



**Kenya Hotels & Allied Workers Union v Jacaranda Hotel (Cause 1534 of 2018) [2023] KEELRC 2497 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2497 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1534 OF 2018  
NZIOKI WA MAKAU, J  
OCTOBER 3, 2023**

**BETWEEN**

**KENYA HOTELS & ALLIED WORKERS UNION ..... CLAIMANT**

**AND**

**THE JACARANDA HOTEL ..... RESPONDENT**

**RULING**

1. The Respondent's application dated July 5, 2023 is due for determination. In it, the Respondent asserts the Claimant has been indolent in the prosecution of the suit and that for over 3½ years, the matter has been dormant, the file inactive. The Respondent thus urges that the suit be dismissed for want of prosecution.
2. The Claimant was opposed and filed the affidavit sworn by the Grievant. The Grievant deponed that of his own knowledge, he knew that under Section 2(a) and (e) of the *Labour Relations Act* 2007, the term authorized representative, refers to the Secretary General or any other person appointed in writing by an authorized representative to perform such functions. He stated that at the institution of the suit herein, he had authorized and/or mandated one John Simiyu, the then 2<sup>nd</sup> Deputy Secretary General to the Claimant and duly appointed him as such to litigate this matter amongst many others in Court, on behalf of the Union. The deponent stated that the Claimant had set June 29, 2021 as the date when elections were to be conducted for the appointment of new office bearers to the Union. The Grievant deponed that John Simiyu, being the then 2<sup>nd</sup> Deputy Secretary General to the Claimant, had to defend his seat, amongst other elective posts. He deponed that of his own knowledge, he knows that the said person who was in conduct of this matter amongst many matters, aggrieved by the loss at the election caused to disappear with the file in this cause. The Grievant asserts that from the loss of the elections of June 29, 2021, the Union was unaware that among the files in Simiyu's custody, was the one before this Honourable Court up to and until sometime in June 2022, when the same was handed over to the Claimant, upon follow up by the Grievant on the status of his case.



3. He deponed further that on getting possession of the file, he instructed Counsel on record, Messrs SED Legal LLP Advocates to file a Notice of Appointment of Advocates, and activate the file. He deponed that at all material times prior to setting down the suit herein for purposes of fixing a hearing date, did this Honourable Court did not issue a Notice to Show Cause, why the suit should not be dismissed. He went on to state that the non-prosecution of the suit herein was for the reasons aforesaid, and not occasioned by laxity on the part of the Claimant. The Claimant thus pleads and urges this Honourable Court not to dismiss the suit herein, but to exercise its powers and order for the expeditious hearing of the suit. It was asserted that it is in the interest of justice and fairness that the Respondent's Notice of Motion dated July 5, 2023, be dismissed with costs.
4. The matter was disposed of by way of written submissions. The Respondent/Applicant filed submissions but the Claimant did not – or if they did, none were placed on the Court file. The Respondent submitted that the advocates for the Claimant are not on record and therefore have no audience before the Court. The Respondent submits the issues for determination are whether the Claimant's counsel are properly on record, whether there was indolence on the part of the Claimant in prosecuting their claim, whether there are justifiable reasons for the delay in prosecuting the claim. The Respondent submits that the Advocates for the Claimant did not file any notice of appointment but only filed responses to the motion by the Respondent. The Respondent submits as they have not filed a notice of appointment in terms of Order 9 Rules 5 and 7 of the Civil Procedure Rules means they are not on record for the Claimant. As to whether there was indolence on the part of the Claimant in prosecuting the suit, the Respondent submits that prior to this year, the last time the matter was in court was November 14, 2019 a period of 3 years 6 months. The Respondent cited Order 17 Rule 2(5) of the Rules and submitted that the suit stands dismissed after 2 years where no step has been taken. The Respondent further relied on the case of *Kibara v Thumbi* (Environment & Land Case 18 of 2018) [2022] KEELC 3333 (KLR) (27 July 2022) (Ruling) where the court held:

Clearly therefore, where no action has been undertaken in a suit for 2 years, such suit “stands dismissed” by operation of the law and the Court is not even obliged to issue any notice for such dismissal. The dismissal is automatic. The mischief intended under that provision which was introduced through L.N No 22 of 2020 must have been to ensure that suits which have been in the registries for 2 years and above with the parties taking no action are removed to pave way for other cases and not to take up valuable space in our already congested registries indefinitely.

5. The Respondent submitted that clearly, there has been delay on the part of the Claimant in prosecuting this suit and that the callous attitude of the Claimant does not deserve the exercise of the Court's discretion in their favour. The Respondent cites the cases of *Stephen M. Kanui & 52 others v China Wu Yi Co. Ltd* [2022] eKLR and *Kenya National Private Workers Union v Lavington Security Limited* [2021] eKLR as well as that of *Kenya Plantation and Agricultural Workers Union v Unilever Tea (K) Limited* [2021] eKLR for the proposition that the party who comes to court bears the primary responsibility to progress the matter towards conclusion. The Respondent submits that the Claimant in attempting to explain the delay states that they got the file in June 2022 and took no action for a year. The Respondent submits that this proves the Claimant did not deem this suit as urgent. The Respondent relied on the case of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR where it was held the evidential burden of proving the fact lies on he who alleges. The Respondent submits that the Claimant had failed to avail proof of the purported elections or that the representative of the Claimant disappeared with the file. The Respondent thus urged the dismissal of the suit for want of prosecution.



6. The Counsel for the Claimant did not come on record formally. Overlooking the faux pas, the Court has reviewed the Affidavit deposed to by the Grievant, the owner of the suit so to speak. In the affidavit, there are allegations of impropriety by the representative the Claimant had engaged to prosecute the suit. A suit remains at all times the property of the litigant and never does the responsibility to prosecute the matter speedily transfer to the legal representative. Indeed, in the cases where no action and no steps are timeously taken, the cases are amenable to dismissal – automatically in some cases. Such cases are rightly so dismissed as the indolence on the part of the Claimant means the cases clog the system unnecessarily. The Claimant in this case is undeserving of the exercise of the Court’s discretion in keeping the case alive. The foregoing is ample proof that the Court is not persuaded to disallow the motion to dismiss the suit. In the final analysis, the suit is dismissed albeit with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2023**

**NZIOKI WA MAKAU**

**JUDGE**

