REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 901 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

DOUGLAS ONWONGA OGETO.....CLAIMANT

VERSUS

SECURITY GUARDS SERVICES LIMITED.....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 27th February 2020 seeking Orders that this suit be dismissed for want of prosecution and the cost of the Application and suit be provided for.

2. The application is based on the grounds that the Claimant lodged the suit on 15th May 2017 and had failed to take action including setting up the matter for hearing. The court referred the matter to mediation on 1st November 2018.

3. The first mediation session was fixed on 5th February 2019 on which date neither the Claimant nor his advocates appeared. The matter was fixed for mediation on two subsequent dates with the mediator taking it upon himself to call the Claimant and his advocate in person with little success. The Claimant and his advocate again failed to appear for the last mediation session on 27th March 2019 prompting the mediator to conclude the mediation process and file a Certificate of Non-Compliance.

4. The parties were invited for mention before the Mediation Deputy Registrar on 5th April 2019 vide a mention notice dated 19th March 2019 when neither the Claimant nor his advocate attended. The Mediation Deputy Registrar acknowledged that the mediation had collapsed due to the Claimant's non-compliance and referred the matter back to this court's Deputy Registrar for mention on 29th April 2019.

5. The matter was however not mentioned on the above date due to the file still being in the mediation registry. It was again fixed for mention for directions on 11th February 2020 which date was gazetted as a public holiday in honour and for the burial of the former President Daniel Arap Moi.

6. The application is supported by the Affidavit sworn by the Respondent's Operations Officer, Earnesto Kingondu who avers that based on the Claimant and his advocates conduct, the Claimant has no interest in pursuing the matter further. That the Respondent has shown more interest to have the matter concluded by fixing dates for the matter to be mentioned and that the Claimant's sole intention is to frustrate the Respondent. As a result, the Respondent continues to suffer prejudice as the suit remains unprosecuted and not dismissed. He therefore urges the court to hear and conclude the matter expeditiously.

7. The Claimant responded through a Replying Affidavit sworn on 11th November 2020 by his Counsel, Elijah Bitange Mageto. The affiant avers that the application is premature, incompetent, bad in law and an abuse of the court process. That it is untrue that he failed to take action to set the case down for hearing given that the file was moved to mediation and as such, he was unable to comply with order 11 of the Civil Procedure rules.

8. He states that the office email address **elijahmageto@yahoo.com** crashed and he was unable to receive correspondence from the mediator hence it was not possible for him and the Claimant to attend all the sessions which situation was not deliberate or intentional.

9. He avers that he was not aware of the mediation process as he did not receive notice of the same. He states that he only received a mention notice dated 17th December 2019 which was defective as it had indicated that the claim was fixed for mention on 11th February 2019, a date that had passed. The mention slotted for 11th February had aborted owing to it being gazetted as a public holiday.

10. He states that the Respondent did not attend all the mediation sessions as confirmed from the proceedings of 5th February 2019 but is quick to blame the Claimant on its failure. He avers that the application offends the provisions of Article 159 of the Constitution that dismissing a party's case for want of prosecution is a draconian measure which should at all times be discouraged by the court.

11. He concludes that he is willing to take a hearing date for the case at any time and that it is in the interest of justice that the Application herein be dismissed so that the Claimant's case can be heard on merit.

Applicant/Respondent's Submissions

12. The Applicant submitted that the excuse that the office mail of the Claimant's Counsel had crashed is not sufficient and only intended to absolve the Claimant and his Counsel for the mistake and that he had presented no proof of the same. Additionally, that whether or not the email was received is not even the big concern; rather, the Claimant has not told the court why he did not take steps to have the matter heard and determined.

13. The Applicant submitted that the Claimant has not been vigilant in prosecuting his claim and urged this court to be guided by the maxim that equity does not aid the indolent; but the vigilant. Further, that delay defeats equity.

14. The Applicant relied on the case of **Chairmania Events Limited v Transcend Media Group [2018] eKLR** where the court held that;

> *"... Indeed, a party should only be denied a chance to litigate his or her case if the delay to prosecute his or her case has been inordinate, inexcusable and caused the prejudice to his or her opponent. In this case, this court found that the Appellant did not offer a plausible explanation why it did not prosecute its case expeditiously."*

15. The Applicant further relied on the case of **Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M. D. Popat and Others & Another [2016] eKLR** where Aburili J. dismissed a suit on grounds that continued delay no doubt infringed on the defendants' rights and legitimate expectations that the dispute against them should be resolved.

16. The Applicant submitted that the Claimant has failed to give a plausible account as to why he was unable to prosecute his claim since 19th April 2017 when he filed his claim. He further argued that since its inception, the Respondent has been quite proactive in having the matter disposed of since 2017 that this amounts to an inordinate and an inexcusable delay.

17. The Applicant relied on the case of **Kiiru M'mugambi v Moses Kirima (T/A Meenye & Kirima Advocates & 3 Others (2020] eKLR** where Mbugua J., held that courts should be reluctant in giving audience to non-committed litigants and that litigation must come to an end.

Claimant's Submissions

18. The Claimant submitted that the application is premised on Rule 16 of the Employment and Labour Relations Court (Practice) Rules which make provision for Notice to show cause why suit should not be dismissed. He submitted that the Application is premature as it does not meet the threshold set by the law owing to the fact that the same was filed before the lapse of one year as provided for under the above rules.

19. The Claimant contended that the equivalent of Rule 16 is Order 17 Rule 2 of the Civil Procedure Rules. He relied on the case of **George Gatere Kibata v George Kuria Mwaura & Another [2017] eKLR** where the court stated:

> *"In my view, a defendant seeking dismissal of a suit on the ground of want of prosecution must satisfy the legal requirement of one-year threshold stipulated in Order 17 Rule 2 of the Civil Procedure Rules. After satisfying the one-year threshold, he must also show that there was inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial. Lastly, he must satisfy the court that owing to the delay, a fair trial cannot be achieved."*

20. He submitted that the applicant has not fulfilled any of the above conditions and argued that dismissal for want of prosecution is discretionary and this discretion ought to be exercised judiciously. He relied on the case of **Utalii Transport Company and 3 Others v NIC Bank Limited & another [2014] eKLR** where the court held that the law prohibits the court from impulsive inclination and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution.

21. He submitted that he is entitled to a fair hearing on merit pursuant to the provisions of Article 50(1) of the constitution and that it is therefore just that his case be heard and determined conclusively on merit as no prejudice will be occasioned upon the Respondent. That there is no delay in prosecution of the same. He therefore urged this court to dismiss the application with costs.

Analysis and Determination

22. Having considered the facts of this cause, evidence adduced by the parties hereto, submissions by both parties, the issues for determination are:-

(i) Whether the application dated 27th February 2020 is merited.

(ii) Costs

Whether the application dated 27th February 2020 is merited.

23. Rule 16(1) and (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 states:

> **(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 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 show to its satisfaction, may dismiss the suit.**
>
> **(2) …**
>
> **(3) Any party to the suit may apply for dismissal as provided in paragraph (1)**
>
> **(4) …"**

24. The Court in **Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Another [2014] eKLR** held:

> *"Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:*
>
> *1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
>
> *2) Whether the delay is intentional, contumelious and, therefore, inexcusable;*
>
> *3) Whether the delay is an abuse of the court process;*
>
> *4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
>
> *5) What prejudice will the dismissal occasion to the plaintiff?*
>
> *6) Whether the plaintiff has offered a reasonable explanation for the delay;*
>
> *7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court;"*

25. The substantive claim in this suit was filed on 15th May 2017. The parties were sent for mediation with the notice of appointment of Mediator being issued on 1st November 2018. From the proceedings of the mediation, this court takes notice of the fact that both parties had missed mediation sessions with the Claimant missing the most. From the court attendance/status report filed on 21st February 2019, the mediator indicated:

> *(i) Mediator to communicate with the Claimant's Counsel or to call the Claimant directly*
>
> *(ii) Claimant given one last chance*
>
> *(iii) Next mediation on 27th March 2019 at 10:30 am"*

26. On the session for 27th March 2019, the mediator noted the following:

> *1. "Claimant not present*
>
> *2. Mediator to file Certificate of Non-Compliance"*

27. While the Claimant's Counsel argues that the office email had crashed at the time the Mediator contacted his office, he has not provided any evidence to support this claim. I find it curious that despite this allegation, Counsel had not taken steps to inquire on the progress of the matter even through a phone call. The fact that the Mediator had taken it upon himself to call Counsel and the Claimant proves the laxity of the Claimant and his Counsel.

28. The court in **Kiiru M'mugambi v Moses Kirima**(supra) held that:

> *"An applicant ought to be vigilant in prosecution of his case without delay. In this case the applicant took about a year without pursuing prosecution of his application. He stated that the reason was due to technical and unavoidable circumstances, which I consider to be a vague explanation which does not suffice."*

29. The Court notes that the application herein has been responded to by Counsel. There is no evidence that the Claimant, as opposed to his Counsel, is interested in prosecuting his case. The Claimant himself ought to assure the court of his interest to prosecute his case.

30. The record shows that prior to mediation proceedings of 22nd February 2020, the Claimant had not taken any steps to prosecute the claim. Again from the date the Mediator filed notice of noncompliance to the date of filing the instant application on 27th February 2020, no action was taken by the Claimant to fix the case for hearing.

31. A party who brings another to Court cannot sit back and forget about the suit. Equity does not aid the indolent and nor would such an indolent party hide behind Article 159. I find that the Claimant has not demonstrated any interest to prosecute the claim herein since the institution of the suit.

32. **Based on this, I find the application by the Respondent/Applicant is merited and hereby dismiss the suit with costs for want of prosecution.**

33. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF JULY 2021

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B** 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.

MAUREEN ONYANGO

JUDGE