



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 137 OF 2017

JOHN MWANGI KAMAU.....CLAIMANT

VERSUS

HACO TIGER BRANDS (E.A) LIMITED.....RESPONDENT

RULING

1. The Claimant instituted this suit vide a Memorandum of Claim dated 26th January 2017. The Respondent is desirous of dismissing the Claimant's suit for want of prosecution as the Claimant has not taken any steps to set down the matter for hearing for the last 3 years as the last action was in November 2017. The Respondent thus urges the suit be dismissed for want of prosecution.

2. The Claimant is opposed and in his replying affidavit in opposition to the motion by the Respondent he asserts that he has been keen to have the suit disposed of by way of hearing and that the Court can take judicial notice of the notoriety of the paucity of judges and the lack of dates. He asserts that since the Respondent has conceded that there could be strict time lines issued in respect of the matter that the Court should not take this most draconian step of dismissing the suit.

3. Counsel for the Respondent Miss. Wangechi urged the motion and Mr. Kuria for the Claimant responded. In a case where a party seeks the dismissal of the suit, certain criteria is to be met. The Court must of necessity consider the factors which would lead to the draconian step of dismissal for want of prosecution. In the case of **Ivita v Kyumbu [1975] eKLR** the test I am to consider was summarized as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

Additionally, in the case of **Mwangi S. Kimenyi v Attorney General & Another [2014] eKLR** the Court held that:-

When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion 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.

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;

- 1) whether the delay has been intentional and contumelious;*
- 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;*
- 3) whether the delay is inordinate and inexcusable;*
- 4) 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 issues in action or causes or likely to cause serious prejudice to the Defendant; and*
- 5) 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.”*

4. This Court is in agreement that where the delay in prosecuting a case is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. Whereas it should always be

remembered that to deny the subject a hearing should be the last resort of a Court, in this case it does seem that the delay has been contumelious or intentional as there is not even one simple letter from the Claimant's advocate seeking a date. In the absence of any proof that the Claimant has been keen to have his case heard, the Claimant's suit stands dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2021

Nzioki wa Makau

JUDGE