



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.789 OF 2017

PATRICK GICHUHI NGUGI.....CLAIMANT

VERSUS

TEAM AUSTRALIA LIMITED..... RESPONDENT

RULING

The respondent, Team Australia filed application dated 8th October, 2020 seeking for orders that the suit be dismissed for want of prosecution with costs on the grounds that on 27th April, 2017 the claimant filed suit and the respondent filed response on 9th May, 2019 and the matter came for pre-trial directions on 28th May, 2019 but since such date the claimant has no taken any action to prosecute the claim and it is over one (1) year since and under the Rules, such suit should be dismissed for want of prosecution.

The application is supported by the affidavit of Tabitha Njoki Waititu and who avers that she is lead manager for the respondent and has authority to respond herein. She avers that pleadings in this case closed when hearing directions issued on 28th May, 2019 and the claimant has not taken any step whatsoever to prosecute the claim and should therefore be dismissed with costs.

The claimant in reply filed his Replying Affidavit and avers that the matter was last in court on 28th May, 2019 for pre-trial directions and on 11th June, 2019 he invited the respondent to take a hearing date and served the respondent for 18th, June, 2019 but there was no attendance.

The entire period of 2020 everyone was battling COVID-19 forcing courts to temporarily close and the matter delayed. The delays in taking a hearing date were necessitated by factors beyond the claimant's control.

The respondent filed Further Affidavit of Ms Waititu and who avers that the alleged failure by the respondent to attend on 18th June, 2019 did not stop the claimant from being allocated a hearing date and this is only sued to justify the inordinate delay and should not be allowed. The court has conducted virtual hearings and delivered judgement during the COVID-19 period and the claimant cannot justify his inaction on this fact.

Determination

On the application, affidavit and written submissions, it is trite that Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (Court Rules) the court on its own motion, the parties upon application can have a matter dismissed for want of prosecution where there is inaction for over a year.

The records is clear to the extent that the claimant filed suit on 27th April, 2017 and served the respondent who filed response and on 28th May, 2019 parties attended and pleadings were marked closed pursuant to Rule 14 of the Court Rules and hearing directions issued. Parties were directed to take a hearing date at the registry.

Nothing is done until the respondent filed the instant application and seeking dismissal of the suit for want of prosecution.

The court takes judicial notice that On 16th March, 2020 the Chief Justice issued Notice following the COVID-19 pandemic with temporary closure of courts.

In August, 2020 courts up-scaled operations and gave room to parties to prosecute matters in a blended manner, virtually and physically in adherence to the COVID-19 protocols issued by the government in conjunction with the Judiciary.

However, the temporary closure of court did not stop any party from securing justice over any matter.

From 28th May, 2019 when hearing directions issued, to date the claimant has done nothing to secure a hearing date. Despite being served with the instant application and seeking dismissal of the suit for want of prosecution, there is nothing tangible on his part that he is keen to prosecute his suit.

Such only speaks to a litigant who is not vigilant.

All factors put into account, the claimant now moved and in the interests of justice, the claimant shall be given a fair chance to urge his case and secure a hearing date within the next 30 calendar days failure to which the suit shall stand dismissed as of 8th October, 2021. Costs are due to the respondent as the applicant.

Accordingly, application dated 8th October, 2020 is declined save the claimant has 30 calendar days to fix a hearing date failure to which the suit shall stand dismissed on 8th November, 2021.

Costs to the respondent.

DELIVERED IN COURT AT NAIROBI THIS 7TH DAY OF OCTOBER, 2021.

M. MBARU

JUDGE