



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

Before Hon. Lady Justice Maureen Onyango

CAUSE NO. 694 OF 2018

(Formerly Nakuru ELRC Cause no. 197 of 2015)

MAXWELL ENGENDA ONYANGO

CLAIMANT

VERSUS

NAISULA HOLDINGS LIMITED

RESPONDENT/APPLICANT

AS CONSOLIDATED WITH CAUSE NO. 693 OF 2018

SARA ANN WANGUI MAINA

CLAIMANT

VERSUS

NAISULA HOLDINGS LIMITED

RESPONDENT/APPLICANT

RULING

1. Before me for determination is the Respondent's Notice of Motion Application dated 18th May, 2021 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 Claimants neglected and/or failed to set the suit down for hearing or take any steps to prosecute the matter for a period of 36 months as the matter was last in Court on 3rd May 2018.
3. This Application is supported by the Affidavit sworn by **JOB ODHIAMBO OCHIENG**, Counsel on record for the Respondent/Applicant on 18th May, 2021 in which he reiterates the grounds on the face of the motion.
4. He further deposed that the pendency of this matter in Court is causing the Respondent great anxiety and urges the Court to dismiss the same for want of prosecution.
5. The Application is filed under Order 12 rule 3(2), Rule 6(2), Order 17 Rule 2(1), 2, 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.
6. The Claimant opposed the Application through a Replying Affidavit sworn by **Henry Kamau Nyaga** counsel on record for the Claimant on 18th June, 2021 in which he avers that the contents of the application are not factual or the true position of the prosecution of the matter.
7. The affiant states that it has moved this Court on various dates in pursuit of a hearing date, that on 28th June 2018 the Deputy Registrar of the Court informed parties that the Registry was not able to issue dates as the diary was full.
8. The affiant further states that in the year 2020 normal Court operations were scaled down due to COVID-19 pandemic which eventually led to the closure of Court operations.
9. The Claimant states that in an attempt to resume normal Court operations the Court posted a notice stating that it was only issuing dates for matters registered in the year 2016 and below

10. The Claimant states that the application before the Court is malicious and ignorant of the status of the Court as the Applicant is aware on the current standing of Court in regard to issuing dates. That the application is therefore premature and should be dismissed with costs.

Submissions by the Parties

11. The Applicant submits the instant application meets the threshold set out under Order 16 Rule 1 and that the suit should be dismissed as no steps have been taken by the Claimant to prosecute the claim for more than a year.

12. The Applicant submits that the Claimant in their replying affidavit stated that on an attempt to fix the matter for hearing they were directed that the diary for 2019 was not available and that dates will be fixed on priority basis. That this did not mean the Claimant could not move the Court.

13. The Applicant submits that in exercise of its discretion the Court should consider the delay is inordinate and inexcusable as it has been 5 years since the suit was filed and three years since the suit was before this Court.

14. The Applicant submits that the Claimant has been indolent in dealing with the suit and relies in the holding in **Fran Investment Limited Versus Security Services Limited 2015 eKLR** where Gikonyo J. held

“His is well understood in the legal reality that dismissals of a suit without hearing it on merit is such draconian act comparable only to the proverbial sword of Damocles but that reality should be checked against yet another equally important constitutional demand that cases should be disposed off expeditiously which is founded on the old age ad and now express constitutional principle of justice under Article 159 of the constitution that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only to the plaintiff.”

15. The Applicant submits that delay in litigation whether deliberate or inadvertent is always prejudicial to the party who has been dragged to Court and may affect the likelihood of a fair trial being held as documents and witnesses may become unavailable or the memories of such witnesses may fade over time.

16. The Applicant prays that the application be allowed with costs.

Claimant's Submissions

17. The Claimant on the other hand in opposition to the Application reiterated the averments made in his Replying which demonstrated the consistency and willingness to prosecute the matter with well substantiated official letters in pursuit of a hearing date.

18. The Claimant submits that despite the matter having been filed at Nakuru law Courts in the year 2015 it was transferred to Nairobi and registered in the year 2018. That the matter had to follow the administrative procedures of the Court.

19. The Claimant submits that he has done all that he could in pursuit of progressing this matter to a probable conclusion and the said progression has been hindered by several inadvertent Court administrative directives and natural catastrophic occurrence that were beyond the influence of the Claimant.

20. The Claimant relies on the holding in **Hilder Anyika Isuruti v Poonam Chaudhary [2021] eKLR** where the Court held that:

“The Court is satisfied that failure to obtain a hearing date to determine the matter is as a result mainly by the Court registry in declining to grant matters filed in 2017 hearing dates due to the backlog of cases that pertains at Nairobi Employment and Labour Relations Court, this situation has been exacerbated by the COVID-19 pandemic,”

21. The Claimant submits that given the application is made at a time when this Court is giving priority to older matters in a bid to clear backlog it is only fair to conclude that the application was made prematurely with no regard to the current hardships faced by the Court.

22. The Claimant prays that that the application be dismissed with costs.

Analysis and determination

23. There is no dispute that this matter was last in Court on 3rd May, 2018 when the matter had just been transferred to Nairobi from Employment and Labour Relations Court in Nakuru. On the said date the Court gave directions that the matter be placed before the Deputy Registrar for fixing of a hearing date.

24. It is also noted that following the Court's directions, the Claimant vide a letter dated 29th May 2018 requested for a hearing date for the matter. The Court responded vide a letter dated 28th June 2018 stating that it was not in a position to issue a hearing date as the diary was full and the diary for 2019 was yet to be opened.

25. 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.

26. 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.

27. 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.”*

28. The Claimant has explained the reasons that prevented him from securing a hearing date. He has also pointed out the catastrophic consequences of the outbreak of COVID-19 that afflicted the nation in March 2020 that afflicted the normal operations of the Court.

29. To be successful, the Applicant must satisfy the threshold as outlined in **Utalii Transport Company Limited & 3 others v NIC Bank Limited & Another (2014) eKLR**. 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 the Court in writing indicated that it was not able to grant a hearing date as there were no dates in the Court diary which reason is administrative and beyond the control of the Claimant.

31. The Court also takes judicial notice of the COVID-19 pandemic that hit the country affecting the normal operations of Court.

32. However, the Court also notes that beyond the last activity on 28th May 2018 the Claimant has not tendered any evidence on any other attempt he has made to move the Court in this matter.

33. The Applicant on the other had has not showed the prejudice it shall suffer should the matter proceed to hearing.

34. The Court takes judicial notice that due to the backlog of cases the Court has been giving preference to older cases and that even if the Claimant moved the Court, perhaps he would not have succeeded in fixing this suit for hearing.

35. In **Hilder Anyika Isuruti v Poonam Chaudhary [2021] eKLR** the Court held that:

“The Court is satisfied that failure to obtain a hearing date to determine the matter is as a result mainly by the Court registry in declining to grant matters filed in 2017 hearing dates due to the backlog of cases that pertains at Nairobi Employment and Labour Relations Court. This situation has been exacerbated by the COVID -19 pandemic,”

36. I find that denying the Claimant an opportunity to prosecute his case would be unjust as part of the delay has been caused by the Court in its bid to clear backlog. For this reason, I grant the Claimant an opportunity to fix the matter for hearing within 60 days.

37. The Respondent will pay costs of the application in any event.

38. These orders shall apply to the application in Cause No. 693 of 2018.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 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 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.

MAUREEN ONYANGO

JUDGE