



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS

AT MOMBASA

CAUSE NO. 106 OF 2018

1. ABDI MOHAMMED ABDI

2. MUSA KHALIF MAHAMUD.....CLAIMANTS

VERSUS

1. FAYAZ BAKERS LIMITED

2. SHUNGULI DABLE KHALIF t/a S.D.K. SECURITY SERVICES....RESPONDENTS

R U L I N G

1. Before me is the Respondent's Notice of Motion dated 16th July 2021, expressed to be brought under Sections 1A,1B,3&3A of the Civil Procedure Act, Orders 17 Rule 2(1) & (3) and 51 Rule 1 of the Civil Procedure Rules and Rule 16(1) of the Employment and Labour Relations Court Rules. The Respondents seek the following orders:-

a) That the Court be pleased to dismiss the suit herein for want of prosecution.

b) That costs of the application be provided for, and be borne by the Claimants.

2. The application is supported by the affidavit of one Swaleh Awadh Hemed, a Human Resource Manager in the 1st Respondent Company, sworn on 16th July 2021.

3. The application is opposed by the Claimants, who on 6th August 2021 filed a Replying Affidavit, sworn by MUSA KHALIF MAHAMUD (the 2nd Claimant) on 4th August 2021.

4. When the application first came up for hearing before me on 21st September 2021, the Respondent/Applicant sought, and I granted him leave to file and serve a further affidavit. I further directed parties to file and to exchange written submissions on the application. Submissions have since been filed.

5. Dismissal of suits for want of prosecution is provided for in Rule 16 of the Employment and Labour Relations Court (Procedure) Rules 2016, which provides:-

“(1) in any suit where 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 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.

(2) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.

(3) Any party to the suit may apply for dismissal as provided in paragraph (i).

(4) The Court may dismiss the suit for non-compliance with any direction given under this Rule.”

6. According to the Court's record, hearing was on 14th January 2020 adjourned to 4th May 2020, and the Claimant was ordered to pay costs of ksh.2000 before the next hearing date. Record further shows that on 4th May 2020, the suit was called out in Court and that none of the

parties was present. The Court ordered that parties do move the Court. According to the Court's record, no further action was taken towards prosecution of the suit until 22nd July 2021 when the present application was filed.

7. The 1st Respondent/Applicant deponed in its supporting affidavit that the Claimants inaction on the matter was unjustified, and was putting the 1st Respondent to needless expense.

8. In his Replying Affidavit mentioned in paragraph 3 of this Ruling, the 2nd Claimant deponed, *inter-alia*:-

a) that the Claimants had been ready and that amendment of the claim and issuance of fresh summons on the 2nd Respondent had caused some delays as the matter was mentioned severally to confirm service.

b) that the Claimants were ready to proceed with the hearing on 4th May 2020 but the Court was not sitting.

c) that parties were negotiating settlement of the matter.

d) that the Claimants fixed the matter for hearing on 23/5/2019, 28/11/2019 and 4/5/2020, and served hearing notices on the Respondents.

e) that due to the Covid-19 pandemic, Courts were closed from March 2020, thereby causing further delays.

f) that the Claimants are ready, willing and able to proceed with the matter at any time that the Court may direct.

9. In its further affidavit sworn by Swaleh Awadh Hemed on 17th September 2021 and filed in Court on 24th September 2021, the 1st Respondent/Applicant deponed, *inter-alia*:

a) that Courts resumed after 4th May 2020, and matters proceeded virtually, but the Claimants failed and/or neglected to fix the suit herein for hearing.

b) that the letter attached (exhibited) by the Claimant (on the issue of negotiations) was written in the year 2019, and was written on strictly without prejudice basis, and should no be used in evidence.

c) that the hearing notices referred to by the Claimant/Respondents were never served on the 1st Respondent, and are not admissible.

10. Both parties have acknowledged, and the Court has taken judicial notice of the global Covid-19 pandemic that has ravaged all the Countries of the World starting from January 2020 or thereabouts, and which slowed down Court operations in Kenya for sometime during the year 2020, I have also carefully perused the Court's record and I have noted that although the Claimants did not take any step towards prosecution of the suit herein from 4th May 2020 to 22nd July 2021 when the present application was filed, they (the claimants) had previously taken reasonable steps towards prosecution of the suit. I decline to dismiss the suit for want of prosecution and proceed to make the following orders:-

a) the Notice of Motion dated 16th July 2021 is hereby dismissed with no orders as to costs.

b) the Claimants shall prosecute the suit herein within six (6) months from the date of this Ruling, failing which the suit shall stand dismissed.

c) the suit shall be mentioned in Court for appropriate directions and for fixing of a hearing date on 30/3/2022.

11. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MARCH 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

No appearance for Claimant

No appearance Respondent