



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 1719 of 2017**

**NGILE WAMBUA.....CLAIMANT/RESPONDENT**

**VERSUS**

**MR & MRS LATIF.....RESPONDENT/APPLICANT**

**RULING**

1. The instant Application which is dated 19<sup>th</sup> February, 2021 has been brought by the Respondent/Applicant pursuant to Rule 16(1) and (3) of the Employment and labour Relations Court (Procedure) Rules, 2016 and any other enabling provisions of the law. The Application is supported by the grounds on its face and on the Affidavit of Ms. Kimosop Tito, Advocate on record for the Applicant.

2. The Application seeks the following orders;

1. *That this suit be dismissed for want of prosecution.*
2. *That costs of this Application and of the entire suit be awarded to the Respondent.*

3. The main grounds upon which the Application is premised is that the Claimant had failed to take any steps to set down the suit for hearing for over sixteen (16) months upon close of the pleadings. That the Claimant had occasioned and necessitated the Applicant's Advocate to procure and ensure registration of the suit in the e-filing system, as the same had not been registered hence the file had been classified as dormant. That the Claimant's neglect to prosecute the suit has led to a prolonged, inordinate and inexcusable delay which amounts to abuse of court process.

4. The Application was opposed through the Replying Affidavit of Ms. Serah Njenga, Advocate on record for the Respondent. Through the said Affidavit which is dated 4<sup>th</sup> March, 2021, Ms. Njenga averred that the Application was fatally defective and laced with malice. That the matter was set down for pre-trial directions in 2019 and certified ready for hearing. That it was to be set down for hearing in the year 2020 but due to the global pandemic of Covid 19, the court processes were scaled down. That upon resumption of court processes, there was transfer of judges and the registry advised that hearing dates could not be given as the station had not received new Judges to handle the matters. Counsel further averred that they have been encountering challenges in obtaining a hearing date from the court's registry, having been informed by the registry that the diary was yet to be opened.

5. The Applicant filed a Further Affidavit through Mr. Kimosop in response to the Claimant's Replying Affidavit. He denied the averments proffered by Ms. Njenga to the effect that there was no evidentiary back up to indicate that the Claimant had attempted to have the matter set down for hearing.

6. Both parties filed written submissions in support of their rival positions. The Applicant submitted that the delay of 16 months, which is more than 4 months beyond the stipulated period, is inordinate. And that the reason advanced was not sufficient or excusable. It placed reliance on the case of **Argan Wekesa Okumu vs Dima College Limited & 2 others (2015) eKLR**. The Applicant further submitted that it had been greatly prejudiced by failure on the part of the Claimant to set down the suit for hearing as one of its witnesses had since passed on.

7. On the other hand, the Claimant submitted that it deserved an opportunity to have its day in court and that it will be highly prejudiced if the suit is dismissed. It invited the court to consider the determination in the cases of **Pinpoint Solutions Limited & another vs Lucy Waithegeno Wanderi (as the legal administrator of the estate of James Nynaga Muchangi (2020) eKLR**, **Ivita vs Kyumbu (1975) eKLR** and **Utalii Transport Company Limited vs NIC Bank Limited & another (2014) eKLR**.

**Analysis and determination**

8. It is evident that the main issue for determination by the court is whether the suit herein is liable for dismissal for want of prosecution. **Rule 16(1)** of the Employment and Labour Relations Court (Procedure) Rules, 2016 is relevant herein and 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.”**

9. The import of the foregoing provision is that a suit that has been inactive or idle for a period of more than one year, is liable for dismissal for want of prosecution. All the same, this is not a black and white scenario where one year of idleness translates to automatic dismissal of a suit for want of prosecution. Each case must be decided on its own merits, taking into account the circumstances appertaining and various factors that come into play.

10. From the record, the matter came up for mention on 29<sup>th</sup> May, 2019, when the court directed the Claimant to serve the claim and summons afresh upon the Applicant, having determined that there was no proof of service. The Court further directed that upon compliance by the Claimant, the matter to be set down for mention at the registry.

11. The Respondent filed its response on 27<sup>th</sup> September, 2019 and thereafter, there appears to have been no activity until 3<sup>rd</sup> November, 2022 when the Court on its own motion, caused the matter to be listed for mention for purposes of confirming whether parties had complied with all pretrial directions. It is on the said date, that the Applicant brought to the Court’s attention the instant Application.

12. The Claimant has attributed the delay in prosecuting the claim on transfer of judges, failure by the registry to open the diary so as to allow for taking of hearing dates and the Covid 19 pandemic.

13. In as much as the Claimant has placed blame on the Covid 19 pandemic and lack of hearing dates from the registry, it has not produced any evidentiary material to prove that it sought the Court’s intervention in the form of a request for a date, albeit for mention. Seemingly, it went to sleep, from the date the matter was mentioned on 29<sup>th</sup> May, 2019 and was jolted to action by the instant Application as well as the mention notice issued from the Court.

14. The Court further takes judicial notice that as at 29<sup>th</sup> May, 2019, the Covid 19 pandemic was yet to be reported in the country, hence the courts were operating normally.

15. Essentially, it is the duty of any Claimant to progress its matter to its logical conclusion. It ought not to wait to be moved by the Respondent or by the Court.

16. The foregoing, notwithstanding, the court notes that the period of inactivity between the close of the pleadings and prior to institution of the instant Application, is approximately 16 months and coupled with the fact that the Court is currently handling 2017 matters, as the one herein, finds that the delay by the Claimant as not being so inordinate as to deny him an opportunity to prosecute his case.

17. It is also not lost to the court that dismissal of a suit is a draconian act that 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.”**

18. In view of the foregoing, 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 of the Application.

19. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Applicant/Respondent      Mr. Kimosop

For the Respondent/Claimant      Ms. Njenga

**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**