



**REPUBLIC OF KENYA**

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

**CAUSE NO 647 OF 2017**

**MISAWA ALI MWISHEE.....CLAIMANT**

**VS**

**KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....RESPONDENT**

**RULING**

1. On 4<sup>th</sup> August 2017, the Claimant filed a Memorandum of Claim seeking compensation for unlawful termination of employment and payment of terminal dues.
2. The Respondent filed a Reply on 30<sup>th</sup> November 2017.
3. The Respondent subsequently moved the Court by way of Notice of Motion dated 13<sup>th</sup> March 2020, seeking dismissal of the Claimant's claim for want of prosecution.
4. The Notice of Motion is supported by an affidavit sworn by the Respondent's Counsel, Moses Njuru and is based on the following grounds:
  - a) The Claimant has refused, neglected and/or otherwise failed to take any steps to prosecute his claim for a period of over one year;
  - b) The claim is therefore, an abuse of the process of the Court;
  - c) The Respondent continues to suffer unnecessary anxiety due to the delay in the prosecution of this claim.
5. The Claimant's response to the Respondent's application is by way of a replying affidavit sworn by his Counsel, M.N. Waweru on 28<sup>th</sup> September 2020.
6. Counsel for the Claimant depones that the Claimant is desirous of prosecuting the matter and the delay in doing so is due to unavoidable circumstances.
7. Counsel states that the Claimant's Advocates on record were undergoing in-house issues which prevented them from pursuing the matter in 2018 and 2019.
8. He adds that after resolving the said issues, there was the Corona Virus Pandemic which hindered normal progress of court operations.
9. The Claimant's Advocate asks the Court to be guided by the provisions of Section 3 of the Employment and Labour Relations Court Act and allow the matter to proceed to its logical conclusion.
10. Counsel claims that no prejudice will be occasioned to the Respondent in the event that the matter is allowed to proceed to conclusion.
11. He adds that any prejudice to the Respondent can be remedied by way of costs.
12. Counsel states that Rule 16(2) of the Employment and Labour Relations Court (Procedure) Rules grants the Court discretion to retain suits that have not been prosecuted for their expeditious hearing and determination.
13. The application was urged by way of written submissions.

14. In pursuing its application, the Respondent relies on Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules, which provides as follows:

***2(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.***

***(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.***

15. From the court record, the Claimant filed his claim on 4<sup>th</sup> August 2017 and the Respondent filed its Reply on 30<sup>th</sup> November 2017. From the date of filing suit, the Claimant took no action towards progressing his case.

16. In his replying affidavit opposing the Respondent's application, the Claimant's Counsel alludes to some undisclosed in-house issues facing his law firm as the reason for failure to prosecute the Claimant's claim. Counsel did not find it necessary to give any particulars as to the nature of these issues thus denying the Court the opportunity to properly exercise its discretion one way or the other.

17. Moreover, it has been said and it bears repeating that matters filed in court belong to the named parties and not to their Advocates (see ***Edney Adaka Ismail v Equity Bank Limited [2014] eKLR*** and ***Whycliffe Bundi v Flame Tree Africa Limited [2018] eKLR***)

18. The Claimant himself did not tell the Court why he had failed to take steps towards prosecuting his case. The Court therefore found no reason to exercise its discretion in his favour.

19. In the result, the Respondent's application dated 13<sup>th</sup> March 2020 is allowed with the consequence that the Claimant's claim is dismissed for want of prosecution.

20. Each party will bear their own costs.

21. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY NOVEMBER 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Gathu for the Claimant

Mr. Kulecho for the Respondent