



**Kadenge v Hotel (Cause 315 of 2015) [2022] KEELRC 57 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 57 (KLR)

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

**CAUSE 315 OF 2015**

**AK NZEI, J**

**APRIL 28, 2022**

**BETWEEN**

**PHILIP KAHINDI KADENGE ..... CLAIMANT**

**AND**

**LEOPARD BEACH HOTEL ..... RESPONDENT**

**RULING**

1. The application before me is the Respondent's Notice of Motion dated 25<sup>th</sup> October 2021, vide which the Respondent seeks dismissal of the Claimant's suit herein for want of prosecution. The application is expressed to be brought under Order 17 Rule 2(1) & 3 and 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The application is premised on grounds that are set out in the body of the application and replicated in the affidavit of John Nomanyi, the Respondent/Applicant's Financial Controller sworn on 25<sup>th</sup> October 2021 in support of the application. It is deponed in the said affidavit, inter-alia:-
  - a) that the suit herein was commenced by the Claimant vide a statement of claim dated 27<sup>th</sup> May 2015.
  - b) that the Respondent entered appearance and subsequently filed a statement of Response on 9<sup>th</sup> July 2015; upon which directions were subsequently taken and the suit fixed for hearing.
  - c) that the Claimant testified and closed his case on 22<sup>nd</sup> January 2020, upon which the defence case was fixed for hearing on 31<sup>st</sup> March 2020 and that hearing could not proceed on the said date owing to the advent of the Covid-19 pandemic.
  - d) that although Court operations have since resumed, no step has been taken towards setting the suit down for hearing.



- e) that the delay in setting the suit down for hearing is inordinate and inexcusable and that the Applicant continues to incur legal costs and to suffer unnecessary anxiety and uncertainty due to delay in prosecuting the suit.
2. The application is opposed by the Claimant vide a Replying Affidavit sworn by Samuel Odhiambo Eleakim Advocates sworn on 23<sup>rd</sup> November 2021 and filed in Court on the said date. It is deponed in the said affidavit, inter-alia:-
- a) that the Claimant testified and closed his case on 22<sup>nd</sup> January 2020 and defence case was fixed for hearing on 31<sup>st</sup> March 2020, a date on which hearing could proceed due to the advent of Covid-19 pandemic.
  - b) that hearing had proceeded partly before a judge who has since been transferred and the Court had been giving mention dates for parties to take directions.
  - c) that efforts by the Claimant's advocates to trace the Court file in order to fix a mention date were in vain and that it was not the Claimant's fault that the Respondent/Applicant's case had not been fixed for hearing.
  - d) that the Claimant has not lost interest in the case and his advocates have been writing letters with a view to having the suit settled out of Court.
3. Documents annexed to the said Replying Affidavit include a Service Requisition Form dated 31<sup>st</sup> May 2021 requesting for the Court file herein at the Court's Registry. I have seen on the Court's record a letter by Odhiambo S. & Company Advocates dated 5<sup>th</sup> August 2021 informing this Court's Deputy Registrar of the unavailability of the Court file and asking for his intervention in retrieving the file. I have also seen on the Court's record the Court's Deputy Registrar's letter on the suit herein dated 9<sup>th</sup> August 2021 addressed to Odhiambo S.E & Co. Advocates and stating as follows:-
- “we refer to your letter dated 5<sup>th</sup> August 2021. The above mentioned file is now available at the registry for your further action.”
4. Dismissal of suits by this Court for want of prosecution is provided for under 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.”
5. Although the Respondent/Applicant was within its right to apply for dismissal of the Claimant's suit over a year since the matter was last in Court, it is my finding that the Claimant, who had long



prosecuted and closed his case, giving way to hearing of the defence case had, though belatedly, made notable efforts towards fixing the suit for further hearing.

6. Further, I take Judicial notice of the global Covid-19 Pandemic which, for sometime during the year 2020, considerably slowed down Court operations. As admitted and appreciated by the parties, Covid-19 Pandemic was the reason why hearing of the defence case did not proceed on 31<sup>st</sup> March 2020 as earlier scheduled by the Court.
7. In the case of *Dominic Kiragu Warui v K-rep Bank Limited*[2017] eKLR, the Court stated as follows:-

“the Court in exercise of its jurisdiction to dismiss suits for want of prosecution is guided by the principles laid out in *Utalii Transport Company Limited & 3 others v Nic Bank Ltd & another* [2014] eKLR that the Court must examine if there is inordinate delay in prosecution of the case, the delay is intentional and not excusable; delay is in abuse of Court process, delay gives rise to substantial risk to fair trial or prejudice to the Respondent; no prejudice will be occasioned to the Claimant; there is no reasonable explanation offered for the delay, and the Court should consider what is in the interest of justice...”
8. In the present case, the delay in fixing the suit for defence hearing, though exceeding one year, was clearly not intentional on the part of the Claimant and has sufficiently been explained. In the circumstances of the case herein, dismissing the Claimant’s suit will not serve the interest of justice.
9. Consequently, and having considered written submissions filed by Counsel for both parties pursuant to the Court’s directions in that regard, I make the following orders:-
  - a) The Notice of Motion dated 25<sup>th</sup> October 2021 is hereby dismissed with no order as to costs.
  - b) The case shall be mentioned in Court on 10<sup>th</sup> May 2022 for purposes of fixing a date for defence hearing.
10. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 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:

Opolo for Claimant

N/A for Respondent

