



**Oteri v China Road and Bridge Corporation Ltd (Cause
1691 of 2017) [2022] KEELRC 1260 (KLR) (8 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1260 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1691 OF 2017**

SC RUTTO, J

JULY 8, 2022

BETWEEN

BETHSEBA KERUBO ORERI CLAIMANT

AND

CHINA ROAD AND BRIDGE CORPORATION LTD RESPONDENT

RULING

1. The Application before me is dated 23rd August, 2021, and is expressed to be brought under sections 1A, IB, 3A of the *Civil Procedure Act*, Order 17 rule 2(3) of the *Civil Procedure Rules* and all other enabling provisions of the law.
2. The Application is supported by the grounds on its face and on the Affidavit of Ms. Veronica Ouko, who identifies herself as the Applicant's human resource manager.
3. The Application seeks the following orders;
 - a. Spent
 - b. The claimant's Memorandum of Claim herein dated 23rd August, 2017 be dismissed for want of prosecution.
 - c. The costs of the Application together with the Memorandum of Claim herein be borne by the claimant.
4. The Application is premised on grounds that the matter was last in Court on 25th September, 2019, for mention. That the Claimant has since neglected, failed and/or refused to take any step towards the prosecution of the claim for a period of two years following the Court's directions given on 25th September, 2019. That it is clear that the Claimant has lost interest in the Claim and the same should be dismissed with costs to reduce unnecessary case backlog in the judiciary. That the continued existence



of the subject claim is not only prejudicial but is also causing the Applicant huge losses arising from the need to defend the colossal claim alleged in the Claimant.

5. The Application was opposed through the Replying Affidavit sworn on 3rd June, 2022 by the Claimant who avers that she was served with the Application on 23rd May, 2022. That this was after she had been issued with a notice to show cause from the Court why the matter should not be dismissed for want of prosecution. That when the notice to show cause came up on 16th December, 2021, the Court was satisfied with her explanation hence the matter was set for hearing on 23rd May, 2022. That it is on the said hearing date, that she heard of the existence of the instant Application. That she satisfactorily explained the delay in prosecuting the suit on 16th December, 2021.
6. The Application was canvassed through oral submissions on 20th June, 2022, with the Applicant's counsel, Ms. Koech urging the Court to allow the Application as there had been no activity on the matter for two years. That the Claimant did not give any reasons why she had failed to prosecute the matter.
7. The Claimant who is self-representing, submitted that she was unable to obtain a hearing date at the registry as she was informed that there were no dates available. That thereafter, the Covid 19 pandemic hit the country and she could not get a hearing date, through the digital platform. That she had even written a letter to Court requesting for a date. She asked the Court to allow the claim proceed for hearing.

Analysis and determination

8. Arising from the Application, the response thereto, the parties' oral submissions before Court and the applicable law, it is clear that the main issue falling for the Court's determination is whether the suit herein is liable for dismissal for want of prosecution.
9. Rule 16(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, which is key, is couched 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.”
10. It is notable that the above provision is a replica of Order 17 Rule 2 of the Civil Procedure Rules, 2010.
11. The import of the provisions 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.
12. The foregoing notwithstanding, it does not mean that a case that has been idle for more than one year, automatically falls for dismissal. In this regard, each case ought to be determined based on the relevant circumstances.
13. From the record, the matter was mentioned on 15th March, 2018 and parties directed to take a hearing date at the registry. The Claimant caused the matter to be listed for mention on 25th September, 2019, before the Deputy Registrar for purposes of taking a hearing date.



14. The record indicates that both parties were absent from Court on that day hence the Court directed that parties take a date at the registry. The Claimant told Court that on that day, she did not hear her matter being called out and upon follow up, she was informed that there were no hearing dates.
15. The record also bears that the Court directed the Claimant through a notice dated 26th November, 2021, to show cause why the matter should not be dismissed for want of prosecution.
16. On 16th January, 2021, when the notice to show cause came up, the Claimant informed Court that she had been trying to get a hearing date but was informed that the diary was closed. She stated that she was still interested in the case. The Applicant was not present in Court on the said date. The Court proceeded to allocate a hearing dated for 23rd march, 2021 and directed that the Applicant be served as appropriate.
17. From the record, it appears that the Claimant proactively followed the matter until 25th September, 2019. The other initiatives she mentioned in Court as having taken to have the matter prosecuted, are not on record. Nonetheless, the Court takes judicial notice that a pro se litigant as the Claimant herein, may not be acquainted with the legal procedures and other intricacies of the law as advocates. As such, they may face limitations and become disadvantaged on issues of law. This includes documenting the steps undertaken to have their matter prosecuted.
18. Besides, the Court 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 delay in prosecuting the matter cannot be deemed as inexcusable.
19. The Court is also cognizant 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.
20. In the circumstances, I will decline to allow the Application as prayed and instead, I will grant the Claimant an opportunity to prosecute her matter.
21. To this end, I 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 8TH DAY OF JULY, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Applicant/Respondent Ms. Koech

For the Respondent/Claimant In person

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

