

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 1915 OF 2016

PAUL MUTISYA CLAIMANTS

VERSUS

KENMET LIMITED.....RESPONDENT

RULING

Introduction

1. The Claimants brought this suit on 16.9.2016 seeking declaration that his employment contract was unfairly terminated and prayed for payment of terminal benefits plus compensatory damages. The respondent filed her defence on 12.10.2016 denying the alleged unfair termination and the claim for terminal benefits. She further prayed for the suit to be dismissed with costs.

2. On 3.3.2017, the claimant fixed the suit for pretrial directions on 15.5.2017 and served the respondent with the requisite notice. Counsel for both parties attended the pretrial conference and the court gave direction that the matter was ready for hearing. However, two years thereafter the suit was not fixed for hearing. As a result, the respondent brought the Notice of Motion dated 11.6.2019, praying for the suit to be dismissed with costs for want of prosecution. The application is supported by the affidavit sworn by the respondent's Managing Director Mr. Mohan Raman Karuvan on even date. The grounds upon which the application stands are that since 15.5.2017 when the suit was certified ready for hearing, the Claimant has not set down the suit for hearing or taken any steps to prosecute it for over two years; and that the suit is an abuse of the court process because the suit was resolved by the labour officer but the claimant opted to file the suit.

3. The Claimant has opposed the application through the Replying Affidavit sworn by his counsel Ms Fatuma Natasha Mungoni on 26.6.2019. The counsel contended that the failure to fix a hearing date was due to willful neglect but because the court diary did accommodate the suit between 2017 and 2018; that in November 2018, the court published a notice inviting advocates to fix hearing dates; that by letter dated 26.11.2018, she invited the respondent to meet at the registry on 11.12.2018 to fix hearing date; that when they went to the court registry, they were told that the diary had been closed but they will be advised once it is opened again; that thereafter the court gave priority to suit filed in 2015 and earlier; that on 28.1.2019, she wrote to the Deputy Registrar of the court requesting for a mention date for directions but she advised that the matter should await for notification when the diary would be opened; and finally she denied the allegation that she took no effort to fix the suit for hearing for 2 years and prayed for the application to be dismissed with costs.

4. I have carefully considered the application, Affidavits and submissions by counsel. There is no dispute that since the suit was certified ready for hearing, the suit has not been fixed for hearing. The issue for determination is whether the suit herein should be dismissed for want of prosecution.

5. Rule 16(1) & (3) of the ELRC procedure Rules provides that: -

“In any suit in which no application has been made in accordance with Rule 15 or action has been taken by either party within one year from the date of its filing the court 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)”

6. The Claimant's counsel explained that she took steps towards fixing the suit for hearing but failed because there was no space in the court diary for matters filed in 2016 and after. The counsel produced correspondences between her and the respondent on the one hand, and also between her and the Deputy Registrar of the court on the other hand, as proof of her effort to fix the suit for hearing. The evidence of the said correspondences has not been rebutted.

7. I am satisfied by the explanation and/or reasons given by the claimant which I find to be reasonable. The correspondences produced confirms that the claimant did not go to sleep after the pre-trial directions were given. They show that the claimant has desperately been seeking for a hearing date but in vain. I therefore find that the applicant has not proved that the claimant did nothing towards fixing the suit for hearing for more one year from the 15.5.2017 when it was certified ready for hearing.

8. In view of the foregoing finding I dismiss the application dated 11.6.2019 for being bereft of merits. I also award costs of the application to the claimant. This ruling shall apply to the similar applications filed by the respondent on 11.6.2019 in cause number 1916 of 2016 and 1917 of 2016.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N. MAKAU

JUDGE