



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 1172 OF 2017

MOSES WAWERU.....CLAIMANTS

VERSUS

DIGNITAS.....RESPONDENT

RULING

1. The Claimants brought this suit on 23.6.2017 seeking declaration that his employment contract was unfairly terminated and prayed for payment of terminal benefits plus compensatory damages. The claimant also brought application seeking an order that the respondent deposits security for payment of the claim.

2. The respondent filed defence on 20.7.2017 denying the alleged unfair termination and the claim for terminal benefits. It further filed a Replying Affidavit opposing the application for depositing of security.

3. The application was fixed for hearing on several occasions until 27.9.2017 when it was withdrawn by consent. On the said date the claimant sought for a hearing date for the main suit but the court referred him to the registry to take a date. The claimant fixed the matter for hearing on 8.10.2019 on which date the counsel for the two sides agreed to adjourn the hearing to pursue out of court settlement. The court fixed the matter for mention on 25.11.2019 to record settlement but on the said date, a new counsel appeared for the respondent and asked for time to get instructions.

4. Since then the matter was not fixed for hearing until 24.5.2021 when the matter came up for hearing of the respondent's Notice of Motion dated 19.3.2021 seeking for the dismissal of the suit for want of prosecution.

5. According to the respondent, the claimant has not set down the suit for hearing for hearing from 8.10.2019, about 17 months ago; that there is no reason for said delay; and that the delay in finalizing the suit is prejudicial to it. Consequently, the respondent prays for the suit to be dismissed with costs.

6. The claimant has opposed the application vide his replying Affidavit sworn on 21.5.2021 in which he deposed that the failure to fix the suit for hearing is because the court diary was full except for matters filed before 2016. He filed as exhibit copy of minutes of the Bar/Bench Committee held on 1.3.2021 as proof of the lack of space in the court diary.

7. I have carefully considered the materials presented to the court in respect of the instant application. The issue for determination is whether the suit should be dismissed for want of prosecution.

8. Rule 16(1) & (3) of the ELRC procedure Rules provides that: -

“In any suit in which no application has been made in accordance with Rule 15 or action has been taken by either party within one year from the date of its filing the court 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.

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

9. The Claimant has denied being indolent in this matter and averred that the reason he could not fix the matter for hearing was lack of hearing dates for matters filed after 2016. The problem of getting hearing dates for matters filed after 2016 in ELRC Milimani is a matter of public notoriety. Consequently, I do not blame the claimant for the delay in prosecuting the suit.

10. The chronology of events highlighted in my opening remarks above, show that the claimant wanted to finalize the matter quickly. He

withdrew the application for depositing of security and immediately sought for a hearing but the court referred him to the registry. The minutes of the Bar/Bench committee have confirmed that the suit could not get any hearing date because the court diary was only open for older matters.

11. I have also noted that the respondent participated in the delay because its former counsel agreed to an adjournment in order to try an out of court settlement and later its new counsel sought adjournment to get instructions.

12. Having considered all the circumstances of the case, I find that the application by the respondent has no merits, and the precedents cited in support thereof are not relevant to the facts of this case. Consequently, I dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY SEPTEMBER, 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 15th 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