



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO 654 OF 2018

WALTER OCHIENG OLOO..... CLAIMANTS

VERSUS

H. YOUNG & CO (EA) LIMITEDRESPONDENT

RULING

Introduction

1. The Claimants brought this suit on 7.5.2018 alleging that his employment contract was unfairly terminated on 5.3.2018 and prayed for payment of terminal benefits plus compensatory damages. The respondent filed her defence on 24.5.2018 denying the alleged unfair termination and the claim for terminal benefits. She further prayed for the suit to be dismissed with costs.
2. On 29.8.2018, the claimant fixed the suit for pretrial directions on 18.12.2018 and served the respondent with the requisite notice. Counsel for both parties attended the pretrial conference and they confirmed that the claimant had filed all the required documents but the respondent had not. She therefore sought and was given leave of 14 days to file witness statements. The court, also, gave direction that the matter was ripe for trial and authorized the parties to take a hearing date at the registry. However, more than one year thereafter the suit was not fixed for hearing and, the respondent brought the Notice of Motion dated 4.3.2020, urging for the suit to be dismissed with costs for want of prosecution.
3. The application is supported by the affidavit sworn by the respondent's Advocate, Mr. David Onsare on even date. The grounds upon which the application stands are that since 18.12.2018 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 one year; that there is no justifiable reason for the said delay or neglect to prosecute the suit; that the said delay has occasioned injustice to her and contended that the court is bound to do justice to both parties without undue delay. Therefore, she prayed for suit to be dismissed with costs.
4. The Claimant opposed the application through the Replying Affidavit sworn by his counsel Mr. Gicheha Kamaui on 21.7.2020 in which contended that the failure to fix a hearing date was not due to willful neglect but because the court diary did accommodate the suit due to backlog of older cases which were given priority according to notices published by the Deputy Registrar of the Court.; that the claimant has and is still desirous to prosecute his case save that the visits by his Clerk to the court to take a hearing date have been in vain, that the allegation that the claimant has taken no effort to fix the suit for hearing is not true; finally he contended that the application is misconceived, incompetent and an abuse of the court process and prayed for the application to be dismissed with costs.
5. I have carefully considered the application, Affidavits and submissions by counsel. There is no dispute that the suit was certified ready for hearing on 18.12.2018 but it has since not been fixed for hearing. The issue for determination is whether the suit herein should be dismissed for want of prosecution.
6. Rule 16(1) & (3) of the ELRC procedure Rules provides that: -

“(1) 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 may 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.

(2) ...

(3) Any party to the suit may apply for dismissal as provided in paragraph (1)”

7. The Claimant's counsel explained that he took steps towards fixing the suit for hearing but failed because there was no space in the court diary. He further explained that his Clerk visited the Court Registry to fix a hearing date severally but found notices published by the Deputy Registrar directing that only old matters could be fixed for hearing to reduce the backlog old matters.

8. I have carefully considered the explanation given by the applicant for the failure to set down the suit for hearing. The court takes judicial notice that there has been a backlog of cases in the Nairobi and that only old cases, five years and above have been getting hearing dates. This suit being 2018 matter could not have been allocated a hearing date in 2019 and 2020 without any demonstration of urgency. Consequently, I am satisfied that the explanation and/or reasons given by the claimant for the delay in fixing the suit for hearing is reasonable. I also do not agree with the respondent that the failure to prosecute the suit is due to willful neglect on the part of the claimant.

9. In view of the foregoing finding, I dismiss the application dated 4.3.2020 for lack of merits. The claimant is directed to seek a hearing date for the suit at the registry forthwith. Costs of the application shall be in the cause.

Dated and Delivered at Nairobi this 23rd day of November, 2020

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE