



**Musembi v Defence Forces Canteen Organisation (Cause  
1819 of 2017) [2022] KEELRC 1473 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1473 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1819 OF 2017**

**SC RUTTO, J**

**MAY 27, 2022**

**BETWEEN**

**JACKLINE KOKI MUSEMBI ..... CLAIMANT**

**AND**

**DEFENCE FORCES CANTEEN ORGANISATION ..... RESPONDENT**

**RULING**

1. Before me for determination is an application dated September 24, 2020 brought under article 50(1), 159(2)(b) of the *Constitution* of Kenya, 2010, order 17 rule 2(3) of the *Civil Procedure Rules* and sections 1A, 3A and 63(e) of the *Civil Procedure Act* and any other enabling provision of the law. The application is supported by the grounds on its face and on the affidavit of Ms. A M Mate, who identifies herself as a colonel in charge of litigation at the Ministry of Defence.
2. The application seeks the following orders;
  1. Spent
  2. That this honourable court be pleased to find the delay in prosecuting it inexcusable and one that defeats equity.
  3. That consequently this honourable court be pleased to strike out and/or dismiss in its entirety the claim herein.
  4. That costs of this application be provided for.
3. The main grounds in support of the application is to the effect that the claimant has never invited the respondent for hearing fixation and that over 15 months had lapsed, since the claim was last acted upon. That the indolence in prosecuting the claim defeats equity and that the delay was inexcusable.



4. The application was opposed through the replying affidavit sworn on December 10, 2021 by Ms. Beatrice J. Sawe, Advocate practicing in the firm which is on record for the claimant. Counsel averred in her affidavit that the application was premature, misconceived, mischievous and an abuse of the court process hence urged the court to dismiss the same with costs.
5. She further stated that sometimes between 2018 and February, 2019, the court file got misplaced at the registry, hence the claimant could not have the file listed for mention as intended. That the claimant through her advocates on record employed all means possible to try and locate the file at the registry, but the said efforts were fruitless as the file could not be traced. That as such, for the better part of the year 2019 and early, 2020, the claimant continued to try and trace the file at the registry but the same could not be located.
6. To this end, she annexed letters addressed to the Deputy Registrar and screenshots of emails to the court registry. She further attributed the delay in tracing the court file to the Covid 19 pandemic. Counsel therefore averred that the delay in prosecuting the matter was not of the claimant's making but was brought about by factors beyond her control. That the file having been located and placed before court, the claimant is intent on prosecuting the matter to its logical conclusion.

### Submissions

7. The parties agreed to dispose off the application by way of written submissions. The applicant submitted that the claimant having failed to take any step to ensure the expeditious hearing of the suit for almost three (3) years, is guilty of laches hence the said inaction renders the suit ripe for dismissal by dint of order 17 rule 2(1) as applied under rule 2(3) of the *Civil Procedure Rules*. To support its submissions, the applicant relied on several authorities including *Cecilia Wanjiku Njoroge vs National Environment Management Authority (NEMA) & another*, (2013) eKLR and *Mukhisa Biscuit Company Limited vs West End Distributors* (1969) EA 699.
8. On its part, the claimant reiterated the averments of the replying affidavit sworn by Ms. Beatrice Sawe and maintained that the delay in prosecuting the suit was occasioned by factors beyond her control. The claimant invited the court to consider several authorities including *Argan Wekesa Okumu vs Dima College Limited & 2 others* (2015) eKLR, *Ceven Limited vs Erastus Gichubi & 4 others* (2021) eKLR and *Ivita vs Kyumbu* (1975) eKLR.

### Analysis and determination

9. Evidently, the main issue for determination by the court is whether the suit herein is liable for dismissal for want of prosecution. The applicable legal provision in this instance is rule 16(1) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 which provides as follows;

“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. The above provision is a replica of order 17 rule 2 of the *Civil Procedure Rules*.
11. The import of rule 16(1) of this *Court's Rules* and order 17 rule (2) of the *Civil Procedure Rules*, 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. Be that as it may, this does not mean that a case that has been idle for more than one year



earns an automatic dismissal. As such, each case must be decided on its own merits bearing in mind the circumstances appertaining.

12. From the record, the matter came up for mention on 3<sup>rd</sup> July, 2018, when the court directed the parties to file a list of agreed issues. Subsequently, the parties complied and filed a statement of agreed issues on December 4, 2018.
13. There seems to have no activity on the court file shortly after the filling of the agreed issues. The claimant avers that the court file had gone missing for some period of time between 2018 and February, 2019. This is not apparent from the court record. Nonetheless this issue was not controverted by the applicant. Further, the claimant has adduced evidence to prove that it attempted to have the matter set down for hearing in the years 2019, 2020 and 2021.
14. There is a letter on record, dated April 11, 2019, through which the claimant's advocate invited the applicant to fix a pretrial date at the registry on April 16, 2019. It is however not apparent what transpired on that day.
15. The claimant further produced a letter dated August 20, 2019, addressed to the Deputy Registrar, seeking directions on the matter. This was followed by another email of June 19, 2020 to the court, still seeking directions on the matter.
16. There is also a copy of an email of June 23, 2020 and 1 September 3, 2021, through which the claimant's advocate requested the court for a mention date for purposes of taking directions on the matter. In response to the email of September 13, 2021, the claimant's advocate was advised that the court was listing 2017 matters in a chronological order hence was advised to await a mention before the Deputy Registrar who was to issue a hearing date. Thereafter, the matter was listed for mention on November 24, 2021 when the instant application was brought to the court's attention.
17. Subsequently, and in view of the communication emanating from the claimant's advocate, it would seem that she made several attempts, to have the matter mentioned. This demonstrates that she tried to move the court in one way or another through her advocates, with a view to having the matter prosecuted.
18. It is therefore apparent that the delay in prosecution of the matter is not entirely attributable to the claimant and cannot be termed as inordinate and inexcusable on her part.
19. The court further takes judicial notice of the Covid 19 pandemic which largely interfered with normal court operations for the better part of 2020 and sometimes in 2021. Accordingly, the claimant's explanation as regards the delay in prosecuting the matter, is rational.
20. It is also notable that dismissal of a suit is a draconian act as it 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.”
21. In light of the foregoing, I will not allow the application as prayed and instead, I will direct that the matter be listed for hearing on a priority basis noting that it is a 2017 matter.



22. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2022.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Applicant/Respondent Mr. Tuitoek

For the Respondent/Claimant Mr. Muchai

Court Assistant Barille Sora

**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**

