



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 721 OF 2014

DANSTONE BEDI.....CLAIMANT

VERSUS

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....RESPONDENT

RULING

1. The Claimant's claim was dismissed on 26th November 2018, for want of prosecution.
2. On 16th June 2021, the Claimant moved the court by filing a notice to act in person together with a Notice of Motion seeking reinstatement of the claim.
3. The Motion is based on the following grounds:
 - a. The Claimant is an aggrieved former employee of the Respondent who has sought the intervention of the Court for redress for unlawful and unfair termination;
 - b. Whereas the Claimant's suit was filed in May 2014 and there have been frequent efforts to get a hearing date thereof to no avail, the claim was dismissed by **Makau J** during the service week on 26th November 2019;
 - c. The dismissal came to light on 26th November 2019, when the Judge asked the Claimant to instruct Counsel to file the application and which task was not undertaken due to the COVID-19 Pandemic which set in the country in December 2019;
 - d. The Claimant was not able to make the application earlier due to the shutdown of the Court Registry and the subsequent e-filing challenges that were prevailing in the year 2020;
 - e. The Claimant is keen to prosecute the matter as he suffered great injury and damage due to the unprocedural dismissal;
 - f. It is in the interest of justice that the suit be re-instated for it to be heard and/or decided on merit.
4. In his affidavit in support of the application, the Claimant depones that on 26th November 2019, when the matter came up for notice to show cause, his Advocates were not available. The Claimant adds that his Advocates asked him to pass by their office to pick the file together with a note for someone to hold their brief.
5. The Claimant claims to have called the Respondent's representative asking for the file to be placed aside as he was running late.
6. The Claimant depones that upon reaching court, he found the suit had been dismissed by **Makau J**, who was penning off his order.
7. The Claimant further depones that he made attempts to address the Judge who informed him that he should ask his Advocates to make the necessary application.
8. The Claimant states that in the process of preparing documents, the COVID-19 Pandemic hit the country in December 2019 and the Claimant therefore avoided going to crowded places, including his Advocates' law firm.
9. The Claimant claims to have occasionally followed up with his Advocates but was informed that in the year 2020 the Court Registry had

closed and not much activity was going on.

10. The Respondent filed Grounds of Opposition dated 5th October 2021 stating:

- a. The Claimant has not given sufficient reasons for failure to attend court on 26th November 2019;
- b. The reasons advanced in the supporting affidavit are not convincing;
- c. There has been inordinate delay in prosecuting the suit and filing of the application;
- d. Reinstating the suit will be prejudicial to the Respondent who already paid the Claimant and the witnesses have left office;
- e. The application lacks merit and is therefore an abuse of the court process.

11. 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.**

12. The considerations to be taken into account in an application such as the one before me were set out in *Ivita v Kyumbu (1984) KLR 441* as follows:

“The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and or, witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He 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. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

13. In the more recent decision in *Mwangi S. Kimenyi v Attorney General and another [2014] eKLR Gikonyo J* restated the test thus:

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties-the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far from the parties.

Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent but rather it is serving the interest of justice, substantive justice on behalf of the parties.”

14. In the present case, the Claimant filed his claim on 5th May 2014 and the Respondent filed a Statement of Response on 3rd March 2015.

15. The matter came up for hearing on 25th September 2017 but the Claimant was absent.

16. Another hearing date was fixed for 18th September 2018 but the matter was not heard. The matter came up yet again on 26th November 2018 when it was dismissed for want of prosecution.

17. In his affidavit in support of the application, the Claimant states that on the date the claim was dismissed, he arrived in court just as the Judge was penning off. He however does not explain why he had failed to take steps towards prosecuting his claim.

18. Moreover, there is no credible explanation as to why the application to reinstate the claim was filed close to three years after the date of dismissal.

19. The Claimant's attempt to link this delay to the onset of the COVID-19 Pandemic fails, because the first case of COVID-19 was reported in the country in March 2020 and not December 2019 as alleged by the Claimant.

20. Overall, I find and hold that the Claimant has failed to explain the inordinate delay in prosecuting his case and in bringing the present application.

21. To reinstate this claim, which was filed eight (8) years ago would be highly prejudicial to the Respondent, whose evidence may have dissipated.

22. The Claimant's application dated 16th June 2021 is therefore dismissed with no order for costs.

23. In the result, the Claimant's claim stands dismissed and this file is closed.

24. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY NOVEMBER, 2021

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JUDGE

Appearance:

Danstone Bedi (the Claimant in person)

Miss Wanyama for the Respondent