

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.104 OF 2016

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....CLAIMANT

VERSUS

RILEY SECURITY SERVICES LIMITED.....RESPONDENT

RULING

The respondent, Riley Security Services Limited by application and Notice of Motion dated 26th August, 2019 is seeking that the suit herein be dismissed for want of prosecution and on the ground that the claimant has neglected and or failed to take any action to prosecute the matter for a period of 3 years and it is manifest that there is no interest in this matter and the same should be dismissed with costs.

The application is supported by the affidavit of Nicholas Weru, advocate for the respondent and who avers that the claimant filed the claim on 10th March, 2016, served the respondent who replied thereof on 19th April, 2016, there was a mention on 28th July, 2018 and on 17th October, 2016 the respondent filed a defence and counter-claim and since the matter has not been fixed for hearing. The claim should therefore be dismissed.

The claimant replied and filed Grounds of Opposition and Replying Affidavit of Geoffrey Otieno advocate for the claimant and who avers that the claimant has relied on the wrong provisions of the law and rules instead of Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and the application lacks basis and should be dismissed in the interests of justice.

Mr Otieno in his affidavit avers that upon receiving instructions from the claimant he allocated the file to Geno Lui Okwengu a partner in his law firm and who has since joined the judiciary and upon perusal of the file he had not taken any action. On numerous occasions he has attended at the registry but could not be allocated any dates due to misfiling of the same. The claimant is now desirous of moving with the hearing and application seeking to dismiss the suit should be disallowed.

Both parties made oral submissions in court.

The failure by a party to reply on Rule 16 of the Court Rules in seeking to have a suit dismissed for non-attendance for over one (1) is not fatal and particularly where the party has cited the provisions of Order 17 rule 2(3) and order 51 of the Civil Procedure Rules which inherently seek to address similar provisions as under Rule 17 of the Court Rules. See **Invesco Assurance Company Limited versus Oyange Barrack [2018] eKLR** and in **Ruth Ndegwa versus Development Alternatives Incorporated [2017] eKLR** on the application of Rule 16.

The substance of the application is addressed in that for a period of over one year the claimant has not taken any action to have the suit heard and determined. This fact is not contested. The reasons given for inaction is that the file was allocated to an advocate and partner who failed to act on it and since there have been efforts to trace the file without success.

Such averments and reasons by the claimant are without any evidence. Where indeed the advocate required to attend failed to take action and have the matter prosecuted, such averments though under oath are left bare. Equally the alleged efforts to have the file secured and dates allocated, there is no material to support such averments. Ordinarily to secure a hearing or mention dates at the registry there are requests or letters inviting the other party to attend for mutual dates allocation. There is nothing in this regard.

Under Rule 16 of the Court Rules, the court on its own motion can cause parties to attend to show because why a matter should not be dismissed for non-attendance for over year. The parties on the other had had similar right and which the respondent has applied.

Without any good cause given as to why the claimant has not moved the court for over one (1) year; application dated 26th August, 2019 is found with merit and is hereby allowed. The suit herein is dismissed with costs to the respondent.

As the respondent has a Counter-Claim a hearing date shall be allocated.

Delivered at Nakuru this 23rd day of January, 2020.

M. MBARU

JUDGE

In the presence of: