



**Odera v Fairview Hotel Limited (Cause 192 of 2014)
[2024] KEELRC 973 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 973 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 192 OF 2014
L NDOLO, J
APRIL 11, 2024**

BETWEEN

RUPET OCHIENG ODERA CLAIMANT

AND

FAIRVIEW HOTEL LIMITED RESPONDENT

RULING

1. This matter came before me on 6th December 2023 for Notice to Show Cause why the claim should not be dismissed for want of prosecution. At the Claimant's request, I allowed him to file an affidavit in response to the Notice to Show Cause.
2. In his affidavit sworn on 29th January 2024, the Claimant makes general statements indicating his willingness to prosecute the matter. He however does not explain why he took so long to prosecute his claim. All he does is to cite unexplained challenges in setting down the matter for hearing.
3. The Respondent filed its own affidavit sworn by its Human Resource Manager, John Mungai on 3rd March 2024.
4. Mungai depones that the Claimant has failed to demonstrate any sufficient cause why the suit should not be dismissed for want of prosecution. He points out that the Claimant has not exhibited any letters addressed to the Court seeking a mention or hearing date.
5. Mungai gives the following chronological court events in the matter:
 - a. On 20th August 2018, the matter came up for mention for directions when Ms. Wambua holding brief for Mr. Kenyatta for the Claimant sought leave to file a reply to the Memorandum of Response;
 - b. Leave was duly granted and the matter was set down for further mention on 24th October 2018 when there was no appearance for the Claimant and the matter was stood over generally;



- c. Since that date, more than five years ago, the Claimant has never taken any step in the matter.
6. Mungai states that the Respondent stands to suffer prejudice if the claim is allowed to proceed to hearing after the inordinate delay due to the following reasons:
 - a. Ownership and management of the Respondent Hotel have changed hands since the Claimant left employment. The ownership first changed hands in 2014 when it was sold by the Szlapak Family to the City Lodge Hotel Group of South Africa which subsequently sold the Hotel to the Westmont Hospitality Group in July 2022;
 - b. The only two witnesses who could provide first hand testimony as to the Claimant's employment at the Hotel are the then Human Resources Coordinator and the Executive Chef at the time;
 - c. The Human Resources Coordinator left the Respondent's employment on 30th September 2015 and the Respondent has no way of contacting her while the Executive Chef's employment was terminated on 5th December 2017 and he subsequently filed a claim for unfair termination against the Respondent in Nairobi ELRC Cause No 594 of 2018, which was dismissed on 28th February 2023;
 - d. In view of the foregoing, the Respondent has lost critical witnesses and its ability to fairly and properly defend itself in the suit has been severely impaired as a result of the inordinate delay on the part of the Claimant.

7. The foregoing chronology accords with the court record.

8. Rule 16(1) of the Employment and Labour Relations Court Procedure Rules provides 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.

9. 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 in the following terms:

“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.”

10. In the present case, the Claimant has not offered any credible reason why he did not, over a period in excess of five years, move the Court for hearing and disposal of his claim.
11. Further, the Respondent states that the ownership of the Hotel at which the Claimant was employed has changed ownership twice and that all the potential witnesses have long left employment. There is therefore the real danger that the Respondent’s defence has been compromised.
12. For the foregoing reasons, I find no reason to cause the Court to exercise discretion in favour of the Claimant. His claim is therefore dismissed for want of prosecution.
13. Each party will bear their own costs.
14. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF APRIL 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Omondi h/b Mr. Kenyatta for the Claimant

Mr. Owino for the Respondent

