



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 1652 OF 2017**

**KENYA NATIONAL PRIVATE WORKERS UNION.....CLAIMANT/RESPONDENT**

**VERSUS**

**“A” TEAM SECURITY LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. The Applicant has moved this Court vide a Notice of Motion Application dated 9<sup>th</sup> August, 2021, which is premised on Sections 1A, 1B and 3B of the Civil Procedure Act and Order 17 Rule 2(1) and (3) and Order 51 Rule 1 of the Civil Procedure Rules (2020), Section 12 of the Employment and Labour Relations Court Act and Rule 16 of the Employment and Labour Relations Rules. The Application is supported by the Affidavit of Mr. Cyprian Onyony, Counsel on record for the Applicant/Respondent.

2. The application seeks the following orders;

1. That the claimant's suit be dismissed for want of prosecution.
2. That costs of this Application be provided for by the claimant.

3. The main grounds upon which the application is premised, is that the claimant has not taken any steps to prosecute the matter for more than 3 years and that the respondent should not be made to suffer prejudice and anxiety by having the suit pending. The respondent further avers that the claimant has abused the overriding objective by its indolence and delay in prosecuting the matter. Further, the respondent termed the delay in prosecuting the claim as inordinate, unreasonable and inexcusable. Therefore, it urged the court to dismiss the suit for want of prosecution.

4. The Application was opposed through the Replying Affidavit of Mr. Isaac G.M Andabwa, who identified himself as the claimant's National General Secretary. He averred that the claimant's former legal officer left without properly handing over and that it had experienced challenges in instructing a new legal officer. He further stated that the court's registry was not giving dates for 2017 matters hence it was not possible to obtain a hearing date. Mr. Andabwa further cited the Covid 19 pandemic as having interfered with the court's normal operations hence the delay in prosecution of the suit. In addition, he stated that mistake of counsel should not be visited on an innocent client.

**Submissions**

5. On 10<sup>th</sup> November, 2021, the court directed that the Application be disposed of by way of written submissions.

6. The Applicant submitted that under Article 159 (2) of the Constitution, justice delayed is justice denied and that section 3A of the Civil Procedure Act which gives the court the inherent power to make such orders as may be necessary to meet the ends of justice, also ensures protection against abuse of the court process. The Applicant thus urged the court to invoke its inherent power and dismiss the suit for want of prosecution as it had discharged its obligation in meeting the required legal threshold. To buttress its submissions, the Applicant invited the court to consider the findings in the case of **Naftali Onyango vs National Bank of Kenya (2005) eKLR** where it was held that a defendant must demonstrate that the delay had been inordinate and inexcusable. It further submitted that the claimant had failed to give any compelling reasons as to why it had not taken any steps to prosecute the claim. On this issue, it cited the case of **Rajesh Rughani vs Fifty Investments Ltd and another (2016) eKLR**.

7. On its part, the respondent submitted that the delay in prosecuting the matter was not deliberate and that dismissal of the suit would be grave. It invited the court to take judicial notice of the prevailing conditions in the judicial system which has resulted in back log of cases due to lack of judges. That as a result, the registry was not giving dates for 2017 matters. It urged the court to consider the holding in the case

of **Naftali Onyango vs National Bank of Kenya (2005) eKLR** and find in its favour. It also placed reliance on the case of **Mwangi S. Kimenyi vs the Attorney General, Civil Suit, Misc. No. 720 of 2009** where it was held that prolonged delay should not prevent the court from doing justice to all parties.

### Analysis and determination

8. Evidently, 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.”**

9. Closer home, **Rule 16(1)** of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows;

**“(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.”**

10. From the record, it is discernable that the claimant has not taken any steps to move the court from the time it filed the suit. It has blamed the delay in the prosecution of the matter on the fact that its former legal officer left without properly handing over. It has also cited the fact that the registry was not allocating dates for 2017 matters and that the onset of the Covid 19 pandemic interfered with the normal operations of the court.

11. The court has noted that in as much as the claimant has placed blame on the Covid 19 pandemic and lack of hearing dates for 2017 matters, it has not placed any evidentiary material before court to prove that it sought the court’s intervention in the form of a request for a date albeit for mention. From what it appears, it filed the suit and went to sleep and was jolted to action by the instant Application.

12. Indeed, there is no evidence that it moved the court for purposes of taking of pretrial directions as stipulated under Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

13. Be that as it may, the court 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.”**

14. In the circumstances, I will not allow the Application as prayed and instead, I will direct that the claimant takes concrete steps towards prosecution of the matter within the next 30 days, failure to which the suit shall stand dismissed for want of prosecution and in which case, the Applicant shall be entitled to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JANUARY, 2022**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Applicant/Respondent Mr. Obiero

For the Respondent/Claimant Ms. Wanyama

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**