REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2279 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

ALEXANDER MUTINDA NGILA.....CLAIMANT

VERSUS

PAUL ILUVYA MUTUNGA & BONIFACE

MWANZIA MUINDI T/A MUTUNGA &

MUINDI COMPANY ADVOCATES.....RESPONDENTS

RULING

The Respondents/Applicants filed a notice of motion application dated 25th October, 2019 on 29th October, 2019 (the **Application**) which is expressed to be made under Order 17 Rule 2(3) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The Application seeks dismissal of the Claimant's suit for want of prosecution with costs.

The Application is supported by an affidavit sworn by PAUL ILUVYA MUTUNGA on 25th October, 2019 (the **Supporting Affidavit)** and is premised on the grounds set out on the face of the Application and the Supporting Affidavit as set out briefly below.

The Respondents aver that the Claimant has not taken any steps to prosecute the suit since 24th May, 2018 and there has been inordinate delay in the prosecution of this suit. They also averred that the pendency of the suit is an abuse of the process of the Court.

PAUL ILUVYA MUTUNGA, the deponent in the Supporting Affidavit, and a Respondent in the suit, deposes that the suit was filed by the Claimant on 9th December, 2016. The Respondents then filed a response to the claim on 10th February, 2017 which the Claimant responded to on 6th March, 2017. He further deposed that the Claimant vide a letter dated 18th May, 2018 invited the Respondents' Advocates for fixing the same for hearing which was not done because the parties had not undertaken a pre-trial conference. That since then no further step has been taken by the Claimant to prosecute his suit.

The Court record shows that the Application came up before the Deputy Registrar on 27th November, 2019, who issued directions for hearing before this Court on 17th December, 2019. When the matter came up on that date both parties were present in Court where the Claimant stated that he had not been served with the Application despite the contrary position by the Respondents' counsel that the Claimant had been served. The Respondent relied on a return of service filed in court. Nevertheless, this Court directed the Respondents to serve the Claimant with the Application which service was done in Court and the Claimant was directed to file a response within 7 days.

In opposition to the Application, the Claimant filed a Replying Affidavit on 28th March, 2020, (the **"Replying Affidavit"**) wherein the Claimant deposed that he had been struggling to fix the matter for hearing without success as there were Court directives requiring the fixing of suits filed in 2015 and before on priority over other suits. The Claimant produced as annexure **AMN1** invitation letters which he deposed to have served on the counsel for the Respondents and the Court.

Further, he deposed that the Court only gave directions for the Court diary, with respect to matters filed in 2016 and later, to be opened for fixing dates commencing 22nd November, 2019 following which he invited the Respondents' counsel vide a letter dated 14th November, 2019 for fixing on 22nd November, 2019. He produced a Notice dated 7th November, 2019 issued by the Deputy Registrar of this Court.

The Claimant went ahead to depose that when he appeared in Court for fixing, the file was not listed and he proceeded to follow up with the

registry on several occasions. He was then informed by an officer of the Court that the matter was listed for mention on 27th November 2019 and issued with a hearing date for an application on 17th December 2019. This, he deposed, was how he came to attend court on the said date.

It was the Claimant's deposition that on 27th November, 2019, when the Court read to him the Affidavit of Service sworn by **PAUL K. MWANIA** on 13th December, 2019, he protested the service. He deposed that the same was false as on the date he was purported to have been served in a restaurant in Nairobi, he was in Mariakani in Mombasa.

Further, he deposed that in any event, the Respondents' Advocates ought to have invited him to fix the matter for hearing and in his absence they could then seek to have the suit dismissed since each party is entitled to invite and fix a matter for hearing. This, in the Claimant's view showed that the Application was brought in bad faith as the Respondents being Advocates were aware that there had been no available dates for hearing of 2016 cases as the court diary had not been opened. In conclusion, the Claimant deposed that he was interested in prosecuting the matter and prayed for the Court to give him the opportunity to fix the matter for hearing.

In support of their Application, the Respondents filed written submissions dated 13th December, 2019. Therein, they submitted that the pleadings closed on 6th March, 2017 after the Claimant filed the reply to their response to the memorandum of claim yet the Claimant has not taken any further steps to prosecute his claim.

It was the Respondents' submission that the Claimant simply went into slumber and had no further interest in the suit. Further, that the Claimant is indolent and has not demonstrated any effort or attempt to proceed with the matter.

The Respondents relied on the provisions of Section 1A, 1B, and 3A of the Civil Procedure Act and Order 17 Rule 2(1) of the Civil Procedure Rules. They further relied on the holding in the case of **JOHN GITOBU RUKWARU v ARITHO IGWETA & ANOR [2006] eKLR** that:-

> *"Granted, this is a matter involving land and court ought always to consider the sensitive nature of land before closing the path of justice to a party. However, even then, a party that is clearly uninterested in pursuing his cause cannot expect a court of Justice to aid his disinterest. That is the position of the Respondent in this Application. If he chooses to sleep, as he has, the court will turn its judicial eye to a litigant who chooses not to sleep, like the Applicant in this case. I am aware that this is an Application for Judicial Review orders but I am still convinced that where a party brings an action and then goes to sleep because he has orders of stay of a decision, this court has inherent jurisdiction to do what it must do to ensure that the court process is not abused. Even if Order XVI Rule 5 of the Civil Procedure Rules does not apply, this court still has the power to stop abuse of its process. I should only also note in passing that the Notice of Motion dated 28.3.2003 is so procedurally defective that had it gone for full hearing it would have been struck off because of those defects. The motion for these reasons cannot stand and must be quickly put to rest.*
>
> *It is submitted that the Claimant has a duty to ensure expeditious prosecution which he failed to and has given no reason for the failure to prosecute."*

On 6th March 2020, the Claimant filed his written submissions dated 2nd March, 2020 wherein he reiterated the contents of his Replying Affidavit. Further, he submitted that the Application is premature as the Respondents have not yet complied with pre-trial directions. Further, that the Respondents have come to Court with unclean hands knowing that the Court diary would not be opened until 22nd November, 2019 yet they proceeded to file the Application on 25th October 2016, a month before the opening of the Court diary.

Determination

The Application is brought under the provisions of Order 17 Rule 3 of the Civil Procedure Rules. This Court operates under the provisions of the Employment and Labour Relations Court Act and Rules, thus, it would have been appropriate for the Respondents to have brought the Application under Rule 16 of the Employment and Labour Relations Court, Rules. It is however not a fatal oversight by the Respondents in light of the overriding objectives of this Court set out in Section 3 and 20 of the Employment and Labour Relations Court Act and Article 159 of the Constitution, 2010.

Rule 16 of the Employment and Labour Relations Court (Procedure) Rules empowers the Court of its own motion to dismiss a suit where no application or step has been taken by either party for one year while **Rule 3** opens the door for any party to move the Court to dismiss the suit.

The case of **Birket v James [1978] A.C. 297** elaborately set out the principles that the Court ought to consider in an application for dismissal for want of prosecution where it was held:-

> *"... I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:*
>
> *i. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
>
> *ii. Whether the delay is intentional, contumelious and, therefore, inexcusable;*
>
> *iii..... Whether the delay is an abuse of the court process;*

iv. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;

v. What prejudice will the dismissal occasion to the plaintiff

vi. Whether the plaintiff has offered a reasonable explanation for the delay;

vii. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?"

The Claimant filed suit on 9th November, 2016, the Respondents filed their response to the claim on 9th February, 2017 and the Claimant subsequently filed his response to the Respondents' response to the claim on 3rd March, 2017. The pleadings thus closed on 17th March, 2017 pursuant to Rule 13(4) of the Employment and Labour Relations Court Rules.

The Claimant has produced as part of annexure **AMN 2a**, two letters addressed to the Deputy Registrar of this Court. The first of which is dated 16th January, 2017 and received on 16th February, 2017 requesting for a mention date for directions to take a hearing date as the Respondent had not filed a response to the claim. The second letter dated 28th November, 2018 and received on 20th December, 2018 prays for the matter to be listed for pre-trial directions and for taking of a hearing date. I have seen the original of both letters in the Court file, both of which had acknowledgment signatures and directions on the face of the letters for dates to issue.

The Claimant has also produced as part of annexure AMN-1 a letter dated 18th May, 2018 addressed to the Respondent's Advocates inviting them to attend court on 24th May, 2018 for purposes of fixing a hearing date. The body of the letter reads:-

"*Kindly send your representative to meet ours at the Employment and Labour Relations Court at Nairobi on the 24th of May 2018 at 10:00 am, for the purposes of fixing a convenient hearing date in the above matter.*

TAKE FURTHER NOTICE that in default of your non-attendance on your part ours shall be at liberty to fix an ex-parte date in your absence notwithstanding."

The Respondents acknowledge receipt of this letter at paragraph 6 of the Supporting Affidavit wherein the deponent deposes in part as follows:-

"*THAT without fixing the matter for pre-trial conference, the Claimant vide a letter dated 18th May, 2018 (date written) invited our advocates on record to meet at the registry on 24th May, 2018 to fix a mutually convenient date and no date was fixed thereof because no pre-trial conference had been undertaken…"*

Indeed, there is a stamp and signature of acknowledgement by the Respondents' Advocates on the face of the letter. The Respondents have indicated that the matter was not fixed for hearing as the parties had not held a pre-trial conference. This is likely the reason that the registry did not fix the matter for pre-trial as the Claimant sought a hearing date following the invitation to the Respondents Advocates.

Rule 15 of the Employment and Labour Relations Court (Procedure) Rules under the heading – "***Pre-Trial Procedure***" requires any of the parties to a suit to move the court to hold a scheduling conference and enumerates the purpose thereof under sub-rule (1). It goes ahead to qualify at sub rule (2) that the same shall not apply where parties act in person. The Respondents have not filed any witness statements or list and bundle of documents they intend to rely on for their defence pursuant to the provisions of **Rule 14(8) and (10)** of the Employment and Labour Relations Court (Procedure) Rules.

I also take judicial notice of the fact that due to the heavy backlog of cases, the Courts have had to issue administrative directives to clear the backlog. I am aware that the Deputy Registrar issued a notice directing that causes filed after 2015 would not be fixed for hearing, in order to allow the Judges available deal with the huge backlog of old cases on the Court's docket. I am thus persuaded that the delay in the fixing of the date was not caused by the Claimant.

The overriding objectives under Section 1A as cited by the Respondents Section 3 and 20 of the Employment and Labour Relations Court Act and Article 159 of the Constitution of Kenya, 2010 require the Court to balance in exercise of its discretion the need to dispense justice expeditiously with the need to dispense it substantively. I find that in the circumstances of this case, these provisions favour exercise of my discretion in favour of the Claimant.

I accordingly dismiss the Respondent's Application with no order as to costs and direct the Respondent to file and serve all pre-trial documents within 60 days of the date of this ruling.

The Claimant is then to fix the matter for hearing within 60 days of receipt of the Respondents' documents. The registry shall give a convenient hearing date on a priority basis.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JUNE 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE