



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 29 OF 2016

WILLIS ODHACH ACHOLA.....CLAIMANT/RESPONDENT

VERSUS

GEORGE ANYONA AREK.....1ST RESPONDENT/APPLICANT

FREDRICK OMINDO CHAJI.....2ND RESPONDENT/APPLICANT

DENIS AMOLO.....3RD RESPONDENT/APPLICANT

RULING

1. The respondent filed application dated 12/3/2019 praying for an Order in the following terms: -

(a) That this honourable Court be pleased to dismiss this suit for want of prosecution with costs to the defendant.

2. The application is premised on grounds set out on the Notice of Motion that the plaintiffs have taken no step to set this suit down for hearing since January, 2018 when the same was last in Court which is more than one year ago; that the suit be dismissed in the interest of justice with costs to the respondent. The application was buttressed by affidavit of Jared Sala the advocate in conduct of the suit for the respondents.

3. The deponent states that the issue in dispute in this suit is the results of the Rarienda Branch General Election held on 5/2/2016 of the Kenya National Union of Teachers.

4. The claimants prayed for a declaration that the elections conducted on 5/2/2016 were a sham as same were marred with bribery, intimidation and procedural irregularities.

5. The suit together with an urgent application was filed on 9/2/2016. Interim exparte Orders were granted on the said 9/2/2016 restraining the Registrar of Trade Unions from registering the purported new elected officials of Kenya National Union of Teachers (KNUT) Rarienda Branch.

6. An Amended Statement of Claim was filed on 4/3/2016.

Replying Affidavit

7. The claimant/respondent filed a replying affidavit sworn on 18/4/2019 on 2/5/2019 opposing the application.

8. The claimant/respondent states that the matter was last in Court on 24/5/2018 and not 30/1/2018 as alleged by the respondent.

9. The matter was removed from the Cause list on 24/5/2018 by the Deputy Registrar by a letter dated 15/5/2018 informing parties that the Judge would not be sitting.

10. That in August, 2018 the claimant instructed his advocates to negotiate an out of Court settlement with the Advocate for the respondent. That agreement was reached to have the matter withdrawn with each party bearing their costs of the suit.

11. That on 3/7/2018, the advocate for the claimant wrote a letter forwarding the consent in triplicate dated 3/7/2018 to Mr. Sala Advocate

for the respondents to sign and return to the Advocate for the claimant to sign and file the same in Court. The consent is attached to the replying affidavit and marked "WOA – 2(a) and 2(b).

12. That to date the said consent has not been returned to the Advocates for the Claimant for filing and adoption.

13. That one year has not lapsed since the last step was taken by the Claimant.

14. That the application is not based on good faith and same be dismissed with costs.

Determination

15. The Court is satisfied that one (1) year of inaction had not lapsed by the time this application was filed on 5/4/2019 since the matter had last been set down for hearing on 24/5/2018, when it was removed from the cause list by the Court and for no fault of either party.

16. The applicant/respondent is also guilty of non-disclosure that the claimant had expressed interest in writing to have the suit withdrawn on 3/7/2018 and that the draft consent to have the suit withdrawn was served on the respondent/applicant which was not acted on.

17. The Applicant lacks good faith in this respect and this suit could not have been clogging the busy schedule of the Court had the applicant acted in good faith to have the consent to withdraw matter with each party meeting their costs executed and filed before Court.

18. The application to have the matter dismissed with costs for lack of prosecution lacks merit and is flaunt with non-disclosure and bad faith on the part of the applicant and same is dismissed with costs.

19. The Court notes that the claimant being the *dominus litis* is at liberty to unilaterally file a notice of withdrawal of the suit in Court and leave the matter of costs to be determined by the Court if the respondent insists on the matter.

Dated and delivered at Nairobi this 18th day of February, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Sala for Respondent/Applicant

Mr. Amos Ayuko for Claimant/Respondent

Chrispo: Court Clerk.