



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.15 OF 2012

DR PIUS WANJALA.....PETITIONER

VERSUS

THE PERMANENT SECRETARY,

MINISTRY OF MEDICAL SERVICES.....1ST RESPONDENT

THE DIRECTOR OF MEDICAL SERVICES..... 2ND RESPONDENT

THE MINISTRY OF MEDICAL SERVICES.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

THE PUBLIC SERVICE COMMISSION..... 5TH RESPONDENT

RULING

The respondents and through the office of the 4th respondent and State Counsel Odukenya Wycliffe filed application dated 8th March, 2021 under the provisions of Order 51 Rule 1, Order 17 Rule 2 (1) and (3) and section 3A of the Civil Procedure Act and the Rules thereto and seeking for orders that;

This suit be dismissed for want of prosecution and Costs of this application be provided for.

The application is supported by the annexed affidavit of Odukenya Wycliffe and on the grounds that;

1. The matter was filed before the High Court as Constitutional Petition No.124A

of 2012 on 5th April 2012 and later transferred before this court in 2012 and allocated the current number

2. On 11th March, 2013 Hon. Justice Nzioki wa Makau vacated the orders issued by the High Court and directed the petitioner to report to Western Province where he had been posted or take leave pending determination of this petition but the petitioner never prosecuted the petition nor reported to Western Province.

3. The petitioner in an apparent abuse of the court process has filed various petitions before this court flagging vacated court orders and misleading various courts that the vacated orders issued by the High Court in 2012 permanently preserved him at National Quality Control Laboratory (NQCL).

4. We made several efforts to peruse the file but the file could not be traced. We wrote a letter to the Deputy Registrar to retrieve the file but our efforts bore no fruits. The matter was scheduled to be listed before court on 19th November, 2019 but nothing happened on the said date and since then the petitioner either by himself or through counsel has not set the matter down for hearing.

5. It is evident that the petitioner has no interest in prosecuting the suit as more than 8 years and 11 months have lapsed since the petition was filed.

6. *The petitioner has been guilty of prolonged, inordinate and inexcusable delay in prosecuting this matter with intention to keep on misleading courts with vacated orders.*

7. *This suit's pendency is prejudicial and grossly unjust to the respondents.*

8. *In the premises it is only fair and just that this suit be dismissed with costs.*

In his affidavit in support of the application, the State Counsel Odukenya Wycliffe avers that the petitioner is in apparent abuse of court process after filing various suits before the courts flagging vacated court orders and misleading that the vacated orders issued by the High Court in the year 2012 as still in force. The petitioner filed other petitions in Court Petition No.124 of 2019 and Petition No.E099 of 2020 and it has been over 8 years since he initiated this petition but has not taken steps to prosecute it and the last the matter was in court is over a year and the delay in inexcusable and should be dismissed for want of prosecution with costs.

In reply, the petitioner filed his Replying Affidavit and avers that the delayed conclusion of the petition is caused by the respondent's actions and failure by the court to sit on several occasions and failure to re-allocate the file to another judge following transfer of the presiding judge. This is confirmed by the respondents in the Supporting Affidavit that they also made efforts to have the matter listed without success.

Dr Wanjala also avers that the respondents only made a single attempt to have the matter heard. He made over ten attempts to move the court and application that there is want of prosecution is without good basis. The Court of Appeal stayed prosecution of the contempt of court proceedings; the respondents erroneously drafted orders executed by the Deputy Registrar on 31st May, 2013; there were attempts to negotiate the matter out of court; the court failed to sit on several occasions; upon the transfer of presiding judge there was no allocation of another judge.

The petitioner also avers that on 16th June, 2020 he filed contempt of court proceedings in Petition No.124 of 2019 on account of the respondents' disobedience of court orders;

i. The decree/judgement of 31st January, 2020 in ELRC Petition No.124 of 2019;

ii. The decree/judgement in HC Misc. Application N.131 of 2011; and

iii. The Conservatory/Orders in these proceedings Petition No.15 of 2012.

The court on 9th July, 2020 convicted the respondents herein for contempt of court on account of the decree in ELRC Petition No.124 of 2019 delivered on 31st January, 2020 and also directed for initiation of contempt proceedings in this petition.

The court also held that the deployment in June, 2019 was in breach of court orders in HC Misc. App 131 of 2011 and HC Petition 124A of 2012 and the same should be viewed as further breach of court orders.

The petitioner also avers that while he was preparing to move the court as directed, the respondent moved to the Court of Appeal in Civil Appeal No.107 of 2020 and stayed the instant proceedings. He moved to have the orders reviewed so as to prosecute the contempt of court proceedings and the court on 4th March, 2021 suspended proceedings herein until the Court of Appeal proceedings conclude.

The Deputy Registrar has admitted vide letter dated 7th February, 2014 that the order of the court was erroneous due to lack of clarity in the handwriting and this caused a delay in the proceedings. The interim orders were not vacated as alleged. The issue at hand has remained the transfer of the petitioner or taking of annual leave as directed by the court on 11th March, 2013 and although dissatisfied there was compliance but since the matter was listed for hearing on 21st May, 2014 but the court did not sit and on the next date 23rd July, 2014 the respondents sought to engage in negotiations and the matter stood over generally to 16th September, 2014. The respondents were not keen to negotiate despite several invitations.

On 16th March, 2016 the petitioner wrote to the court seeking a mention date and allocated the 6th June, 2018 but the matter was not on the cause list.

The matter was allocated for hearing on 13th November, 2019 but the same was not on the cause list. The petitioner sent letter dated 11th March, 2020 to the Deputy Registrar requesting for a hearing date but on 12th June, 2020 the respondent transferred him to another station in contravention of the court orders forcing him to commence contempt of court proceedings and the court made a finding and convicted the respondents on 9th July, 2020.

The petitioner also avers that the respondents have not demonstrated what prejudice shall be occasioned to them where the orders sought are not issued and the application should be dismissed with costs.

Both parties attended and made oral submissions.

The respondents as the applicants submitted that the last attendance by the petitioner herein was vide letter dated 25th February, 2020 seeking for a hearing date and until the instant application was filed, no action had been taken to prosecute this petition. There is a lapse of 12 months

since. The respondents are allowed to move the court as herein done and seek for the dismissal of the petition for want of prosecution.

The reasons given by the petitioner that he has not moved the court is that the presiding judge was transferred but such did not stop him from taking a hearing date. The averment that there was an erroneous order extracted by the Deputy Registrar and alleged offer for a settlement, no evidence is submitted that the petitioner was barred from taking a hearing date to prosecute his petition.

The respondents also submitted that were the court to hear the petition, there is no jurisdiction the same as the petition is mute and the question of the petitioner's deployment to Western Province is no longer valid. On 19th July, 2017 the petitioner was deployed to another department and he challenged the same. The initial transfer was challenged in High Court Petition No.124A of 2012 which was transferred to this court as herein and the interim orders issued were vacated on 11th March, 2013 but the petitioner asserted that he could not report to his junior. He failed to comply as directed.

In the year 2020 the petitioner was redeployed but opted to challenge the same and filed ELRC Petition No.E099 of 2020 seeking to quash the deployment of 12th June, 2020 applying the order issued in the year 2012 in High Court Petition.124A of 2012 which is non-existent. If the petition was to be heard, the facts intervening cannot issue. The challenge of the petitioners' deployment has already been addressed.

The Court of Appeal has made a ruling temporarily halting the deployment of the petitioner and this court cannot issue an order to reinstate the petitioner outside of such stay orders. The petition being mute should be dismissed as it has no chance of success.

The filing of different suits in court over the same subject matter is in abuse of court process.

The petitioner submitted that Order 17 Rule 2 of the Civil Procedure Rules requires that for a dismissal of a suit, a party must be idle for a year. There is no evidence that the suit and petitioner has been idle. On 25th February, 2020 he sent letter to the court seeking for a meaning date.

Either party can move the court. The respondents wrote to the court on 12th March, 2020. There is no inactivity to justify a dismissal of the suit.

With regard to the court jurisdiction, the Court of Appeal orders on 9th July, 2020 with regard to the conviction of the respondents by this court relates to a different matter. There is disobedience of the court and the ruling of the court opened the matter for contempt proceedings against the respondents. For the last year, the respondents have not allowed the petitioner into office while the matter is pending before the Court of Appeal. These proceedings should be stayed until determination therefrom.

Determination

What is before court at this instance is application dated 8th March, 2021 by the respondents seeking for the dismissal of the suit for want of prosecution. The application is based on the provisions of Order 51 Rule 1, Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules save an application seeking for the dismissal of a suit before this court should be premised under the provisions of Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016;

16. (1) In any suit in which 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 its 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.

the court will therefore dismiss a suit where either party has failed to take any action within one year and there is no sufficient cause demonstrated that the delay or failure to take action was for good cause.

Even where Order 17 Rule 2 of the Civil Procedure Rules were to apply, there is no much departure from the procedure applicable under the ELRC Rules as the same requires that;

(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 cause is not 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 direction given under this order.

The respondents have moved the court on the basis that the petitioner has failed to take any action to prosecute his petition for over a year. That the last action taken was vide letter dated 25th February, 2020 and the instant application is filed on 8th March, 2021 exactly one (1) year and 11 days after the fact.

Failure to take action in any matter for a period of one (1) is a serious lapse. The necessity of Rule 16 is apparent. Such is to curb inaction and to ensure a keen litigate is active and alive to the facts leading to the filing of suit and hence the need to remain vigilant.

On the one hand, where the delay in prosecuting a matter should not apply to delay justice, on the other hand, the court should not reward indolence. In **Agip (Kenya) Limited v Highlands Tyres Limited [2001] KLR 630** the court held that

Where a reason for the delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay.

And in the case of **Ivita v Kyumbu [1975] eKLR** that;

Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time.

...

The records are not elegantly arranged save the last attendance prior to the instant application by the respondents is noted as 19th September, 2018.

In the intervening period, the petitioner and others filed ELRC Petition No.124 of 2019 and therefrom the respondents lodged and appeal following ruling delivered on 9th July, 2020 in Nairobi Court of Appeal in Civil Appl. No.107 of 2020 and which resulted in an interim order of *stay of proceedings in Petition No.124 of 2019*. This order of stay was confirmed vide ruling delivered on 20th November, 2020.

There is stay of proceedings in ELRC Petition No.124 of 2019.

This stay does not affect the instant petition. Though the parties are the same, the cause of action leading to ELRC Petition No.124 of 2019 and need to file a separate suit from herein is different.

There is **ELRC Petition.105 of 2020 – Dr. Pius Wanjala & another v Cabinet Secretary, Ministry of Health & others** and there is an order issued on 4th March, 2021 staying such proceedings taking into account the Court of Appeal Ruling in Civil Appeal No.107 of 2020 of 20th November, 2020. Parties were hence directed to await the outcome of the Court of Appeal Proceedings as set out above and proceedings relating to ELRC Petition No.124 of 2019.

The petitioner is alive to the application of Order 17 Rule 2. In his oral submissions, he asserted that either party is at liberty to move the court and urge the petition to avoid time lapse and the negation of the one year rule of inaction. This is his petition.

Even where there has been intervening matters and necessitating the petitioner filing various suits and including ELRC Petition No.124 of 2019, to keep the instant petition idle is to invite an application as instantly done by the respondent and seeking dismissal of the petition for want of prosecution. The submissions that the petitioner is wronged and the respondents have failed to obey court orders are not sufficient cause to keep the petition inactive.

In any event, the subject letter by the petitioner dated 25th February, 2020 with regard to a request for an early hearing date is not pursued in any manner.

The import of the inactivity is severe. The court finds no cause to justify keeping the petition in the achieves for no good cause.

Properly moved, and taking into account there is no good cause shown by the petitioner as to why he has failed to take action in the prosecution of the petition for over a year, the application dated 8th March, 2021 is found with merit.

Accordingly, the suit herein is dismissed for want of prosecution. Costs to the respondents.

DELIVERED IN OPEN COURT AT NAIROBI THIS 19TH DAY OF APRIL, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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