



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 95 OF 2017**

**FRED WANGILA NYANGORI.....CLAIMANT**

**VERSUS**

**CHURCH WORLD SERVICE (CWS)/RESETTLEMENT**

**SUPPORT CENTRE (RSC) AFRICA.....RESPONDENT**

*(Before Hon. Lady Justice Maureen Onyango)*

**RULING**

The application before the Court is dated 12<sup>th</sup> November, 2018, and seeks to dismiss the claimant's suit for want of prosecution. The application is supported by the Affidavit of Grace Wairimu who states that the last time the matter came up was on 24<sup>th</sup> March, 2017 when the Claimant filed a Response to the Defence.

The claimant/Respondent filed a Replying Affidavit opposing the application wherein he states that the court's diary in 2017 was only open for one week and currently the court diary is closed. The Claimant avers that if he is given a date now he is ready and willing to prosecute the claim.

**Respondent/Applicant's Submissions**

It is submitted that the matter has not been prosecuted for over one year and that the allegation that the Court's diary has been closed has not been supported by evidence such as a letter to the Deputy Registrar or an invitation to the Respondent to fix a hearing date. That Article 159 of the Constitution provides that justice shall not be delayed and it is for this reason counsel for the Respondent/applicant urges the Court to allow the application.

**Claimant's Submissions**

It is submitted that the matter was filed in 2017 and thus at the date of filing the application the matter was only a year old. The Claimant holds the position that this cannot be termed as inordinate delay in prosecuting the suit.

The Claimant further contends that the Rules of the Court do not provide for 3 months as the period that a matter should take before any action is taken. That under Article 159 of the Constitution justice should be dispensed to the parties without hurdles. That it would not be in the interest of justice to allow the application.

**Determination**

The well-known maxim of equity that 'equity aids the vigilant and not the indolent' is discussed in *Snell's Equity (30<sup>th</sup> Edition, 2000)* page 33. The discussion in Snell goes on to state that what equity looks for is 'reasonable diligence'. The question herein is thus whether the Claimant exercised diligence in prosecuting the matter.

A cursory glance of the Court file shows that movement in the file last happened on 24<sup>th</sup> March 2017 when the Claimant filed a Reply to the Respondent's answer to Claim. Thereafter it seems the Claimant went to sleep and he was awoken by the Respondent when they filed the instant application on 12<sup>th</sup> November, 2018.

The matter was thus inactive for slightly over one and half years. The matter was filed in 2017 and we are now in 2019 and the matter is yet to take off. There is no doubt that the suit is ripe for dismissal for want of prosecution as sought by the Respondent. Nevertheless, it is now trite that even where delay is proved, the Court can still excuse the same if the interest of justice so dictates. This was expressed by the Court of Appeal in *Ivita vs. Kyumbu [1975] eKLR* thus:

*"Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."*

The Claimant cites that the reason the matter has not been listed for hearing is that the Court diary has been closed and is still closed. This assertion is unsupported by evidence and thus no plausible explanation has been offered for the delay. The court is however alive to the fact that hearing dates for cases of 2017 have not been easy to obtain as priority has been given to older cases.

From the foregoing the Court finds that it would not be in the interest of justice to dismiss the suit at this juncture as the matter has not been heard on merit. The Respondent has also not advanced any reason to show what prejudice it would suffer should the application be denied. It is therefore in the interest of justice that the matter proceed to hearing at the earliest opportunity.

The application is thus denied.

The Court directs that the matter be listed before the Deputy Registrar for fixing of a hearing date on a priority date.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**