



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 743 OF 2016

KEPHER MOKANDU MITIEKA.....CLAIMANT

VERSUS

SHEILA LOLANI ALLOBAI.....RESPONDENT

RULING

1. On 21st June 2021, **Makau J** dismissed the Claimant's claim for want of prosecution.
2. The Claimant subsequently moved the Court by way of Notice Motion dated 14th July 2021, seeking reinstatement of the claim.
3. The Motion is supported by an affidavit sworn by the Claimant's Counsel, Patrick Waiganjo Wachira and is based on the following grounds:
 - a) That the order of dismissal of 21st June 2021 was made through no fault or wrongdoing on the part of the Claimant;
 - b) That Claimant's Counsel's failure to attend court on the said date was not deliberate, as it was caused by use of a wrong virtual court access link posted in the day's cause list;
 - c) That the Claimant has satisfactory reasons why the matter should not have been dismissed for want of prosecution in the first place;
 - d) That the Claimant desires to prosecute his case to the fullest;
 - e) That the application has been made without undue delay;
 - f) That the Respondent will not suffer any prejudice if the order sought is granted;
 - g) That it is in the interest of justice to grant the order sought.
4. In his affidavit sworn in support of the application, Counsel explains the delay in prosecuting the claim by stating that only matters filed in 2015 and before were proceeding and the Claimant's claim being a 2016 matter, was put on hold.
5. Counsel states that the Claimant is ready and willing to prosecute his claim against the Respondent and adds that the mistake by Counsel should not be borne by the Claimant.
6. The Respondent did not respond to the application. This notwithstanding, the Court will examine the Claimant's plea based on the law and facts.
7. The single issue for determination is whether the Claimant has made out a case for reinstatement of his claim dismissed on 21st June 2021, for want of prosecution.
8. 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.

9. Regarding the considerations to be taken into account in an application such as the present one, *Ivita v Kyumbu (1984) KLR 441* set the following standard:

“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.”

10. 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.”

11. Both in the Notice of Motion and the supporting affidavit, the Claimant appears to explain the failure to attend court on 21st June 2021, while ignoring the real question before the Court, which is why he had failed to take steps towards prosecuting his claim.

12. According to the court record, after filing his claim on 4th May 2016, the Claimant took no action until he was jolted by the dismissal order, five (5) years later. I need to stress that cases belong to litigants and not to their Advocates. It cannot therefore be said that the Claimant is an innocent party in this lapse.

13. The inordinate delay has not been explained and the unsupported statement that only matters filed in 2015 and before were proceeding does nothing to change the position.

14. That said, the Claimant’s Motion dated 14th July 2021 is disallowed with no order for costs.

15. The result is that the Claimant’s claim stands dismissed and the file is closed.

16. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021

LINNET NDOLO

JUDGE

Appearance:

Mr. Waiganjo for the Claimant

No appearance for the Respondent