



**REPUBLIC OF KENYA**

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

**CAUSE NO. 2157 OF 2015**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 15<sup>th</sup> April, 2020)**

**HILDAH MUTHONI .....CLAIMANT**

**VERSUS**

**LEADING EDGE FOOD**

**& ENTERTAINMENT LIMITED**

**T/A JOHN & JO'S RESTAURANT.....RESPONDENT**

**RULING**

1. Pending before me for determination is the Notice of Motion Application dated 30<sup>th</sup> October, 2019. The same is brought under Order 17 Rule 2 & 3 and Order 51 Rules 1 & 3 of the Civil Procedure Rules seeking Orders that:-

***1. This Suit be dismissed for want of prosecution.***

***2. Costs of this Application be awarded to the Respondent/Applicant.***

2. The Application which is premised on the grounds that:-

***a) The Claimant/Respondent has not taken any steps to list the matter for hearing since 27<sup>th</sup> June 2018 when the matter was last in Court.***

***b) The delay in fixing the matter for hearing is inordinate, unjustifiable and prejudicial to the Respondent/Applicant.***

3. The Application further supported by the Affidavit of **KAREN MUTHEE** sworn on 30<sup>th</sup> October, 2019, in which she reiterates the averments made in the Notice of Motion Application.

4. In response to the Application the Respondent through the firm of Kiingati Ndirangu & Associates that filed a Notice of Change of Advocates on 25<sup>th</sup> November, 2019 filed a Replying Affidavit deposed by **RUTH WACUKA KIHENJO**, counsel on record for the Claimant herein on 22<sup>nd</sup> November, 2019, in which she avers that the delay in setting down this matter for hearing was as a result of separation of partners of Kairu Mbuthia & Kiigati that was previously on record for the Claimant herein.

5. She further averred that following the separation, a mix up arose resulting in mix up of files among them the instant matter. She further contended that the firm only got their file on 18<sup>th</sup> November, 2019 after the instant Application had already been filed.

6. The Claimant/Respondent urged this Court to indulge them for the delay that was inadvertent and undertook to set down the matter for hearing at the earliest opportune moment.

7. The Claimant/Respondent urged this Court to dismiss the instant Application and allow them proceed to prosecute the matter on merit. It was contended that allowing the Application would greatly prejudice the Claimant as it would amount in the deliberate infringement of her rights. She further maintained that the mistakes of counsel as in this case should not be visited upon an innocent litigant.

8. In conclusion, the Claimant urged this Honourable Court to dismiss the instant Application and proceed to hear and determine the matter on merit.

9. The Application proceeded orally on 22<sup>nd</sup> January, 2020.

**Submissions by the Parties**

**Respondent Applicant's Submissions**

10. The Respondent/Applicant submitted that the instant suit ought to be dismissed for want of prosecution the Claimant having failed to take necessary steps to prosecute the same for more than a year.

11. The Respondent further submitted that the reasons cited by the Claimant on the failure to prosecute this matter are invalid and therefore urged this Court to disregard the same.

12. The Respondent further contended that it will greatly be prejudiced if its Application herein is not allowed.

13. In conclusion, the Respondent/Applicant urged this Court to allow its Application with costs.

**Claimant's Submissions**

14. The Claimant on the other hand submitted that the delay in prosecuting this matter was inadvertent and as per the reasons cited in her Replying Affidavit.

15. The Claimant further submitted it is ready to prosecute this matter at the earliest opportune moment and urged the Court to dismiss the instant Application and allow her proceed to prosecute the matter on merit.

16. In conclusion, the Claimant urged this Honourable Court to dismiss the instant Application.

17. I have considered the averments of the Parties herein. The Respondent herein wants this claim dismissed for want of prosecution.

18. The Claimant on the other hand has explained that the delay was occasioned by the separation of the firm previously on record, which led to a mix up of the Claimant's file.

19. The explanation given by the Respondent/Claimant is indeed plausible and there is no evidence to support any contrary position.

20. Coupled with this mix up as alleged by the Claimant, this Court takes judicial notice of the fact that a party should not be punished for mistake of his Counsel- since the Claimant is ready and willing to prosecute her cause, I will decline to allow the application dismissing this claim for want of prosecution. I will instead direct that the Claimant proceed to set down this case for hearing within 90 days failure of which this claim will stand dismissed for want of prosecution.

21. Costs in the cause.

Dated and delivered in Chambers via Zoom on this **15<sup>th</sup> day of April, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Parties