



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1280 OF 2018

DENIS ORIKI OMBETA.....CLAIMANT

VERSUS

EAST AFRICAN GROWERS LIMITED.....RESPONDENT

RULING

1. This ruling flows from the Respondent's Notice of Motion dated 2nd February 2021, seeking dismissal of the Claimant's claim for want of prosecution.

2. The Motion is supported by an affidavit sworn by the Respondent's Group Human Resource Officer, Vitalis Osodo and is based on the following grounds:

a. The Claimant filed his claim dated 20th July 2018 on 2nd August 2018. Subsequently, the Respondent entered appearance on 31st August 2018 and filed its Memorandum in Response dated 13th September 2018 on 18th September 2018;

b. Ever since, the Claimant has taken a back seat and no attempt to prosecute the suit has been made;

c. The Claimant has not taken any step for a period exceeding 1 year since the Respondent filed its Memorandum in Response;

d. The matter has thus been in court for the last 2 years and 4 months, without the Claimant taking any action to fix it for hearing;

e. The delay in prosecuting the matter for 2 years and 4 months is inordinate and inexcusable on the part of the Claimant;

f. The Claimant has a primary duty to take steps to have the matter prosecuted having dragged the Respondent to court and where the Claimant fails to do so as he has done in this case, it is beyond peradventure that he has lost interest in prosecuting the matter;

g. The delay by the Claimant to prosecute this matter and the pendency of the suit continues to prejudice the Respondent's right to a just, expeditious, proportionate and efficient trial as it continues to suffer loss having used a lot of funds to retain Counsel and to defend the claim;

h. The Respondent should not be condemned any further to continue suffering prejudice and anxiety of having this suit hovering above its head like a Sword of Damocles, when the Claimant has demonstrated clear intentions not to prosecute the same;

i. Owing to the delay, a fair trial cannot be achieved and it is in the interest of justice that this suit be dismissed for want of prosecution and for disclosing no reasonable cause of action;

j. The overriding objective has been abused by the indolence of the Claimant evident in his contumelious, lethargic and inordinate delay in prosecuting this case. It is apparent that the Claimant is no longer interested in the suit and the same only remains an unnecessary burden on the Respondent;

k. Justice delayed is justice denied. The delay as enumerated above defeats the essence of fair trial and the suit should be dismissed with costs to the Respondent.

3. The Claimant's response to the Respondent's Motion is contained in his own affidavit sworn on 9th March 2021.

4. The Claimant depones that his claim was filed on 2nd August 2018 and the Respondent's Statement of Response was filed on 18th September 2019.

5. The Claimant claims that in the year 2019, the Court had a huge backlog of old cases and it was dealing with cases filed prior to 2016 and 2017. The Claimant adds that he did follow up with his Advocates but there were no dates for fresh cases.

6. The Claimant states that he was advised that the Court was to allocate him a date in the year 2020 but in the month of March 2020, there was a total lockdown of court operations due to the COVID-19 Pandemic.

7. The Claimant further states that operations resumed on a small scale towards the end of 2020 and he was advised that pre-trial was to take place in the 1st Quarter of 2021.

8. The Claimant takes the view that the delay in prosecuting his claim is excusable and no prejudice has been occasioned on the Respondent.

9. Rule 16 of the Employment and Labour Relations Court (Procedure) Rules provides as follows:

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 expeditious hearing and determination of the suit.

3. A 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.

10. According to this provision, a party facing an application for dismissal of their claim for want of prosecution must lay before the Court reasons for the delay.

11. The Court was referred to the decision in *Wargan Wekesa Okumu v Dima College Limited & 2 others [2015] eKLR* where **Omondi J** (as she then was) restated the principles governing applications for dismissal of a case for want of prosecution in the following terms:

“The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay.”

12. The learned Judge further held that once delay is established it must be well explained and if it is not explained, then it becomes inexcusable.

13. In this case, the Claimant filed his claim on 2nd August 2018 and the Respondent filed a Statement of Response on 18th September 2018. After that, no action was taken until the present Motion.

14. In his affidavit in response to the Motion, the Claimant makes a general statement that in the year 2019, the Court was dealing with old cases and he was therefore not allocated a date for his case. This statement is however not supported by any evidence to show that the Claimant had even approached the Court for a date. In any event, the Claimant should have moved the Court for pre-trial for him to establish that there were no hearing dates.

15. Regarding the question whether the Respondent has been prejudiced by the delay I will say this; court cases are expensive and disruptive, a party that brings another to court therefore has a standing responsibility to expedite resolution of the case (see *Nilani v Patel (1969) EA 341*).

16. As submitted by the Respondent, a court case swings like the Sword of Damocles and the party that has been sued, lives with the fear of a negative outcome. What is more, as cases lie dormant in court, evidence is compromised by the passing of time.

17. Indeed, the essence of the provision for dismissal of cases for want of prosecution is informed by public policy which dictates that court cases must be dispensed with expeditiously.

18. As it stands, the Claimant filed his case and went away. No credible explanation has been offered for this lapse.

19. In the result, the Respondent's Motion dated 2nd February 2021 is allowed and the Claimant's claim is thus dismissed for want of prosecution.

20. Each party will bear their own costs.

21. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2021

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JUDGE

Appearance:

Mr. Mosei for the Claimant

Mr. Kiigata for the Respondent