

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2191 OF 2016

BANKING INSURANCE & FINANCE UNION (KENYA)....CLAIMANT

-VERSUS-

PARAMOUNT UNIVERSAL BANK KENYA LTD.RESPONDENT

RULING

1. The application before me is the Respondent's Notice of Motion dated 21.3.2019 which seeks the following orders.

- a) That the Honourable Court be pleased to dismiss this suit for want of prosecution.
- b) That cost of this application and the entire suit be borne by the Respondent/claim.

2. The application is premised on the grounds set out on the body of motion and the supporting affidavit sworn by Mr. Emanuel Mumia, on 21.3.2019. The gist of the applications is that two years after the filing of the suit, the claimant has not taken any steps to prosecute the suit; that the claimant has lost interest in the suit; the delay in prosecuting the suit is prejudicing the applicant; and finally, it is fair and in the interest of justice to allow the application as prayed.

3. The claimant has opposed the application by filing the Replying Affidavit sworn by his counsel, M/s. Judith Kubai on 29.4.2019. In brief the claimant contended that she is still interested in prosecuting the case but her effort to fix a hearing date has not been successful due to lack of space in the court diary. She appealed to the court to dismiss the application and fix the suit for hearing because the suit involves a genuine grievance. She urged the court not to send away a litigant from the seat of justice.

4. I have carefully considered the application, affidavits and the written submission filed by both parties. It is without dispute that the claimant filed this suit on 27.10.2016 and the respondent filed her defence on 8.5.2017. It is also clear that since the filing of the defence, no date was fixed by the claimant either for mention or hearing. The issue for determination is whether the suit should now be dismissed for want of prosecution.

5. Rule 15 of the ELRC Procedure Rules provide that within 14 days after close of pleadings the parties shall move the court to hold a scheduling conference which is otherwise called pre-trial Conference. Rule 16 of the same Rules provides that if no application has been made in accordance with Rule 15 or no action has been taken by either of the parties within one year from the date of filing the suit, 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. Paragraph (3) allows any party to the suit to apply for dismissal as provided in paragraph (1).

6. Whereas the obligation to move the court for pre-trial direction or take steps towards prosecuting a suit seems to be upon both parties to the suit, it is obvious that the obligation is tilted more towards the claimant who stands to suffer more should the suit be dismissed. In this case the claimant has not tendered any evidence to prove that she had taken any steps towards setting down the suit for hearing. She did not even produce any letters to the court or the defence requesting for a hearing or mention date, or just an invitation of the respondent to the court registry to fix a mention or hearing date. I, therefore agree with the applicant that the claimant has not taken any steps towards prosecuting the suit.

7. The foregoing notwithstanding, however, I have noted from the record that the applicant also had a share in the delaying trial. She filed Memorandum of Appearance and defence more than 7 months after filing of the suit. She has upto date not filed documents and witness statements in preparation of the trial. It follows therefore that even if the claimant fixed the suit for pre-trial conference, or hearing the same would not be done because the respondent will be asking for leave to file the said documents.

8. In the interest of justice therefore, I declined to dismiss the suit because the parties especially the respondents is not ready even for pre-trial conference. I, therefore, direct the parties to file and exchange witness statements and documents within 21 days and thereafter attend court for pre-trial conference on a date to be fixed today.

Dated, signed and delivered in open court at Nairobi this 14th day of February, 2020.

ONESMUS N. MAKAU

JUDGE