



REPUBLIC OF KENYA



KENYA LAW
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**Siaji v Craft Silicon Limited (Cause 157 of 2019)
[2023] KEELRC 1861 (KLR) (3 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1861 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 157 OF 2019
NZIOKI WA MAKAU, J
JULY 3, 2023**

BETWEEN

CHRISPINE OTIENO SIAJI CLAIMANT

AND

CRAFT SILICON LIMITED RESPONDENT

RULING

1. The respondent/applicant seeks the dismissal of the claimant's suit for want of prosecution. The respondent asserts that rather than take a concerted effort to prosecute or at the very least progress this matter, the claimant fell into slumber for a second time and a second year running, prompting the respondent to take steps to wake the claimant from what has become an unwavering and rather comfortable sleep. It submits that a cumulative delay of two (2) years and two (2) months in failing to take any steps in these proceedings, and in a court that is already overburden with a backlog of cases, is inordinate and this court should not condone the claimant's contumelious and inexcusable activity. The respondent submits the fact of the matter remains that claimant has not taken any significant steps to progress this matter in a timely manner. Further, thereto, claimant has treated this Court's orders with such casualness and in the process left the respondent to wander in limbo for years without any excusable justification to merit this Court's discretionary intervention. In light of these circumstances, the respondent invites this court to be guided by the Court's rationale in *Mobile Kitale Service Station v Mobil Oil Kenya Limited & anor* [2004] eKLR cited with the approval of *Republic v Commissioner of Income Tax & anor; Equitorial Commercial Bank Ltd (now known as Spire Bank Ltd)* [2022] eKLR in dismissing this cause for want of prosecution: -

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously.



Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the Plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the Defendant. The consequences must be placed on Plaintiff's shoulders." [emphasis supplied]

2. The respondent submits that in *Chrispine Otieno Sijaji v Craft Silicon Limited* [2021] eKLR this Court held that: -

“As the case is not delayed on account of deliberate inactivity by the claimant, it shall be listed for mention to confirm compliance and eventually a hearing date to be fixed.

Due to the anxiety the respondent expresses, this should be done within the next two (2) weeks before any other Judge of ELRC Nairobi.”

3. It submits that in rendering its decision on November 24, 2021, this Court understood the import of substantial delay and the grave prejudice occasioned to the respondent in defence of these proceedings. Suffice to say, following this Court's directive, the claimant was under an obligation to hastily prosecute this matter or at the very least take steps in the prosecution or listing of this matter for directions. It is submitted that however, despite being granted two (2) weeks to regularize this procedural lapse, the claimant slumbered once again and only sought to take a step in this matter on January 27, 2023, one (1) year and two (2) months, after the Court's Ruling delivered on November 24, 2021. It is for this reason that the respondent vehemently objects to the claimant being accorded a second pardon and a second bite at the cherry in the prosecution of his claim. This is having disregarded this Court's express directions in full recognition of what would transpire by failing to comply with the Court's explicit directions.

4. In determining this application, the respondent therefore submits that it is the claimant that is in pursuit of a remedy in this cause and it is therefore not the duty of the respondent to prosecute or take steps on the claimant's behalf in the prosecution of this cause. Consequently, the claimant's inordinate delay has prejudiced the respondent and its right to an expeditious trial, further highlighting the claimant's lack of interest in these proceedings. The respondent submits that this Court should not permit itself to be used as a medium to harbor dormant cases with the hope that the Court's favourable discretion shall always carry the day which is the very essence of abusing the Court process.

5. The respondent submits dismissal is governed by rule 16 of the *Employment and Labour Relations Court (Procedure) Rules [2016]* which speaks in clear terms. The respondent submits that underscoring the import of this provision, the Court in *Kenya Plantation and Agricultural Workers Union v Unliver Tea Kenya Limited* [2021] eKLR analyzed this provision and observed as follows:-

“From the foregoing provisions, an applicant seeking for dismissal of a suit for want of prosecution is only required to demonstrate that no action has been taken by either party for one year in the suit and that the failure was for no good cause. Once the applicant has demonstrated the above points, the evidential burden shifts to the claimant to demonstrate that he was prevented by sufficient cause from taking steps towards prosecuting the Suit.”

6. It submits that from the foregoing, it is therefore clear that whether to exercise the discretionary power to dismiss this cause for want of prosecution this Court ought to be satisfied that there has been a period of inactivity for one (1) year and that no reasonable cause has been placed before the Court to merit its discretionary intervention. The respondent submits that it has met its evidentiary burden and the claimant has failed to meet the criteria to permit this Court to exercise its discretion for a second time for the reasons hereunder.



7. The respondent submits that by the claimant's disregard of this Court's directions issued on November 23, 2021, it is a rarity to have two applications filed in the same cause to dismiss a suit for want of prosecution within a year apart from each other. This is because the general assumption would be that once the Court pardons inactivity at the first instance, the expected reaction by the claimant would be to take every possible step to progress their case to its logical conclusion.
8. The respondent submits the question as to whether a two-year period of inactivity was inordinate and sufficient to merit the Court to exercise its discretion to dismiss a suit of want of prosecution, the Court in *Kenya Plantation and Agricultural Workers Union v Unliver Tea Kenya Limited* [2021] eKLR observed as follows: -

“It would appear from the record that after the suit was adjourned at the instance of the claimant on 15/5/2019, the claimant went into a sleep mode until it was woken up by the instant application. The inaction by the claimant from 15/5/2019 to 15/10/2021 when the application was made is inordinate and not justified by any reasonable explanation.

I must agree with the Applicant that the failure by the claimant to take action towards prosecuting the suit is without any good cause and the delay of over two years is inexcusable. They deliberately failed to invite the applicant to the court registry for over two years to seek for hearing date.”

9. The respondent submits that as such, the claimant cannot have any recourse this time around as not only did he fail to fix this cause for hearing when directed, the claimant failed to take any step, as small as it could have been, towards the prosecution of this matter. To this end, the respondent cites the case of *Pius Wanjala v Permanent Secretary Ministry of Medical Services & 4 others* [2021] eKLR where it was held as follows:

“The failure to take action for a period of one (1) year is a serious lapse and rule 16 of the *ERLC procedure Rules* ensures that litigants remain vigilant.”

10. On the issue of the claimant's failure to advance a reasonable and excusable justification for the inordinate delay it was submitted that in attempting to offer this Court a plausible reason for his inordinate delay, the claimant submits that following this Court's directions on 24th November 2021, there were administrative inefficiencies at his legal representative's offices which heavily contributed to inactivity to prosecution of this matter. The respondent submits that such a reason is not excusable to merit this Court to exercise its discretion against dismissal of this cause for want of prosecution and asserts that after all, apart from mere allegations, the claimant has not provided any evidence to this Court that he had undertaken any efforts in following up on the prosecution of this matter from 2019 and more so since this Court issued further directions on November 24, 2021.
11. The respondent cites the decision by the Supreme Court of Kenya in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR and re-affirmed by the Court in *First National Finance Bank Limited v Universal Apparels (EPZ) Ltd & 2 others* [2017] eKLR thus:

“this Court has had occasion to remind litigants that article 159(2) (d) of the *Constitution* is not a panacea for all procedural shortfalls. Where the statute or the applicable rules stipulate a procedure to be followed, parties ought to comply. It is only when rules are followed that there is orderliness in the manner in which proceedings are handled. If the courts were to totally disregard the rules of procedure, the result is likely to be total anarchy.”



12. The respondent submits that therefore, were this Court to pardon such an inexcusable conduct, a travesty of justice shall be occasioned and the respondent shall be condemned to further prejudice in the contumelious prosecution of this cause. It is for this reason that the Court in *Savings and Loans Limited v Susan Wanjiru Muritu* [2002] eKLR as cited with the approval of *In re EK & another (Minors)* [2021] eKLR took a stance on such sluggish prosecution of proceedings by holding that: -

“A case belongs to a litigant and not to the advocate. A litigant has a duty to pursue the prosecution of his case. The Court cannot set aside orders on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend Court. It is the duty of the litigant to constantly check with his advocate the progress of his case.

... it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant.”

13. It is submitted that as articulated by the Court in *Mwangi S. Kimenyi v Attorney General & another* [2004] eKLR and relied upon in *Nzoia Sugar Company Limited v West Kenya Sugar Limited* [2020] eKLR:

“The litmus test of inordinate delay is that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable.

Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases under the law.” [emphasis supplied]

14. The respondent submits that the claimant has failed to provide a justifiable reason as to its inordinate delay in the prosecution of this suit. As to the prejudice to be suffered, the respondent finds comfort in the Court's finding in *Bilha Ngonyo Isaac v Kembu Farm Ltd & anor* [2018] eKLR: -

“There would be no injustice to a party who for three consecutive times would fail to attend court for hearing of her case, and no satisfactory reasons are given when the court fails to hear him out, then states that she is prejudiced by an order of dismissal.

In the circumstances, it is the respondents who were prejudiced by the appellant's failures to prosecute the case without unreasonable delay. Pendency of a case in court when it is obvious that the plaintiff is not interested to prosecute it, costs time and money to the Defendants not to mention mental anguish of having a burden of the case over their shoulders for an unnecessary period of time.

In the process, the court becomes the punching bag, leading to lose of confidence with the judicial system due to delays in finalizing cases, when in effect and in most of the cases, it is the parties, mostly the plaintiffs, who would take the earliest opportunity to delay finalization by requesting for unnecessary adjournments without clear and convincing reasons. A Court should desist from allowing parties to have joy rides over their cases to the prejudice of other parties including the courts.”

15. As to the claimant's duty to prosecute, the respondent submits that the onus to prosecute this cause or have it progressed to its logical conclusion remains with the claimant. It cites the decision in *Utalii*



Transport Company Ltd & 3 others v NIC Bank & another [2014] eKLR, where the Court observed thus: -

“It is the primary duty of the plaintiff to take steps to progress their case since they are the ones who dragged the Defendant to Court.”

16. The respondent cites the case of *Anthony Kaburi Kario & 2 others v Ragati Tea Factory Company Limited & 10 others* [2014] eKLR, where the Court held:

“It is only too trite to say that, as in every civil suit, it is the Plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches.

On the other hand, when he fails to bring his claim to a speedy conclusion, the Defendant ought to invoke the process of court towards that end as soon as it is convenient by either applying for its dismissal. Delay in these cases is much to be deplored.

17. It is submitted that this Court must therefore bear in mind that there is no justification in law for a party to file a suit and thereafter go to sleep. A suit is not filed for the sake of it. A party cannot therefore file a suit and park it at the Court registry for times on end. The respondent submits that there is no point of populating the Court registries with a claim that is not being prosecuted and that there is no reason to clog the judicial system. It thus submits that the suit be dismissed for want of prosecution.

18. The claimant in response filed a replying affidavit sworn on March 20, 2023. In it, he asserts that he has been advised by his counsel on record that following the Ruling of the Court in November 2021, instructions were issued internally within the law firm representing him for the case to be fixed for hearing. He deposes that there was transition in the staff, to wit, the employees who were to effect the instructions without effective transmission of the instructions to incoming staff. The claimant asserts that an in depth audit was carried out and this matter was noted to have been affected and immediately, in January 2023, a request was made to take directions in order to fix the matter for hearing. It was submitted that contrary to assertions by the respondent, the last time action had been taken was in December 2021 when a request was made for a copy of the Ruling. He asserts that the respondent had made the application for dismissal of his case in 2021 when it was well aware that no dates were being issued for 2019 matters. He submits that the delay in setting down the matter for directions was occasioned by an administrative lapse in the claimant advocate’s office. The claimant submits that an advocate’s mistake should not be visited on his client and that any perceived delay on the part of his advocates should not, in all fairness, be visited upon him. The claimant submits that in the unique circumstances of his case the delay is neither inordinate nor excessive. He cited the case of *Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas & 2 others* [2014] eKLR where it was held:

There is no precise measure of what amounts to inordinate delay as that would differ from case to case depending on the circumstances and facts of each case; for instance, the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases. See the case of *Allen v Alfred Mcalphine & Sons* [1968] 1 All ER 543: where a delay of fourteen (14) years was considered inordinate and inexcusable. But



see also the cases of *AGIP (kenya) Limited V Highlands Tyres Limited* [2001] KLR 630 and *Sagoo v Bhari* [1990] KLR 459, where delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. And also NBI HC ELC Case No 2058 of 2007 where delay of about 1½ years was considered not to be inordinate. At this point, I think I should examine the circumstances of this case and the amount of delay involved to determine whether it is inordinate and inexcusable?

19. The claimant submits that the respondent has not particularised what prejudice they have or may suffer as a result of the delay. He cites the case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR where it was held:

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 amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 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 issues in action or causes or likely to cause serious prejudice to the Defendant; and 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.

20. The claimant submits that since there is no substantial injustice or additional prejudice suffered by the respondent, it is still possible despite the delay to give substantial justice to the parties. The claimant cites the case of *Pravichandra Jamnadas Kakad v Kenya Bus Services Limited & another* [2014] eKLR where the court held:

The next question the Court should answer before it concludes the delay is inexcusable is whether it is still possible despite the delay to serve substantive justice. The basis for this is what I stated earlier in this ruling that, every Court of law should pay homage to its core duty of serving substantive justice in judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT Dobie case that the Court should aim at sustaining rather than terminating suit. The constitutional principle and policy here is that dismissal of suit summarily for want of prosecution completely divests a party of a hearing of his case on merit, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the “Sword of the Damocles”. Therefore, where an explanation has been given of the delay, the Court should evaluate it to see if it is reasonable and thus, excuse the delay. The Court would at the same time consider prejudice to the Defendant as well as to the Plaintiff if the suit is sustained or dismissed, respectively. Substantial to fair trial or grave injustice to the Defendants is the test here, but it must be shown the Defendant will suffer some additional prejudice which results into 1) impending fair trial; 2) aggravated costs; or 3) specific hardships to the Defendant which has worsened the Defendant’s position in the suit. The 1st Defendant has not shown such substantial risk occurring due to the delay. And the 2nd Defendant is already accused of default of a court order. He cannot stand on a pedestal or be beyond reproach such that he can point a finger at the Plaintiff for a delay he has contributed to. Using the test formulated in *Ivita v Kyubmu* (1984) KLR 441 (*supra*), by Chesoni, J (as he then was), the hearing of the case is still possible without causing injustice or extreme difficulties in the trial. At least, the suit against the 1st Defendant is sustained so that a just resolution of disputes through a fair and public hearing in accordance with article 50(1) of the *Constitution* is achieved. See the opinion of Russel



L.J. in *William C. Parker Ltd v F.j. Ham & Sons* at p 1586 which was quoted in *Birket v James* p 335.

21. The claimant submits that the respondent has not placed any material before the Court to demonstrate the delay was deliberate or inordinate or that there was any prejudice as a result of the perceived delay. The claimant submits that article 50 of the [Constitution](#) provides for a right to fair trial and article 159(2)(d) provides that justice is to be administered without undue regard to technicalities which is the respondent's intention to curtail the hearing of the suit herein on its merits. The claimant submits that the attempt by the respondent to curtail the hearing of the suit is mala fides as the respondent is yet to comply with Order 11 and that the intention is to defeat the ends of justice. The claimant submits that he is very keen on having the case heard and determined being cognizant of the fact that litigation must come to an end. He submits that the court should be guided by the case of [Invesco Insurance Company Limited v Oyange Barrack](#) [2018] eKLR. The claimant thus urges the court to dismiss the respondent's application and directs that the matter herein be heard and determined on merits.
22. The Court has considered the motion and the rival arguments for and against the same as well as the law and authorities cited. The Court associates itself with the sentiment expressed in the case of [Nzoia Sugar Company Limited v West Kenya Sugar Limited](#) *supra* that parties should file suits in court with a view to prosecute them. It ought not be the case that suits are filed for the sake of it. Cases should therefore not remain parked in the court's registry, taking up space and creating a false sense of backlog of cases and propagating an appearance of inefficiency on the part of courts. The respondent has a right to have a just and expeditious disposal of the suit and not have the agony of a sword hanging over its head ad infinitum. When the Court granted the claimant a chance to prosecute his case after the previous lapse on his part, he ought to have grabbed the chance. By failing to do so, it leaves the Court with the only exit available to the suit - this suit is clearly one fit for dismissal for want of prosecution. As remarked by the respondent, it is indeed rare for two applications to be mounted for dismissal for want of prosecution as has happened here. The claimant has not provided any evidence to this Court that he had undertaken any efforts in following up on the prosecution of this matter from November 24, 2021. The claimant has been demonstrably indolent and since justice aids the vigilant, his suit must be dismissed as it is an unnecessary clog to the stream of justice. Suit dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JULY 2023

NZIOKI WA MAKAU

JUDGE

