



**Mbotha v Usiku Entertainment Limited (Employment and Labour Relations Cause E651 of 2020) [2023] KEELRC 3200 (KLR) (1 December 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3200 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E651 OF 2020  
AN MWAURE, J  
DECEMBER 1, 2023**

**BETWEEN**

**AMOS MOSES MBOETHA ..... CLAIMANT**

**AND**

**USIKU ENTERTAINMENT LIMITED ..... RESPONDENT**

**RULING**

1. The Respondent/ Applicant filed a Notice of Motion dated 13<sup>th</sup> June 2023 seeking orders that:
  1. The Honourable Court be pleased to dismiss the claim for want of prosecution.
  2. The costs of the application be borne by the Claimant.

**Respondent/ Applicant Case**

2. The Respondent/ Applicant avers that since instituting the claim on 16<sup>th</sup> October 2020, the Claimant has not taken any further action towards the progress of the matter.
3. The Respondent/ Applicant avers that it filed a memorandum of response dated 1<sup>st</sup> February 2021 and filed on 12<sup>th</sup> February 2021. Since then the Claimant has not taken any steps to set down the matter for pre-trial directions and his action has lasted over 2 years beyond the threshold set by Rule 16(1) of the *ELRC Rules*.
4. The Respondent/ Applicant avers that the delay is inordinate and inexcusable and the suit is amenable to dismissal for want of prosecution.

**Claimant's Case**

5. In opposition to the application, the Claimant filed his replying affidavit dated 2<sup>nd</sup> October 2023.



6. The Claimant avers that he is willing and able to prosecute the suit at the earliest and shortest time possible; the delay is occasioned by the management of the court diary for the matters lodged during Covid 19 pandemic and is not inordinate.
7. The Claimant avers that his former advocate on record informed him of the challenge on getting dates for 2020 matters but got the mention date on 19<sup>th</sup> September 2023 when the diary was settled.
8. The Claimant avers that if there was indolence on the part of his former advocate, it should not be meted on him and he will ensure the matter is prosecuted within 120 days from the date of hearing if allowed to proceed with the suit.

### **Claimant's Submissions**

9. The Claimant submitted that the delay is not inordinate as the matter was filed in 2020 during the onslaught of Covid 19 pandemic. The court was trying to find a way of prosecuting matters and had not opened the diary for the matters filed during the pandemic.
10. Immediately after the pandemic, the court's diary was opened and the Claimant set the matter for mention on 19<sup>th</sup> September 2023. The court has not till now issued a Notice to Show Cause why the suit should not be dismissed yet it does so if it detects no progress. It didn't send notice to dismiss because the matter was still fresh and the diary issue was being settled.
11. The Claimant submitted that the Respondent will not be prejudiced as he is currently holding the Claimant's unpaid salaries but the Claimant will be extremely prejudiced in the worst possible way as he will lose his hard-earned money.
12. The Claimant submitted that the present suit is not hopeless but raises triable issues and there is a cause of action in that the Claimant is claiming dues from his employer for unpaid salary sums therefore this court should not dismiss this suit but set it down for hearing in the earliest instance.

### **Analysis and Determination**

13. The main issue for determination is whether the main suit should be dismissed for want of prosecution.
14. Order 17 Rule 2 of the *Civil Procedure Rules*, 2010 provides as follows:
  - “(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 should not be 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.”



15. In the case of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & Another* (2014) eKLR, Gikonyo J. stated as follows:

“... I will discern the principles which the law has developed to guide the exercise of discretion by Court in an Application for dismissal of suit for want of prosecution. These principles are:

1. Whether there has been inordinate delay on the part of the Claimants in prosecuting the case;
2. Whether the delay is intentional, contumelious and, therefore, inexcusable;
3. Whether the delay is an abuse of the Court process;
4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Respondent;
5. What prejudice will the dismissal occasion the Claimant;
6. Whether the Claimant has offered a reasonable explanation for the delay;
7. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the Court.”

16. It is not in dispute that the Claimant has delayed in prosecuting this suit. He however, has satisfied this court that the delay was not intentional and was not wholly his fault partly but was occasioned by the backlog of cases in this court as was expressed by Hon. Lady Justice Maureen Onyango in *Juma Ndegwa Nzowa v Dunhill Consulting Limited* [2022] eKLR:

“I however take judicial notice that due to the backlog of cases the court has been giving preference to cases filed earlier. It is only now that 2017 cases are being fixed for hearing. It is my view that even if the Claimant moved the Court perhaps, he would not have succeeded in fixing this suit for hearing.”

17. Therefore, in lenient exercise of its discretion and without condoning the obvious delay in prosecuting this matter, this court grants the Claimant an opportunity to fix a hearing date within 30 days and should he fail to do so, the suit will automatically stand dismissed.

18. Costs will be in the cause.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 1ST DAY OF DECEMBER, 2023.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

