



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1544 OF 2018

(Formerly ELRC Nyeri Cause No. 138 of 2018)

Before Hon. Lady Justice Maureen Onyango

BRIAN KELI MULI..... CLAIMANT

VERSUS

PERFORMERS RIGHTS SOCIETY OF KENYA (PRISK).....1ST RESPONDENT

KENYA ASSOCIATION OF MUSIC PRODUCERS (KAMP).....2ND RESPONDENT

RULING

The 1st Respondent/Applicant filed a Notice of Motion Application dated 18th February 2020 seeking Orders that this suit be dismissed for want of prosecution and the cost of the Application and suit be provided for.

The Application is based on the grounds that the Claimant lodged the suit on 3rd April 2018 and it is now more than one year since the matter was certified ready for hearing, when the Claimant was directed to take a hearing date at the registry. That the continued existence of the suit is an abuse of the process of court as the Claimant has no interest in the matter.

The Application is supported by the Affidavit sworn by the 1st Respondent's Advocate, Kenneth Gichuhi who avers that the matter was certified ready for hearing on 23rd January 2019 but the Claimant has not taken any step to fix it for hearing. That it is evident the Claimant has not been keen to prosecute this suit and it is thus mete and just that the suit be dismissed with costs.

The Claimant filed a Replying Affidavit dated 9th September 2020 sworn by his Advocate, Veronica Wamuyu Kimiti who opposes the Application herein in its entirety. She avers that after confirmation of pre-trial directions on 23rd January 2019, their efforts to get a hearing date at the court registry were delayed as dates were only being issued to matters filed in the years 2016 and earlier. That the delay to fix a hearing date was thus beyond them. That it is only on 18th February 2020 that they managed to invite the Respondents for purposes of fixing a hearing date. That the Respondents filed the Application on the same day of the invitation to fix a hearing date which is an indication that the application is an afterthought since the Respondents were also aware of the directive by the registry regarding fixing of dates for hearing. It is also her averment that the Claimant has always had interest and made all efforts to pursue the matter.

1st Respondent/Applicant's Submissions

The 1st Respondent/Applicant submits that the Application herein is premised on **Order 17 Rule 2(3), Order 51 Rule 1 of the Civil Procedure Rules 2010, Rule 16(3) of the Employment and Labour Relations Court Rules and Section 3 of the Employment and Labour Relations Court Act**. That **Order 17 rule 2(3) of the Civil Procedure Rules 2010 and Rule 16 of the Employment and Labour Relations Court Rules** provide that a suit shall be dismissed where no action is taken in the suit for a period exceeding 1 year.

It cites the case of **Birket v James (1978) AC 297** which established the guiding principles in an application contemplated under Rule 16 (3) of the Employment and Labour Relations Court Rules. That the said principles were upheld by the court in **Utalii Transport Company Limited & 3 Others v NIC Bank Limited and Another (2014) eKLR** as hereunder:

"..Accordingly, 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:

- 1) Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;*
- 2) Whether the delay is intentional, contumelious and, therefore, inexcusable;*
- 3) Whether the delay is an abuse of the court process;*
- 4) Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;*
- 5) What prejudice will the dismissal occasion to the plaintiff?*
- 6) Whether the plaintiff has offered a reasonable explanation for the delay;*
- 7) Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?*

The 1st Respondent/Applicant also submits that the Application herein is merited because the inordinate delay by the Claimant was intentional as he has not produced even a single letter showing that he made any attempts to request for a hearing date and set the matter down for hearing. Further, that such delay has hindered its ability to effectively defend itself. That the reason given in the Claimant's Replying Affidavit is escapist and dishonest. That the said Replying Affidavit was also notably filed eight months after the application herein was served on the Claimant.

It further submits that the Court cannot force a litigant to prosecute a claim and that the court does not also aide the indolent. That the Application which is only meant to preserve the 1st Respondent's right to a fair trial and the sanctity of the judicial process ought to be allowed.

Claimant/Respondent's Submissions

The Claimant/Respondent relies on the decision in **Susan Wairimu v Gladways Academy & another [2019] eKLR** wherein the court was persuaded by the claimant/respondent submission that:

*"That this Court has severally taken judicial notice of the unavailability of dates as a result of backlog of cases in the ELRC Nairobi station such as in the cases of **David Eris v Baloon Safaris Limited [2018] eKLR** and **Hilda Anvikalsuruti v Pooman Chaudharv [2018] eKLR** where the applications for dismissal for want of prosecution were consequently dismissed for that reason."*

That from the foregoing, the delay in fixing a hearing date was not intentional and was also not an abuse of the court process since several steps were taken in order to comply with the Court's directive to fix a hearing date at the registry. Further, that no substantial risk to fair trial or serious prejudice to the Respondents would have arisen due to the delay. The claimant notes that the application herein though filed on 18th February 2020 was served upon the Claimant's Advocates on 21st February 2020. He submits that the Respondent/Applicant thus filed the application following the receipt of the Claimant's invitation to fix the suit for hearing. That the Applicant has therefore not satisfied the one year's threshold set under **Rule 16 (3) of the ELRC Procedure Rules** since the last action in prosecuting this matter was on 18th February 2020 when the invitation for fixing of a hearing date was served upon the Respondents' Advocates.

It is the Claimant/Respondent's further submission that the Respondent's application offends the Doctrine of Legitimate expectation as well as the Claimant's Constitutional right of Access to Justice and the laws of Natural justice.

Analysis and Determination

The issue for determination is whether the 1st Respondent's Application dated 18th February 2020 for dismissal of suit for want of prosecution is merited.

Rule 16(1) and (2) of the Employment and Labour Relations Court Rules provides that:

- (1) In any suit in which no application has been made in accordance with Rule 15 or no 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) If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.

From the record, the letter inviting the Respondents to fix a hearing date and the Respondent's Application herein are both dated 18th February 2020 although the said application was served on the Claimant on 21st February. One can only deduce that the 1st Respondent filed the instant application as a reaction to the letter from the Claimant's advocates inviting them to fix a date for hearing of the suit. I agree with the Claimant that if this Court is persuaded that the application herein came after the letter of invitation to fix a hearing date, then the Applicants will not have satisfied the one year threshold set under Rule 16 (3) of the ELRC Procedure Rules. In the case of *George Gatere Kibata v George Kuria & another* [2017] eKLR the court held that the one year threshold is mandatory and where it has not been satisfied, then the application for dismissal for want of prosecution ought to be dismissed without the need to consider whether the delay was inordinate or whether the applicant will suffer any prejudice if the matter proceeds to hearing.

On the reason given by the Claimant/Respondent, this Court is persuaded by the decision in the case of *Susan Wairimu* (supra) where the Court in finding the application to dismiss the suit not merited held that:

“On issue of delay in persecuting this case, it is in this Court's knowledge that due to backlog in Court, this Court embarked on a programme to clear cases in the system that were 5 years and older. Case 838 of 2016 was not in the list as of December 2018 and still is not in the system currently for quick disposal.

The Respondent/Claimant has explained why she could not set down this case for hearing. In the circumstances, failure to set down the case for hearing was excusable.”

In considering the legal framework and the guiding jurisprudential principles on dismissal of suits for

want of prosecution, this Court finds that the 1st Respondent's application dated 18th February 2020 is not merited as the one year threshold has not been satisfied.

The result is that the application is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 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, this 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 this 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