



**Wabware v Beta Bakers Limited (Cause E931 of 2021)  
[2024] KEELRC 300 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 300 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E931 OF 2021  
AN MWAURE, J  
FEBRUARY 16, 2024**

**BETWEEN**

**SYLVESTER WABWARE ..... CLAIMANT**

**AND**

**BETA BAKERS LIMITED ..... RESPONDENT**

**RULING**

1. The Respondent filed a Notice of Motion dated 8<sup>th</sup> August 2023 seeking orders that:
  1. The Claim against the Respondent/ Applicant herein be dismissed for want of prosecution.
  2. The costs of this application be provided for.

**Respondent/ Applicant’s Case**

2. The Respondent/ Applicant avers that this Claim was commenced by a Memorandum of Claim filed on 11<sup>th</sup> November 2021 and summons to enter appearance were served on the Respondent.
3. The Respondent/ Applicant avers that it entered appearance vide a Memorandum of Appearance on 18<sup>th</sup> February 2022 and Statement of Response dated 8<sup>th</sup> April 2022 denying the Claimant’s claim.
4. The Respondent/ Applicant avers that despite service of these documents, the Claimant has not taken any steps to prosecute the matter.
5. The Respondent/ Applicant avers that the Claimant’s failure to set down the matter for hearing has caused great prejudice to it as it has been condemned to live with anxiety of the claim hanging over it.

**Claimant’s Case**

6. In opposition to the application, the Claimant filed a replying affidavit dated 6<sup>th</sup> November 2023.



7. The Claimant avers that there is backlog of cases in the Employment and Labour Relations Court which occasions delays to some if not all matters in the court.
8. The Claimant avers that his advocates have been pursuing the registry with a view of fixing a pre-trial date and even uploaded a letter dated 18<sup>th</sup> April 2023 seeking a mention in this matter.
9. The Claimant avers that the Registry was giving priority to matter filed from 2017 and below thus occasioning him a hard time fixing a mention date. He was informed that the court's diary for matters filed in the year 2021 has not yet reached and the same will be communicated.
10. The Claimant avers he is willing to prosecute the matter and prays the Respondent's application be dismissed as the reasons for delay were well out of his powers.

### **Analysis and Determination**

11. The guiding provisions on dismissal for want of prosecution are laid in rule 16 of the [ELRC procedure Rules](#) which provides that: -

“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.

(3) Any party to the suit may apply for dismissal as provided in paragraph (1)”

12. Additionally, order 17 rule 2(1) of the [civil procedure Rules](#) provides:

(1) In any suit in which no application has been made or steps taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

13. In [Kenya Plantation and Agricultural Workers Union vs Unliver Tea K Limited](#) [2021] eKLR the court held:

“.....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.

Once the applicant has demonstrated the above points, the evidential burden shifts to the Claimant/Plaintiff to demonstrate that he was prevented by sufficient cause from taking steps towards prosecuting the suit.”

14. Further, in [George Gatere Kibata v George Kuria Mwaura & another](#) [2017] eKLR the court held:-

“In my view, a defendant seeking dismissal of a suit on the ground of want of prosecution must satisfy the legal requirement of one-year threshold stipulated in Order 17 Rule 2 of the [Civil Procedure Rules](#). After satisfying the one-year threshold, he must also show that there was inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the court that he will be prejudiced by the delay if the suit were to be allowed to



proceed to trial. Lastly, he must satisfy the court that owing to the delay, a fair trial cannot be achieved. In *Ivita Vs. Kyumbu*, the court echoed this view by stating as follows:

“(the defendant) 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 its discretion in his favour and dismiss the action for want of prosecution.”

In answering the three questions set out in the opening paragraph of this Ruling, the court is to be guided by the legal framework in Order 17 Rule 2 and the guiding jurisprudential principles on dismissal of suit on account of want of prosecution. The court should also carefully and critically examine and evaluate the court record, the explanation tendered by the respondent in response to the application for dismissal, the general prevailing circumstances within the judicial system at the time of the alleged inaction, and the grounds put forth by the applicant in advancing the view that he would be exposed to grave injustice if the suit were to proceed to trial.

The legal ramifications of the statutory threshold set out under Order 17 Rule 2 of the *Civil Procedure Rules* is that a suit qualifies to be dismissed for want of prosecution if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit.”

15. The Claimant/ Respondent herein avers that the delay in prosecuting the case was due to the backlog at the ELRC Registry. However, no evidence was produced in court to ascertain his explanation that he was informed of the said backlog and/or that the court registry was focusing on 2017 files and beyond.
16. However it is clear That before 2021 that is when more judges were posted to the court there was a heavy backlog in court and only files of over four to five years old were being given dates. The court will give the claimant the benefit of doubt and allow him to be heard. It is a rule of natural justice to as much as possible to give all opportunity to all to be heard. This will not mean being lazy and negligent in prosecuting ones case is rewarded. Be warned.
17. This being a 2021 case the court will give the claimant 40 days from today’s date to fix the case for hearing failure of which it will stand dismissed.
18. Also, the claimant/respondent will pay the respondent/applicant Kshs 10,000- as throwaway costs before he fixes the case for hearing.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

