



REPUBLIC OF KENYA



**KENYA LAW**  
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**Osano v Registrar Nursing Council of Kenya & another (Petition  
86 of 2015) [2023] KEELRC 3446 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3446 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**PETITION 86 OF 2015**  
**NZIOKI WA MAKAU, J**  
**NOVEMBER 22, 2023**

**BETWEEN**

**MAURICE KECH OSANO ..... PETITIONER**

**AND**

**THE REGISTRAR NURSING COUNCIL OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**NURSING COUNCIL OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Respondents/Applicants filed a Notice of Motion Application dated 31<sup>st</sup> May 2023 seeking to be heard for Orders that the Petitioner's suit against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be dismissed for want of prosecution and that the Petitioner/Respondent bears the costs of this Application and those of the entire suit. The Application was supported by the Affidavit of Ms. Caroline Muchina. It was premised on the grounds that the Petitioner had not undertaken any activity in the file since 14<sup>th</sup> December 2021 when the matter had been scheduled for hearing. That hearing on the said 14<sup>th</sup> December 2021 was adjourned at the Petitioner's instance and the Respondents were awarded costs of the day. However, the Petitioner had since then refused, neglected and/or otherwise failed to take any steps to set down the suit for hearing. That the Petitioner's inaction thus rendered the suit an abuse of the process of this Honourable Court as he had shown disinterest in pursuing the matter. Further, that the continued pendency of this suit for the 8<sup>th</sup> year running greatly prejudices the Respondents/Applicants and causes great anxiety and that it was accordingly just and fair that they be relieved of the burden of this litigation in the circumstances.
2. In response, the Petitioner/Respondent filed a Replying Affidavit sworn by his advocate, Mr. Owino Opiyo on 25<sup>th</sup> August 2023. Mr. Opiyo averred that as per the Amended Order 17 Rule 2(5) and (6) of the *Civil Procedure (Amendment) Rules* Kenya, 2020, a suit should be dismissed after two (2) years of inactivity where no step has been undertaken by either party. That since two years had not lapsed, the Petitioner's suit should not be dismissed for non-prosecution. He explained that they were



unable to proceed and/or prosecute the case because the Court File was missing and could not be traced despite them making various visits to the registry to try tracing the file. He thus denied the assertion that the Petitioner had not taken any steps to have his Petition heard and disposed and stated that in any event, the 2<sup>nd</sup> Respondent/Applicant has a corresponding duty in law to have this matter listed for hearing. He further averred that the Petitioner/Respondent cannot be punished for failure by the court registry to avail the Court File. That the Petitioner was still very interested in pursuing and defending his rights and interests and should the case be dismissed, he would suffer prejudice, as he will have been denied an opportunity to present his case before the trial Court. That on the other hand, the Respondents/Applicants would not suffer any prejudice but would help both parties bring the case to a final determination.

3. Mr. Opiyo argued that the constitutional imperatives require Courts to administer substantive justice to parties before them so that disputes are determined on merit and the constitutional principle of access to justice is adhered to. He averred that the Petitioner was willing to abide by any other conditions or directions that this Court may impose on him and therefore prayed to the Honourable Court to exercise its discretion not to dismiss this suit but afford parties the earliest opportune date to litigate their rights. That it was in the interest of justice and fairness that the Court invokes the overriding objective to allow this case to proceed to its logical conclusion.
4. The Respondents/Applicants filed a rejoinder in a Further Affidavit sworn by Ms. Caroline Muchina on 18<sup>th</sup> September 2023. Ms. Muchina believed that the Petitioner/Respondent's reliance on the provisions of the Civil Procedure Rules Order 17 Rule 2(5) and (6) was erroneous and inapplicable to the present circumstances. She averred that the Application herein was grounded on Order 17 Rule 2(1) and (3) of the *Civil Procedure Rules*, providing for dismissal of suits in which no application has been made or step taken by either party for one year after due notice has been issued. Ms. Muchina further averred that the Petitioner/Respondent had not provided any documentation or evidence to support their allegation that they had made genuine attempts to prosecute their case. That the Petitioner had also failed to substantiate the allegation that they were unable to proceed and/or prosecute this case due to the alleged missing Court File. That the absence of such evidence called into question the veracity of the allegation that the Court File was ever missing and could not be traced. She maintained that suit had severally been adjourned primarily at the instance of the Petitioner and which adjournments had caused unnecessary delays and undue hardship for the Respondents/Applicants.
5. The Application was disposed of by way of written submissions.

### **Respondents/Applicants' Submissions**

6. The Respondents/Applicants submitted that Order 17 Rule 2 of the *Civil Procedure Rules* provides the legal framework for the dismissal of suits for want of prosecution as follows:
  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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
    - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
    - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
    - (4) The court may dismiss the suit for non-compliance with any direction given under this Order.



7. They argued that the above statutory threshold together with those set out under Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 is that a suit qualifies for dismissal for want of prosecution if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit. That the matter having last been in Court on 14<sup>th</sup> December 2021 until the filing of the present Application on 19<sup>th</sup> of June 2023, it was more than one and a half years later and the required threshold for dismissal of suit had thus been met.
8. The Applicants further submitted that the principles governing the dismissals of suits for want of prosecution were considered in the case of *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR wherein the Court stated that 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. For inordinate delay, the Applicants submitted that for this Court to determine whether there had been an inordinate delay in the matter, it has to examine the conduct of the Petitioner since the inception of this suit in 2015. They cited the case of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR in which the Court of Appeal was of the view that the learned Judge, in considering the application, should have looked at the appellant's conduct from the time the appeal was filed up to the date the application for reinstatement was filed. According to the Applicants, the failure to take any step in the instant suit for one and a half years is an inordinate delay that warrants the dismissal of the Petition. That this Court in the case of *Pius Wanjala v Permanent Secretary, Ministry of Medical Services & 4 others* [2021] eKLR held that failure to take action in any matter for a period of one year is a serious lapse and that the necessity of Rule 16 is apparent to curb inaction on part of a litigant. As to whether the delay is excusable, the Applicants submitted that the Petitioner had not produced any letters or copies of emails to show that he indeed wrote to the Court requesting to be allocated a hearing date or indicating that they had at any point attempted to trace 'a missing court file'. They contended that the Petitioner's reasoning on why they were unable to take any steps in the suit holds no water and ought to be treated as untruthful and an attempt to mislead the Court. They argued that the only logical conclusion is that the delay occasioned by the Petitioner is inordinate and not justified by any reasonable explanation and that this Court should dismiss the suit. The Applicants relied on the determination of this Court in *Kenya Plantation and Agricultural Workers Union v Unliver Tea K Limited* [2021] eKLR (Kericho ELRC Cause No. 105 of 2021) that, "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."
9. Regarding the issue of prejudice to be suffered, the Applicants submitted that for the eight (8) years that the suit has been in existence without any reasonable steps being taken, the term of office for the individual who sat in the office of the 1<sup>st</sup> Respondent and was a key witness in this case, expired. That the resultant effect would be that where the Application is not allowed, the Respondents/Applicants would have to seek leave to substitute their witness and the witness introduced would not be in a position to effectively answer any question put to them during cross-examination, being unfamiliar with the circumstances that led to the filing of this case. They argued that as their case had thus been put in jeopardy because of the delay, it was in the best interest of justice to have the suit dismissed. That this Court should consider the prejudice that the Applicants have and continue to suffer and find it fit to dismiss the suit. The Applicants relied on the case of *Ivita v Kyumbu* [1975] eKLR in which the Court held that:

"Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is not easy task for the documents,



and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time."

10. Lastly, the Applicants urged the Court to grant the cost of the Petition and that of the Application to the Applicants herein. They submitted that even in the unlikely event that the Application was not allowed, the Court should still grant the cost of the Application to the Applicants as it is the conduct of the Petitioner that resulted in the filing of the same. It was their conclusion that based on the facts and circumstances of the case, it was clear that the suit should be dismissed for want of prosecution.

### **Petitioner/Respondent's Submissions**

11. The Petitioner/Respondent submitted that Amended Order 17 Rule 2(5) of the [Civil Procedure \(Amendment\) Rules](#) Kenya, 2020, states as follows:

Rule 2 of Order 17 of the principal Rules is amended by inserting the following new sub-rules immediately after sub-rule (4)-

(5) A suit stands dismissed after two years where no step has been undertaken.

12. The Petitioner submits that the above provision clearly supports the position that since the two (2) years have not lapsed, the suit should not be dismissed for non--prosecution. Further, that the test to be applied in the Application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. The Petitioner/ Respondent explained that if the Court is satisfied with the his excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence the action would not be to dismiss the suit but direct that it be heard at the earliest time possible. He cited the case of [Naftali Opondo Onyango v National Bank of Kenya Ltd](#) [2005] eKLR in which the Court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff. It was the Petitioner's submission that applying the principles enunciated in authorities, the two (2) years' time limit had not lapsed and the delay had not been inordinate and falls below the time period provided in law. That the interests of justice lie in allowing the Petitioner to prosecute his claim.
13. The Petitioner has been accused of going to sleep precipitating the motion seeking to have his suit dismissed for want of prosecution. He argues that since the [Civil Procedure Rules](#) allow for 2 years for automatic dismissal, his suit should be sustained. I disagree. Under the [Employment & Labour Relations Court \(Procedure\) Rules](#) 2016, where a party does not take action within 1 year of filing a suit, the same is amenable to dismissal if no reasonable cause is shown to the satisfaction of the court. The Petitioner has not demonstrated any steps taken since the matter was last in court. As is, the case is one of the oldest at the Court yet he seems to be under the illusion that he can wait for time to pass before taking any steps. The Petitioner did not even have the courtesy to file his own affidavit instead subjugating the response to his lawyer. As the Respondents have demonstrated there were no steps taken within a period of over 1 year, the suit is dismissed with costs to the Respondents for want of prosecution by the Petitioner.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2023**

**NZIOKI WA MAKAU**



**JUDGE**

