



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kamau v Gichana & another (Petition E073 of 2021)
[2023] KEELRC 738 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 738 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E073 OF 2021
JK GAKERI, J
MARCH 22, 2023**

BETWEEN

PAUL MURIITHI KAMAU PETITIONER

AND

EDWARD OMBWORI GICHANA 1ST RESPONDENT

THE NAIROBI CITY COUNTY ASSEMBLY SERVICE

BOARD 2ND RESPONDENT

RULING

1. Before the court for determination is a notice to show cause dated August 25, 2022 issued by the court for dismissal of the petition herein for want of prosecution as ordained by Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016.
2. The notice was occasioned by inactivity by the petitioner towards determination of the notice of motion dated May 11, 2021 filed under certificate of urgency and was last in court on September 28, 2021.
3. When the matter came up on September 21, 2022, Mr. Onyiego for the petitioner informed the court that he had filed a replying affidavit and served, although counsel for the 1st respondent had not and appropriate directions were given.
4. Counsel for the 1st respondent urged the court to dismiss the petition for the petitioner's failure to obey orders issued by the trial court on September 28, 2021.

Petitioner's response

5. The petitioner responded by an affidavit sworn on September 19, 2022.



6. The affiant states that Rule 16 contemplated a situation where no activity had taken place for 12 months from the date of filing the suit and proceedings took place on May 25, 2021, June 24, 2021 and September 28, 2021 and the duration since September 2021 was less than one (1) year and he was interested in pursuing the petition and the delay was occasioned by factors relating to legal representation and other occurrences that took place regarding the 1st respondent's position which occurrences had a bearing on this matter.
7. The affiant stated that when the petition was filed, his counsel was not in the Panel of the Nairobi City County Assembly but was enlisted thereafter which precipitated the objection on September 28, 2021.
8. That in his view, there was no conflict until the counsel expressed discomfort in handling the matter and counsel was subsequently appointed as Speaker of the County Assembly and asked the Petitioner to procure another counsel but due to financial challenges, it took long.
9. That in the meantime, in Civil Application No. 351 of 2021, the Court of Appeal barred the 1st Respondent from holding office pending the hearing of Civil Appeal No 255 of 2021 which affected prayers 1 and 2 of the petition but later the appeal was dismissed and the 1st respondent resumed duty as the clerk.
10. That he had now engaged a new firm of advocates to pursue the petition.
11. The affiant urges the court to find that cause had been shown.
12. When the matter came up for hearing on October 26, 2022, counsel for the Petitioner urged the court to find merit on the grounds relied upon and vacate the notice to show cause.
13. Counsel for the 1st respondent urged that submissions were unnecessary and the court of appeal decision had no relation to the petition.
14. Counsel for the 2nd respondent urged that the petitioner had not responded to the notice to show cause.
15. The court gave directions on the filing of submissions and by December 20, 2022, the petitioner and the 2nd respondent had filed submissions.

Petitioner's submissions

16. The petitioner's counsel isolated several issues for determination, namely; whether the suit had been inactive or idle for 1 year, nature of the delay and the issues raised by the petition.
17. Counsel urged that the petition raised matters of public interest which he did not specify.
18. As regards inactivity of the suit, it was urged that the petition had not met the threshold under Rule 16 of the *Rules*. Moreover, the dismissal for want of prosecution was not automatic and each case had to be decided on the basis of its circumstances.
19. As to whether the delay was inordinate, the court was invited to consider the substance of the petition vis-avis the replying affidavit and find that the delay was not inordinate to deny him the chance to prosecute the petition.
20. In conclusion, reliance was made on the decision in *John Nahashon Mwangi V Kenya Finance Bank Ltd (in liquidation) (2015) eKLR* to urge the essence of reluctance to dismiss suits for want of prosecution due to its draconian nature.



2nd Respondent's submissions

21. Counsel discounted the petitioner's affidavit on the ground that the Petitioner had provided no evidence as to when his advocate was enlisted in the Panel of the Nairobi City County Assembly but purported to explain it that he had not been instructed, an allegation counsel refers to as lame excuse and the petitioner's counsel was aware of the irregularity and did not act until the issue was raised in court.
22. In response to the argument that other occurrences impacted on the petition, counsel wondered how the Petitioner could file a petition and await the outcome of other matters or was it a matter of forum shopping?
23. According to counsel, the issue for determination was whether the court should exercise its discretionary power to dismiss the petition.
24. Counsel relied on Rule 16 to urge that each case must be decided on its own merit on the basis of the circumstances of each case.
25. Counsel further submitted that when the matter came up for mention on September 28, 2021, the petitioner was directed to put his house in order but did nothing until August 24, 2022 when the court listed the matter for mention before the Deputy Registrar. That it took the court's intervention for the Petitioner to act having gone to sleep on September 28, 2021 and nothing much would have changed but for the court's initiative.
26. The decision in *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v MD Papat & others and another* (2016) eKLR was relied upon to urge that it was the duty of the Petitioner to ensure that his case progressed to its logical conclusion having been filed under certificate of urgency and should not have waited to be prompted by the court.
27. Reliance was also made on the decision in *Mwangi S. Kimenyi V Attorney General & another* where the court restated the test for dismissal of a suit for want of prosecution to urge that the delay in this case was occasioned by the petitioner's indolence which according to the 2nd respondent demonstrated a casual disinterest and laid back approach.
28. It was urged that the delay from September 28, 2021 to August 24, 2022 was inordinate for an application filed under certificate of urgency and had not provided cogent reasons for the delay or evidence to advance the petition.
29. Finally, it was urged that the Petitioner had not furnished the court with facts for the court to exercise its discretion in his favour.
30. The court was urged to dismiss the petition for want of prosecution.

Determination

31. The singular issue for determination is whether the petitioner has made a case for the vacation of the notice to show cause.
32. It is not in dispute that the petitioner filed the petition herein on May 11, 2021 under certificate of urgency seeking various ex parte orders pending the hearing and determination of the notice of motion application dated April 21, 2021 and the petition of even date and no interim orders were granted and the matter was last before a judge on September 28, 2021 when the question of conflict of interest was raised by counsel for the 1st respondent.



33. It is also not in contest that the petitioner took no action from September 28, 2021 to the mention on September 24, 2022 at the initiative of the court when the issuing of conflict of interest of counsel for the petitioner's counsel who sought 21 days to cease acting. The mention precipitated the notice to show cause dated August 25, 2022 served on August 30, 2022 as evidenced by the affidavit of service and the petitioner filed an affidavit dated September 19, 2022 in his endeavour to explain the delay in prosecuting the petition.
34. In *Mwangi S Kimenyi v Attorney General & another* (Supra), Gikonyo J. stated that;
“Therefore, courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation given should be evaluated by the court to see whether it is reasonable.”
35. I will now proceed to evaluate the explanations provided by the Petitioner.
36. The Petitioner relies on two reasons namely; representation by counsel and other suits before the court.
37. Regrettably, none of the alleged reasons is explained in detail and particulars provided to demonstrate how they contributed to the long delay.
38. For instance, the petitioner states on oath that his counsel was enlisted in the Panel of the Nairobi City County Assembly but conveniently omits the date or timing of the enlistment.
39. Relatedly, from the petitioner's statements, it is clear that the issue of conflict of interest was never discussed between the petitioner and his counsel until the court issued a mention notice and counsel sought 21 days to do so over and above the eleven (11) months they had been indolent.
40. In the absence of essential particulars on the advocates enlistment in the Panel of the Nairobi City County Assembly and the issue of conflict of interest, the court is not persuaded that the Petitioner had a sustainable reason for the delay in prosecuting his case.
41. With regard to the other matters, it is clear that the petitioner filed the petition herein while other suits on the subject matter were on going from as early as 2020 when the 1st respondent was appointed Clerk of the Assembly.
42. The petitioner has not demonstrated how the other suits were the cause for his inaction for 11 months even after the issue of conflicted counsel had been raised.
43. As regards finances to hire counsel, the court is not involved and has no jurisdiction to meddle with advocate client relationship which the domain of counsel and client.
44. Litigants are at liberty to hire counsel and cannot rely on their failure to do so as reason for a delay in prosecuting the case. It behoves the client to make necessary arrangements before engaging a counsel. Litigation involves costs and litigants must be ready to shoulder them.
45. In the instance case, no particulars have been provided in support of the alleged financial constraints.
46. In sum, neither of the reasons cited by the Petitioner has been substantiated or is sustainable or cogent to justify the delay in prosecuting the petition.



47. As correctly posited by the Petitioner, dismissal of a suit for want of prosecution is a draconian act and drives a litigant out of the seat of justice and should thus be used seldomly as captured in *John Nabashon Mwangi V Kenya Finance Bank Ltd (In Liquidation)* 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 judgement. Such acts are comparable only to the proverbial ‘Sword of Damocles’ which should only draw blood where it is absolutely necessary.”

48. The principles governing dismissal of cases for want of prosecution are well settled as explained in legions of decisions principal among them being *Ivita v Kyumbu* (1984) KLR as follows;

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay, thus, 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. It is a matter of and in the discretion of the court.”

49. Finally, in *Mwangi S. Kimenyi v Attorney General & another* (Supra) relied upon by the 2nd respondent, Gikonyo J. summarised the principles as follows;

1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or to both, the court may in its discretion dismiss the action straight away . . .
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 (if amounts to an abuse of the court);
 3. Whether the delay is inordinate and excusable;
 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 the issues in action or cause or likely to cause serious prejudice to the defendant;
 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.”

50. Applying the forgoing principles to the facts of the instant case, it is clear that the Petitioner has failed to demonstrate interest, willingness and desire to prosecute the suit to its logical conclusion.

51. As much as courts are enjoined to sustain and not dismiss suits for want of prosecution and administer substantive justice, this is a case where the claimant has not taken a single step to prosecute the case since the court directed him to resolve the issue of representation on September 28, 2021 until prompted by the court 11 months later and has not provided any credible or cogent reason for the delay which the court finds not only inordinate but intentional and an abuse of the court process bearing in mind that the Petitioner filed the suit under certificate of urgency in May 2021.



52. This is a Petitioner who filed a new suit on matters before the court and because the other matters were on-going and impacted on his case, he demonstrated no enthusiasm in prosecuting the petition and provided no proposals on expeditious disposal.
53. Significantly, the petition has been hanging over the heads of the respondents a kin to the proverbial 'Sword of Damocles' owing to the Petitioner's indolence.
54. Be that as it may, as adverted to elsewhere in this ruling, courts are enjoined to sustain not to dismiss suits for want of prosecution. Since the one (1) year prescribed by the rules had not lapsed before the notice to show cause was issued, the court is persuaded that the petitioner should be afforded the opportunity to prosecute the petition.
55. In the end, notice to show cause dated August 25, 2022 is hereby vacated.
56. There shall be no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF MARCH 2023

DR. JACOB GAKERI

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 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 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 *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.

DR. JACOB GAKERI

JUDGE



DRAFT

RULING Nairobi ELRC Petition No. E073 of 2021 Page 8 of 8

