



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**

**CAUSE NO. 105 OF 2021**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION.....PETITIONER**

**VERSUS**

**UNLIVER TEA K LIMITED.....RESPONDENT**

**RULING**

1. This ruling relates to the Respondent's Notice of Motion dated 24/9/2021, which seeks the following orders:-

a) The Court to dismiss the Suit herein for want of prosecution

(b) Costs of the application be provided for,

2. The application is supported by the affidavit sworn by Mr. Muchela A Onge'enge and it is opposed by the claimant vide the replying affidavit sworn by Mr. Timothy Kipkemboi on 27/10/2021.

3. The applicant's case is that the claimant has lost interest in the matter because since 15/5/2019 when the matter was last in court, it has not taken any action towards prosecuting the same. It is further applicant's case that the continued pendency of the suit is prejudicial to it. Finally it avers that it is in the interest of justice that the suit be dismissed for want of prosecution.

4. For emphases, the applicant relied on Rule 16 (3) of the ELRC procedure Rules which provides for dismissal of a suit if no action has been taken for one year. It also relied on the case **Ivita –v- Kyumbu[1975] e KLR** where the court held that delay causes an injustice to the litigants.

5. It also relied on the case of **Pius wanjala –vs - Permanent Secretary Ministry of Medical Services & 4 others [ 2021] e KLR** where the court held that failure to take action for a period of one (1) year is a serious lapse and Rule 16 of the ERLC procedure Rules ensures that litigants remain vigilant.

6. The claimant's case, on the other hand is that, after the grievants were dismissed from employment they relocated to their rural homes and efforts to trace them were in vain. Thereafter Covid–19 pandemic compounded the problem when court proceedings were changed from physical to virtual.

7. The claimant further averred that, Mr. Khisa who was conducting the suit left the union but now there is a new legal counsel. It contended that the grievants have as good case and they will suffer prejudice if the suit is dismissed before being heard on merits. It further contended that the grievants are still interested in prosecuting suit and urged the court to allow them have their day in court.

8. For emphasis, it relied on **Mandeep Chauhan –vs Kenyatta National Hospital &2 others [2013 of e KLR** where the court cited with approval Supreme Court of Uganda decision in **The Management Committee of Makondo Primary School & 8 others –vs- Uganda National Examination Board H.CCivilMisc. Application no. 18 of 2010** where the court held that it is a cardinal rule of natural justice that no one should use condemned unheard.

9. Finally, the claimant submitted that the applicant has failed to prove that the delay in prosecuting the suit is inordinate and sought support from the case of **Agip (Kenya) Limited –vs Highlands Tyres Limited [2001] KLR 360** where the court set out the principles governing application for dismissal of a suit for want of prosecution including inordinate delay.

**ANALYSIS**

10. I have considered the application, affidavits and submission filed. The issue for determination is whether the suit should be dismissed for want of prosecution

11. The relevant law to the instant motion is Rule 16 of the ELRC procedure Rules which provides that:-

***“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.***

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

12. In addition, Order 17 Rule 2(1) of the civil procedure Rules provides

***“(1) In any suit in which no application has been made or steps taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.***

***(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.”***

13. From the foregoing provisions, an applicant seeking for dismissal of a suit for want of prosecution is only required to demonstrate that no action has been taken by either party for one year in the suit and that the failure was for no good cause.

14. Once the applicant has demonstrated the above points, the evidential burden shifts to the Claimant/Plaintiff to demonstrate that he was prevented by sufficient cause from taking steps towards prosecuting the suit. In this case, no action was taken by either party for over Two years and the claimant explained that it was prevented from taking action by the grievants' disappearance, Covid -19 pandemic and the exit by the legal officer who was in conduct of the suit.

15. According to the applicant, the explanation given by the claimant is not plausible but an indication that the claimant and the grievants has lost interest in prosecuting the suit.

16. Having carefully considered the arguments by both sides, I must agree with the applicant that the failure by the claimant to take action towards prosecuting the suit is without any good cause and the delay of over two years is inexcusable. Even if the grievants were out of reach, that did not prevent the claimant from writing the court to fix a hearing or at least a mention date. They also deliberately failed to invite the applicant to the court registry for over two years to seek for hearing date.

17. It would appear from the record that after the suit was adjourned at the instance of the claimant on 15/5/2019, the claimant went into a sleep mode until it was woken up by the instant application. The inaction by the claimant from 15/5/2019 to 15/10/2021 when the application was made is inordinate and not justified by any reasonable explanation.

18. It is manifestly clear that the claimant and the grievants have lost interest in the matter. The delay is prejudicial to the applicant in terms of costs and the likelihood of losing its witnesses. Consequently, I allow the application as prayed.

19. I gather support from the case of **Pius Wanjala –vs- Permanent Secretary, Ministry of Medical services & 4 others [ 2021] e KLR** where Mbaru J cited decision in the case of **Ivita –vs- Kyumbu [1975] e KLR** that: -

***“Justice is justice to both the plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is not 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”***

20. In the end, I dismiss the suit for want of prosecution as prayed in the application. The applicant will also have costs of the application.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 16TH DAY OF DECEMBER, 2021.**

**ONESMUS N MAKAU**

**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> April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**