



BOM Moi Kapsowar Girls Secondary School v Rutto (Employment and Labour Relations Appeal 12 & 13 of 2020 (Consolidated)) [2023] KEELRC 1701 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1701 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL 12 & 13 OF 2020 (CONSOLIDATED)
MA ONYANGO, J
JULY 6, 2023

BETWEEN
BOM MOI KAPSOWAR GIRLS SECONDARY SCHOOL APPLICANT
AND
MATTHEW KOSGEI RUTTO RESPONDENT

RULING

1. This ruling is in respect of two separate applications being ELRC Appeal No 12 and ELRC Appeal No. 13 of 2020 dated August 1, 2022 both of which seek orders that;
 - i. The Memorandum of Appeal dated October 23, 2020 and filed in court on November 4, 2020 be struck out
 - ii. The costs of the Appeal and application herein be provided for
2. The grounds upon which the applications are anchored are that the appellant has not taken any steps to have the appeals prosecuted for more than one year since the appeals were filed on November 4, 2020 and that there is no justifiable cause given as to why the same should not be dismissed.
3. The application is supported by the affidavit of Joan Too, the Principal of the applicant where she deposes that pursuant to Order 17 Rule 2 of the Civil Procedure Rules 2010, any party to the suit in which no application has been made or step taken by either party for over one year the same may be dismissed for want of prosecution; and that the appeal is thus incompetent and defective and should be struck out.
4. The applications are opposed. The appellant filed replying affidavits sworn on November 10, 2022. The appellant's case is that he filed the instant appeals vide memorandum of appeal on November 4, 2020; that he further requested for the proceedings to be typed vide a letter dated October 21, 2020; that the typed proceedings were not ready until late March 2021 whereupon his counsel proceeded



and filed records of appeal and served upon the respondents on April 8, 2021; that his advocate then made attempts at fixing the matters for mention before the court, that visits to the registry did not bear any fruits prompting issuance of several letters to the Deputy Registrar and to the magistrates court registries as evidenced by the annexures marked MKR 2, MKR3 and MKR4. That thereafter, the appeals were fixed for mention before the Judge on October 17, 2022 but the court did not sit on the said date.

5. According to the appellant, the delay in prosecuting the appeals was occasioned by the registries owing to failure to avail the court files. He further deposes that his advocate has taken the responsible steps to ensure the appeals proceed to their logical conclusion.
6. The court was urged to dismiss the instant applications.
7. On November 14, 2022, the court directed parties to dispose of the applications by way of written submissions. The applicant filed its submissions on January 25, 2023. I have perused the record and found no submissions for the appellant.
8. The instant applications are brought under the provisions of Order 17 Rule 2(1) and (3) of the Civil Procedure Rules which provides;
 - “2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]
 - (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
 - (2)
 - (3) Any party to the suit may apply for its dismissal as provided in Sub Rule 1”.
11. I have perused the record and noted that indeed the appeals herein were filed vide Memorandum of Appeal on November 4, 2020. The record also reveals that the appellant’s counsel, on several occasions wrote to the Deputy Registrar of this court and to the Senior Resident Magistrate Iten Law Courts, the Trial Court, following up on the position of the appeal and the typing of proceedings respectively. There is also correspondence to court seeking that the files be placed before this court for directions.
12. It is on record that the last such letter written before the instant applications were filed which is undated, was received by this court’s registry on May 4, 2022 and by Iten Law Court’s Civil Registry on April 8, 2022. The files were received by this court on July 21, 2022.
13. The instant applications having been filed on October 14, 2022 are premature as one year had not lapsed since the last action was taken in the files. It is further evident that the delay was not caused by the respondent but by the failure of the Trial court to avail the court files to enable this court’s registry to set down the matters for directions. As stated in the replying affidavits of the appellants/respondents, the court registry declined to fix the files for directions without the trial court files.
14. From the forgoing it is evident that there was no indolence on the part of the appellants. On the contrary they made spirited efforts to have the appeals fixed for mention for directions but were frustrated by the absence of the trial court files.
15. The appellants have indeed offered valid reasons for the delay in the hearing of the appeals and justice will not be served if the appeals before this court are dismissed for want of prosecution.



16. In the circumstances I find no merit in the applications herein dated August 1, 2022. The applications are accordingly dismissed. The appellants are directed to fix their respective appeals for directions within the next 30 days.
17. Each party shall bear its own costs of the application.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 6TH DAY OF JULY, 2023

MAUREEN ONYANGO

JUDGE

