



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 546 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

JUMA NDEGWA NZOWA.....CLAIMANT

VERSUS

DUNHILL CONSULTING LIMITED.....RESPONDENT

RULING

1. Before me for determination is the Respondent's Notice of Motion Application dated 11th September, 2020 seeking Orders that this suit be dismissed for want of prosecution and the costs of the suit as well as this Application be awarded to the Respondent.
2. The Application is based on the grounds that the Claimant filed this suit on 16th April, 2018 and served summons upon the Respondent on 23rd May, 2018. The Respondent filed its Memorandum of Appearance on 11th June, 2018 and filed its Memorandum of Response together with witness statements and documents on 30th July, 2018. The documents were subsequently served upon Counsel on record for the Claimant on 9th August 2018.
3. The Applicant averred that since the Claimant was served with the documents on 9th August, 2018 he has failed to file any response to the Memorandum of Response and file the Statement of Issues.
4. That the matter was thereafter fixed for pre-trial directions on 3rd December, 2018. However, the trial Court was not sitting and the pre-trial was rescheduled to 7th March, 2019.
5. On the 7th March, 2019 when the matter was mentioned there was no attendance on the Claimant's part forcing the Court to issue a further mention date for the 22nd May, 2019 and directing the Respondent to serve the mention notice on the Claimant.
6. The Respondent contends that despite serving the Claimant with the Mention Notice there was still no representation on the Claimant's part at the scheduled mention of 22nd May, 2019.
7. The Applicant further contends that there was no valid reason behind the Claimant's failure to take any action in this matter since 16th April, 2018 when the suit was filed and that this failure is tantamount to an abuse of the Court process.
8. It is further the Applicant's contention that it remains greatly prejudiced by the continued pendency of this matter and that it is only fair and just in the circumstances that the orders sought in the application be allowed.
9. This Application is supported by the Affidavit sworn by **STACEY KATILE SAMMY**, counsel on record for the Respondent/Applicant on 11th September, 2020 in which she reiterates the grounds on the face of the motion.
10. She further deposed that the Claimant's failure to prosecute the matter is a clear indication that he has no interest in pursuing this matter and the suit should therefore be dismissed for want of prosecution.
11. The Application is filed under Order 17 Rule 2, 51 Rules 1, 3 and 4 of the Civil Procedure Rules, 2010 Section 1A, 1B, 3A of the Civil Procedure Act and all other enabling provisions of the law.

12. The Claimant opposed the Application through his Replying Affidavit sworn on 14th April, 2021 in which he admits that there has been delay in prosecuting his Claim. He however maintained that the delay was occasioned by a directive issued at the Court Registry to the effect that older matters (those filed in 2016 and earlier) were being given priority when issuing hearing dates in an effort to clear case backlog.

13. The Claimant maintained that he has through his advocates on record taken all necessary steps to set down this suit for hearing and has not in any way dragged and/or delayed the matter. He argued that he was simply following the Court's directions as issued by the Registry.

14. He averred that he was desirous of prosecuting his case to its logical conclusion and therefore maintained that in the interest of Justice the suit ought not to be dismissed.

15. He urged this Court to exercise its discretion and dismiss the instant Application and allow him to proceed to prosecute this matter to conclusion.

16. Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

17. The Respondent/Applicant submits that it has met the threshold for the grant of the orders sought in its application as provided under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules.

18. The Applicant further submitted that it has sufficient grounds to warrant the dismissal of the suit herein the Claimant having failed to take any action to fix the suit for hearing since 22nd May, 2019 when the matter was last in Court. To buttress this argument the Respondent cited and relied on the case of **Josephat Muthui Muli v Ezeetec Ltd (2014) eKLR**.

19. The Applicant argued that the Claimant has failed in his primary duty of taking steps to prosecute and/or progress his claim as stipulated under Sections 1A of the Civil Procedure Act and thus this Court ought to exercise its discretion and dismiss the Claim for Want of prosecution. For emphasis the Respondent/Applicant cited the case of **Moses Mwangi Kimari v Shammi Kanjirapparambil Thomas (2014) eKLR**.

20. The Respondent argued that the Claimant has no valid reason for his failure to fix this matter for hearing as the Court's diary was opened severally within the year 2019 and 2020 and yet he failed to fix the matter as expected.

21. The Applicant further argued that the Claimant's delay in prosecuting this matter is inordinate and inexcusable and that the continued pendency of the matter greatly prejudices the Applicant, offending his right to expeditious access to justice as provided for under Article 159(2)(b) of the Constitution of Kenya, 2010. For emphasis the Respondent/Applicant cited the case of **Omari Shee Kisahafu v Kwale International Sugar Company Limited (2020) eKLR** where the Court allowed a similar application on the ground that the Claimant had not given sufficient reasons as to why he failed to take steps to prosecute his case.

22. In conclusion the Respondent/Applicant urged this Court, in the interest of Justice, to allow the instant Application as prayed.

Claimant's Submissions

23. The Claimant on the other hand in opposition to the Application reiterated the averments made in his Replying Affidavit sworn on 14th April, 2021.

24. The Claimant maintained that he is still desirous of prosecuting his claim to conclusion and that he is entitled to a fair hearing on merit. He argued that the delay in fixing the matter for hearing was beyond him as the Court gave priority to older matter. For emphasis the Claimant cited and relied on the case of **Brian Keli Muli v performers Rights Society of Kenya (PRISK) & Another (2020) eKLR** where the Court while citing the decision in **Susan Wairimu v Gladways Academy & Another (2019) eKLR** found the delay in fixing a hearing date excusable as the Court gives preference to matters filed five years and over.

25. The Claimant submitted that the delay in prosecuting this matter is excusable and that the Applicant will not suffer any prejudice if this matter is set down for hearing on merit. He therefore urged this Court to find the instant application without merit and dismiss it with costs.

Analysis and determination

26. There is no dispute that this matter was last in Court on 22nd May, 2019 for pre-trial directions where the same was certified ready for hearing. It is further not in dispute that the Claimant has since then not taken any steps to prosecute his Claim. The issue for determination is whether the suit should be dismissed for want of prosecution.

27. 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.

28. In the case of **Utalii Transport Company Limited & 3 others vs 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.”*

29. It is clear from the foregoing that for an Applicant to be successful he must satisfied the one year threshold. He must also show that there was inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the Court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial. Lastly, he must satisfy the Court that owing to the delay, a fair trial cannot be achieved.

30. I have considered the reasons for the delay in prosecuting this claim as advanced by the Claimant being that he was denied a hearing date at the registry after the matter was certified ready to proceed for hearing on 22nd May, 2019 and parties directed to fix a hearing date at the registry.

31. The Claimant maintained that he did visit the Court’s registry severally seeking to have a hearing date fixed for the matter but his efforts were rendered futile.

32. However, no evidence of this was availed to the Court for scrutiny in terms of date fixing invites to counsel on record for the Respondent.

33. It is therefore fair to conclude that no action was taken by the Claimant or his counsel on record from 22nd May, 2019 until the Respondent/Applicant filed the instant application on 17th July 2021, to have the suit dismissed for want of prosecution. The Claimant is therefore guilty of sleeping on his rights.

34. The Court in **Kiiru M’ugambi & 39 others v Moses Kirima Meenye & Kirima Advocates & 3 Others (2020) eKLR** held that:

“An applicant ought to be vigilant in prosecution of his case without delay. In this case the applicant took about a year without pursuing prosecution of his application. He stated that the reason was due to technical and unavoidable circumstances, which I consider to be a vague explanation which does not suffice.”

35. The Court in the above matter further stated that *the Courts should be reluctant in giving audience to non-committed litigants and that litigation must come to an end.*

36. It is clear from the record that the Claimant slept on his rights in prosecuting this case. A party who brings another to Court cannot sit back and forget about the suit.

37. 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.

38. Without condoning the obvious delay in prosecuting this matter, I give the Claimant a final opportunity to fix this suit for pre-trial within 30 days, should he fail to do so, the suit will automatically stand dismissed. The Claimant shall pay the Respondent’s costs for this application in any event, which I assess at Kshs.10,000/-, before fixing the suit for hearing.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF JANUARY 2022

MAUREEN ONYANGO

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 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 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.

MAUREEN ONYANGO

JUDGE