



REPUBLIC OF KENYA



**Kiragu v Nairobi Bottlers Limited (Cause 1302 of 2018)
[2022] KEELRC 1431 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1431 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1302 OF 2018**

SC RUTTO, J

JUNE 23, 2022

BETWEEN

BEATRICE KARWITHA KIRAGU CLAIMANT

AND

NAIROBI BOTTLERS LIMITED RESPONDENT

RULING

1. The instant application which is dated May 10, 2022, is expressed to be brought under sections 1A, 1B, 3A of the of the [Civil Procedure Act](#), order 17 rule 2, order 51 rule 1 of the [Civil Procedure Rules](#) and all enabling provisions of the law.
2. The application is supported by the grounds on its face and on the Affidavit of Ms Latiffa Cheronu, who describes herself as the human resource manager of the Applicant.
3. The application seeks the following orders;
 - a. That the honourable court be pleased to dismiss the suit herein for want of prosecution.
 - b. That the honourable court be pleased to award costs of this application and those of the entire suit to the respondent/ applicant.
4. The application is premised on the fact that the claimant has abandoned the suit in its entirety for more than three (3) years since it was instituted in 2018. That the applicant continues to be greatly prejudiced should the suit continue to exist.



5. The application was opposed through a Replying Affidavit, sworn on May 30, 2022, by the claimant, through which she avers that: -
- a. She has made follow ups through her advocates on record, to see if they had secured a hearing date for the matter.
 - b. On such follow ups, she was advised that the court registry had advised that they wait for the official notice from the Court as to when matters filed in 2018 would be allocated hearing dates.
 - c. Her advocates had requested for a mention date for the matter on February 17, 2022.
 - d. Her advocates received an email from the court for a date fixing session and subsequently, the matter was fixed for mention on May 17, 2022.
 - e. Her advocates advised her on May 12, 2022 that the respondent had filed the instant application.
 - f. She is desirous to prosecute the matter.
 - g. The respondent will not suffer substantial risk due to the inadvertent delay in prosecution of the suit.
 - h. Her advocates have not premeditated the delay of the matter.
6. The application was canvassed by way of written submissions which I have considered. The applicant submits that it is the duty of the claimant to expeditiously prosecute the matter to its logical conclusion. That the inactivity which was close to four (4) years, highlights a litigant who has lost interest in the matter. To support its position, the applicant relied on the determinations in Civil Case 1932 of 2004; *Argan Wekesa v Dima College & 4 others* and *Allan v Sir Alfred Mc Alpine and Sons Ltd* [1968] 1 All ER 543. It urged the court to dismiss the suit for want of prosecution.
7. It was submitted on the part of the claimant, that the applicant had failed to prove how the inadvertent delay in prosecuting the matter had seriously prejudiced its right to a fair trial. The claimant placed reliance on the cases of *Utalii Transport Company Limited & 3 others v NIC Bank Limited & another* [2014] eKLR and *Naftali Opondo Onyango v National Bank of Kenya Ltd.* [2005] eKLR.

Analysis and determination

8. From the application, the response thereto and the applicable law, it is clear that the main issue falling for the court's determination is whether the suit is liable for dismissal for want of prosecution. Rule 16(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* is significant and I will reproduce the same as hereunder: -
- “(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 above provision is a replica of order 17 rule 2 of the *Civil Procedure Rules*.



10. 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. Even so, it is not an open and shut case. This means that an idleness of one year does not translate to an automatic dismissal of a suit. As such, each case must this be considered on its own merit.
11. It is discernible from the court record that the claimant's advocates requested for a mention, for purposes of taking a hearing date, through its letter dated May 16, 2019, which was addressed to the deputy registrar. On the said letter is a remark made on May 23, 2019, stating, "pretrial date to issue".
12. Thereafter, no date for pretrial was issued and there was no activity on the court file until February 17, 2022, when the claimant's advocates requested the deputy registrar for a mention, with a view to fixing a hearing date. In the ensuing period, the instant application was filed.
13. When the matter came up for mention on May 17, 2022 before the deputy registrar, the applicant indicated to the court that it had filed the instant application. The application was then fixed for hearing on May 31, 2022 when appropriate directions were given as regards its disposal.
14. Having reviewed the communication from the claimant's Advocate to the court, it is evident that the claimant made few attempts through her advocates, to have the matter prosecuted.
15. Accordingly, and noting that the court is currently handling 2017 matters, the delay in prosecution of the matter cannot be termed as so inordinate and inexcusable as to earn the claimant dismissal of her suit.
16. 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 *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows: -

"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."
17. To this end, 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's a 2018 matter.
18. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the applicant/respondent Ms Mulongo

For the respondent/claimant Ms Nkonge

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 15th March 2020 and subsequent directions of 21st 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

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