



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna v K-Unity Savings & Credit Co-Operative Society Ltd (Cause E265 of 2018) [2022] KEELRC 1725 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1725 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE E265 OF 2018**  
**AN MWAURE, J**  
**JULY 21, 2022**

**BETWEEN**

**LEONARD NJENGA NJUGUNA ..... CLAIMANT**

**AND**

**K-UNITY SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD ..... RESPONDENT**

**RULING**

**(On an application for an order for dismissal of suit for want of prosecution)**

**A. Background**

1. The Claimant (Leonard Njenga Njuguna) filed a Memorandum of Claim dated March 5, 2018 in this Honourable Court through which he claimed to have been unfairly and unlawfully dismissed from employment by the Respondent who further refused to pay him terminal dues. The Claimant prayed for the following:
  - (i) A declaration that the Claimant's termination was both substantively and procedurally unfair and unlawful.
  - (ii) An award of Kshs.1,621,032 made up as follows:
    - (a) Accrued leave for one year.....Kshs.115,788
    - (b) 12 month's compensation.....Kshs.1,389,456
    - (c) October 2017 salary.....Kshs.115,788
  - (iii) Certificate of Service
  - (iv) Costs of the suit



- (v) Any other relief that the Court may deem fit to grant.
2. The Respondent filed a Reply to the Claimant's Memorandum of Claim on April 16, 2018 and further filed an Amended Reply to the Claimant's Memorandum of Claim together with a Counter Claim. The Respondent sought that judgment be entered for itself against the Claimant for special damages amounting to Kshs. 1,195,021.43 and costs of the Counter-Claim.
  3. The Court has perused the court file and finds it important to briefly summarize the case of both the Claimant and Respondent accordingly.

#### **B. The Claimant's Case**

4. The Claimant avers that he was employed by the Respondent on 30<sup>th</sup> January 2001 as a savings clerk under the Co-operative Society's predecessor, Kiambu Dairy & Pyrethrum Farmers' Co-operative Union Limited.
5. As a result of his diligence and stellar performance he was promoted to the position of a Bank Clerk which saw his salary increased from Kshs. 7200 to Kshs. 8400. He continued serving diligently and earned himself yet another promotion to the position of Branch Manager which position he served until his termination. His salary at the time of termination was Kshs. 115,788.
6. He further states that on October 16, 2017, he was astonished when he received a show cause letter demanding explanation for irregularly discounting a cheque of Kshs. 670,000- Account Number 0061-7803 while serving as Branch Manager at the Respondent's Maai Mahiu Branch. The Claimant defended himself on 17<sup>th</sup> October 2017 stating that due process was followed in discounting the said cheque.
7. The Claimant adds that he was suspended from duty without pay for a month vide a letter dated October 19, 2021. This was followed by a summary dismissal letter dated 27<sup>th</sup> October 2017.
8. It is the Claimant's case that he was unfairly and unlawfully dismissed from employment as the Respondent completely disregarded Sections 41 and 45 of the *Employment Act* of 2007. He further states that his right to fair administrative action as envisaged in Article 47(1) of *the Constitution* of Kenya was infringed on.

#### **C. The Respondent's Case**

9. The Respondent does not deny the fact that the Claimant was its employee. It however goes ahead to state that the Claimant was the author of his own misfortune due to his professional misconduct and fundamental breach of his obligations arising out of his contract of employment.
10. It is stated that from the onset the Claimant was not without incident as he had already written an apology letter and was pardoned in July 2001. Additionally, it is said that the Claimant was in gross violation of accounting procedures and policies of the union relating to imprest management since he had credited all imprest cheques into his personal account No. XXXXX amounting to Kshs. 153,568.
11. It is the Respondent's position that the Claimant without undertaking due diligence and/or following due procedure and in total ignorance of the Customer Policy Procedures discounted cheques from relatively new individuals of accounts which were opened vide application forms on August 25, 2016. This mistake resulted in loss of Kshs. 371,453.43. In yet another escapade Kshs. 670,000 is said to have been irregularly discounted without following due procedure on September 13, 2017.



12. Following the events above, an audit was done to the Respondent's Maai Mahiu Branch. The audit report contained an account statement relating to one Serah Wanjiru Njoroge. The withdrawal, transaction documents and bank statements relating to the account had proof of negligence by the Claimant. The Respondent also accuses the Claimant of payment of an uncleared cheque even though it later bounced.
13. It is as a result of the foregoing that the Respondent saw it wise to dismiss the Claimant from employment. It avers that the Claimant was paid all his benefits amounting to Kshs. 2,197,360 via bankers cheques of No. 462693, 462694 and 462687.

#### **The Application Dated January 14, 2022**

14. Having looked at both the Claimant's and the Respondent's case, the attention of this Honourable Court is shifted to the Notice of Motion dated January 14, 2022 filed by the Respondent.
15. From the application, the Respondent/Applicant prayed that the suit herein be dismissed for want of prosecution for the reason that no other step had been taken by the Claimant herein to prosecute the matter since January 30, 2019 when this suit was listed for hearing. Three years since the response to the Memorandum of Claim was filed and served there has been no action taken by the Claimant. It also states that it continues to suffer prejudice.
16. In opposition to this application the Claimant/Respondent filed a Replying Affidavit dated March 4, 2022 wherein it was stated that the matter was listed for hearing on 30<sup>th</sup> January 2019 but the same did not proceed.
17. The Claimant/Respondent stated it was not their fault as there was a directive from the Court's Registry to work on the backlog on employment matters from the year 2016. Consequently, all matters that had been filed after 2016 never proceeded.
18. The Claimant/Respondent avers that this application is frivolous, brought with ill-intent and vexatious. Further, he requests to have a day in court to plead his case as guaranteed by Article 50 of *the Constitution* of Kenya 2010.
19. In its wisdom, this Honourable Court frames only one issue for determination: Whether this suit should be dismissed for want of prosecution.

#### **D. Whether this suit should be dismissed for want of prosecution**

20. The Employment and Labour Relations Court is a creature of Article 162 (2) (a) of *the Constitution* of Kenya. It was created as one of the specialized courts under *the Constitution* and it thus has its own rules as was stated by Learned Judge in *Prisca Jepng'etich v Generation Career Readiness Social Initiative Limited* [2021] eKLR. Consequently, this Honourable Court seeks to rely on the Employment and Labour Relations Court (Procedure) Rules 2016. This Court further guided by the case of *Vincent Mwatsuma Nguma & 5 Others v Kilifi Mariakani Water and Sewerage Co Ltd* [2021] eKLR where Learned Judge stated as hereunder:

..... it is to be appreciated that only these rules will be resorted to in determining how to proceed before the court.

21. Section 16 of the *Employment and Labour Relations Court (Procedure) Rules* 2016 states as follows:
  - (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.

- (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 (1).
- (4) The court may dismiss the suit for non-compliance with any direction given under this rule.

In *Ivita v Kyumba* [1984] eKLR the Court established the principles governing applications for dismissal of a suit for want of prosecution. The Court said:

The test applied by the courts in the 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 and in the discretion of the court."

22. It is a fact that the delay by the Claimant to prosecute the suit was inordinate. It is also true for quite a while in 2019 to 2021 the Employment and Labour Relations Courts had few judges and were concentrating on finalizing the very old cases. The ELRC was only reasonably manned towards the end of 2021.
23. There is otherwise nothing on record to show the Claimant deliberately sought to delay the course of justice. He says a good portion of the delay was caused by the policy of the registry not giving dates unless for very old cases due to shortage of judges. That settles the question of exercise of judicial discretion to allow the respective parties to have their cases heard on merits.
24. Justice is better served when both parties to a dispute are accorded an opportunity to be heard on merits in order to ventilate on their issues. This is unless it can be shown one party deliberately purposed to obstruct or delay justice.
25. For the foregoing reasons I will exercise discretion and allow the Claimant's case to proceed for hearing and disallow the Respondent's application for dismissal of the Claimant's case.
26. It is ordered that the parties set the case for hearing within the next 2 months as this is a fairly old case.
27. Costs of this application will be in the cause.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 21<sup>ST</sup> JULY, 2022**

**ANNA NGIBUINI MWAURE**

**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 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**

