



**Kanai v Parliamentary Service Commission & another (Cause
560 of 2014) [2022] KEELRC 4126 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4126 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 560 OF 2014
DN NDERITU, J
SEPTEMBER 29, 2022**

BETWEEN

ANNIE KANAI CLAIMANT

AND

PARLIAMENTARY SERVICE COMMISSION 1ST RESPONDENT

SAMBURU COUNTY WOMEN REPRESENTATIVE, HON. MAISON

LESOOMO 2ND RESPONDENT

RULING

I. Background

1. Vide a Notice of motion dated 15th February, 2022 (the application) the 1st respondent (Applicant) is seeking the following orders –
 - (a) That the suit be dismissed for want of prosecution.
 - (b) That the costs of this application be provided for.
2. The application is expressed to be brought pursuant to Order 17 Rule 2(1) and (3) and Order 51 Rule 1 of the *Civil Procedure Rules* 2010, Rule 16(1) and (3) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and any other enabling provisions of the law.
3. The application is based on the grounds on the face of the same and the supporting affidavit of Arnold Angaya, Advocate, sworn on 15th February, 2022.
4. The Claimant responded to the application by way of a replying affidavit sworn by herself on 14th April, 2022.
5. By consent it was agreed that the application be heard by way of written submissions. Mirugi Kariuki & Co. Advocates for the Claimant filed their written submissions on 8th June, 2022 while Arnold Angaya,



Advocate, for the Applicant filed his submissions on 10th June, 2022. The 2nd Respondent did not participate in the hearing of the said application.

II. Applicant's Case

6. In the supporting affidavit by Arnold Angaya, Advocate, the Applicant states that after the Claimant filed this claim on 29th October, 2014 she failed to take any steps to prosecute the same and that on 20th November, 2019 the cause was dismissed for want of prosecution.
7. The Claimant thereafter filed an application dated 12th February, 2020 for reinstatement of the cause and the court reinstated the cause on 21st May, 2020.
8. However, the reinstatement was conditional to the Claimant paying the costs of Kshs.10,000/= that was awarded to the Applicant herein.
9. In the ruling dated 21st May, 2020 the court (Mbaru J) ruled as follows-

“Accordingly, application dated 12th February, 2020 is hereby allowed; the order issued on 20th November, 2019 is hereby set aside and the suit reinstated save the Claimant shall pay the Respondent Kshs.10,000/= in costs.” Further the Judge stated that “the court shall hear the matter on the merits save the Claimant shall meet costs due to the Respondent for attendance in prosecution by the Notice of Motion all assessed at Ten Thousand Kenya Shillings (Kshs.10,000) before allocation of a hearing date.”
10. Clearly, the reinstatement was conditional on payment of costs awarded to the Applicant herein in the sum of Kshs.10,000/=. However, the allocation of a hearing date was conditional. The Applicant has stated that the said awarded costs have not been paid to this day.
11. The deponent avers that since the said reinstatement of the cause the Claimant has not taken any steps towards prosecuting the matter and that the delay is inordinate, unreasonable, and inexcusable and that the same is causing prejudice and injustice to the Applicant.
12. On the basis of the foregoing the Claimant prays that this cause be dismissed with costs for want of prosecution as prayed in the application.

III. Claimant's Case

13. In her replying affidavit the Claimant attributes the delay in prosecuting the cause to two factors. Firstly, she alleges that Covid-19 affected court operations to the extent that her lawyers were not able to obtain a hearing date for this cause. Secondly, the Claimant alleges that some reorganisation or restructuring and reshuffling in the registries and personnel of her advocates on record caused her file to be misplaced in the archives and that in the process the matter was not fixed for hearing.
14. The Claimant argues that the delay in prosecuting the matter cannot be attributed to her and that the said delay is neither inordinate, unreasonable, nor inexcusable. She pleads that she be given a last chance to prosecute the same.
15. The court record shows that on 21st February, 2022 the Claimant's Advocates took a mention date for 23rd March, 2022 for purposes of fixing a hearing date. However, it would appear that the Advocates for the Claimant moved to fix the matter for mention after they were served with the instant application for dismissal which was filed on 18th February, 2022 and served upon them on the same date. There is a letter on record from the Applicant's Advocate dated 2nd March, 2022 to that effect.



IV. Issues for Determination

16. There is only one issue for determination in this application –should the Claimant’s cause be dismissed with costs for want of prosecution?

V. Submissions by Applicant’s Counsel

17. Counsel for the Applicant has argued that under Order 17 Rule 2(1) and (3) of the Civil Procedure Rules and Rule 16(1) and (3) of the Employment and Labour Relations Court (Procedures) Rules, 2016 this cause is due for dismissal for want of prosecution.
18. Counsel argues that the matter has been devoid of any action from the Claimant for over one year and that there is no good reason(s) given for the unreasonable delay in prosecuting this cause.
19. Counsel for the Applicant contends that the Claimant has not paid the costs as ordered in the ruling of 21st May, 2020 where the court (Mbaru J) stated that “the court shall hear the matter on the merits save the Claimant shall meet costs due to the Respondent for attendance in the prosecution of the Notice of motion all assessed at Ten Thousand Kenya Shillings (Kshs.10,000) before allocation of a hearing date.”
20. Counsel submits that the said costs have not been paid and either way a date cannot be allocated for hearing before the same is paid.
21. Counsel for the Claimant has cited several decisions on how this court should exercise its discretion under Order 17 of the Civil Procedure Rules, in dismissing a cause for want of prosecution. He has cited Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v MD Popat & Others (2016) eKLR, George Gatere Kibata v George Kuria Mwaura & Another (2017) eKLR, and Mwangi S. Kimenyi v Attorney General & Another (2004) eKLR.
22. He has relied on David Pius Mugambi v Kenya Commercial Bank Limited & 2 Others (2021) eKLR in asserting that it is not enough for a party to allege that the matter was delayed by the effects of Covid-19 without demonstrating how and to what extent the effects of Covid-19 actually caused or occasioned the delay.
23. On the period of time in delay which may be termed as inordinate, unreasonable, and inexcusable Counsel has relied on Trade Bank LTD (in liquidation) v L.Z. Engineering Construction LTD & Another Civil Appeal No. NAI 282/98 in asserting that each case depends on its own unique circumstances.
24. Counsel submits that in the entire circumstances of this cause the delay in prosecuting the same is unreasonable, inordinate, and inexcusable.

VI. Submissions by Counsel for Claimant

25. Counsel for Claimant has insisted that the Covid-19 pandemic rendered it difficult for the matter to be fixed for hearing. Further Counsel argues that due to the pandemic the personnel in their registry had to be reorganized and restructured as a result of which this cause could not be fixed for hearing.
26. Counsel argues that in the best interest of justice the Claimant should be allowed to prosecute this cause. He has not denied that costs have not been settled as ordered by court in the sum of Kshs.10,000/=.



27. Counsel argues that the Claimant should not be denied the right to be heard and he has relied on *Martha Wangari Karua v IEBC & Others*, Nyeri Civil Appeal No. 1 of 2017 and *JMK v MWM & Another* (2015) eKLR, among others.
28. Arguing that a mistake by Counsel should not be visited upon an innocent party, Counsel has relied on *Philip Chemwolo & Another v Augustine Kebende* (1986) eKLR.

VII. Determination

29. There is no explanation offered as to why the costs in the sum of Kshs.10,000/= have not been paid as ordered by court in the ruling dated 21st May, 2020. As per that ruling the Claimant cannot fix the matter for hearing before the said sum is paid. There is no indication from the Claimant on the willingness to settle the said costs. That is one act that would demonstrate that the Claimant is ready and willing to prosecute this cause as it is a condition precedent to fixing the cause for hearing that the said costs be settled.
30. There is no affidavit sworn by Counsel from the law firm representing the Claimant on what and how the restructuring and reorganization of their registry at their office affected this cause to the extent that a date for hearing could not be taken.
31. There is no evidence that the court registry was closed at any point in time due to the Covid-19 pandemic. There is no evidence on any attempts that were made to fix the cause for hearing. It is only after her advocates were served with the instant application that the Claimant moved to fix the matter for mention for taking a hearing dated. A hearing date would not have been allocated, in any event, without the costs being settled first.
32. It is in the Claimant who was ordered to meet the costs in the sum of Kshs.10,000/= not her Advocates. She has not settled the same since 21st May, 2020.
33. It is the view of this court, and it is so held, that there is no reason given whatsoever as to why this matter has not been prosecuted or any steps taken towards prosecution of the same.
34. Justice cuts both ways. While the Claimant has a right to be heard she is equally under obligation to take steps to be heard by prosecuting her cause and taking steps as appropriate towards such prosecution of the cause.
35. The Applicant is equally entitled to fair hearing under Article 47 of *the Constitution* and the *Fair Administrative Action Act*. The Claimant cannot hold the Applicant at ransom as justice delayed is justice denied to either party.
36. This cause has been pending in court since 2014 and there is no reason(s) given whatsoever as to why the Claimant did not prosecute the same before, during, and even after the Covid-19 pandemic.
37. This court holds that the delay by the Claimant is inordinate, unreasonable, and inexcusable. No plausible reason(s) has been advanced for the prolonged delay in prosecution of the cause.
38. The net effect is that the application by the Applicant herein has merits and the same is allowed with costs.

VIII. Orders

39. The Notice of motion dated 15th February, 2022 is allowed with costs to the Applicant and hence this cause is hereby dismissed for want of prosecution with costs to the Applicant and the 2nd Respondent.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 29TH DAY OF
SEPTEMBER, 2022.

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DAVID NDERITU

JUDGE

