



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 1252 OF 2015

DICKENS MWENDWA NGANGA..... CLAIMANTS

VERSUS

ADIX PLASTICS LIMITED..... RESPONDENT

RULING

1. The Claimants brought this suit on 17.7.2015 seeking declaration that his employment contract was constructively terminated and prayed for payment of terminal benefits plus compensatory damages. The respondent entered appearance on 15.9.2015 and filed defence on 7.3.2019 denying the alleged unfair termination and averred that it is the claimant who deserted employment. For that reason, the respondent contended that the claimant is not entitled to the reliefs sought.

2. The suit has not been heard since close of pleadings and the respondent filed Notice of Motion dated 22.3.2021 seeking for the suit to be dismissed with costs for want of prosecution. The application is supported by the affidavit sworn by the respondent's HR manager Ms. Anna Maragia on 22.3.2021 and her further Affidavit sworn on 29.6.2021. The claimant has opposed the application vide Replying Affidavit sworn on 24.5.2021 by his counsel Mr. Caleb Jomo Ong'uti.

3. The applicants case is that the claimant is guilty of inordinate, prolonged and inexcusable delay in prosecuting the suit; that the matter was fixed for hearing on 1.11.2019 but the claimant did not attend forcing his counsel to apply for adjournment; that since then the claimant has not fixed the matter for hearing or even invited it to fix one for online hearing; and that the delay is prejudicial to the defence. It relied on **Tirth Construction Limited v Orion Hotels Limited [2020] eKLR** to urge that delay in prosecuting the suit will prejudice the defence. Consequently, it prayed for the application to be allowed as prayed.

4. The claimant has contended that he failed to attend court on 1.11.2019 due to ill health and his attempt thereafter to fix another hearing date has failed due to backlog of cases and the closure of court due to Covid-19 pandemic. He further argues that it is in the interest of justice that the application is dismissed otherwise he will forever be denied a chance of being heard in his suit.

5. I have carefully considered the application, affidavits and submissions. 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 is 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 in 2015 coupled with the Covid-19 Pandemic challenges. He has, however not explained the failure to write to the Court asking for a date or at least inviting the respondent to the registry to fix a date for a virtual hearing.

8. The suit was filed in 2015, and from where I sit, the court has persistent in fixing hearing dates for all the matters filed 5 years and earlier. Consequently, agree with the respondent that the delay in fixing the suit for hearing is inordinate.

9. However, I appreciate that the court exists to do justice and in this case, I would say that the claimant was eager to be heard on 1.11.2019 but he fell sick. Thereafter the covid-19 situation disrupted court operations and also movement of people. Whereas I agree with the

respondent that further delay in prosecuting the suit will be prejudicial to the defence case, I find that such prejudice in the circumstances of this case will not exceed that which will be occasioned to the claimant if the application is granted since he will be forever banished from the seat of justice.

10. Consequently, in the interest of justice, and in the circumstances of this case, I find and hold that the application must be dismissed. The claimant is granted 60 days within which to secure a hearing date from the Deputy Registrar of the Court. There shall be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 8TH 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 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