



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1983 OF 2017**

**DICK KWINGA NZIOKA.....CLAIMANT**

**-VERSUS-**

**KENYA POWER & LIGHTING CO. LIMITED.....RESPONDENT**

**RULING**

1. The application herein is the respondent's Notice of Motion dated 18.8.2020 seeking for the claimant's suit to be dismissed with costs for want of prosecution. The application is brought under Order 17 rule 2 and Order 51 Rule 1 of the Civil Procedure Rules and Rule 16 of the Employment and Labour Relations Court (Procedure Rules, 2016).

2. The application is supported by the Affidavit sworn on 18.8.2020 by Mr Hillary K. Sigei, Counsel for the applicant. The application is opposed by the Claimant vide the Replying Affidavit sworn by his Counsel Mr Peter Omingo Obinchi on 11.9.2020. The application was canvassed by written submissions.

3. In brief the applicant's case is that the claimant has failed to set down the suit for hearing or failed to take steps towards prosecuting the suit for almost three years since filing. It contended that the application has met the legal threshold for dismissing a suit for want of prosecution as discussed by the court in **George Gatere Kebata Vs George Kuria & Another [2017] eKLR** namely, the applicant should prove that:

- a. There was inordinate and inexcusable delay in the circumstances of the case.
- b. He will be prejudiced by the delay if the suit were to be allowed to proceed to trial.
- c. Owing to the delay, a fair trial cannot be acquired.

4. The applicant contended that the continued delay is prejudicial to it in terms of costs and time in maintaining the suit. He contended further delayed justice is justice denied and submitted that the explanation given by the claimant for the delay is not sufficient. It further argued that the correspondences between his counsel and the court annexed to the Replying affidavit were triggered by the instant application. Therefore it prayed for the suit to be dismissed with costs to pave the way for prosecuting his counterclaim.

5. The claimant's case is that after the close of pleadings he has made attempts to set down the suit for hearing but the court declined and informed him that the diary for 2017 matters had not been opened. He produced letter dated 7.1.2019 and a court receipt (POO198b) as proof of his attempts to set down the suit for pre-trial directions. He also produced emails dated 3.9.2020 between his counsel and the court registry in which the counsel was advised that diary for 2017 was yet to be opened.

6. He submitted that application herein has no legal threshold for dismissing suit for want of prosecution and relied on several authorities including **Agip (Kenya) Limited Vs Highlands Tyres 2001 KLR 630** where Visram J held that, where a reason for the delay is offered, the court should be lenient and allows the plaintiff a chance to have his case determined on merits, upon consideration whether the defence has been prejudiced.

**Determination**

7. There is no dispute that since the suit was filed and pleadings closed, the same was not set down for pre-trial directions under section 15 of the ELRC Rules nor was it fixed for hearing. The issue for determination is whether the suit should be dismissed for want of prosecution.

8. Section 16 of the ELRC Rules provides that;

*(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 the date of 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) ...

(3) *Any party to the suit may apply for dismissal as provided in paragraph (1)*

(4) ...”

9. In this case the application is by the respondent who also has a counterclaim which he intends to prosecute. Under the foregoing Rule, he is required to satisfy the court that:

a. The claimant has not applied for pre-trial direction under Rule 15, or

b. The claimant has not taken any action within one year after filing the suit.

c. In terms of Rule 15(2), it should show that the suit is one which is complex and requires directions under Rule 15

10. Having carefully considered the material presented by both parties, I am not satisfied that the application meets the legal threshold for dismissal set out under Rule 16 of the ELRC Procedure Rules. The claimant has produced copy of letter dated 5.12.2018 to the Deputy Registrar of the court seeking for mention for pre-trial direction. The said letter is in the court file and it was received on 7.1.2019. The letter amounts to action taken within months after closure of pleadings.

11. I have also considered the circumstances of the case in line with the response by the court vide email date 3.9.2020 that the diary for 2017 matters was yet to be opened. The court also takes judicial notice that due to shortage of Judges in the court, there is a backlog of cases and it has not been possible to fix hearing dates for 2017 matters. Consequently, I must find and hold that the claimant has given a plausible explanation for the delay. I further find that the delay is excusable in the circumstances of the case because going by the court diary the delay is not entirely to blame on the claimant but the lack of space in the court's diary.

12. As indicated in the judicial precedents cited by both sides, the applicant has an obligation to prove that the delay in prosecuting the suit has prejudiced his case and fair trial. The Respondent cited costs of maintaining the suit as the prejudice it will suffer as a result of delay in prosecuting the suit. However, as observed above, the claimant is not entirely to blame for the delay. Consequently, I find that the respondent has not proved that it has been prejudiced by the said excusable delay in prosecuting the suit. It has also not proved that the delay will prejudice fair trial.

13. In the end, I dismiss the application dated 18.8.2020 with no costs and direct the parties to attend the court for pre-trial direction on 21.6.2021.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JUNE, 2021.**

**ONESMUS N. MAKAU**

**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 15<sup>th</sup> April 2020, this Ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**