



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO 359 OF 2017**

**FRANCIS KIBAKI NDOME .....CLAIMANTS**

**VERSUS**

**WELFAST (K) LIMITED .....RESPONDENT**

**RULING**

1. The Claimants brought this suit on 21.2.2017 seeking declaration that his employment contract was unfairly terminated and prayed for payment of terminal benefits. The respondent filed defence on 7.4.2017 denying the alleged unfair termination and the claim for terminal benefits.
2. The claimant failed to take steps towards prosecuting the suit and the respondent filed application dated 18.6.2018 and the suit was dismissed for want of prosecution. However the claimant brought application dated 26.8.2019 through which the suit was reinstated by consent.
3. Thereafter the claimant did not fix the suit for hearing and again the respondent filed the notice of motion dated 1.2.2021 seeking dismissal of the suit with costs for want of prosecution. The application is supported by the affidavit sworn on 1.2.2021 by the respondent's Counsel where he contends that the claimant has failed to fix the suit for hearing for no good reason citing the previous dismissal for claimant's indolence.
4. However the claimant opposed the application vide his lawyer's Replying Affidavit sworn on 4.6.2021 where he contends that after the suit was reinstated on 25.11.2019, the court directed that a hearing date be fixed at the registry but due to Covid-19 situation, it became a challenge to secure a date from the registry. Further the claimant contents that the registry advised that the hearing dates available were only for matters filed in 2016 and before.
5. 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.
6. 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)”**

7. 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 coupled by the novel Covid-19 Pandemic which affected administration of justice. Without belabouring the point, I must say that the problem of getting hearing dates for matters filed after 2016 in ELRC Milimani is a matter of public notoriety.
8. The reason for the backlog of cases in the court registry has been due to the small number of judges to handle the ever increasing suits. The said problem was exacerbated by the Covid-19 situation that has adversely affected the administration of justice in the country. Consequently, I do not blame the claimant for the delay in prosecuting the suit even after the court reinstated it on 25.11.2019 and directed that a date be obtained from the registry.
9. There cannot be any doubt that delaying trial would be prejudicial to the respondent who continues to bear the yoke of suit around its neck

for years and stand the risk of losing crucial evidence should its witnesses leave employment. However, the prejudice of delayed hearing cannot in any way be equated with dismissal of a suit because that means the claimant is forever banished from the seat of justice.

10. 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 no costs with directions that the suit will now be mentioned before the Deputy Registrar on 9.11.2021 for fixing of a hearing date

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 15<sup>TH</sup> DAY OCTOBER, 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**