



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. 7 OF 2018

KWALE INTERNATIONAL SUGAR COMPANY LTD.....APPELLANT

VERSUS

MASIKA NYUNDO MWACHIZ.....RESPONDENT

(Appeal arising from the Ruling of Hon. D. Nyambu, CM

dated 4/7/2018 in (Kwale CMCC No. 346 of 2015.)

RULING

1. The appeal herein was lodged in this Court's Registry on 1/8/2018, and is shown to be against the ruling of the kwale Chief Magistrate (Hon. D. Nyambu) delivered on 4/7/2018 in the said Court's Civil Suit No. 346 of 2015. The lower court's said ruling is shown to have been in respect of a preliminary objection raised by the defendant in the said case (now the appellant in the appeal herein), but which the lower court dismissed.

2. No action is shown to have been taken by the appellant towards prosecution of the appeal from the said date of its filing (1/8/2018) until 22/6/2021 when the Court's Deputy Registrar issued a notice under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016 calling upon parties herein to show cause why the appeal could not be dismissed for want of prosecution.

3. When the matter came up in court on 15/7/2021 for the Notice to Show Cause, counsel for the appellant was ordered to file response to the Notice to Show Cause within fourteen days, and the matter was fixed for mention on 30th September 2021.

4. An affidavit in response to the Notice to Show Cause, sworn by Kishore Nanji Advocate on 29th September 2021, was filed in court on 30/9/2021. The said affidavit, which was filed outside the period of fourteen days ordered by the court on 15/7/2021 and without leave, was admitted on record by the court upon application in that regard by counsel for the appellant.

5. Rule 16(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows:-

“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 its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no cause is shown to its satisfaction, may dismiss the suit”.

6. In the affidavit referred to in paragraph 4 of this Ruling, counsel for the appellant deponed, *inter-alia*:-

a) “That the above appeal filed on 1st August 2018 relates to suit no. 346 of 2015 (the suit) of the Principal Magistrate's Court at kwale where the cause of action arose at work on the 8th November 2011 under the employer-employee relationship which is way after the enactment of the Work Injury Benefits Act 2009.

b) That the reason why I did not take any step to prosecute this appeal was because I was awaiting the outcome of the (sic) Petition of Appeal dated 1st February 2019 filed in the Supreme Court of Kenya challenging the decision of the Court of Appeal dated 17th April 2017 in Civil Appeal No. 133 of 2011.

c) That sometimes in March 2020 I became aware of the supreme court's judgment in the said petition of appeal which was delivered on 3rd December 2019 and soon thereafter I closed my office due to the prevailing issues pertaining to Covid-19.

d) That after my office opened sometime in July 2020, I reviewed my file in respect of the suit and found that the same stood dismissed by virtue of no step having been undertaken therein for more than 2 years.

e) That I therefore decided to let sleeping dogs lie until I received the aforesaid Notice to Show Cause from this Honourable court.

f) That on 4th August 2021, I filed my letter dated 2nd August 2021 in the suit requesting the Court to mark the same as dismissed.

g) That as soon as the suit is marked as dismissed in the Kwale court, I will be happy to withdraw this appeal as otherwise the appellant may be prejudiced.

h) That it is only right and just that the appellant is given an opportunity of having the suit marked as dismissed immediately whereafter I shall take steps to withdraw this appeal.”

7. Rule 16(2) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides as follows:-

“if reasonable cause is given to the satisfaction of the court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.”

8. The meaning of the word “**suit**” is given in Rule 1 of the Employment and Labour Relations Court (Procedure) Rules, 2016, and the same means **a Claim, Petition, application for Judicial review, appeal or any proceedings before the court for determination.**

9. From the deposition of counsel for the appellant in his affidavit partly reproduced in paragraph 6 of this Ruling, it is quite clear that the appellant herein is not desirous of prosecuting the appeal. For over three years now, no step has ever been taken towards prosecution of the appeal.

10. It is clear from the aforesaid affidavit that all that the appellant wants is to hold onto the Memorandum of Appeal filed herein over three years ago as it gets the already dismissed lower court suit “**marked as dismissed**”.

11. The practice by parties and/or litigants of filing suits in courts and leaving those suits unprosecuted for years, thereby creating daily case backlog statistics in the judiciary, is to be discouraged. Once filed, a suit must be prosecuted as by law provided.

12. I am not satisfied that reasonable cause has been shown why the appeal herein should not be dismissed for want of prosecution.

13. Consequently, the appeal is hereby dismissed for want of prosecution. No orders as to costs.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14TH DAY OF OCTOBER 2021

AGNES M.K. NZEI

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

AGNES M.K. NZEI

JUDGE

Appearance:

Nasimiyu for the Claimant

No Appearance for the Respondent