



**Opele v Biometric Technology (Cause E350 of 2020)
[2024] KEELRC 2552 (KLR) (18 October 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2552 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E350 OF 2020
SC RUTTO, J
OCTOBER 18, 2024**

BETWEEN

FLORENCE KHAMALA OPELE CLAIMANT

AND

BIOMETRIC TECHNOLOGY RESPONDENT

RULING

1. What comes up for determination in this Ruling is the Application dated 21st February 2024, through which Respondent/Applicant seeks to have the Claimant’s Amended Statement of Claim dismissed for want of prosecution.
2. The Application is supported by the grounds appearing on its face and the Affidavit of Anthony Maina Mithanga, the Applicant’s Chief Executive Officer. Grounds in support of the Application are that the Claimant has taken a back seat since the Court delivered its Ruling on 19th August 2022. That further, the Claimant has not taken any step to prosecute this matter for the last one year five months since the said Ruling was delivered.
3. In his Affidavit, Mr. Mithanga deposes that the delay in prosecuting the matter for over one year five months is inordinate and inexcusable on the part of the Claimant. He contends that the Claimant has a primary duty to take steps to have the matter prosecuted having dragged the Applicant to court. It is his view that where the Claimant fails to do so as they have in this case, it is clear that they have lost interest in prosecuting the matter.
4. He further avers that the delay by the Claimant to prosecute this matter and the pendency of this suit continues to prejudice the Applicant’s right to a just, expeditious, proportionate and efficient trial as they continue to suffer loss having used a lot of funds to retain counsel and to defend the Claim.
5. The Claimant countered the Application through her Replying Affidavit dated 16th May 2024 in which she deposes that subsequent to the Ruling delivered by the Court on 19th August 2022, her



Advocate on record requested for a mention date for directions on several occasions via letters dated 7th November 2022 and on 28th August 2023 which request was not acted on.

6. That on 10th November 2022, her Advocate wrote an email to the Court registry requesting for directions, which request was responded to on 16th November 2022 with a promise to revert back with a date but no action was taken. She visited the registry personally and her Advocate sent his clerk severally to fix the matter for directions on different occasions in the year 2023 but their efforts bore no fruits.
7. The Claimant avers that after visiting the registry, she was informed that the registry had started issuing dates but the same was to be done in phases and according to the year of filing. She was subsequently informed that 2020 matters will be issued dates after matters filed in the year 2018 and 2019 had been given priority and allocated dates and was thereafter given a notice to the same effect.
8. That despite the notice, the registry has never issued dates in the matter or communication regarding the issuance of the dates in the said matter.
9. According to the Claimant, the delay in fixing the suit down for hearing was not deliberate.
10. The Claimant further avers that she is still keen and interested in pursuing the matter going forward in the fulfillment of time.

Submissions

11. The Application was canvassed by way of written submissions. Both parties complied and I have considered their respective submissions. On the Applicant's part, it was submitted that the Claimant is utterly in breach of the sacred principle of the overriding objective to expeditiously prosecute its suit. Referencing the case of *James Ovid Shugars Yhap vs Eric Okeno & 2 others* (2018) eKLR, the Applicant argued that the Claimant has not been diligent in pursuing the expeditious disposal of its suit and thus the delay goes to the pinnacle of the principle of administration of justice.
12. According to the Applicant, the Claimant's conduct is unacceptable, inexcusable and the inordinate delay to comply with Court's direction of filing of submissions, and the failure to prosecute its case should not be aided by this Honorable Court. In support of this argument, the Applicant sought to place reliance on the case of *Stephen Boro Gititha vs Family Finance Building Society & 3 others Civil Application No. Nai. 263 of 2009*.
13. On her part, the Claimant posited that the delay of one year four months in setting down the suit for hearing was not inordinate as she took steps to set the suit down for hearing and should therefore not be punished for circumstances beyond her control.
14. Citing the case of *Thathini Development Company Limited Vs Mombasa Water & Sewerage Company & another* (2022) eKLR, the Claimant submitted that she stands to suffer irreparable loss and damage as opposed to the Applicant as justice can still be delivered despite the justifiable delay in setting the suit for hearing.
15. Further submitting in support of her case, the Claimant urged the Court to exercise its discretion by rendering justice to all parties by dismissing the Application herein and setting the suit down for hearing. To this end, she relied on the case of *Omondi & 4 others vs Brava Food Industries Limited (Cause 1772 of 2017)* (2023) KEELRC 2765 (KLR) 19 October 2023.



Analysis and Determination

16. Evidently, the singular issue for determination in this Application is whether the Claimant's suit should be dismissed for want of prosecution.

17. The legal framework on dismissal of suits for want of prosecution is found in Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (now revoked), which is couched as follows: -

“(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.”

18. It is worth pointing out that the above provision is a replica of Order 17 Rule 2 of the Civil Procedure Rules.

19. The statutory threshold set out under Rule 16(1) is that a court may suo motto dismiss a suit for want of prosecution where such a suit has been inactive for a period of more than one year. Equally, the court may dismiss a suit on the same ground on the application of either party to the suit.

20. It should be appreciated that Rule 16 (1) is not cast in stone and that inactivity of one year does not automatically translate to the dismissal of a suit for want of prosecution. Therefore, each case must be considered on its own facts and the circumstances leading to the delay in prosecution of a case ought to be given due consideration.

21. The Court in the case of *Argan Wekesa Okumu vs Dima College Limited & 2 others* [2015] eKLR considered the principles for dismissal of a suit for want of prosecution and reckoned as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay... Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

22. And further, in *Ivita vs Kyumbu*(1984) KLR 441 it was held as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

10. In *Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009*, the court restated the test as follows: -

1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties-



the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.
23. Coming back to the case herein, the Claimant has averred that her Advocates have made several attempts to have the matter fixed for directions on different occasions but their efforts have borne no fruits.
24. In support of her averments, the Claimant annexed to her Replying Affidavit, a copy of a letter dated 7th November 2022 from her Advocates addressed to the Court registry, requesting for a mention date. In response, the court registry via an email of 16th November 2022 promised to revert back and requested the Claimant's Advocate to pay for fees for mention via e-filing.
25. There is no evidence of further activity or follow-up from the Claimant's end upon receipt of the email from the court registry. I say so in light of the Claimant's averments in her Replying Affidavit, that in 2023, her Advocate sent his clerk to the court registry severally to fix the matter for directions. This assertion is not supported by evidence and I must say that it is rather odd that for an entire year, the Claimant's Advocate did not at any time communicate with the court registry in writing and only chose to send his clerk to do physical follow-ups.
26. It is also notable that the Notice dated 20th April 2023 annexed to the Claimant's Replying Affidavit, emanated from the Chief Magistrate Milimani Commercial Courts as opposed to this Court.
27. Worthy of mention is that prior to the Applicant filing the instant Application, the parties herein had been issued with a Notice to Show Cause dated 28th March 2024, as to why the matter should not be dismissed for want of prosecution. This further demonstrates the fact that there was no activity from the Claimant's end, thus prompting issuance of the said Notice to Show Cause by the court.
28. What can be deduced from the foregoing is that more than one year had elapsed from the time the matter was last in Court and when the Claimant's Advocate corresponded with the court registry in an attempt to have the matter fixed for mention. Consequently, the present Application satisfies the one year threshold stipulated under the law.
29. Beyond satisfying the one year threshold, the Applicant is also required to show that there was inordinate and inexcusable delay in the circumstances of the case.
30. From the Applicant's standpoint, the Claimant's delay in prosecuting the matter for over one year five months is inordinate and inexcusable.



31. As was held in *Ivita vs Kyumbu* (supra), even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time.
32. Applying the foregoing decision to the case herein, this Court takes the view that the delay by the Claimant in prosecuting the suit is not so inordinate as to deny her an opportunity to prosecute her case.
33. The Court also takes cognizance of the fact that dismissal of a suit is a draconian act that drives a litigant away from the seat of justice and as such, discretion ought to be exercised judiciously. This position was amplified in the case of *John Nahashon Mwangi vs Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows;

“Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial ‘Sword of the Damocles’ which should only draw blood where it is absolutely necessary.”

34. To this end, I will not allow the Application as prayed and instead, I will direct that the Claimant takes concrete steps towards prosecution of the matter within the next 30 days, failure to which the suit shall stand dismissed for want of prosecution and in which case, the Applicant shall be entitled to the costs of the Application herein.
35. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2024.

STELLA RUTTO

JUDGE

In the presence of:

For the Applicant/Respondent Mr. Kigata

For the Respondent/Claimant No appearance

Court Assistant Millicent Kibet

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 15th March 2020 and subsequent directions of 21st 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 had 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 *Civil 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.

