



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 1848 Of 2017**

**DAUDI MUTUA.....CLAIMANT/RESPONDENT**

**VERSUS**

**CROWN INDUSTRIES LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The main suit revolves around termination from employment which according to the claimant terms, was unfair and unprocedural. This assertion has been refuted by the respondent through its statement of defence.

2. The Respondent/Applicant has moved this court vide an undated Application which is expressed to be brought under the provisions of Section 3A of the Civil Procedure Act, Order 17 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules. The Application is supported by the grounds on its face and on the Affidavit of Ms. Anna Maragia, the head of Human Resource at the respondent company.

3. The application seeks the following orders;

1. *That the suit be dismissed for want of prosecution.*
2. *That costs of the Application to be awarded to the respondent.*

4. The application is premised on the ground that the claimant has been guilty of prolonged, inordinate and inexcusable delay in prosecuting the matter and had failed to take any steps to get a hearing date.

5. The Application was opposed through the Replying Affidavit of Ms. Kisiangani Eddah, Advocate on record for the respondent. Through the said Affidavit which is dated 26<sup>th</sup> November, 2021, Ms. Kisiangani averred that the claimant has always been ready, able and willing to prosecute the matter. She further deponed that parties have been negotiating and working towards an amicable settlement of the matter. She further blamed the delay in prosecuting the matter on the prevailing Covid 19 pandemic, which she opined as having greatly affected the functioning of the court's processes. Ms. Kisiangani further averred that the delay was not deliberate as the court registry was allocating dates with priority being given to the 2016 matters.

6. On 20<sup>th</sup> December, 2021 the Application came up for hearing and both parties indicated that they will be relying on their respective pleadings, hence would not be filing any written submissions.

**Analysis and determination**

7. Without doubt, the main issue for determination by the court is whether the suit herein is liable for dismissal for want of prosecution. Order 17 Rule 2 of the Civil Procedure Rules is relevant herein and provides 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 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.”**

8. This provision has further been reiterated under **Rule 16(1)** of the Employment and Labour Relations Court (Procedure) Rules, 2016 which is in the following manner;

**“(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. Essentially, a suit that has been idle for a period of more than one year, is liable for dismissal. Nonetheless, the rules of the game in this instance, are not open and shut. That is to say, one year of idleness does not automatically equal dismissal of a suit for want of prosecution. Each case must be decided on its own merits, taking into account the circumstances appertaining.

10. As per the record, the court on 20<sup>th</sup> June, 2018 directed parties to file a list of agreed issues and take a hearing date at the registry. As directed, the parties filed the List of Agreed Issues on 24<sup>th</sup> May, 2018.

11. Thereafter, there appears to have been no activity until 12<sup>th</sup> January, 2021 when the claimant wrote to the court requesting for a mention date to take directions so as to have the matter dispensed with by way of adoption of statements, documents and written submissions.

12. The Deputy Registrar remarked on the said letter, as follows “*Directions have already been taken. Kindly await the opening of the diary for 2017 matters (hg)*”

13. Subsequently, the instant Application was filed.

14. 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 **Inter vs Kyumba (1984) K.L.R 441**, where the court 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.”**

15. I will not reinvent the wheel. Thus, the question is whether the claimant herein is guilty of inexcusable and inordinate delay?

16. As stated herein, the claimant attempted to have the matter disposed of by way of adoption of statements, documents and written submissions but the request was denied as directions had already been issued hence, was to await the opening of the court’s diary for hearing of the 2017 matters.

17. This record from the court lends credence to the claimant’s assertion that the court registry was prioritizing hearing of the 2016 matters and below. 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.*

18. 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.

19. 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 vs 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.”**

20. 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 2017 matter.

21. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2022.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Applicant/Respondent Ms. Kibaba

For the Respondent/Claimant Mr. Mwinzi

Court Assistant Barille Sora

**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 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**