



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 201 OF 2017**

(Before Hon. Lady Justice Maureen Onyango)

**KEVIN ORUO.....CLAIMANT**

**VERSUS**

**FAMILY BANK LIMITED..... RESPONDENT/APPLICANT**

**RULING**

1. Before me, for determination is the Respondent's Notice of Motion Application dated 1<sup>st</sup> March, 2021 seeking Orders that this suit be dismissed for want of prosecution and the costs of the Application be provided for.
2. The Application is based on the grounds that the Claimant lodged this suit on 6<sup>th</sup> February, 2017 and had failed to take any steps in prosecuting his claim since the Respondent filed its Defence on 10<sup>th</sup> April, 2017.
3. The Applicant further argued that there was no valid reason behind the Claimant's failure to fix the matter for pre-trial proceedings and that it is tantamount to an abuse of the Court process.
4. This Application is further supported by the Affidavit sworn by **KEZIAH RUTTO**, the Respondent/Applicant's Legal Manager on 1<sup>st</sup> March, 2021 in which she reiterates the grounds on the face of the motion.
5. She further deposed that the Claimant's failure to prosecute the matter is a clear indication that he has no interest in pursuing this matter and the suit should therefore be dismissed for want of prosecution.
6. The Application is filed under Order 16 Rule (1) and (3) of the Employment and Labour Relations Rules and all enabling other provisions of the law.
7. The Claimant opposed the Application through his Replying Affidavit sworn on 11<sup>th</sup> June, 2021 in which he admits that there has been delay in prosecuting his Claim. He however maintained that the delay was occasioned by firstly, the lack of finances as he was unable to raise legal fees as required by his Advocates on record to facilitate the prosecution of the matter and secondly, the COVID -19 pandemic that the Court's operations as the Courts were forced to scale down their operations.
8. The Claimant maintained that he has a right as protected under Article 50 of the Constitution of Kenya, 2010 to be heard and that the right ought not to be limited to technicalities.
9. He averred that he was desirous of prosecuting his case to its logical conclusion and therefore maintained that in the interest of Justice the suit ought not to be dismissed.
10. The Affiant contended that the Applicant will not suffer any prejudice if the matter is set for hearing to allow it proceed and a determination made on merit.
11. He urged this Court to exercise its discretion and dismiss the instant Application and allow him proceed to prosecute this matter to conclusion.
12. Parties agreed to dispose the Application by way of written submissions.

## Submissions by the Parties

13. The Respondent/Applicant submits having met the threshold for the grant of the Orders sought in its Application as provided under Rule 16 of the Employment and Labour Relations Court Rules and as enumerated in cases of **Ivita v Kyumbu (1984) KLR 441** and **Argan Wekesa Okumu v Dima College Limited & 2 Others (2015) eKLR**.

14. The Applicant further submitted that it has discharged its burden of proof as required of it and therefore urged this Court to allow the Application as prayed. To buttress this argument the Applicant relied on the cases of **Naftali Onyango v National Bank of Kenya (2005) eKLR** and **Mwangi S. Kimenyi v Attorney General, Civil Suit No. 720 of 2009** where the Court held that for an application for dismissal of a suit for want of prosecution the Applicant must show that there had been inordinate delay, the delay is inexcusable and that it (the Defendant/Applicant) is likely to suffer prejudice by the delay.

15. The Applicant argued that the four year delay to prosecute this matter is inexcusable and that the reasons given for the Claimant's failure to prosecute the matter are not plausible. It is further argued that the continued pendency of the matter gives rise to a substantial risk to a fair trial and would largely prejudice the Claimant/Respondent.

16. The Applicant maintains that the Claimant has not been vigilant to prosecute his matter and can therefore not rely on the provisions of Article 50 of the Constitution of Kenya, 2010 as Courts should not be seen to award an indolent litigant under the guise of Article 50. For emphasis the Applicant relied on the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR**.

17. In conclusion the Respondent/Applicant urged this Court, in the interest of Justice, to allow the instant Application as prayed.

## Claimant's Submissions

18. The Claimant on the other hand in opposition to the Application reiterated the averments made in his Replying Affidavit in opposition sworn on 11<sup>th</sup> June, 2021.

19. He further submitted that the applicant has not met the threshold for the grant of the Orders it so desires in its Application. He further argued that dismissal for want of prosecution is discretionary and ought to be exercised judiciously. For emphasis the Claimant relied on the case of **Naftali Opondo Onyango v National Bank of Kenya Limited (2005) eKLR** where it was held that *Courts should be slow to dismiss matters for want of prosecution.*

20. The Claimant maintained that he is still desirous of prosecuting his claim to conclusion and that he is entitled to a fair hearing on merit by dint of the provisions of Article 50 of the Constitution of Kenya, 2010. He further argued that it is in the interest of justice that the Claim be allowed to proceed for hearing.

21. In conclusion the Claimant maintained that the delay in prosecuting this matter is excusable and that the Applicant will not suffer any prejudice if this matter is set down for hearing on merit. He therefore urged this Court to find the instant application without merit and dismiss it with costs.

## Analysis and determination

22. There is no dispute that since the suit was filed and pleadings closed, the same was not set down for pre-trial directions under section 15 of the Employment and Labour Relations Court Rules nor was it fixed for hearing. The issue for determination is whether the suit should be dismissed for want of prosecution.

23. **Section 16 of the Employment and Labour Relations Court (Procedure) Rules** provides that;

### **16. Notice to show cause why suit should not be dismissed**

**1. 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 reasonable cause is shown to its satisfaction, may dismiss the suit.**

**2. 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.**

**3. Any party to the suit may apply for dismissal as provided in paragraph (1).**

**4. The Court may dismiss the suit for non-compliance with any direction given under this rule.**

24. A defendant seeking dismissal of a suit on the ground of want of prosecution must satisfy the legal requirement of one year threshold stipulated in Rule 16 (3) as enumerated herein above.

25. After satisfying the one year threshold, he must also show that there was inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the Court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial. Lastly, he

must satisfy the Court that owing to the delay, a fair trial cannot be achieved. This is as enumerated in the case of **Ivita v Kyumbu (supra)**, where the Court echoed this view by stating as follows:

1. “(the defendant) must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution.”

26. I have considered the reasons for the delay in prosecuting this claim as advanced by the Claimant being that he was financially unable to raise legal fees as required by his Advocates on record and secondly, he blames the COVID-19 pandemic that led to the Courts scaling down its functions.

27. I also note from the file that the last action taken by counsel on record for the Claimant was on 31<sup>st</sup> October, 2018 when the firm of Wasuna and Company Advocates, on record for the Claimant wrote to the Court’s Deputy Registrar seeking to be furnished with a mention date before the trial Court for directions. However, it is not clear from the file why a date was not issued as requested.

28. No action was taken by Claimant or his counsel on record from that date until now when the Respondent/Applicant filed to have the suit dismissed for want of prosecution.

29. The reasons given for the failure to fix the matter for pre-trial directions and hearing in my view is inexcusable as the Claimant is at liberty to act on his own behalf if he so wishes in the event he is unable to raise the requisite legal fees. Secondly, scaling down of Court operations did not necessarily close down the Courts entirely as the Courts have been proceeding with matters virtually.

30. I further wish to state that this matter has been inactive even before COVID-19 pandemic and it is therefore not fair for the Claimant to hide under the guise of the pandemic for his failure and/or indolence in prosecuting this matter.

31. The Court in **Kiiru M’ mugambi & 39 others v Moses Kirima Meenye & Kirima Advocates & 3 Others (2020) eKLR** held that:

“An applicant ought to be vigilant in prosecution of his case without delay. In this case the applicant took about a year without pursuing prosecution of his application. He stated that the reason was due to technical and unavoidable circumstances, which I consider to be a vague explanation which does not suffice.”

32. The Court in the above matter further stated that *the Courts should be reluctant in giving audience to non-committed litigants and that litigation must come to an end.*

33. It is clear from the record that the Claimant slept on his rights in prosecuting this case. A party who brings another to Court cannot sit back and forget about the suit. Equity aids the vigilant not the indolent and an indolent party cannot hide behind Article 159 as the Claimant so wishes.

34. I however take judicial notice that due to the backlog of cases the court has been giving preference to cases filed earlier. It is only now that 2017 cases are being fixed for hearing. It is my view that even if the Claimant moved the Court perhaps he would not have succeeded in fixing this suit for hearing.

35. Without condoning the obvious delay in prosecuting this matter, I give the Claimant a final opportunity to fix this suit for pre-trial within 30 days, should he fail to do so, the suit will automatically stand dismissed. The Claimant shall pay the Respondent’s costs for this application in any event, which I assess at Kshs.10,000/-, before fixing for hearing.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2021**

**MAUREEN ONYANGO**

**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> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**