Kenya National Private Security Workers Union v G4S Kenya Limited (Cause 587 of 2019) [2023] KEELRC 349 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 349 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 587 OF 2019

AN MWAURE, J

FEBRUARY 9, 2023

BETWEEN

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION ..... CLAIMANT

AND

G4S KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. The Respondent/Applicant has filed the application dated the August 18, 2022 seeking orders for dismissal of the cause for want of prosecution.

2. The application is based on the grounds on the face of the application and the affidavit of the Respondent's Employee Relationship Manager, Emma Maina.

3. It is deposed that it is over one year and ten months since the suit was last in court, yet the claimant has not taken steps to prosecute the matter nor fix it for hearing. The respondent further states that she verily believes that the claimant is not interested in prosecuting this suit. She deposes that it is in the interests of justice that the Respondent should not continue to be prejudiced and vexed by this suit when it is evident that the claimant is no longer interested in pursuing this suit.

4. The claimant union in the replying affidavit of Isaac G M Andabwa deposes that on the September 23, 2022, the union was informed by the firm of George Gilbert Advocates, who had the conduct of the matter that the case would be mentioned on the October 13, 2020 and upon further inquiry as to whether there were dates issued, the said advocate informed the union that hearings of matters was only given priority to 2015, 2016 and 2017. The advocate said he would inform the union once the court diary is open for 2019 matters and the claimant did not take 'back sit', as the case has been active throughout, save for the unavailability of hearing dates.

5. It is deposed that in the year 2021, dates were not issued for 2019 matters and it is in the court's knowledge that due to backlog in court, the court embarked on a program to clear cases in the system

that were 5 years and older. The present case was not in the list as per December 2021 and is still not in the system currently for quick disposal.

6. That he came to learn on the October 17, 2022, that there was an application to dismiss suit for want of prosecution and yet the advocate who had the conduct of the matter had informed the union on or about December 2020 that 2019 matters did not have dates by then.

7. The claimant states that the union has since changed advocates and thus necessary steps are now being undertaken to set down the suit for hearing with no intention to drag or delay the matter. It is deposed that the union's advocate on record have informed it that dates are now being issued for 2019 and 2020 matters as per the notice issued on or about September 2022.

8. The union is desirous of prosecuting the case to its logical conclusion. The case involves 76 grievants who were unlawfully terminated by the Respondent herein and therefore it is in the interest of justice the suit ought not be dismissed.

Applicant's Submissions

9. The Respondent/Applicant relies on Rule 16 of the *Employment and Labour Relations Court Procedure Rules, 2016* (ELRC Rules) which provides that (1) in any suit where 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 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.

10. The Applicant relies on the case of *John Njoroge Wanjiku v Aldonai Enterprises Ltd 2022 eKLR* where it was held 'that once a suit has been filed, it must be prosecuted in accordance with the law and procedure. If a suit is not prosecuted, the Court will not allow it to lie in its Registry and become part of daily statistics of case backlog in the Judiciary.

11. The Applicant also relied on the case of *Pius Wanjala v Permanent Secretary Ministry of Medical Services and 4 others 2021 eKLR* where the court held that failure to take action for a period of one year is a serious lapse and Rule 16 of the *ELRC Rules* ensures that litigants remain vigilant and the lapse in the present case is 1 year and 10 months.

12. The applicant also cited the case of *Utalii Transport Company Limited and 3 Others v NIC Bank and Another 2014 eKLR* where the court held that 'Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

    1. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;

    2. Whether the delay is intentional, contumelious and, therefore, inexcusable;

    3. Whether the delay is an abuse of the court process;

    4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;

    5. What prejudice will the dismissal occasion to the plaintiff"

    6. Whether the plaintiff has offered a reasonable explanation for the delay;

    7. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court."

13. The Respondent/Applicant argues that in the present case there has been an inordinate delay of 1 year and 10 months, the plaintiff has offered no explanation for the delay and the plaintiff will suffer no prejudice from the dismissal of the suit as they have not demonstrated that they are interested in pursuing the claims. The Respondent/Applicant submitted that the suit should be struck out for want of prosecution.

14. There were no submissions filed on behalf of the claimant/respondent on the file and CTS.

Analysis & Determination

15. It is common cause that the last time when the claimant took steps to have the matter prosecuted was on December 1, 2020. The issue for determination is whether the suit/claim should be dismissed for want of prosecution.

16. Rule 16 of the *Employment and Labour Relations Court Procedure Rules, 2016* (ELRC Rules) provides that (1) 'in any suit where 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 filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and (2) if no reasonable cause is shown to its satisfaction, may dismiss the suit. Any party to the suit may apply for dismissal as provided in paragraph (1) above.

17. Lady Justice Maureen Onyango in *Juma Ndegwa Nzowa v Dunhill Consulting Limited [2022] eKLR* cited the case of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & Another [2014] eKLR* where Gikonyo J stated as follows: "... I will discern the principles which the law has developed to guide the exercise of discretion by Court in an Application for dismissal of suit for want of prosecution. These principles are:

    1. Whether there has been inordinate delay on the part of the Claimants in prosecuting the case;

    2. Whether the delay is intentional, contumelious and, therefore, inexcusable;

    3. Whether the delay is an abuse of the Court process;

    4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Respondent;

    5. What prejudice will the dismissal occasion the Claimant;

    6. Whether the Claimant has offered a reasonable explanation for the delay;

    7. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the Court."

    'It is clear from the foregoing that for an Applicant to be successful he must satisfy 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'.

18. Onesimus Makau J in *Sospiter Omariba Mogere v Mex Logistics Africa Limited [2021] e KLR* said that 'I have considered the explanation by the claimant and noted from the said notice dated November 22, 2020 that indeed the delay to set down the suit for hearing was not entirely to be blamed on the

claimant. It is in the public domain that there has been a persistent problem of case backlog in the country's justice system and more in this Court which has only 12 judges to serve the whole nation'

> As a result, the delay in the hearing and determination of this matter has not been occasioned by the Respondent but by the Court's operations. Article 159 (2) (b) of the *Constitution* provides that one of the principles that should guide court's in exercising judicial authority is that justice shall not be delayed. It would therefore be unjust for this Court to dismiss a matter where the delay in delivering justice has been occasioned by inevitable circumstances it is faced with. I gather support from *David Eris v Balloon Safaris Limited [2018] eKLR* where Wasilwa J held:
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> "I agree that the Claimants have not prosecuted this case since it was filed in 2016. However, I take judicial notice of the fact that the registry has not been able to allow some cases to be fixed for hearing given the heavy backlog that this Court has been facing. The Claimant cannot therefore be wholly to blame for their inaction in prosecuting this case. The Claimants have also submitted that they are willing to prosecute this case."

19. The court has considered the explanation given by the Respondent/claimant to explain the delay in having the matter prosecuted and takes judicial notice that indeed in the year 2021 dates were not being issued for 2019 matters due to backlog that was in the Employment and Labour Relations Court. The court then had only 12 Judges serving the whole nation in employment and labour matters. The court is also aware that there was still difficulty in getting hearing dates last year before the Court for a matter that was filed in the year 2019.

20. The claimant is therefore not wholly to blame for the delay. And even if there is delay the same can be blamed on the claimant's counsel since the claimant relied on his services an advice. It would be very prejudicial to dismiss the suit against the grievants without a hearing. The Respondent/Claimant have expressed willingness to have the matter prosecuted and no prejudice will be occasioned to the applicant in having the matter heard and determined on merit. The court therefore gives the claimant another opportunity to have the matter fixed for hearing within 30 days, failure of which the suit shall stand automatically dismissed. Furthermore the claimants are ordered to pay Kshs 15,000/= as throw away costs to the respondents before the case is fixed for hearing.

    Orders Accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY 2023.

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 March 15, 2020 and subsequent directions of April 21, 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 *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