



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO 338 OF 2018**

**VIOLET MUSIMBI.....CLAIMANT**

**VERSUS**

**KENAFRIC MANUFACTURING LIMITED.....1<sup>ST</sup> RESPONDENT**

**NIDE SERVICES LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Claimants brought this suit on 19.3.2018 against the 2<sup>nd</sup> respondent seeking declaration that her employment contract was unlawfully and unfairly terminated and prayed for payment of terminal benefits plus compensatory damages. On 23.4.2018, she filed an Amended Memorandum of Claim to join the 1<sup>st</sup> respondent.
2. The 1<sup>st</sup> respondent filed defence on 7.6.2018 denying any employment relationship with claimant and prayed for the suit against it to be dismissed with costs. The 2<sup>nd</sup> respondent filed defence on 29.8.2018 admitting that it employed the claimant. However, it denied the alleged unfair termination and averred that the claimant was lawfully dismissed for gross misconduct after being accorded a disciplinary hearing. Consequently it prayed for the suit to be dismissed with costs..
3. The claimant allegedly failed to take steps towards prosecuting the suit and the 1<sup>st</sup> respondent filed application dated 20.11.2019 seeking for order that the suit was dismissed with costs for want of prosecution. The application is supported by the affidavit sworn on even date by the respondent’s Counsel Mr. Dennis Juma where he contends that the claimant has failed to take any steps to prosecute the suit for a period of one year after filing the same; that the delay in prosecuting the suit amounts to abuse of the court process and it is causing it to incur unnecessary costs; that the delay is inordinate and inexcusable; that the claimant has lost interest in the matter.
4. The 2<sup>nd</sup> respondent supported the application for dismissal of the suit for want of prosecution vide its counsel’s written submissions dated 21.6.2021.
5. The claimant opposed the application vide the Replying Affidavit sworn 7.5.2021 by her counsel Mr. Wangira Okoba where she blames the delay in prosecuting the suit on case backlog in this court. He contended that since the filing of the suit the claimant has been desirous to prosecute her case. He further argued that the court has given priority to cases filed in 2015 and before, and as such the instant suit having been filed in 2018 could not be allocated a hearing date. Consequently, the counsel contended that the application for dismissal is premature, meant to escape liability and as such it ought to be dismissed with costs.
6. I have carefully considered the application, affidavits and submissions presented to the court in respect of the instant application. The main issue for determination is whether the suit should be dismissed for want of prosecution.
7. 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)”***

8. The Claimant has denied being indolent in this matter and averred that the reason she could not fix the matter for hearing was because priority has been given to cases filed in 2015 and before. However, I must agree with the respondents that the claimant did not take any steps

towards fixing the suit for hearing since the close of pleadings. There is no single letter from the claimant to the court, was ever written requesting for a hearing date for over a year since the pleadings were closed. Consequently, the respondent are justified to ask the court to dismiss the suit for want of prosecution.

9. The foregoing view notwithstanding, it must be noted that the problem of getting hearing dates for matters filed after 2016 in ELRC Milimani is a matter of public notoriety. There has been a backlog of cases in the court registry 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 in circumstances.

10. There cannot be any doubt that delaying trial would be prejudicial to the respondents who continue 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.

11. Having considered all the circumstances of the case, I find that the application by the respondent is has no merits. 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 since there are many Judges sitting in Nairobi ELRC now.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 15TH 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**