



**Maingi v Zenith Steel Fabricators Limited (Cause 794 of 2018)
[2024] KEELRC 2868 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2868 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 794 OF 2018
L NDOLO, J
OCTOBER 31, 2024**

BETWEEN

NICODEMUS MICHAEL MAINGI CLAIMANT

AND

ZENITH STEEL FABRICATORS LIMITED RESPONDENT

RULING

1. This ruling determines the Notice of Motion dated 11th June 2024, by which the Claimant seeks to set aside the order made on 24th July 2023, dismissing the suit for want of prosecution, and reinstatement of the suit for hearing on priority basis.
2. The application is supported by the Claimant's own affidavit and is based on the following grounds:
 - a. That the Court dismissed the suit on its own motion on 24th July 2023;
 - b. That neither the Claimant nor the Respondent prompted the Court for dismissal of the suit;
 - c. That there was no notice of dismissal of the suit for want of prosecution that was issued by the Respondent to the Claimant;
 - d. That the Claimant has always been vigilant and willing to prosecute the matter to its logical conclusion and has no intention to obstruct or delay the course of justice in this case;
 - e. That the Claimant's suit is meritorious and has high chances of success;
 - f. That it is in the interest of justice that the Claimant be given a chance to prosecute the suit;
 - g. That this application is made in good faith and in the sole interest of justice and fairness,
3. In his affidavit in support of the application, the Claimant deposes that the suit had not been in abeyance for a period of over one year, to warrant dismissal for want of prosecution.



4. The Respondent opposes the application by a replying affidavit sworn by its Head of Finance, Bakirali Noordin on 2nd August 2024. Noordin accuses the Claimant of misleading the Court, by claiming that the matter had been ongoing until its dismissal on 24th July 2023.
5. Noordin points out that the Claimant filed his Memorandum of Claim on 30th April 2018, upon which the Respondent filed a Response on 25th October 2018. He adds that after that the Claimant took no action on the matter for nearly five years.
6. It is further deponed that after dismissal of the matter for want of prosecution, the Claimant purported to serve a mention notice and a hearing notice, indicating that the matter was listed before the Chief Magistrate's Court.
7. The Respondent asserts that reinstating the matter would be prejudicial to it, as critical witnesses who had interacted with the Claimant have long departed from the Respondent Company.
8. By his application, the Claimant faults the Court for dismissing his claim without being moved by any of the parties. In this regard, the Claimant appears to suggest that the Court has no power to act on its own motion. However, Rule 43(1) & (2) 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 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.
9. The applicable principles in dismissing 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.”
10. A perusal of the court record reveals that after filing his Memorandum of Claim on 24th May 2018, to which the Respondent responded on 31st October 2018, the Claimant did not take any action towards prosecution of his claim. Indeed, apart from a solitary letter dated 28th March 2023 from Kituo Cha Sheria, addressed not to this Court but to the Chief Magistrate's Court seeking a mention date, there was no other action taken by the Claimant.
11. Moreover, even after the dismissal of the claim on 24th July 2023, the Claimant did not move the Court until almost a year later on 11th June 2024. Neither this delay nor the failure to take action towards



prosecution of the matter have been explained, meaning that the Court has no reason to exercise discretion in favour of the Claimant.

12. The Claimant's Notice of Motion dated 11th June 2024 is therefore declined and the suit stands dismissed.

13. Each party will bear their own costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER 2024.

LINNET NDOLO

JUDGE

Appearance:

Nicodemus Michael Maingi (the Claimant in person)

Mr. Muguna for the Respondent

