



**Kigundu v Auto Express Limited (Employment and Labour Relations Cause 318 of 2019) [2023] KEELRC 1915 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1915 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 318 OF 2019  
MA ONYANGO, J  
JULY 31, 2023**

**BETWEEN**

**MICHAEL WANJAU KIGUNDU ..... APPLICANT**

**AND**

**AUTO EXPRESS LIMITED ..... RESPONDENT**

**RULING**

1. An application dated March 15, 2022 the respondent/applicant seeks to have the suit herein dismissed with costs for want of prosecution.
2. The application is supported by the grounds on the face thereof and the affidavit of Njeri Mucheru, counsel for the respondent.
3. The applicant avers that no action has been taken in the file for more than one year, the last action having been the filing of issues by the respondent/applicant on November 8, 2021.
4. The application is opposed by the claimant through a replying affidavit of Godfrey Makuyu Otenyo, counsel in conduct of the suit on behalf of the claimant.
5. In the replying affidavit counsel depones that indeed the last action was on November 8, 2021, that the counsel had experienced difficulties accessing the file at the registry and that there had been numerous notices from the court registry, two of which are appended to the replying affidavit.
6. The first is an undated notice from court registry stating that the court was fixing 2018 matters for hearing. The second is another undated notice from the court registry informing litigants that the registry was fixing 2016 and older matters for hearing.
7. Counsel deponed that the suit is ready for hearing when the court issues a date.
8. The application was disposed of by way of written submissions.



9. The applicant submits that there was inordinate and inexcusable delay in fixing the case for hearing, relying on the decision in *Nzoia Sugar Company Limited v West Kenya Sugar Limited* [2020] eKLR where the court held that delay of 2 years in prosecuting the case was inordinate and unreasonable, had not been explained by the claimant and that it was apparent that the suit had been filed for the sole purpose of obtaining injunctive orders. The court further stated that the more fact that the defendant had not demonstrated that it would suffer any prejudice was not sufficient to sustain the suit.
10. For the claimant it is submitted that it filed the claim on May 21, 2019 while the respondent filed a counter claim on July 10, 2022(sic) the correct date of answer to memorandum of claim and counter claim is July 10, 2019.
11. The claimant further invites the court to take judicial notice of the covid-19 pandemic which restricted service delivery at the court.
12. The claimant further submits that there was action in the file on June 21, 2021 which culminated in the filing of the client's issues on November 8, 2021. That the instant application was filed only 4 months thereafter.
13. The claimant questions why the respondent who has filed a counter claim did not opt to fix the suit for hearing.

### **Analysis And Determination**

14. Having considered the application, the grounds and affidavit in support thereof, the replying affidavit and the submission of the parties, the issue of determination is whether the suit was ripe for dismissal for want of prosecution on the date the instant application was filed.
15. Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides for dismissal of suits for want of prosecution as follows:  
 Notice to show cause why suit should not be dismissed
  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 as it thinks fit to obtain the expeditious hearing and determination of the suit
  3. Any party to the suit may apply for dismissal as provided in paragraph (1).
  4. The court may dismiss the suit for non-compliance with any direction given under this rule.
16. As is clear from rule 16 (1) as read with 16(3), either party may apply for dismissal of the suit for want of prosecution only where "no action has been taken by either party within one year"
17. In the instant suit, the last action in the file was on November 8, 2021 when the list of issues was filed as stated in both the affidavit in support of the application and the replying affidavit.
18. The instant application having been filed on March 15, 2022, one year had not lapsed since the last action was taken in the file.



19. For this reason, I find that the application herein was filed prematurely. I further find that the respondent who had filed a counter claim, had a similar responsibility as the claimant to fix the suit for hearing unless it has not lost interest in its counter claim.
20. The application is accordingly dismissed with no orders as to costs, taking into account the fact that both parties had a responsibility to fix the suit for hearing.

**DATED, DELIVERED VIRTUALLY AT ELDORET THIS 31<sup>ST</sup> DAY OF JULY, 2023.**

**M. ONYANGO**

**JUDGE**

