



REPUBLIC OF KENYA



KENYA LAW
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**Nzili v Consolata Catholic Mission Trustees (Cause 725 of 2018)
[2023] KEELRC 704 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 704 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 725 OF 2018
JK GAKERI, J
MARCH 16, 2023**

BETWEEN

FILDEMA NZILI CLAIMANT

AND

CONSOLATA CATHOLIC MISSION TRUSTEES RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Respondent/Applicant dated August 15, 2022 seeking Orders That:-
 1. The suit be marked as dismissed by operation of Order 17 Rule 2(5) of the [Civil Procedure Rules, 2010](#);
 2. In the alternative, and without prejudice to (1) above, this suit be dismissed for want of prosecution.
 3. The costs of the suit and this application be borne by the Claimant/Respondent.
 4. Any other orders the court may deem fit and just.
2. The Application expressed under Article 159(2)(b) of the [Constitution of Kenya, 2010](#), Order 17 Rule 2(1)(3) 5 of the [Civil Procedure Rules, 2010](#) and Section 1A, 1B and 3A of the [Civil Procedure Act](#) is based on the grounds set forth on its face and the undated and unsigned Supporting Affidavit by Daniel Kennedy Wamai.
3. The Applicant states that the Claimant has not taken any step since June 13, 2019, a duration of over three (3) years and the delay is inordinate and inexcusable.



4. The unsworn affidavit states *inter alia* that the suit was filed on May 16, 2018 and the Respondent responded on June 19, 2018 and on June 13, 2019, the matter was certified ready for hearing and the parties were to fix a hearing date at the Registry and the Claimant/Respondent invited the Respondent by letter dated July 2, 2019 but the Claimant's advocate or representative did not attend on August 16, 2019 at 9.00 am.
5. That a perusal of the court file on January 16, 2020 showed that no action had been taken.
6. That pendency of the suit is prejudicial to the Respondent/Applicant's rights and causes unnecessary anxiety.
7. That it was in the interest of justice that the suit be dismissed as the Claimant was not interested in prosecuting it.

Response

8. In opposition to the application, the Respondent filed a Replying Affidavit sworn by Fildema Nzili, the Claimant.
9. The affiant confirms that she sued the Respondent on May 16, 2018 and the court satisfied the suit ready for hearing on May 13, 2019.
10. That her advocate on record M/s Lumumba Mogere & Co did not communicate progress of the case and changed representation and a Notice of Change of Advocates dated November 12, 2020 was filed and served upon the Respondent's counsel on record.
11. That M/s Lumumba Mogere & Co Advocates refused to release the file to the advocate on record to enable them appreciate the matter.
12. That the advocate on record has been ready and willing to act but could not do so due to lack of physical records as efforts to procure the same have fallen through.
13. The affiant states that she was still desirous of prosecuting the suit since the Respondent profited from the services she rendered and it would not be in the interest of justice to grant the orders sought.
14. That the delay was occasioned by the mistake of the former advocate and should not be visited upon the client.
15. That the Claimant should not suffer the penalty of not having the case heard on merit.
16. That the Respondent stands to suffer no prejudice by having the suit heard on merit despite the delay.
17. On January 24, 2023, the court gave the parties 7 days a piece to file and serve submissions.
18. By February 13, 2023 when the court retired to prepare this ruling, none of the parties had filed submissions.

Determination

19. The singular issue for determination is whether the Respondent/Applicant's Notice of Motion dated August 15, 2022 is merited.
20. Order 17, Rule 2(1) of the *Civil Procedure Rules, 2010* relied upon by the Respondent/Applicant makes provision for the dismissal of a suit for want of prosecution where no application has been made or step taken by either party for one year either suo moto or on application.



21. The provisions of Order 17 Rule 2 are replicated in Rule 16 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#).
22. Under Rule 16(3) of the Rules,

"Any party to the suit may apply for dismissal as provide in paragraph (1) which provides 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.
 2. If reasonable cause is given to the satisfaction of the court, it may make such orders at it thus fit to obtain the expeditious hearing and determination of the suit."
23. The law governing applications for dismissal of suits for want of prosecution is well settled.
24. Whether or not to exercise the power of dismissal of a case for want of prosecution is within the discretion of the court as held in [Nilesh Premchand Mulji Shah & another t/a Ketan Emporium V MD Popat & others & another](#) (2016) eKLR.
25. The court was emphatic that the discretion must be exercised in the interest of justice. The court should consider whether;
 - i. The party that filed the suit had lost interest.
 - ii. The delay is inordinate, unreasonable, inexcusable likely to cause serious prejudice to the defendant. "It is a matter of and in the discretion of the court."
26. In [Argan Wekesa Okumu V Dima College Ltd & 2 others](#) (2015) eKLR, the court stated 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. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the plaintiff's case for want of prosecution. See the case in *Ivita V Kyumbu* (1984) KLR 441. Further to this, the decision 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."
27. In the instant case, there is no dispute that the last action on record by the Claimant was a notice of change of advocates dated November 12, 2020 until the Respondent/Applicant filed the instant Notice of Motion, a duration of about 2 years.
28. The Claimant deposes that the previous counsel was to blame as he refused to hand over the physical file to the advocate on record on a claim based on lien.



29. Puzzlingly, the Claimant has not disclosed or tendered evidence of when she made the first request for the physical file or the last or any at all.
30. Regrettably, other than the Notice of Change of Advocates, the Replying Affidavit has no other attachment.
31. It is unclear to the court why for more than two (2) years counsel on record did not dispatch any letter to the former advocate on this matter.
32. In *Naftali Opondo Onyango V National Bank of Kenya Ltd* (2005) eKLR cited in *Rose Makokha Mteka V Oserian Development Co Ltd* (2022) eKLR, the court stated as follows;
- “However, in deciding whether or not to dismiss a suit under Rule 6, it is my view that a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff.”
33. Strangely, the Claimant blames the delay on the former counsel and avers that counsel’s mistake should not be visited upon her but is reticent on the advocate on record who does not appear to have filed or served any document after filing the Notice of Change of Advocates to secure expeditious determination of the suit.
34. Finally, although the Claimant deposes that she is desirous of having the case heard on merit, she has not indicated when she is likely to secure the physical file from the previous counsel, if that is the only feasible way nor has she explained what the previous counsel was demanding so as to release the file. In other words, there are no timelines as to when the suit will proceed to hearing. The Claimant is opposing the application by the Respondent without any commitment to secure expeditious hearing and determination of the suit. This court is not amenable to being subjected to such uncertainties over a matter within the control of the Claimant and her counsel.
35. Without timelines, the court cannot be assured that the hearing of the suit will proceed without further delay and the defendant will not suffer hardship.
36. Applying the principles enunciated by the foregoing authorities, it is the finding of the court that the delay in prosecuting the case is prolonged and inexcusable. The reason for the delay implicate the Claimant’s culpability for indolence.
37. In conclusion, the proper orders to make are as follows;
- a. The Notice of Motion dated August 15, 2022 is merited and the suit herein is dismissed for want of prosecution.
 - b. There shall be no orders as to costs.
38. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 16TH 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.

