



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 348 OF 2017

NICHOLAS BARNO.....CLAIMANT

VERSUS

KENYA ORDINANCE FACTORIES CORPORATION...RESPONDENT

RULING

1. The respondent filed application dated 8th October, 2019 on 17th December, 2019, praying for an Order to have the suit dismissed for want of prosecution.
2. The application is supported by an affidavit sworn by Valentine Wanza Mung'ata, Staff Officer II Litigation, Defence Headquarters who deposes that the Claimant has failed and/or neglected to prosecute the suit in that the suit was instituted by a Memorandum of Claim on 7th August, 2017.
3. That the respondent entered appearance through the Attorney General on 2nd November, 2017 and filed and served statement of defence on 23rd November, 2017.
4. That the Claimant has taken no further step since and in particular has failed to set the matter down for hearing.
5. That the delay in prosecuting the matter is inordinate, unreasonable and inexcusable and has caused prejudice upon the respondent in form of costs and time.
6. That the suit be dismissed in the interest of justice with costs.

Response

7. The Claimant filed grounds of opposition dated 19th October, 2019 on 10th December, 2019 stating that the application is frivolous, bereft of fact and law since the claimant has inalienable right to a fair trial as provided under Article 159(2) (d) of the Constitution of Kenya, 2010.
8. That the reasons for the delay are well set out in the replying affidavit of Nicholas Barno, the claimant, including that the respondent was invited to Court to take a hearing date in 2019 as per annexure "Exh2" but the respondent did not appear in Court to take the date.
9. That the respondent has never filed and served statement of defence as alleged or at all upon entering appearance.
10. That there is no known prejudice that the applicant has suffered and none is disclosed in the supporting affidavit.
11. That it is in the interest of justice that the suit be set down for trial.

Determination

12. The applicant and the respondent filed written submissions. The issue for determination is whether the applicant has demonstrated that the claimant has for an inordinate long period failed to prosecute the suit.
13. Rule 16 of the Employment and Labour Relations Court (procedure) Rules, 2016 provides:-

“16. Notice to Show Cause why suit should not be dismissed,

(i) 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 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.

(ii) 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.

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

14. From the Court record, it is apparent that the applicant filed a statement of defence to the statement of claim on 23rd November, 2017 contrary to the allegations by the claimant that no defence was filed.

15. However, the record does not show that either of the parties took any further step and in particular to set down the matter for hearing.

16. The respondent/applicant has not filed any affidavit of service to prove that it served the Statement of defence to the claimant. There is therefore a likelihood that the claimant is not in possession of the Statement of defence. This failure however does not absolve the Claimant from the apparent indolence in setting down the matter for hearing in default of defence or otherwise.

17. This is a suit filed in the year 2017 and in the scheme of things, its conclusion is not inordinately late.

18. The respondent has failed to demonstrate any substantial loss occasioned the respondent by the alleged failure by the Claimant to set down the matter for hearing especially when service of the statement of defence on the claimant has not been proved by the applicant.

19. The overriding objective of the Courts under Article 159(2) is to have justice dispensed to all persons fairly and expeditiously and the right to a fair hearing is inalienable under Article 50(1) of the Constitution of Kenya, 2010.

20. The Article provides: -

“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or if appropriate another independent or/ and impartial tribunal or body.”

21. The applicant has not provided any compelling reasons why the Claimant should be denied the right to a hearing of his suit. The Court is satisfied that the Claimant had attempted, at least once to set down the suit for hearing in the absence of the respondent.

22. It is in the interest of justice and fair play that the applicant serves the statement of defence to the Claimant forthwith and the parties meet to set down the suit for hearing and determination at the registry and/or before the judge. It is recommended that the suit be heard on a priority basis having regard to the age, and traffic of pending cases at the Kisumu Employment and Labour Relations Court.

23. The Court notes that older matters are still pending for hearing before the Court but this is no excuse for any indolence on the part of the Claimant in having this suit prosecuted timeously.

24. Accordingly, the application lacks merit and is dismissed. The claimant to have the suit set down for hearing within 30 days of this ruling.

Dated and delivered at Nairobi this 17th day of December, 2020.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Mokabi for Applicant

Mr. Lagat for Claimant

Chrispo – Court clerk