

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1067 OF 2018

PATRICK WAFULA OGANA.....CLAIMANT

VERSUS

KINGWAY TYRES LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 28th October 2020 seeking to be heard for orders that this suit be dismissed for want of prosecution and for the Claimant/Respondent to pay the costs of this application and suit to the Respondent/Applicant. The Application is based on the grounds that the Claimant/Respondent has lost interest in prosecuting his suit which was last in Court on 25th April 2019 when it was certified ready for Hearing and directions given that a hearing date be taken at the registry. That the Claimant/Respondent has failed to prosecute the suit for a period of over 1 year and which prolonged inaction is inordinate and inexcusable. That the Claimant/Respondent's conduct is further against the overriding objective of the Court and the indefinite existence of the suit in court is otherwise an abuse of process, and that it is just and fair that the Application be granted. The Application is supported by an affidavit sworn on 28th October 2020 by the Respondent/Applicant's Advocate, Nancy Mireri. She avers that litigation must have an end and that the indefinite existence of the suit is prejudicial, unjust and oppressive to the Respondent/Applicant as the same is causing perpetual anxiety to the Respondent/Applicant.

2. The Claimant/Respondent filed a Replying Affidavit sworn on 4th December 2020 by his Advocate, Daniel Rakoro who avers that they had previously filed the Claimant's agreed issues on 4th September 2018 and fixed the suit for mention for directions on 21st January 2019 and 25th April 2019, indicating they were interested in prosecuting this suit. That the date was fixed in 2019 because the Claimant went to up country after losing his job and lost contact with his advocates but is still keen on prosecuting the suit. He further avers that the suit could not be fixed for hearing in 2020 due to the Covid-19 pandemic which greatly interfered with the Court process and procedures and that the suit will be fixed for hearing once the 2021 calendar is opened.

3. In a Further Affidavit sworn on 19th January 2021 by Carolyne Rono for the Respondent/Applicant, she avers it is trite law that the power to dismiss a suit is a discretionary one and which discretion must be exercised judiciously and in the interest of justice. That the alleged failure to fix the matter for hearing due to Covid-19 is a fallacy as the matter was certified ready for hearing way before the pandemic started. The Respondent/Applicant submits that the criteria for dismissal of suits for want of prosecution is very elaborate as set out in Order 17 Rule 2 of the Civil Procedure Rules, 2010 and that the Honourable Court also ought to be minded of the overriding objective as set out in Sections 1A of the Civil Procedure Act, that is, to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The Respondent relies on the holding in the case of **Ivita v Kyumbu [1975] eKLR** where the test for dismissal of a suit under the above provisions of the Civil Procedure Rules, 2010 was exhaustively considered. The Respondent submits that the burden of proof to be met by a defendant seeking dismissal of suit for want of prosecution is well established in the case of **Naftali Onyango v National Bank of Kenya [2005] eKLR** where the Court reiterated the decision in **Allan v Sir Alfred MC Alphine and Sons Ltd [1968] 1 ALL ER 543** that the defendant must show there had been inordinate delay which is inexcusable and that the defendant is likely to be seriously prejudiced by the delay. The Respondent/Applicant submits that it has proved the said three conditions in the instant case because over 20 months have lapsed since the last action was taken in the matter, which period is duly considered inordinate. That while counsel for the Claimant/Respondent places the blame on losing contact with the Claimant, he does not offer the viable efforts they made to establish contact so as to progress the matter and as such the said reason for the delay does not suffice. Further, that the said counsel for the Applicant has also not provided any evidence showing that the litigant attempted to reach out to them. The Respondent also cites the case of **Ruga Distributors Limited v Nairobi Bottlers Limited [2015] eKLR** where the Court emphasized the litigant's duty to pursue the prosecution of their case and to constantly check in with their advocates on the progress of their case. The Respondent submits that this Honourable Court ought to thus find that the delay was inexcusable. It argues that further, the court in **Argan Wekesa Okumu v Dima College Limited & 2 Others [2015] eKLR** held that delay in prosecuting a suit in itself prejudices the interest of the defendant and runs contra to the provisions of the Constitution of Kenya, 2010 and the overriding objective of the Court. That this court must uphold its legitimate expectation that the dispute against it will be determined timely and not allow the Claimant to enjoy the fruits of the delay. That dismissal would be the only effective sanction to uphold the Respondent/Applicant's rights and the overriding objective of the Honourable Court. The Respondent submits that there are sufficient and compelling reasons to warrant the grant of the orders sought in the Application and duly dismissing the Claimant's suit herein.

4. The Claimant submitted that the motion was not for grant and that he is waiting for the court to issue notices calling parties to fix hearing dates for 2018 matters and that the delay in prosecuting the suit was and is therefore not deliberate but caused by factors beyond his control. He further submits that he is still keen to prosecute his case and besides the delay, the Respondent has not suffered any known prejudice and that it is in the interest of justice that the suit be saved and set down for trial. The Claimant relies on the case of **Shaiwaz Sadrudin Jiwa v Rajab Barasa Olemuteke & Another [2021] eKLR** where Boaz Olao J. observed that it is not mandatory that any violation of the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules must lead to dismissal of a suit as the same is a discretion of court. He further submits that therefore in applying the provisions for a dismissal of a suit in which no action has been taken for one year, the Court must not lose sight of the provisions of Article 50 of the Constitution which protect the rights of parties to have their disputes resolved in a fair hearing. The Claimant relies on the case where Sheridan J. in **Sebei District Administration v Gasyali & Others 1968 E.A 300** adopted the

words of Ainley J. in **Jamnadas v Sodha Hirmraj 1952 7 U.L.R 11** and said that it should always be remembered that to deny the subject a hearing should be the last resort of a Court. The Claimant further submits that the Applicant is expected to demonstrate how delay was prolonged, inexcusable and has directly prejudiced its case i.e. being unable to mount any defence to the claim against the Claimant because it no longer has its witnesses or evidence. That in the circumstances the Applicant has not demonstrated how the delay in fixing 2018 matters is inexcusable and how the lapse of time has occasioned prejudice to witnesses or evidence. As to the measure of inordinate delay, he relies on the case of **Mwangi S. Kimenyi v Attorney General & Another [2014] eKLR** and prays for this Court to thus find that the Application herein is without merit and exercise its discretion to dismiss the same. He submits that he has a strong case of unfair termination/dismissal which should be allowed to remain active, go for full trial and be determined on merit and that delay is a matter of fact to be decided on the circumstances of each case. He also relies on the case of **Utalii Transport Company Limited & 3 Others v NIC Bank & Another [2012] eKLR** as quoted by Gikonyo J. in the case of **Moses Mwangi Kimani v Sharii Kanjirapparambil Thomas & 2 Others [2014] eKLR**. The Claimant submits that he is the one who will suffer prejudice as dismissing the suit will forever banish him from court and prays for the court to safeguard his right to a fair hearing and to observe that no substantial risk to fair trial or prejudice has been suffered by the Respondent.

5. The Court in determining an application such as this has to consider principles and the criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been well articulated and settled in a number of leading authorities, among them, the case of **Ivita v Kyumbu (supra)** where it is summarized as follows:

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

While in the decision in **Mwangi S. Kimenyi v Attorney General & Another (supra)** 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.”

6. The Court is in agreement 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 does not seem in this case that the delay has been contumelious or intentional. As such the Claimant’s suit survives this motion with directions being given for its disposal within 40 days of this Ruling excluding the period over Easter. Each party will bear their own costs for the motion.

It is so ordered.

Dated and delivered at Nairobi this 12th day of March 2021

Nzioki wa Makau

JUDGE