



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 769 OF 2017**

**DANIEL KYURA KIRAGU.....CLAIMANT**

**VS**

**PAPILLON LAGOON REEF HOTEL.....1<sup>ST</sup> RESPONDENT**

**PAPILLON DIANI LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By their Notice of Motion dated 6<sup>th</sup> August 2020 and filed in court on 26<sup>th</sup> August 2020, the Respondents seek dismissal of the Claimant's claim for want of prosecution.
2. The application is supported by an affidavit sworn by the Respondent's Counsel, Margaret Nguyo and is based on the following grounds:
  - a. That over one (1) year has elapsed since the suit came up before the Court and the Claimant has not taken any step or action to list the case for hearing;
  - b. That the suit was filed by the Claimant, through the law firm of Marende Necheza & Co Advocates, on 25<sup>th</sup> September 2017;
  - c. That the firm of Nguyo Kariuki & Co Advocates came on record for the Respondents on 7<sup>th</sup> November 2017;
  - d. That the said firm filed a Response to Memorandum of Claim on 20<sup>th</sup> November 2017 and list of witnesses, Respondent's witness statements and list of documents on 21<sup>st</sup> February 2018 and lastly further list of documents on 2<sup>nd</sup> May 2019;
  - e. That the last time the suit came up in court was on 3<sup>rd</sup> April 2019 when it was stood over generally and the Claimant has not made any efforts to prosecute his case nor has he taken any necessary steps as required or at all;
  - f. That since the closure of pleadings, the Claimant has neglected and/or refused or otherwise not taken any material step to prosecute his claim or set it down for hearing and more than one year has since lapsed;
  - g. That it appears that the Claimant has lost conceivable interest in the suit herein and its continued pendency has been prejudicial to the Respondents;
  - h. That it would be in the interest of justice and the overriding objective of the Court that the application be allowed.
3. The Claimant filed Grounds of Opposition on 7<sup>th</sup> October 2020 stating:
  - a. That the Respondents' application is an abuse of court process and a waste of judicial time;
  - b. That the matter was last in court on 3<sup>rd</sup> April 2020; however, the Court was not sitting;
  - c. That as at 2<sup>nd</sup> May 2019, the Respondents were still complying with Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, having filed their further list of documents then;

- d. That pleadings had not closed until 3<sup>rd</sup> July 2019 when the Claimant filed his list of issues;
- e. That since then, the Claimant was not able to trace his file in order to list the matter for pre-trial until 2020;
- f. That both parties have complied and the suit is ready for hearing;
- g. That it is in interest of justice that the claim herein be heard and determined on merit;
- h. That the Claimant is willing to abide by any directions by the Court as to the expeditious disposal of the claim herein.

4. The Respondent's application is premised on Order 17 Rule 2 and 3 of the Civil Procedure Rules which allows a party to apply for dismissal of a matter which has remained unprosecuted for a year.

5. In skeleton arguments filed by the Respondent's Counsel on 24<sup>th</sup> November 2020, reference was made to the decision in *Ivita v Kyumbu [1984] KLR* where it was held that in determining whether delay in prosecuting a matter is prolonged and inexcusable, the Court will interrogate the reason for delay, with the aim of doing justice to all the parties.

6. In *Mwangi S. Kimenyi v Attorney General [2014] eKLR Waki J* (as he then was) restated the following guiding principles in the exercise of discretion in a motion such as the one before me:

- a. **Whether there has been inordinate delay on the part of the Claimant in prosecuting the case;**
- b. **Whether the delay is intentional, contumelious and therefore inexcusable;**
- c. **Whether the delay is an abuse of the court process;**
- d. **Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Respondent;**
- e. **The prejudice the dismissal will occasion to the Claimant;**
- f. **Whether the Claimant has offered a reasonable explanation for the delay;**
- g. **The dictates of the interest of justice.**

7. Gleaning from the record, the Claimant filed his claim on 21<sup>st</sup> September 2017 and the Respondent filed its Response on 20<sup>th</sup> November 2017. However, the Respondent continued filing supporting documents well into the year 2019.

8. It is therefore incorrect to say that pleadings had been closed in 2017 or 2018.

9. In this regard, I am persuaded by following holding in *Austin Securities v Northgate and English Stores Ltd [1969] 1 WLR 529*:

**“...the Court will look at the conduct of both parties. If the defendant has considerably contributed to the delay or afortiori, has actually agreed to it, he will seldom obtain the dismissal of the action....”**

10. Having contributed to the delay in prosecuting the matter by continuing to file documents over a period of close to two years, the Respondent cannot benefit from a plea for dismissal for want of prosecution.

11. The Respondent's application dated 6<sup>th</sup> August 2020 is therefore disallowed with costs in the cause.

12. The parties are directed to list the main claim for hearing on priority basis.

13. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY DECEMBER 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:

Mrs. Kyalo for the Claimant

Mrs. Kariuki for the Respondent