



**Mulisho v Hakika Transport Services Limited (Cause 222 of 2016)
[2022] KEELRC 13009 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13009 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 222 OF 2016
AK NZEI, J
OCTOBER 27, 2022**

BETWEEN

MOSES KAZUNGU MULISHO CLAIMANT

AND

HAKIKA TRANSPORT SERVICES LIMITED RESPONDENT

RULING

1. The suit herein was filed on March 29, 2016 *vide* a Memorandum of Claim dated 8th February 2016. The Respondent entered appearance on May 9, 2016 and thereafter filed Response to the Memorandum of Claim on June 27, 2016. The Respondent filed a list of witnesses, a witness statement and a list and bundle of documents on July 25, 2016. A second witness statement is shown to have been filed by the Respondent on November 9, 2017.
2. The Court's record shows that on May 20, 2016, a representative of the Claimant's Advocates attended the Court's Registry on May 20, 2016 and fixed the matter for mention for directions on June 27, 2016. The Court's record does not show what happened in Court on June 27, 2016 as there are no proceedings taken on that date. Thereafter, the Claimant did not take any step towards prosecution of the suit until February 9, 2022, over five years down the line, when the Respondent's Notice of Motion dated February 8, 2022 was filed. That is the application before me.
3. The application is expressed to be brought under Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules 2016*, Section 3 of the *Employment and Labour Relations Court Act* and Article 159 of *the Constitution* of Kenya. The Respondent seeks orders:-
 - a. that the suit herein be dismissed for want of prosecution.
 - b. that costs of the application and of the entire suit be borne by the Claimant.



4. The application is supported by the affidavit of Yusra Mohammed Abeid, a legal officer in the Respondent/Applicant Company. It is deponed in the said supporting affidavit that the last step taken by the Claimant towards prosecution of the suit was on April 16th 2018 when the Claimant's Advocates served the Respondent's Advocates with a hearing notice dated April 16, 2018. It is further deponed on behalf of the Respondent/Applicant that the Claimant's failure to prosecute the suit and the continued pendency thereof is prejudicial to the Respondent/Applicant as it lost, and stands a chance to loose key evidence and witnesses on the claim herein.
5. It is further deponed on behalf of the Respondent/Applicant that failure by the Claimant to prosecute the suit herein offends the essence of justice and the judicial system as envisaged in *the Constitution* of Kenya and the *Employment and Labour Relations Court Act*.
6. The application is opposed by the Claimant, whose Counsel, Clara Wanyama, filed a replying affidavit on March 28, 2022. It was deponed on behalf of the Claimant, inter-alia:-
 - a. that the suit has come up before this Court several times, being 27/6/2016, 25/7/2016, 18/9/2016, November 10, 2016, 26/1/2017, 18/5/2018 and 20/7/2017, with the matter being fixed for hearing on November 27, 2017, on which date the matter did not proceed and parties were directed to fix the matter for hearing at the Registry.
 - b. that the suit was fixed for hearing on October 30, 2018 and a hearing notice was duly served on the Respondent's Advocates, but hearing did not proceed due to circumstance beyond the Claimant/Respondent's control.
 - c. that efforts to prosecute the suit in 2020 were greatly hampered by the Covid 19 pandemic and the adverse effects it had on the functions and running of the Courts in general.
 - d. that upon return to normalcy, the Claimant's Advocates made effort to fix the suit for hearing but were informed that the file was not traceable at the registry.
 - e. that failure to prosecute the suit was not deliberate but excusable in the circumstances.
7. As I preceded to state in this Ruling, the Court's record shows that the Claimant's Advocates took action on the suit herein only once, and that was on May 20, 2016 when they fixed the matter for directions on June 27, 2016. Directions were never taken as no proceedings were taken on June 27, 2016. Thereafter, the Claimant took no action. This Court is a Superior Court of record and every action taken on every suit filed in the Court is chronicled in the particular Court file.
8. Even assuming that the Claimant did take dates for hearing and/or prosecution of the suit upto October 18, 2018 as alleged, the Claimant has not told this Court why no action was taken on the suit from October 2018 to the year 2020.
9. Further, I am not convinced that the Court file was unavailable at the Court's registry from the year 2020 upto February 9, 2022 when the present application was filed. Had the Court file been missing, and had the Claimant been desirous of prosecuting the suit herein, there would be correspondence exchanged between the Claimant and/or his Advocates and this Court's Deputy Registrar in that regard. Applications for reconstruction of untraceable Court files are always a consideration by a vigilant litigant whose file a Court's Registry confirms missing. The Claimant has not demonstrated that the Court file herein was at any given time unavailable at this Court's registry.
10. Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules 2016* provides as follows:-



- (1) “In any suit where 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 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.”
11. The Claimant has failed to set his suit down for hearing and to prosecute the same, not for 1 year as provided in Rule 16 of this *Court’s Rules*, but for a record five years.
 12. The Claimant, through his Counsel, has not given any convincing reason why the suit has stood unprosecuted for over five years. The Notice of Motion dated February 8, 2022 is allowed, and the Claimant’s suit herein is hereby dismissed for want of prosecution. Each party will bear its own costs of both the application and the suit.
 13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant/Respondent

..... for Respondent/Applicant

