



Nakitare v County Government of Elgeyo Marakwet & 3 others (Employment and Labour Relations Cause 24 of 2020) [2024] KEELRC 427 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 427 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE 24 OF 2020
MA ONYANGO, J
FEBRUARY 29, 2024**

BETWEEN

JULIUS O. NAKITARE CLAIMANT

AND

COUNTY GOVERNMENT OF ELGEYO MARAKWET 1ST RESPONDENT

COUNTY SECRETARY, ELGEYO MARAKWET COUNTY .. 2ND RESPONDENT

COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

CHIEF OFFICER, HEALTH SERVICE AND SANITATION 4TH RESPONDENT

RULING

1. The Claim before me was filed on 15th April 2020. On 11th May 2023, the Respondents lodged an application seeking the dismissal of the Claim for want of prosecution.
2. The grounds upon which the application is anchored as set out on the face thereof and in the affidavit of Richard M. Wafula, the Respondents Counsel, sworn on 11th May 2023, in support of the same are that this cause was filed on 15th April 2020 yet the Claimant has refused, neglected and failed to actively take steps to prosecute it; that the last time the matter was in court was on 17th January 2021; that a period of over one year has therefore lapsed since the time the matter was in court; that the Claimant has not given any reasonable explanation as to why he has not endeavored to set down this cause for hearing or for directions; that the Claimant is highly disinterested in prosecuting this cause; that the Claimant has been indolent in prosecuting his claim, hence does not deserve leniency from this court; that the Claimant's actions negate the overriding objective of the Court as set out in sections 1A, 1B and 3A of the *Civil Procedure Act*; that the inaction on the part of the Claimant goes against the spirit of the Kenyan Constitution, more specifically article 159(2)(b) of the *Constitution*; that litigation must come to an end and lastly, that this cause has no place in court and is an abuse of the process of this court.



3. The Claimant replied to that application vide his sworn affidavit dated 13th June 2023 in which he states that the instant application is tainted with half-truths and obviously a deliberate attempt to have the suit dismissed yet all parties have been engaging in out of court negotiations to have the matter settled amicably; that the Respondents have failed to disclose material facts to the court to the extent that all the issues between the parties have been settled after long negotiations and that parties were awaiting approval to be sent to their respective advocates to have a consent filed marking the matter as settled; that the instant application is made in utmost bad faith yet the Claimant has been engaging directly with his employer to have the matter resolved and indeed the issues have been resolved; that a mention date had been fixed at the registry on 14th June 2023 at the instance of the Claimant for purposes of confirming settlement since the Respondents counsel was yet to communicate on the same; that at no time did the Claimant make any move to hoodwink the court since all the parties herein were constructively engaging each other with intent to resolve the matter and that it is astonishing for the Respondents' counsel to insinuate that the Claimant continues to earn a salary illegally yet the Respondents in good faith continue to allocate the Claimant duties which he performs diligently and which is acknowledged by the Respondents; that the 3rd Respondent at one point advised the Claimant to withdraw the instant claim if he needed promotion; that the Claimant is desirous to have this case resolve through amicable settlement; that the Claimant's engagement with the Respondents has been peaceful and that the Claimant recently took leave which had been approved by the Respondent. The Claimant urged the court to dismiss the instant application.
4. In a rejoinder, the Respondent's filed a further affidavit sworn by the 3rd Respondent's Secretary, Christine Ngeno on 4th July 2023 in which the Respondents deny engaging with the Claimant in any out of court settlement. It is averred that at no time has the 3rd Respondent, the Claimant's employer, engaged in any negotiations, either directly or indirectly with the Claimant and that the Claimant has deposed to falsehoods.
5. The Respondents aver that the mention date 14th June 2023 was taken at the instance of the Claimant as he alleges, but was fixed by the Registry and aver that the said date was not fixed for purposes of confirming settlement.
6. It is the Respondents' case that the Claimant continues to be allocated duties and that he has been earning his pay as there is a court order in place which has to be obeyed despite the fact that the Claimant has not been performing his duties diligently.
7. The Respondents urged the court to dismiss the suit for want of prosecution.
8. The application was disposed of by way of written submissions. The Respondents' submissions were filed on 4th August 2023 while the Claimant's submissions were filed on 28th August 2023.
9. I have considered the application, the response and the submissions on record.
10. The issue for determination in the present application is whether there is a basis for the court to dismiss the instant Claim for want of prosecution.
11. The test applied by the courts in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and, if it is in the interest of justice as was held in the case of *Ivita vs. Kyumbu* (1984) KLR 441
12. In the present case, from a perusal of the record, this cause was filed on 15th April 2020 together with a Notion of Motion. On 17th April 2020, the court issued interim orders restraining the respondent from terminating the Claimant's employment. On 2nd July 2021, the matter was fixed for mention on 4th October 2021 at the registry at the instance of the Claimant's counsel. On the said 4th October



2021, the court gave a further mention date for 8th November 2021 for purposes of taking directions. It appears that on the 8th November 2021, there was no appearance by either of the parties. On 25th November 2021, the Claimant filed an undated application which was placed before the court on 26th November 2021 where the court directed for the application be served on the Respondents. The court directed that the matter be mentioned on 17th January 2022. On the 17th January 2022 when the matter was before court for directions, there was no appearance by both parties. On 20th April 2023 the Respondents' counsel on record R.M Wafula fixed the matter at the registry for mention on the 19th June 2023 and thereafter filed the instant application on the 11th May 2023.

13. Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules* provides for dismissal of suits for want of prosecution as follows:

16.

- (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. Pre-trial procedure. Notice to show cause why suit should not be dismissed.

14. It is clear from the chronology of events that this suit is not ripe for dismissal for want of prosecution as the file has been active.

15. It is however evident that the Claimant has been enjoying the stay orders of this court without pursuing the expeditious disposal of the suit after filing the same under certificate of urgency. Unless the Claimant can demonstrate that there are negotiations and that parties are likely to record consent in the very near future, a hearing date shall be given by the court on the date of delivery of this ruling.

16. The application herein is consequently dismissed.

17. Each party shall bear its costs of this application.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF FEBRUARY 2024

MAUREEN ONYANGO

JUDGE

