



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2245 OF 2017**

**JOHN KATIWA .....CLAIMANT**

**VERSUS**

**ARK CONSTRUCTION COMPANY.....RESPONDENT**

**RULING**

1. The Respondent brought the Notice of Motion dated 2.7.2019 under order 17 Rule 2 (3), and Order 51 Rule 1 of the Civil Procedure Rules seeking the following Orders;

- a. The suit herein be dismissed for want of prosecution.
- b. Costs of the suit and the motion.

2. The application is supported by affidavit sworn by James Ngotho Njunge on 2.7.2019. The gist of the application is that the claimant has failed to take any steps towards prosecuting the suit since it was filed over a year ago; that the delay in fixing the suit for hearing or mention after the close of pleadings is inordinate and without excuse; that the claimant has lost interest in the suit; and the delay is prejudicial to the defence case.

3. The claimant opposed the motion by his Replying Affidavit sworn on 17.10.2019. In brief he contended that the delay was caused by the erroneous belief that Kituo Cha Sheria, who assisted in drafting the pleadings would act for him in court; that when he realized the mistake he appointed a counsel who is now ready to set down the suit for hearing; that he has not lost interest in his suit and he has indeed complied with pretrial requirements and is ready for hearing; and that it is in the interest of justice that the application be disallowed.

4. The issue for determination is whether the suit herein should be dismissed for want of prosecution.

5. The relevant law herein Rule 16 of the ELRC Rules which provides that:-

***a. "16(i) 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) . . . . .**

**(3) Any party may apply for dismissal as provided in paragraph (1)."**

6. Rule 15 requires that the parties to a suit shall, within 14 days after close of pleadings apply for rescheduling conference. In this case the applicant contends that since filing of the suit the claimant has not fixed the suit for hearing or mention and for that matter, it should be deemed that he has lost interest in the suit and it should be dismissed.

7. I have however perused the entire court record and found that the claimant did apply for mention for pretrial direction vide his letter dated 27.1.2018. The letter was received by the court the same day. As at that time the respondent had not filed defence. She indeed filed it out of time on 21.2.2018 minus witness statements and supporting documents. Todate she has not filed the said documents meaning that she is not ready to take pre trial directions.

8. In view of the claimant's letter dated 27.1.2018 I find that the applicant has failed to prove that the claimant has not taken any step to fix the suit for hearing or mention since the filing of the suit. On the contrary it is my view that it is the applicant who is delaying the suit by filing her pleadings and supporting documents and witness statements late.

9. In the end I find no merit in the application and dismiss it with costs.

**Dated, signed and delivered in open court at Nairobi this 24th day of January, 20120.**

**ONESMUS MAKAU**

**JUDGE**