



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.76 OF 2017

PETER BOTUMA.....CLAIMANT

VERSUS

SALIGNA WOOD VENTURE.....RESPONDENT

RULING

The ruling herein is with regard to the application dated 2<sup>nd</sup> September, 2019 by the respondent, Saligna Wood Venture and brought under the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules and seeking to have the suit herein dismissed for want of prosecution and on the grounds that the claimant filed the suit on 10<sup>th</sup> November, 2017 and has since not taken any steps to have the same heard despite pleadings closing. That is apparent that the claimant has lost interest in the suit and it should be dismissed.

The application is supported by the affidavit of Peninah Muigai-Gate advocate and who avers that the matter was last in court on 10<sup>th</sup> July, 2018 and since, the claimant has not taken any steps to have the same heard and should be dismissed with costs to the respondent who is incurring unnecessary costs for keeping this suit alive.

In response the claimant filed affidavit of Owen Magata Advocate who avers that as advocate for the claimant upon the claimant filing suit 21<sup>st</sup> February, 2017 he relocated to his rural home in Kisii County after his employment was terminated by the respondent.

Mr Magata also avers that he last saw the claimant was in February, 2017 when the instant suit was filed and thereafter he was unable to reach him and does not know his home and unable to trace the claimant.

Sometime in September, 2019 the claimant called with information that he left Nakuru and sold his phone after losing his employment and been a casual employee in Kikuyu along the Nairobi highway. That is why the suit was not fixed for hearing and the claimant should be allowed a chance to a hearing.

The parties relied on the filed affidavits.

The respondent has relied on the provisions of Order 17 of the Civil Procedure Rules and there rules thereto but for applications seeking dismissal of suit before the court Rule 16 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (the Rules) apply. The mix-up of the rules is not fatal as the substance of the application is not lost.

Under the provisions of Rule 16 of the Court Rules the court on its own motion or upon being moved by the parties can dismiss a suit where no action is taken for a period of over one year. These provisions are serious and drastic as the failure by a claimant to move the court within a year demonstrate indolence. The Rules provides as follows;

*16. (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.*

*(3) Any party to the suit may apply for dismissal as provided in paragraph (1).*

*(4) The court may dismiss the suit for non-compliance with any direction given under this rule.*

Therefore, where there is inaction for a year, the court can cause to be issued a show cause notice and where there is no good cause shown for such inaction, proceed and dismiss the suit.

The parties have an equal opportunity to move the court with application giving reasons to have an inactive claim dismissed. This then invites a respondent to such an application to show reasonable cause why the suit or given matter should not be dismissed. Without giving any satisfactory reason or cause, the court invited should proceed and dismiss the suit.

The claimant has responded to the application herein through the advocate's affidavit and who avers that since February, 2017 there was no contact until September, 2019 when the claimant called and indicated that he had not lost interest in the matter.

The averments by the claimant's advocate that the claimant is still interested in his suit are left bare. There is no affidavit by the claimant indicating his interest in the suit. Despite the advocate response herein, the right hold remains the claimant as the party who filed the instant suit.

Despite the claimant being served with the instant application, no action however remote is demonstrated as having been taken to move the court in securing a hearing date for his claim. The alleged call and conversation with the advocate would have held more credibility where the claimant filed his affidavit on oath that he is interested with the suit. No invitation is given seeking to have the matter heard.

The court finds no good or reasonable cause shown to demonstrate the claimant is interested in this suit to the satisfaction of the requirements under Rule 16 of the Court Rules. Upon notice of the instant application, the claimant has remained inactive. To keep the suit subsisting will only prejudice the respondent in retaining their advocates which comes with an expense?

**Accordingly, the court finds no reasonable cause why the instant suit should not be dismissed. Application dated 2<sup>nd</sup> September, 2019 is hereby allowed. The suit is dismissed. Costs to the respondent.**

**Delivered at Nakuru this 17<sup>th</sup> day of December, 2019.**

**M. MBARU**

**JUDGE**

In the presence of:

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