



**Rift Valley Railways Workers Union (K) v China Road & Bridge Corporation Kenya;
Ministry of Labour, Social Protection State Department of Labour & another (Interested
Parties) (Cause 1647 of 2018) [2023] KEELRC 2284 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2284 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1647 OF 2018
NJ ABUODHA, J
SEPTEMBER 29, 2023**

BETWEEN

RIFT VALLEY RAILWAYS WORKERS UNION (K) CLAIMANT

AND

CHINA ROAD & BRIDGE CORPORATION KENYA RESPONDENT

AND

**MINISTRY OF LABOUR, SOCIAL PROTECTION STATE DEPARTMENT OF
LABOUR INTERESTED PARTY**

RAILWAYS AND ALLIED WORKERS UNION INTERESTED PARTY

RULING

1. The Respondent filed this application dated 1st March, 2023 seeking for orders that this suit be dismissed for want of prosecution.
2. The application was supported by the Affidavit of Mary Mwihaki Gichuki the Human Resource manager of the Respondent wherein she averred that this case was last in court on 2nd February, 2021 when the matter came up for mention for directions and from the said date the Claimant has not made any application or taken any step on record to prosecute or advance the prosecution of this suit hence a delay of a period of more than 2 years is inordinate.
3. The Respondent further averred that it has suffered and continues to suffer prejudice by the prolonged litigation since the case has been left to hang over the Respondent indefinitely and that it is against the principle of law that a Claimant is responsible for prosecution of their case and there must be an end to litigation.



4. In reply the Claimant filed their response to Respondent's preliminary objection dated 28th December, 2018 dated 12th May, 2023 (which ought to be on the current application) and averred that the matter has been actually in court for a record 19 times being litigated despite the challenges that have been posed by Covid-19 pandemic which affected the activities of the court.
5. The Claimant averred that directions were issued on 26th September, 2022 that parties take a date in the court for purposes of canvassing the main suit which directions were still in force and have never been reviewed by the Respondent and the Claimant had engaged the Deputy registrar with respect to being allocated a date and attached email correspondence over 10 in number. The allegation of want of prosecution were therefore not just, far-fetched and out right malicious and intended to avoid the subject matter of the Claim.
6. The Claimant further averred that the Respondent on February 2023 tried to make the Claimant sign a consent order to mark the matter as settled and when the Claimant refused to sign the Respondent escalated this matter to this application and prays that the Preliminary objection be disallowed for being filed as afterthought after the Respondent's two Preliminary objections were dismissed.
7. The Application was dispensed of by the Respondent filing its submissions dated 22nd June, 2023 and the Claimant relied on its response dated 12th May, 2023.

Determination

8. The Court has considered the Application, the response by the Claimant, submissions by the Respondent, the court records and the only main issue for determination is whether this cause should be dismissed for want of prosecution.
9. The rules of this Court currently do not contain any provisions on dismissal of suits for want of prosecution however such absence cannot be an excuse for any litigant to keep a case or issue in Court indefinitely at the expense of the other party. Article 159(2) enjoins the Court while exercising judicial authority to ensure among others that justice is not delayed. To keep a matter indefinitely in Court is to deny a party the justice of enjoying the fruits of a successful determination or the benefit of planning and paying off successful claims against them and moving on with their lives.
10. In this case it is the Respondent has moved the court to have the case dismissed for want of prosecution. The Court has the discretion to dismiss a suit for want of prosecution where merited but the Court as well, must bear in mind that a case determined on merit more often than not settles a dispute better and durably than one decided on technicality. To allow or not, an application for want of prosecution the Court will rely on the dictum in the case of *Argan Wekesa Okumu vs Dima College Limited & 2 others* [2015] eKLR where the court stated thus:

“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.... Further to this, the decision of 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.”



11. Further in the case of *Naftali Opondo Onyango vs National Bank of Kenya Ltd* [2005] eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay.
12. It is not in dispute the last time this matter was in court was 26th January, 2021 where the court directed parties to take a date before Deputy Registrar on 2nd February, 2021 on hearing of the main suit and on 2nd February, 2021 only the Respondent counsel appeared before the Deputy Registrar who directed that the file would be returned to registry waiting opening of 2018 diary and hearing was to be fixed on priority basis.
13. It was also clear that no party had moved the court to have the matter set down for hearing of the main suit despite the court's directions. This is a 2018 matter which ought to have been finalized by now. However, the Court takes note of Covid-19 pandemic challenges and note that matters proceeded with a lot of challenges. Notwithstanding the challenges, the registry has advanced its operations and has been issuing dates via email.
14. With the above in mind and authorities cited, the court in exercise its unfettered discretion will not order the suit dismissed for want of prosecution but will instead order that the same be set down for hearing within 60 days of this ruling and in default the same shall stand dismissed for want of prosecution without intervention of any party.
15. Cost of the suit shall abide the main cause.
16. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2023. DELIVERED VIRTUALLY THIS 29TH DAY OF SEPTEMBER, 2023.

ABUODHA JORUM NELSON

JUDGE

