



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 132 OF 2017

NYAMAI KISANGAU.....CLAIMANT

VS

DIAMOND INDUSTRIES LIMITED.....RESPONDENT

RULING

1. By its application brought by Notice of Motion dated 17th April 2019, the Respondent asks that the Claimant's claim be dismissed for want of prosecution.
2. The application is premised on the ground that more than two years have elapsed since the case was filed, with no action being taken by the Claimant. The Respondent therefore maintains that the Claimant has lost interest in pursuing the claim.
3. In his affidavit in support of the application, the Respondent's Counsel **Azmina Husein Amarshi, Advocate** depones that the claim was filed on 16th February 2017. The Respondent subsequently filed its Reply on 3rd March 2017.
4. Counsel further depones that since filing his claim on 16th February 2017, the Claimant had not listed it either for pre-trial conference or for hearing.
5. The Respondent's position is that the delay occasioned herein is inordinate and prejudicial to the Respondent.
6. The Claimant's response is contained in a replying affidavit sworn by his Counsel, **P. Cynthia Onyango, Advocate** on 10th May 2019. Counsel concedes that the claim herein was filed on 16th February 2017 and that the Respondent had filed his Response on 3rd March 2017.
7. She however denies the averment that the Claimant had not taken any steps towards prosecuting the matter. She states that the Claimant had on several occasions invited the Respondent to fix the matter for hearing but the Respondent had never shown up.
8. Further, this being a work injury claim, the Respondent had held the position that this Court is not seized of original jurisdiction to preside over it.
9. Counsel discloses that she had advised her client of the uncertainty arising from:
 - a. **Civil Appeal No 133 of 2011: Attorney General v Law Society of Kenya & Central Organisation of Trade Unions** in which the Court of Appeal had rendered judgment on 17th November 2017;
 - b. **High Court Petition No 196 of 2018** filed on 24th July 2018 and orders emanating therefrom.
10. The Claimant's Counsel takes the position that the matter ought to await finality on the issue of jurisdiction.
11. At the time of writing this ruling, the Supreme Court had rendered its decision in **Petition No 4 of 2019: Law Society of Kenya v The Attorney General and Central Organisation of Trade Unions**. While pronouncing itself with finality, on the issue of jurisdiction with regard to work injury claims, the Supreme Court took judicial notice of the confusion occasioned by previous judicial pronouncements over this issue.
12. With the Apex Court in the land having recognised that there was indeed confusion in this area of law, this Court cannot now fault the

Claimant for failing to proceed with his claim.

13. For this reason, the Respondent's application dated 17th April 2019 is declined.

14. Each party will bear their own costs.

15. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF DECEMBER 2019

LINNET NDOLO

JUDGE

Appearance:

Miss Onyango for the Claimant

Mrs. Amarshi for the Respondent