicant's Case

2. The Respondent/Applicant avers that the claimant/Respondent has not taken any step whatsoever to prosecute the suit since 16/11/2020 when it filed the memorandum of claim dated 03/11/2020.
3. The Respondent/Applicant avers that 3 years and 4 months have lapsed since the Claimant took steps to prosecute this suit and the delay is inexcusable and inordinate. This shows that the Claimant has lost interest in prosecuting the suit.
4. The Respondent/Applicant avers that the continued pendency of this suit is prejudicial to the Applicant and is a waste of valuable judicial resources and it is only fair and just that the suit be dismissed for want of prosecution.
5. The Respondent/Applicant avers that it is in the interest of justice that this application be allowed and the suit be dismissed for want of prosecution.



Claimant/Respondent's Case

6. In opposition to the application, the Claimant/Respondent's advocate filed a replying affidavit dated 12th March 2024.
7. The Claimant's advocate avers that it was appointed to represent the Claimant on 5/07/2023 in place of Tebino & Associates Advocates. Thereafter it wrote to the Deputy Registrar of this court on 06/07/2023 for a pre-trial date so as to fix a convenient hearing date.
8. The Claimant's advocate avers that it did not receive any response and wrote again to the Deputy Registrar on 30/01/2024 and was informed the matter is fixed for a mention on 06/03/2024.
9. The Claimant's advocate avers that it served the Respondent's advocate with a mention notice on 06/02/2024 and on 06/03/2024 the cause list was generated and the matter was listed before Hon. Fredrick Nyamora's court.
10. The Claimant's advocate avers that on the same date it received an application to dismiss the suit for want of prosecution,
11. It is the Claimant's advocate's case that several letters were written to have the matter mentioned to fix a hearing date and was mentioned on 21/09/2023, 08/11/2023 and 14/12/2023.
12. These mentions were conducted in the absence of a mention notice served on the Claimant's advocate or his previous advocates by the court or the party present.
13. The Claimant's advocate avers that on 06/03/2024, it experienced technical issues and the call dropped off; once she re-logged in the matter had been called and when she addressed the court after the cause list was over, she was informed that she was registered absent while the Respondent's advocate was present and the matter coming up for hearing was the instant application on 19/03/2024.
14. The Claimant's advocate avers that from the foregoing, it is evident that it is interested in prosecuting the suit without any delay and as such the suit should not be dismissed.

Respondent/Applicant's Submissions

15. The Respondent submitted that order 17 Rule 2(5) of the Civil Procedure Rule provided that a suit stands dismissed after 2 years where no step has been taken.
16. In the instant suit, the last action was filing of a Statement of Response by itself on 29/01/2021 and no further action was initiated by the Claimant. The Claimant's advocate came on record on 05/07/2022 and it has been 2 years 5 months since any registry action had been taken.
17. It is the Respondent's submission that the Claimant has not offered the court an explanation of the delay or tendered any evidence to rebut the delay.
18. The Claimant took 2 years to six the matter for pre-trial which delay is inexcusable for a party that is intended to pursue determination of a dispute.

Claimant/Respondent's Submissions

19. It is the Claimant's submission that since the firm of Shapley Barret & Co. Advocates took over the conduct of this matter from 05/07/2023; it has not taken a year to ensure that the matter was fixed for mention. This proves the Claimant had not lost interest in the case.



20. The Claimant submitted that the delay occasioned was not inordinate or intentional for the reason that the Claimant and/or his advocates had not been informed of the appropriate dates. It would have proceeded to prosecute the matter as soon as possible as he has great interest in it.
21. The Claimant submitted that the Respondent shall not suffer great prejudice that cannot be remedied by hearing and determining this matter. However, if the suit is dismissed, the Claimant will be prejudiced and suffer immense loss as he will be denied a right to assert his labour rights.

Analysis and Determination

22. The main issue for the court's determination is whether the suit should be dismissed for want of prosecution.
23. Rule 16 of the Employment and Labour Relations Court Procedure Rules provides as follows –
 1. In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.
 2. If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
 3. Any party to the suit may apply for dismissal as provided in paragraph (1).
 4. The court may dismiss the suit for non-compliance with any direction given under this rule.”
24. The court held in [*Kenya Plantation and Agricultural Workers Union v Unliver Tea K Limited \[2021\]*](#) eKLR that: -

“From the foregoing provisions, an applicant seeking for dismissal of a suit for want of prosecution is only required to demonstrate that no action has been taken by either party for one year in the suit and that the failure was for no good cause.”

25. In [*George Gatere Kibata v George Kuria Mwaura & another \[2017\]*](#) eKLR it was decided: -

“..... the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of *Ivita -vs- Kyumbu*(1984) KLR 441 where it is summarized as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

In [*Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009*](#), the court restated the test as follows:-

1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.



2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”
26. Further, *Thatbini Development Company Limited v Mombasa Water & Sewerage Company & another [2022]* eKLR the court held: -
- “In order for these legal principles to be applicable the following need to be demonstrated: -
- a. That no application has been made or step taken by either party for one (1) year from the time of filing the suit and
 - b. That the Respondents have failed to comply with the directions of the court clearly.
27. Clearly, the powers granted to court hereby by law are discretionally and have to be exercised judicially, fairly and capriciously. In so doing, the test applied by court in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. In other words, if the delay is satisfied with the Plaintiff’s excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence the action would not be to dismiss it but direct that it be heard at the earliest time possible and available.”
28. The court is not willing to encourage slothfulness on the part of the litigants when they file suits and sit pretty. At the same time it is the cardinal rule to as much as possible not to lock out a litigant from the corridors of justice as long as they are ready and wiling to prosecute or to defend their suit.
29. The claimant changed his advocate in mid 2023 and has since been approaching the court for pre-trial directions. In September 2023 the cause list before Hon. Nyamora the matter was fixed for mention.
30. The claimant has demonstrated he is interested and has been interested in prosecuting the suit. The suit is not yet ready for dismissal. Being persuaded by the case of *Mwangi S. Kimenyi vs Hon. The Attorney General & Another 720 of 2009* (supra) the court has discretion to dismiss a suit for want of prosecution or to allow the same to proceed. What is important is to ensure no party is denied access to the corridors of justice and the court must be conscious it is not aiding an indolent person.
31. Going by the application and the rival submissions the court is persuaded to exercise its jurisdiction and allow the suit to proceed. The application for dismissal of the suit dated 5th March 2024 is dismissed and throw away costs will be paid by the claimant to the respondent’s advocates at kshs 10,000/- within 30 days hereof.
32. Case to be fixed for pre-trial directions within 30 days from today’s date failure of which the orders herein will be cancelled and the suit will stand dismissed. As well if claimant does not pay the costs the Court will not give him audience any further.
33. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10TH DAY OF JULY, 2024.



ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

