Ayoo v Nursing Council of Kenya & 2 others (Cause 270 of 2019)
[2022] KEELRC 13110 (KLR) (2 November 2022) (Ruling)

Neutral citation: [2022] KEELRC 13110 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 270 OF 2019

JK GAKERI, J

NOVEMBER 2, 2022

BETWEEN

FRANCIS OGOLA AYOO ..... CLAIMANT

AND

NURSING COUNCIL OF KENYA ..... 1ST RESPONDENT

EDNA KIMAIYO TALLAM ..... 2ND RESPONDENT

DUKE O ONGECHI ..... 3RD RESPONDENT

RULING

1. Before the court for determination is a notice of motion application dated December 17, 2021 seeking orders that:-

    i. The claimant /respondent's suit against the 1st and 2nd respondent/applicant be dismissed for want of prosecution.

    ii. That the claimant /respondent bears the costs of this application and those of the entire suit.

2. The application is expressed under section 1A, 1B and 3A of the *Civil Procedure Act* and order 17 rule 2(3) and order 51 rule 1 of the *Civil Procedure Rules, 2010* and rule 16 (3) of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and all other enabling provisions of the law and is premised on the grounds stated on its face and the supporting affidavit sworn by Caroline Wanjiku Muchuna, the Ag Corporation Secretary and Legal Manager of the 1st respondent/applicant who depones that the suit against the respondents was initiated by a memorandum of claim dated April 24, 2019, and the respondents entered appearance on May 16, 2019.

3. The affiant states that failure by the claimant to set down the suit for hearing has been inordinate and inexcusable and prejudicial to the respondents.

4. That when the matter came up for mention for directions on October 1, 2019, the court directed that the claimant was at liberty to fix the matter for hearing after October 18, 2019 but the claimant had not taken any steps to prosecute the case.

5. The affiant further states that the suit herein is an abuse of the process of the court as the claimant is not interested in pursuing it to its logical conclusion and the same should be dismissed with costs.

applicants/respondent's submissions

6. The applicant identifies a singular issue for determination, whether the memorandum of claim dated April 24, 2019 should be dismissed for want of prosecution.

7. It is submitted that there are compelling reasons for dismissal of the instant suit for want of prosecution as the claimant had taken no step for its prosecution for the last 2 years. That the suit was an abuse of the court process.

8. Reliance is made on order 17 rule 2(1) of the *Civil Procedure Rules, 2010* on the one year rule of inaction by a party.

9. Further reliance is also made on the decision in *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v MD Popat & others (2016) eKLR* on the discretion of the court under article 159 of the *Constitution* of Kenya, 2010 and order 17 rule 2(3) of the *Civil Procedure Rules*.

10. The respondents submit that they were apprehensive that if the matter was heard after such a long time, there was imminent risk of prejudice and pray for the court's protection.

11. The respondents urged the court to allow the application with costs.

Claimant /Respondent's submissions

12. In his submissions dated July 28, 2022, the claimant submitted ensured that the suit was set for hearing on March 26, 2020.

13. That after the first Corona case was reported on March 12, 2020, court processes were affected and communication with the court was by email and the transfer of Radido J who was handling the matter, followed by re-organization of court register starting with the oldest to the most recent cases.

14. The claimant stated that when the register for 2019 opened, the suit was listed for hearing on April 19, 2022.

15. According to the claimant /respondent, the issue for determination was whether the suit should be dismissed for want of prosecution.

16. The claimant urged that the applicants failed to conduct preliminary investigations to inform their application such as a letter from the registry to confirm that the suit was indolent.

17. It is further submitted that the applicants had not provided data to demonstrate that other suits made progress, the prevailing conditions notwithstanding, such as how many cases filed in 2019 had been concluded or when the matter was allocated to another judge.

18. It is further submitted that the claimant sought directions from the court on April 29, 2020, May 15, 2020 and July 5, 2020. Other dates cited when specific actions were taken are August 26, 2020, May 5, 2021, August 20, 2021, August 27, 2021, February 17, 2022 and March 25, 2022.

19. Finally, the claimant attributed the delay to the court. He submitted that as a consumer of court services, he had no capacity to dictate, manipulate, influence or speed up the process other than follow instructions.

Determination

20. The singular issue for determination is whether the suit herein should be dismissed for want of prosecution.

21. Before delving into the issue, I will set out the guiding principles and the legal framework on dismissal of suits for want of prosecution generally.

22. Order 17 rule (2) of the *Civil Procedure Rules* provides as follows;

    2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if no cause is shown to its satisfaction, may dismiss the suit.

    (2) If cause is shown to the satisfaction of the court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

    (3) Any party to the suit may apply for its dismissal as provided in sub-rule-1.

    (4) The court may dismiss the suit for non-compliance with any directions given under this order.

23. Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* replicates the provisions of order 17 rule 2 of the *Civil Procedure Rules, 2010*.

24. In *Ivita v Kyumbu (1984) KLR 441*, the court stated as follows;

> " The test is whether the delay is prolonged and in excusable and, if it is, can justice be done despite such delay."

25. The test was restated in *Mwangi S Kimenyi v Attorney General and another Misc No 720 of 2019* where the court stated that;

    1. "When the delay is prolonged and inexcusable, such that it could cause grave injustice to one side or the other or to both, the court may dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties, the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

    2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

        i. Whether the delay has been intentional and contumelious;

        ii. Whether the delay or conduct of the plaintiff amounts to an abuse of the court process;

        iii. Whether the delay is inordinate and inexcusable;

        iv. Whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of the issues in action or causes or likely to cause serious prejudice to the defendant; and

v. What prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

26. This court is guided accordingly.

27. The foregoing principles are explicit that the elemental requirement is one year of inaction by the parties. In the present case, there is no dispute that before June 7, 2022, the suit was previously in the hands of Radido J and was last in court on October 1, 2019 when the court directed the parties to take a hearing date at the registry.

28. Regrettably, the claimant who acts in person did not file an affidavit to demonstrate the steps he had taken since October 1, 2019 to have the suit listed for hearing, though he does so in his submissions but again did not attach evidence of email communication between him and the registry which is apparent.

29. In a nutshell, the claimant /respondent has tendered no shred of evidence to demonstrate the steps taken to have the suit heard and determined.

30. Be that as it may, the more crucial question is whether the inordinate delay is inexcusable. The court is not persuaded it is. In his submissions, the claimant states that after the first case of Corona infections was detected in Kenya on March 12, 2020 coupled with subsequent developments which inter alia affected court processes, communication was exclusively by email which affected individual litigants adversely.

31. It requires no belabouring that the court has for many years suffered from inadequate human capital which had greatly affected the speed at which matters are disposed of, a matter in the public domain, and backlog remains a challenge.

32. Having regard to the fact that the claimant has been acting in person and this is a 2019 matter whose diary had not opened by the time the application herein was made on December 17, 2021, the court is disinclined to allow the application.

33. Relatedly, the applicant/respondent has not demonstrated the specific prejudice it stands to suffer if the suit is heard and determined on its merits.

34. In arriving at its decision, the court is guided by the overriding principle that the discretion granted by article 159 of the *Constitution* of Kenya, 2010 and order 17 rule 2 of the *Civil Procedure Rules* must be exercised in the interest of justice to both parties.

35. For the foregoing reason, the court is satisfied that the notice of motion application dated December 17, 2021 is unmerited and is accordingly dismissed with no orders as to costs.

36. Parties to seek a hearing date at the registry.

37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 2ND DAY OF NOVEMBER 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 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.

DR JACOB GAKERI

JUDGE