



**Kungu v Brookside Dairy Limited (Cause 2597 of 2016)  
[2022] KEELRC 1724 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1724 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2597 OF 2016**

**JK GAKERI, J  
JULY 21, 2022**

**BETWEEN**

**PETER KUNGU ..... CLAIMANT**

**AND**

**BROOKSIDE DAIRY LIMITED ..... RESPONDENT**

**RULING**

1. The claimant filed the suit herein on December 19, 2016 and served and filed an affidavit of service on March 3, 2017. The respondent entered appearance on June 10, 2017 and filed its response to the claim on July 10, 2017.
2. The respondent's application dated July 19, 2017 to vary the order confirming the matter as undefended was allowed on September 25, 2017.
3. The court issued a notice to show cause for dismissal for want of prosecution dated March 20, 2017 and on the appointed hearing date none of the parties attended as there was no evidence of service of the notice to show cause.
4. Records show that the claimant was last in court on July 19, 2017.
5. Noteworthy, the claimant has been acting in person.
6. The respondent filed a notice of motion application dated April 4, 2022 praying for orders:
  - i) That the claim be dismissed for want of prosecution.
  - ii) That the claimant do bear the costs of this application.
7. The application is expressed under rule 16 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, sections 3 of the *Employment and Labour Relations Court Act, 2011* of the Laws of Kenya and all enabling provisions of the law.



8. The application is based on the grounds that:
  - i. That the claimant has failed to have the matter set down for hearing since September 25, 2017;
  - ii. That it is in the interest of justice that the respondent be discharged from the obligations imposed by the suit as the claimant is clearly no longer interested in prosecuting their claim.
9. The application is supported by the affidavit dated April 4, 2022 sworn by J K Njuguna, advocate who *inter alia* depones that the suit herein was filed on December 19, 2016.
10. That after the court allowed the respondent's application to defend the suit on September 25, 2017, the claimant was granted 72 days to respond and thereafter fix the matter for hearing.
11. It is further deponed that it has been four (4) and a half years since September 25, 2017 and the suit has not been set down for hearing.
12. It is the respondent's case that the claimant is no longer interested in the matter and it is only just the suit against the respondent be dismissed with costs.
13. Finally, it is deponed that the respondent continues and will continue to suffer prejudice as long as the suit is pending.
14. Instructively, the respondent served the hearing notice of the application through registered post to the claimant's last known postal address, P O Box 42756 – 00100, Nairobi and attached a copy of the postal certificate dated May 6, 2022 at 11.51 am.
15. The claimant did not appear for the hearing and has not written or reached out to the court in any way for assistance in having the suit disposed of.
16. The applicant prays that the suit be dismissed with costs.
17. The claimant did not oppose the application.

### **Analysis and Determination**

18. The singular issue for determination is whether the notice of motion application dated April 4, 2022 is merited.
19. Section 3 of the [Employment and Labour Relations Court Act](#) provides:
  - a. The principal objective of this Act is to enable the court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.
  - b. The court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).
20. This provision enjoins the court to *inter alia* facilitate, just and expeditious resolution of disputes in an efficient and proportionate manner having regard the circumstances of every case.
21. In furtherance of the principal objection of the [Employment and Labour Relations Court Act](#), rule 16 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) provides:
  - a. 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.



- b. ...
- c. Any party to the suit may apply for dismissal as provided in paragraph (1).
22. Relatedly, order 17 rule 2(1) and (3) of the [Civil Procedure Rules, 2010](#) governs dismissal of suits for want of prosecution where no application has been made or action taken by either party for one year.
23. In [Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M D Popat and others](#) [2016] eKLR the court stated as follows –
- “Nonetheless, article 159 of the Constitution and order 17 rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita V Kyumba* [1984] KLR 441 espoused.”
24. Similarly, in [Ivita v Kyumba](#) [1984] klr 441 the court stated as follows:
- “The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of discretion of the court.”
25. Similar sentiments were expressed in [Argan Wekesa Okumu v Dima College Limited & 2 others](#) [2015] eKLR.
26. The court is guided by these sentiments. However, legions of decisions are also emphatic that courts should be slow to dismiss suits for want of prosecution as it is a draconian step.
27. In [Naftali Opondo Onyango v National Bank of Kenya Ltd](#) [2005] eKLR, the court stated as follows:
- “However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the plaintiff.”
28. The court is guided with these sentiments.
29. I will now proceed to apply the foregoing principles to the facts of the instant case.
30. It is not in dispute that the claimant filed the suit herein on December 19, 2016 and took no action even after the notice to show cause dated March 20, 2019 pursuant to rule 16 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#).
31. It is also not in dispute that the last time the claimant was in court was on July 19, 2017 and has not made any noticeable attempt to have the suit set down for hearing or seek assistance of the court on the disposal of the suit.



32. Relatedly, the notice of hearing of this application though, served by registered post elicited no response from the claimant. A duration of more than four (4) years of unexplained inactivity is not only long but inordinate.
33. The court is constrained to agree with the applicant that the claimant appears to have lost interest in the suit but has not expressly stated so.
34. Having found that the delayed action by the claimant is inordinate, the next question for determination is whether the claimant has provided any reason for the inaction. Regrettably, none has been furnished to the court for its consideration.
35. Finally, on the issue of prejudice, the applicant depones that it continues and will continue to suffer prejudice as long as the suit is pending. According to the respondent, the suit has been pending for too long which is exacerbated by the claimant's inactivity which is inordinate and unexplained. The suit has been hanging round its neck analogous to the proverbial sword of damocles.
36. For the foregoing reasons, the court is satisfied and finds that the applicant has established a sustainable case for the dismissal of the suit herein for want of prosecution.
37. The delay by the claimant to have the matter listed for hearing is inordinate and unexplained. The inactivity appears flagrant and culpable.
38. In the final analysis, the notice of motion application dated April 4, 2022 is merited and the claim herein is dismissed for want of prosecution.
39. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JULY 2022**

**DR. JACOB GAKERI**

**JUDGE**

**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 March 15, 2020 and subsequent directions of April 21, 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 has been guided by article 159(2)(d) of 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.

**DR. JACOB GAKERI**

**JUDGE**

