



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE NUMBER 195 OF 2018**

**ABIUD LUSWETI KALAKATE.....CLAIMANT**

**-VERSUS-**

**SPIN KNIT LIMITED.....RESPONDENT**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**RULING**

**I. INTRODUCTION**

1. This cause was filed in court by the Claimant on 12<sup>th</sup> June, 2018 by way of a Statement of claim dated 4<sup>th</sup> May, 2018. The Claimant is seeking for a declaration that his termination in employment by the Respondent was unfair and unlawful. He is also seeking monetary compensation under various heads totaling Kshs.1,090,728, costs and interest.
2. In a reply to the memorandum of claim dated 19<sup>th</sup> July, 2018 the Respondent prays that the Claimant's claim be dismissed with costs.
3. The parties also filed witness statements, lists of documents, and on 21<sup>st</sup> January, 2020 the matter was certified ready for hearing (Mbaru J) and fixed for hearing on 19<sup>th</sup> May, 2020.
4. The court record does not show what happened on 19<sup>th</sup> May, 2020. The matter came up again in court on 20<sup>th</sup> July, 2020 but there was no representation from the Claimant and thereafter the matter went dormant.
5. After a lengthy period of dormancy, the court issued a Notice to show cause (NTSC) why the cause should not be dismissed for want of prosecution dated 28<sup>th</sup> September, 2021 which came in court for hearing on 26<sup>th</sup> October, 2021.
6. The Claimant opposed NTSC by way of a replying affidavit sworn by **ABIUD LUSWETI KALAKATE**, the Claimant, on 8<sup>th</sup> November, 2021. The Respondent supported the NTSC by way of an affidavit sworn by **N.O. WANJALA** on 31<sup>st</sup> January, 2022.
7. On 2<sup>nd</sup> February, 2022 Counsel for both parties agreed that a ruling be rendered by this court based on the affidavits filed.

**II. THE LAW APPLICABLE**

8. Order 17 Rule 2(1) of the Civil Procedure Rules provides as follows:

***“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.”***

9. Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as hereunder:-

***“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. As stated elsewhere in this ruling there was no action taken by either party for the period from 20<sup>th</sup> July, 2020 when the matter was last in court until the time when the court issued the NTSC on 28<sup>th</sup> September, 2021.

11. In paragraphs 6, 7, and 8 of his replying affidavit, the Claimant attributes the delay in prosecuting the matter to the Covid-19 Pandemic and the confusion and disorder following the pandemic.

12. However, the Respondent argues that the Claimant has been completely inordinate and indolent in failing to take action to prosecute this cause. The Respondent argues that the Claimant is using the pandemic as an excuse for his *inertia* and inexcusable delay in prosecuting the matter.

13. While it is the Claimant who filed this cause and hence he is under obligation to prosecute the same to logical conclusion, this court notes that the applicable law, **Order 17 Rule 2(1) of the Civil Procedure Rules and Rule 15(1) of the Employment and Labour Relations Court (Procedure) Rules 2016**, provides that either party to a cause may take steps to have the same prosecuted and or in the case of the Respondent herein apply for dismissal of the same for want of prosecution. The Respondent herein on its part did not take steps to have the cause prosecuted or dismissed for want of prosecution and it is therefore equally to blame for the prolonged delay and inaction in this matter.

14. The Respondent has only come out strongly in support of the dismissal of the cause for want of prosecution after the court, *suo motto*, issued the NTSC. Of course the Respondent is entitled to support the NTSC but is equally to blame for the delay in view of the provisions of the law cited above.

### **III. DISPOSAL**

15. This court has carefully gone through the replying affidavit by the Claimant and the affidavit in support of the NTSC by the Respondent. Strictly speaking there is no good reason given by the Claimant for the delay in prosecuting this cause. Even in the middle of the Covid-19 pandemic court matters were proceeding virtually and since mid 2021 there has been increased action in courts and registries in allocating dates for hearing of causes.

16. On the other hand, there is no explanation from the Respondent as to why it took no action to have the matter prosecuted or dismissed. Both the Claimant and the Respondent are to blame for the prolonged inaction and delay in either prosecution or dismissal of this cause.

17. However, the law cited above grants this court unfettered discretion in dismissing a cause for want of prosecution or giving the parties an opportunity to take steps towards prosecuting and concluding the cause.

18. Although no good or reasonable cause has been shown by the Claimant to explain the prolonged delay in prosecution of this cause, this court hereby reluctantly exercises its discretion in favour of not dismissing this cause and allows the Claimant a last opportunity to prosecute this cause. He has undertaken to do so in his affidavit.

19. In the circumstances, the NTSC issued by court on 28<sup>th</sup> September, 2021 is hereby set aside and the Claimant is ordered to fix this matter for hearing and to have the same proceed to hearing without any further delay and or unnecessary adjournment.

20. There is no order as to costs in respect of the NTSC.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15<sup>TH</sup> DAY OF MARCH 2022.**

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**DAVID NDERITU**

**JUDGE**