



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 160 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 15th October, 2020)

STELLA CHELANG'AT KORIR.....CLAIMANT

VERSUS

BUNSON TRAVEL SERVICES LIMITED.....RESPONDENT

RULING

1. Before this Court is the Respondent's Application dated 2/3/2020 seeking the following orders:-

a. THAT this suit be dismissed for want of prosecution.

b. THAT the cost of this Application and the entire suit be awarded to the Respondent.

2. The Application is supported by the grounds set out therein and the Supporting Affidavit of David Onsare sworn on 2/3/2020. The Application has been opposed by the Claimant's Replying Affidavit sworn on 7/4/2020.

The Applicant's Case

3. It is averred that since the directions issued to the Applicant on 18/9/2019 to file a witness statement, the Claimant has failed to make any steps to prosecute the suit for a period of one year without any reasonable explanation. It is the Applicant's position that the obligation to set the suit down for hearing lies with the Claimant since she is the one in pursuit of a remedy.

4. It is the Applicant's case that the Claimant's failure to prosecute the case is in breach of the overriding objectives as set out in Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2) (b) of the Constitution, which requires that there be expeditious disposal of cases. Further, that she has been indolent hence this Court should not exercise its discretion in her favour.

5. The Respondent avers that it continues to be put under a lot of anxiety and disadvantage as the matter remains pending before the Court and posits that the suit is an abuse of the Court process. As such, it is in the interest of justice that same be dismissed with costs.

The Claimant's Case

6. The Claimant contends that since the last time the matter was in Court, her Advocates have unsuccessfully tried to fix a hearing date for the same. Further, that her Advocates had sought clarification from the registry through their clerk on when dates would be issued for matters filed in 2017 and 2018 and each time, he would be informed that a notice on when the diary would be opened for fixing of such matters would be communicated.

7. The Claimant avers that to date, there has been no notice on when litigants can fix dates for matters filed in 2018 onwards and contends that this Court is currently hearing cases that were filed in 2016 and below. She urged this Court to take judicial notice of the difficulty in obtaining hearing dates at the Nairobi registry.

8. She posits that it is a cardinal rule of justice that dismissal of a suit should only be resorted to in cases where the delay is inordinate and without any justifiable explanation, or where the suit is an abuse of the Court process.

9. The Claimant avers that she stands to be prejudiced if the suit is dismissed as she will be banished from the Court. She contended that the

interest of justice dictates that Courts should exercise discretion in conformity with Article 159 of the Constitution and dismissing the suit for want of prosecution will contravene this. She urged this Court to dismiss the Application with costs.

10. The Application was disposed of by way of written submissions with both parties filing their written submissions.

11. The Applicant submits that the threshold to be met by a Respondent before a suit can be dismissed for want of prosecution was set out in the case of **George Gatere Kibata vs. George Kuria & Another** [2017] eKLR as:-

a. The statutory threshold set out in order 17 rule 2 of the Civil Procedure Rules.

b. That the delay on the part of the Claimant has been inordinate and inexcusable.

c. That notwithstanding any preceding delay on part of the Claimant, it would cause grave injustice to the Respondent if the case were to be allowed to proceed to trial.

12. The Applicant therefore submits that they have met the statutory threshold outlined in rule 16 (3) of the Employment and Labour Relations Court (Procedure) Rules because at the time of filing the Application, a period of seventeen months had passed which is more than the twelve months demanded by statute.

13. The Applicant further submits that the emails annexed by the Claimant to prove that her Advocates had tried to fix a date but were informed that Courts were handling matters of over five years, are not sufficient to prove that the Claimant has been active in prosecuting the suit. In their view, the Claimant ought to have gone over and above by seeking the intervention of the Deputy Registrar for audience before Court which has on numerous occasions indulged parties and issued hearing dates.

14. It is also the Applicant's submissions that the Claimant ought to have communicated to them the challenges she was experiencing in fixing a hearing date for the matter. That in failing to do so, she acted maliciously. To support its case, the Applicant relies on the cases of **Nilesh Premchand Mulji Shah & Another T/A Ketan Emporium vs. M.D. Papat & Others & Another** [2016] eKLR and **Kimari vs. Shammi Kanjirapparambil Thomas & 2 Others** [2014] eKLR where the Courts explained what amounted to inordinate delay.

15. The Applicant submits that the continued pendency of the suit is oppressive and an infringement of its right to a fair hearing in light of the fact that there has been an unexplainable delay in prosecuting the suit. The Applicant further submits that retaining an advocate in the matter is costly and relies on the cases of **Anthony Kaburi Kario & 2 Others vs. Ragati Tea Factory Company Limited & 10 Others** [2014] eKLR and **Shiphila Wairire Gakaara vs. Industrial & Commercial Development Corporation & Another** [2016] eKLR, to buttress this position.

16. The Applicant concludes by submitting that equity does not aid the indolent and since the Claimant is guilty of laches, the Court should not grant the orders sought.

17. The Claimant's submissions on the other hand, echoed the averments made in the Replying Affidavit. She relied on the cases of **Susan Wairimu vs. Gladways Academy & Another** [2019] eKLR, **Hilda Anyika Isuruti vs. Poonam Chaudhary** [2018] eKLR and **Paul Mutisya vs. Kenmet Limited** [2020] eKLR where the respective Courts dismissed the applications for dismissal before them and acknowledged that Courts were hearing cases filed 5 years and over hence the Claimants in those cases could not have fixed the matters for hearing.

18. I have examined the averments of the Parties herein. It is evident from the submissions of the Claimant that there have been challenges in fixing cases for hearing in the recent past due to work overload.

19. It is also in this Court's knowledge that a decision was made to handle old cases which were filed over 5 years ago. This Claim does not fall in this category.

20. It is my finding that the Claimant has not deliberately delayed to set this case for hearing. I therefore find that the application has no merit. I therefore dismiss it accordingly. I will allow the parties to set down this case for hearing as per the Court's diary.

21. Costs in the cause.

Dated and delivered in Chambers via zoom this 15th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Anne Babu for Claimant – Present

Wangu holding brief Onsare for Applicant – Present