



**Kenya Airways Ltd v Maurice (Cause 1474 of 2018)
[2023] KEELRC 712 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 712 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1474 OF 2018
AN MWAURE, J
MARCH 17, 2023**

BETWEEN

KENYA AIRWAYS LTD APPLICANT

AND

OKHEBERO POLYCARP MAURICE RESPONDENT

RULING

1. The applicant has filed an application dated November 4, 2021 seeking to have the respondent's suit dismissed for want of prosecution.
2. The claimant states that the respondent filed a memorandum of appearance on November 7, 2018 and reply to the statement of claim on October 22, 2021.
3. He says the statement of claim was filed in January 26, 2018.
4. The court is informed that for over two years the respondent has failed to respond and has failed to place this file to the court for directions and/or prosecute the matter.
5. He says the delay in prosecuting the matter has not been communicated to the applicant or this honourable court.
6. The respondent filed a replying affidavit and stated that he has always been willing to prosecute the matter as he has been aggrieved by the applicant/respondent.
7. He says he is entitled to fair hearing as provided in article 50(1) of the *Constitution* of Kenya 2010. He says he has been keen to get a date but could not get one available due to Covid 19 pandemic which was un foreseeable.



8. He says that he is informed his advocate has been trying to get a hearing date but it has not been available. He pleads to the court not to dismiss his claim but instead dismiss the application dated November 17, 2022.

Determination

9. This is a case that was filed in October 2018 and respondent filed his response on January 1, 2019. This is a long time by all standards and the respondent (claimant) though alleging he could not get dates because of Covid 19 pandemic however does not show efforts he made to attempt to set the case for hearing.
10. Going by what is in the court file, the court finds the claimant sat on his suit and from 2019 to date has never set the case for hearing. That constitutes inordinate delay.
11. The applicant had to take the initiative to apply for the suit to be dismissed for lack of prosecution by his application dated November 4, 2021. By the way even this application has taken long to be fixed for hearing and is not clear why that is so. It seems it is a case where almost all the parties gave up on it.
12. The court having said so will be guided by the case Civil case 75 of 2018 *Robert Kimani Inonu v Kenya Deposit Insurance* cause 75 of 2018 where court held:

” in these circumstance what the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionately and equality of arms which are aimed at placing parties before the court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court so far as is possible to secure transitional motions before court do not render nugatory the ultimate end of justice. The court in exercising its discretion should therefore always opt for the lower rather the higher risk of injustice.”
13. In the present case my sentiments are similar to the pronouncements of the Judge in Case No 377 of 2016 *Thathini Developments Company Limited v Mombasa Water & Sewerage Co Ltd* Cause No 371 of 2016 where judge held:

“I have no doubt in my mind that the application dated September 13, 2021 ought to be dismissed with costs to the respondent but nonetheless in the interest of justice, equity and conscience is to have the applicant given an opportunity to be heard.
14. In the present case definitely the respondent (claimant) was culpable of indolence and slept on his rights to prosecute his case for over two years. The court definitely ought to dismiss his case but being cognisant that every individual ought to be given opportunity to have justice done and not to lock him out of the corridors of justice completely the court will not allow the prayer for dismissal of this suit of the respondent (claimant) for want of prosecution but allow the case to proceed.
15. The respondent is however ordered to fix the case for hearing and subject to court’s diary within 30 days from today’s dated this being a 2018 suit, if the respondent (claimant) fails to fix the suit within 30 days from today’s date notice of motion dated November 4, 2021 by operation of law shall be allowed and case shall be dismissed for want of prosecution without any further reference to the court.
16. Costs will be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF MARCH 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE

