



**Ngina v Brandworld Communications Limited (Cause E513 of 2020)
[2025] KEELRC 787 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 787 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E513 OF 2020
L NDOLO, J
MARCH 13, 2025**

BETWEEN

MIRIAM MUMBI NGINA CLAIMANT

AND

BRANDWORLD COMMUNICATIONS LIMITED RESPONDENT

RULING

1. This ruling flows from a notice to show cause why the claim should not be dismissed for want of prosecution, issued by the Court on 1st October 2024.
2. The Claimant responded to the notice to show cause by a replying affidavit sworn by her Counsel, Syphurine Mayende, on 31st October 2024, stating the following:
 - a. The matter came up for pre-trial on 26th September 2022, when the Respondent was directed to file a substitute witness statement within 14 days. A witness statement by one Kirimi Rintaugu dated 27th September 2022, was filed on 28th September 2022;
 - b. While the Claimant's Counsel was in the process of liaising with the Court Registry to fix a hearing date as directed by the Court, the Respondent's Advocates on record, Ombati Nyang'au & Co Advocates reached out to the Claimant's Counsel, via email, with the intention to have the matter settled by consent;
 - c. Since the Claimant's Advocates had several similar matters against the Respondent, the Respondent's Advocates shared with the Claimant's Advocates draft consents in respect of these matters, including this claim, which the Claimant's Advocates reviewed, stamped and sent back to the Respondent's Advocates for execution and filing, as a matter of practice;
 - d. The Respondent's Advocates acknowledged receipt of the aforementioned reviewed and partially executed consent dated 10th June 2024, and it was upon them to execute their part,



file the consent in court and thereafter liaise with the Court Registry to fix a date for adoption of the consent;

- e. However, the Respondent's Advocates took their time, despite the matter remaining pending in court for more than one and a half years;
 - f. The dilatory conduct of the Respondent's Advocates prompted the Claimant's Advocates to send an email dated 6th September 2024, inquiring on the status of the consents;
 - g. The Respondent's Advocates responded by stating that they could not reach their client;
 - h. In light of the above, the non-prosecution of the matter is not intentional, and was occasioned by the Respondent's representation that the matter would be settled out of court;
 - i. The delay in prosecuting the suit is neither inordinate nor inexcusable for the reason that the Claimant relied on the Respondent's representation, which turned out to be a tactic to prolong the negotiation period and have the matter dismissed for want of prosecution;
 - j. The Claimant is now ready and willing to continue with the prosecution of her case and asks for a hearing date;
 - k. Dismissing the suit will cause grave injustice to the Claimant.
3. Rule 43 of the Employment and Labour Relations Court (Procedure) Rules sets out the following procedure for dismissal of suits for want of prosecution:
- 43.
- (1) In any suit in which no application has been made in accordance with rule 31 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 sub-rule (1).
 - (4) The Court may dismiss the suit for non-compliance with any direction given under this rule or rule 31.
4. The principles to be taken into account in issuing an order for dismissal of a suit for want of prosecution were established in *Ivita v Kyumbu* [1984] eKLR 441 as follows:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay? Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay...He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged, if the court is satisfied with the Plaintiff's excuse for the delay, the action will



not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

5. In the present case, there is evidence that the parties were actively pursuing an out of court settlement and the Claimant ought not to be punished for subjecting herself to alternative dispute resolution processes.
6. The Court is satisfied that the Claimant did not go to sleep and will allow her a chance to prosecute her claim on merit.
7. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY MARCH 2025

LINNET NDOLO

JUDGE

Appearance:

Mr. Mayende for the Claimant

No appearance for the Respondent

