



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 1092 OF 2018**

**VIOLET WAITHERA MBUGUA.....CLAIMANT**

**VERSUS**

**POWERMAX GENERAL ELECTRICAL MERCHANTS.....RESPONDENT**

**RULING**

1. What falls for determination is the Respondent's Notice of Motion dated 25<sup>th</sup> March 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 Counsel, Abiero Brian and is based on the following grounds:
  - a) That the Claimant filed a Statement of Claim, Verifying Affidavit, List of Witnesses, Witness Statement and Bundle of Documents dated 22<sup>nd</sup> June 2018;
  - b) That the Respondent entered appearance vide a Memorandum of Appearance dated 3<sup>rd</sup> August 2018 and filed on 9<sup>th</sup> August 2018 and a Statement of Defence dated 29<sup>th</sup> August 2018 and filed on 19<sup>th</sup> September 2018;
  - c) That the Respondent further filed a Notice of Change of Advocates dated 22<sup>nd</sup> June 2020 on 2<sup>nd</sup> July 2020, which was duly served on the Claimant's Advocates;
  - d) That the Claimant has never fixed a date at the Court Registry and no notice has been served upon the Respondent's Advocates;
  - e) That the Claimant has not taken any steps to prosecute the matter before the Court;
  - f) That it has now been 30 months and it is clear that the Claimant is no longer interested in prosecuting the matter;
  - g) That it is only fair and reasonable as well as in the interest of public policy and justice that the matter be dismissed for want of prosecution.
3. In response to the Respondent's Motion, the Claimant filed her replying affidavit sworn on 25<sup>th</sup> May 2021.
4. The Claimant depones that 31<sup>st</sup> October 2018, her Advocates on records requested for a mention date for directions.
5. The Court Registry gave 19<sup>th</sup> March 2019 as a mention date for pre-trial directions. A mention date was duly served on the Respondent.
6. The Claimant states that on 4<sup>th</sup> January 2019, the Respondent wrote to her Advocates expressing the wish to settle the matter out of court.
7. The Claimant's Advocates responded to the Respondent's letter on 14<sup>th</sup> February 2019. There was no further communication from the Respondent.
8. On 19<sup>th</sup> March 2019, the parties' Advocates appeared in court for pre-trial directions, whereat the Respondent asked for 10 days to comply, which request was duly granted.

9. The Claimant depones that the Respondent served her Advocates with compliance documents on 28<sup>th</sup> May 2019.
10. The Claimant further depones that her Advocates have been writing to the Registry asking for a hearing date, which has not been allocated.
11. The Claimant confirms her desire to have the matter determined.
12. Regarding dismissal of claims for want of prosecution, 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.*

13. With respect to the considerations to be taken into account in an application for dismissal of a suit for want of prosecution, *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.”*

14. In the more recent case of *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.”*

15. Looking at the court record, there is evidence of efforts made by the Claimant to set down the matter for hearing. In this regard, the Court takes judicial notice of the policy decision taken to give priority to matters predating the Claimant’s claim, which is a 2018 matter.

16. What is more, the Respondent having intimated that it was willing to pursue an out of court settlement, failed to respond to the Claimant’s offer. The only conclusion to make therefore is that the present application is made in bad faith by a party who itself has been non responsive.

17. On the whole, I find the Respondent’s application unmerited and proceed to dismiss it with costs to the Claimant.

18. It is so ordered.

**DELIVERED VIRTUALLY AT NAIROBI THIS 4<sup>TH</sup> DAY OF NOVEMBER 2021**

**LINNET NDOLO**

**JUDGE APPEARANCE:**

**MR. MOGIKOYO FOR THE CLAIMANT**

**MISS KIULUKU H/B FOR MISS NJANI FOR THE RESPONDENT**

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