Kimani v Ngigi (Cause 1129 of 2018) [2023] KEELRC 2185 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEELRC 2185 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1129 OF 2018

SC RUTTO, J

SEPTEMBER 22, 2023

BETWEEN

CYRUS GICHURI KIMANI ..... CLAIMANT

AND

MUNGAI WAINAINA KIGATHI NGIGI ..... RESPONDENT

RULING

1. The respondent/applicant has brought the instant application dated February 20, 2023, through which he seeks to have the matter dismissed for want of prosecution.

2. The application is supported by the grounds on its face and on the affidavit of Mr Migui Mungai, counsel on record for the applicant. Mr Mungai avers that the matter was certified ready for hearing on December 11, 2019 and that both parties were to appear before court on February 4, 2020, to take a hearing date. He further avers that on February 4, 2020, the applicant and his counsel were present in court while the claimant was absent hence the matter was stood over generally. Mr Mungai further depones that to date, for a period of over three years, the claimant has not taken any steps to obtain a hearing date and prosecute the claim. According to Mr Mungai, there has been inordinate delay on the part of the claimant in prosecuting this claim. Mr Mungai has further termed the delay as deliberate and an abuse of the court process and is therefore inexcusable.

3. The application was opposed through a replying affidavit, sworn on April 11, 2023, by the claimant's advocate, who avers that: -

    a. Upon the matter being certified ready for hearing sometimes towards the close of 2019, he embarked on procuring a hearing date from the registry.

    b. The last time, he heard from the registry while in pursuit of a hearing date was through the registry's email dated August 24, 2021 in which he was informed that priority for hearing dates was being given to 2017 matters and below.

c. It has been extremely difficult for him to know when the diary for 2018 matters is open for picking of hearing dates.

d. It has been extremely difficult for his clerk make physical follow ups at the court registry during the Covid 19 pandemic owing to frequent fumigation activities and limited access to the court premises.

e. The claimant had been infected with the Covid 19 virus sometimes in 2021 and was unwell for the better part of the year, 2022; which circumstances were un ideal for him to attend court and testify.

f. From the onset, he has been diligent and keen on prosecuting this matter on behalf of the claimant contrary to assertions by counsel for the respondent.

g. In light of the above, it is not accurate that three years have lapsed with no action from his end as regards procuring a hearing date to prosecute this matter.

4. The applicant through his advocate on record, filed a supplementary affidavit in response to the claimant's replying affidavit. It is deponed on behalf of the applicant that the court published a notice on the Kenya Law Website and on the physical notice board indicating that the court was fixing 2019 and 2020 matters for hearing. That this being a 2018 matter, it's prudent that the court cannot fix 2019 and 2020 matters without placing in priority the previous years' matters.

Submissions

5. The application was canvassed by way of written submissions which I have considered. The applicant submits that failure to attend court sessions by the claimant is a clear indication that he is not keen to have the suit heard and determined. It was further submitted by the applicant that justice delayed is justice denied and that he who comes to equity comes with clean hands. In support of the application, the applicant placed reliance on the determinations in *Argan Wekesa v Dima College & 4 others* (2015) eKLR, *Tinega v National Cereals & Produce Board* (2023) ELRC 29 (KLR) and *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* (2022) eKLR.

6. The claimant on the other hand urged the court to consider the circumstances raised in the replying affidavit, which point to the imminent difficulties of obtaining a hearing date for the suit. On this score, the claimant invited the court to consider the determination in *Ivita v Kyumbu* (1984) KLR 441.

Analysis And Determination

7. In light of the issues arising from the application, the response thereto and the applicable law, it is clear that the main question calling for the court's resolution is whether the suit is liable for dismissal for want of prosecution.

8. In order to determine this question, rule 16(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* is significant. I will reproduce the same thus: -

> "(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."

9. The above provision is a replica of order 17 rule 2 of the *Civil Procedure Rules*.

10. The import of rule 16(1) of this court's rules is that a suit that has been inactive or idle for a period of more than one year, is liable for dismissal for want of prosecution. Nevertheless, it is not given that an idleness of one year automatically translates to the dismissal of a suit. Therefore, each case must thus be considered on its own merit and the circumstances leading to the delay in prosecution of a case ought to be given due consideration.

11. Opposing the application for dismissal, the claimant's advocate exhibited a copy of email correspondence exchanged between himself and the court registry. In an email of July 13, 2020, the claimant's advocate addressed the court registry requesting for a hearing date. In response, the registry informed the claimant's advocate to await the diary for 2018 matters to be opened.

12. In another email of May 21, 2021, the claimant's advocate enquired from the court registry whether the diary for fixing hearing dates for 2018 matters was open or when it was scheduled to be opened.

13. He further exhibited another email of August 23, 2021, to the court seeking for an appropriate date to invite the respondent to pick a hearing date. In response to the said email, the registry advised that priority was being given to 2017 matters and below for hearing. Through an email of August 24, 2021, the claimant's advocate enquired when the diary for 2018 matters open.

14. Another email of September 17, 2021 was exhibited in which the claimant's advocate once again enquired from the court registry whether they could initiate the process of fixing a date for the instant matter.

15. On his part, the applicant exhibited a notice from court inviting advocates and litigants that the court was fixing 2019 and 2020 matters for hearing. Notably, the said notice was issued in January, 2023.

16. The factors to be taken into consideration by the courts when determining whether to dismiss a suit for want of prosecution have been settled by case law over time. Case in point is *Ivita v Kyumbu* (1984) K.LR 441, where it was held as follows;

> " The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court."

17. Applying the test set out in the aforementioned authority to the case herein, the question that arises, is whether the claimant herein is guilty of inexcusable and inordinate delay?

18. From the email correspondence exchanged between the court registry and the claimant's advocate, it is apparent that he made several attempts to have the matter fixed for hearing and the response from the court registry was that the diary for 2018 matters was yet to be opened.

19. Therefore, it is apparent that the delay in prosecution of the matter is not entirely attributable to the claimant. The delay cannot therefore be termed as inordinate and inexcusable.

20. It is also notable that the notice for fixing of the 2019 and 2020 matters was issued in January, 2023. It is not clear whether a similar notice was issued for 2018 matters. Noting the email correspondence between the court registry and the claimant's advocate, that as at 2021, the court registry was yet to open the diary for 2018 matters, I am minded to give the claimant benefit of doubt in this regard.

21. Besides, the court takes judicial notice of the Covid 19 pandemic which interfered with normal court operations for the better part of 2020 and sometimes in 2021. Accordingly, the claimant's delay in prosecuting the matter cannot be deemed as inexcusable.

22. The court further notes that dismissal of a suit is a draconian act as it drives a litigant away from the seat of justice and as such, discretion ought to be exercised judiciously. This position was amplified in the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR where the court held that:

> " Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial 'sword of the damocles' which should only draw blood where it is absolutely necessary."

23. In the circumstances, I will not allow the application as prayed and instead, I will direct that the matter be listed for hearing on a priority basis noting that it is a 2018 matter.

24. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

STELLA RUTTO

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 had 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.

STELLA RUTTO

JUDGE