

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 204 OF 2017

PETER MUMO GATHURU.....CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE NATIONAL COUNCIL

OF CHURCHES KENYA (NCCK).....RESPONDENT

RULING

1. The Application herein is the Respondent/Applicant's motion seeking dismissal of the Claimant/Respondent's suit for want of prosecution. The Respondent asserts the Claimant has been lax in prosecuting his suit hence the motion seeking dismissal. On his part the Claimant asserts that he has not been lax and that the matter was transferred to the Court from the Milimani Chief Magistrate's Court in 2017 having commenced his suit in 2009.

2. The Respondent/Applicant submits that the law as expressed in Order 17 Rule 2 of the Civil Procedure Rules and Rule 16 Employment and Labour Relations Court (Procedure) Rule 2016), is clear and gives the Court the power to initiate dismissal of a suit if no step has been taken by either party for one year. It is submitted that under Order 17 Rule 2(3) and Rule 16(3) allow any party to make the Application. The Respondent/Applicant submits it is exercising its right under those provisions. The Respondent/Applicant takes issue with the Claimant/Respondent's Replying Affidavit dated 13th October 2021, in which it has set out its response to the Application. The Respondent submits that the Replying Affidavit, is sworn by Mr. Thomas Thuku Ng'ang'a Counsel on record for the Claimant/Respondent. It submits that the best practice is that Counsel on record ought not to swear an Affidavit in a contested matter. The Respondent cites the case of **Simon Isaac Ngui v Courier Services (K) Limited [1998] eKLR** for this proposition. The Respondent/Applicant asserts that paragraph 10 to 12, state that the Counsel lost contact with the Client for about three (3) years and has re-established contact now, yet the Claimant whose suit is to be prosecuted, has not sworn the Replying Affidavit. The Respondent submits that however, paragraph 13 and 14 are not within the knowledge of the Respondent and ought not to be considered as they relate to the personal health of the Claimant. It submits that Order 19 Rule 3(3) Rule 1 Civil Procedure Rules 2010 is applicable and as such, the said Affidavit ought to be struck out. Further, it is submitted, the medical records annexed are illegible and the photograph of a patient in hospital as evidence has no causal link to the Claimant. The Respondent submits that the Court has no idea as to the identity of that patient. It urges this suit be dismissed for want of prosecution.

3. The Claimant/Respondent's counsel asserts the Claimant has not been lax in prosecuting his suit. The Counsel asserts the delays were majorly occasioned by the transfer of the file to this Honourable Court which took a long time and that this was no fault of the Claimant/Respondent as alleged. The Claimant/Respondent submits through the Advocates on record, that he was in fact very actively involved in pursuing the transfer. That the Advocates on record submit that at some point they lost touch with the Claimant/Respondent only to later on learn that the Claimant was indisposed thereby battling health related issues that have persisted up to the year 2020. During this period the Claimant had been in and out of hospital and was until recently admitted at the Nakuru Maternity & Nursing Home. The Claimant/Respondent is said to have since regained his health and is able and willing to expeditiously prosecute his matter under any terms this Honourable Court would prescribe. It is the Claimant's submission that besides the legal framework set out in Order 17 Rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been explicitly articulated and well settled in a number of leading authorities, amongst them, the case of **Ivita v Kyumbu [1984] KLR 441** where the criteria was summarized as follows:

"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay.. 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."

4. The Claimant further submits that the Court in **Argan Wekesa Okumu v Dima College Limited & 2 Others [2015] eKLR** considered the principles for dismissal of a suit for want of prosecution and stated as follows:

"The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. 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... Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

He submits that in the present case, there are two questions that this Honourable Court ought to consider in determining the merits of the Notice of Motion herein (a) is the delay inordinate and inexcusable? and (b) Will the defendant suffer any prejudice? The Claimant submits that in the present case, it is evidently clear that the transfer of the suit file to this Court greatly contributed to the delay in the prosecution of this suit. Further, the delay alleged herein is clearly on account of occurrences that were beyond the Claimant/Respondent's control. He submits that it is an excusable delay and justice can still be done despite this delay. He therefore urges this Honourable Court to examine the

general prevailing circumstances within the judicial system at the time of the alleged delay and also the fact that the Claimant has been fighting for his life due to ill health and that indisposition the justice he is seeking has broken in this suit is by no means one of the concerns that resilience. On the question of prejudice to be suffered, the Claimant submits that the dispute in this matter is one of employment whereby the Respondent/Applicant is accused of unlawful deductions and failure to pay the Claimant his dues. He submits that from the facts and circumstances of the matter, it is clear that the delay which was unavoidable could not be prejudicial to the defendant. The Claimant/Respondent submits that the Respondent/Applicant has not shown the Court that they will be prejudiced if the suit herein is maintained and that justice will not be done or served in the instant case due to the prolonged delay. He submits further that the Applicant has not shown that they have suffered any prejudice which is substantial and results to impending fair trial on their part, has aggravated any costs or any specific hardships to them. The Claimant submits that the Respondent/Applicant has not given this Honourable Court any reason to believe that the unfortunate delay in prosecuting this suit has worsened their position in the suit, if at all. He cited the case of **Ceven Limited v Erastus Gichuhi & 4 Others [2021] eKLR**, where the Court observed that even where there is delay but is properly explained; the court should lean towards saving the suit. The Court further stated that in an application or Notice for dismissal of a suit for want of prosecution, the court should be slow to dismiss the suit if the suit can be continued and be finalized without delay. If it is shown that the defendant will not suffer hardship and there has been no flagrant inactivity on the part of the Plaintiff, the suit should not be dismissed. The Claimant/Respondent's Advocates on record concedes to the fact that the Replying Affidavit dated 13th October 2021 was sworn by Counsel handling the matter. Counsel also concedes that the established principle of law is that Advocates should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. They submit that however, this not the case here. It is their submission that there is not law expressly prohibiting an Advocate from swearing an affidavit on behalf of his/her client in a client's cause, on matters which he/she as an advocate has personal knowledge of, whether informed by his client or arising from the proceedings in the cause. They submit that under Order 19 Rule 3(1) of the Civil Procedure Rules, the Law states that "*affidavits shall be confirmed to such facts as the deponent is able of his own knowledge to prove.*" They submit that the Affidavit in question herein does not raise any facts that were not within the knowledge of the deponent and that the said affidavit simply seeks to clear the image created by the Applicant on allegations of laxity and goes ahead to show that the delay was occasioned partly by ill health of the Claimant and partly by the transfer of the Court file. It is submitted that these are facts well within the knowledge of Counsel handling the matter and who was best placed to articulate them. The affidavit does not contain any arguments and thus they urge this Court to sustain and consider it when making its determination as was the case in **Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR** where the Court in determining this issue was of the view that the mere fact that an affidavit was sworn by an advocate does not render it incurably defective. The Claimant submits that the Respondent/Applicant's Notice of Motion dated 22nd July 2021 should be dismissed and the Claimant/Respondent given the chance to prosecute this matter for he stands to suffer immeasurable prejudice if the orders sought are given and the matter is dismissed. The Claimant/Respondent asserts he is ready and willing to prosecute his case without further delay and it is only fair and just that he be allowed to do so.

5. The Claimant has taken inordinately long to have his case heard as he filed the initial cause in August 2009 over 12 years ago. He has been unwell as asserted in his response. But given the fact his case could not be fixed for hearing due to directions given to prioritise only the cases filed before 2016, the Court is of the view that a grant of the prayers sought by the Respondent would not be proper in the circumstances of this case. Given the reluctance of the Court in fixing pre-2016 cases for hearing, the case is saved and must of necessity be heard and determined before 31st March 2022 and to this end the parties must take a hearing date for a hearing in January 2022. Dates for hearing on invitation at the Registry on priority basis.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF DECEMBER, 2021

NZIOKI WA MAKAU

JUDGE