



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 838 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 16th December, 2019)

SUSAN WAIRIMU.....CLAIMANT

VERSUS

GLADWAYS ACADEMY.....1ST RESPONDENT

PETER WAITHAKA CHEGE.....2ND RESPONDENT

RULING

1. The Respondents/Applicants filed the Notice of Motion application dated 16th April 2019, brought under *Rule 16(3) of the Employment & Labour Relations Court (Procedure) Rules 2016, Section 3 of the Employment & Labour Relations Court Act and Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules.*
2. They seek Orders that the Claimant's suit be dismissed for want of prosecution and in the alternative, the Claimant's case against the 1st Respondent be struck out. Further, that the costs of this application and of the entire suit be awarded to the Respondents.
3. The Application is based on the following grounds that: The Statement of Claim was filed on 12th May 2016 but there has been no progress on the matter 3 years later. That the Claimant's conduct runs against the overriding objective of the Court stipulated in section 3 of the ELRC Act and that she has failed to take steps to progress her case.
4. Further, that the 1st Respondent is not legally capable of being sued by the Claimant and that it is only just and fair that the Application herein is allowed and the suit dismissed with costs.
5. The Application is supported by the Affidavit sworn by the 2nd Respondent who avers that the Claimant has lost interest in this claim as she has never fixed it for hearing and that he is prejudiced by its continued existence as he continues to incur costs defending the same. That he is aware the 1st Respondent cannot be sued because it is not registered even as a company and contends that the Claimant's conduct is an abuse of the Court process.
6. The Claimant filed her Replying Affidavit on 08/10/2019 averring that her advocates on record have made several attempts to prosecute this matter but to no avail due to unavailability of mention and/or hearing dates at the registry. While annexing copies of the letters marked **SW1, SW2 and SW3**, she avers that her advocates particularly informed her:-
 - a. ***They wrote to the Deputy Registrar on 27/07/2016 seeking a mention date for directions as the Respondents were yet to file a response, but no mention date was available.***
 - b. ***They also sought a hearing date for this matter on 28/07/2017 vide their letter dated 18/07/2017 but none was available as the registry was giving priority to older cases filed not later than 2015.***
 - c. ***They also sought a hearing date in 2018 vide their letter dated 07/12/2018 but no dates were available.***
7. That it was not until 26/02/2019 that they were able to secure a mention date of 20/05/2019 and when they served the mention notice on the Respondents' advocates on 02/05/2019, the Respondents filed this application on 06/05/2019. That this matter came up for a mention on the said 20/05/2019 at the instance of her advocates and the same was certified as ready for hearing.
8. That it is clear this matter has always been active and contends that the unavailability of mention and/or hearing dates at the registry is a result of backlog of cases in the ELRC at Nairobi, a fact which this Court has taken judicial notice of. That they cannot take a hearing date

now when the application herein is pending and she is thus inclined to say that this application is meant to delay the hearing and conclusion of this matter.

9. She also avers that the application herein does not meet the mandatory threshold for dismissal for want of prosecution set out under the Court's Procedure Rules. That her advocates have advised her that the definition of an employer under the Employment Act is wide and includes a firm and that she should not be hampered in her quest for justice by the different business and legal permutations adopted by the Respondents.

10. That the nexus between the 1st and 2nd Respondents has been clearly set out at *paragraph 2 of her Memorandum of Claim* and whose contents the Respondents duly admitted at *paragraph 1 of their Statement of Defense*.

11. That the Respondents will not suffer any substantial prejudice if the case is fixed for hearing soon, whereas a dismissal of her claim will deny her a chance to be heard on merits and that she will be forever banished from the seat of justice. That the application herein is unmerited and should be dismissed with costs.

Applicants/Respondents' Submissions

12. The Applicants submit that the application stands unopposed because when they appeared in Court on 17/07/2019, the Claimant requested and was granted 7 days to file a Replying Affidavit but the same was not done. (Claimant/Respondent filed the replying affidavit 5 days after the Applicants had filed their submissions).

13. That the Claimant's conduct runs against the overriding objective of the Court stipulated in **section 3 of the ELRC Act** and that **Rule 16(1) and (3) of the ELRC Procedure Rules** further provide that:-

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).....

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

14. That this suit belonged to the Claimant to take charge of and ensuring that it is heard expeditiously as was observed in the case of **Municipal Council of Embu v Postal Corporation of Kenya [2014] eKLR** where the Court held that the delay was inordinate and inexcusable.

15. That they are prejudiced in terms of cost and time in maintaining this suit with no action from the Claimant and that the 3 years delay on her part amounts to injustice to them. They rely on the case of **Venture Capital and Credit Ltd -v- Consolidated Bank of Kenya Ltd [2006] eKLR** where Ochieng J quoted Lord Denning in **Allen vs. Sir Alfred McAlpine [1968] All ER 543** as follows:-

"The delay of justice is a denial of justice....."

To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3.Sc. 1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, C.1). To put right this wrong, we will in this Court do all in our power to enforce expedition; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure; but it is within the inherent jurisdiction of the Court, and the rules of Court expressly permit it. It is the only effective sanction that they contain."

16. The Applicants further submit that the 1st Respondent is not a legal entity under the Basic Education Act and is thus not capable of suing or being sued and they cite **Civil Appeal No. 9 of 2001, The Headmistress Menengai Primary School -v- Jamila Anyona** where Kimaru J stated that the Respondent should not have sued the headmistress of Menengai Primary School because she had no capacity in law to be sued and that under the Education Act and the (School committees) Regulations made thereunder, it is only a primary school committee mandated with authority of managing the said school that can sue and be sued.

17. That the Court gave a similar holding in the case of **Kisumu ELC Case No. 225 of 2014, Evans Otiende Omollo v School Committee Union Primary School & Another [2015] eKLR** in finding that the four named defendants are non-existent entities capable of being sued and that allowing the suit as is filed to continue to further hearing would be an abuse of the Court's process.

Claimant/ Respondent's Submissions

18. The Claimant/Respondent submits that as held in the case of **George Gatere Kibata v George Kuria & another [2017] eKLR**, it is trite law that besides satisfying the legal framework set out in Rule 16(3) of the ELRC Procedure Rules, a defendant seeking the dismissal of a suit for want of prosecution must also:-

a) show that there was inordinate and inexcusable delay in the circumstances of the case.

b) that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial; and

c) he must satisfy the Court that owing to the delay, a fair trial cannot be achieved.

19. That this Court should critically examine the Court record, her explanation tendered in response to the application herein, the general prevailing circumstances within the judicial system at the time of her alleged inaction and the grounds put forth by the applicants.

20. She submits that she has clearly set out in her replying affidavit the steps she has taken towards prosecuting this matter and that she is not to blame for the delay in prosecuting the same.

21. That this Court has severally taken judicial notice of the unavailability of dates as a result of backlog of cases in the ELRC Nairobi station such as in the cases of **David Eris v Baloon Safaris Limited [2018] eKLR** and **Hilda Anyika Isuruti v Pooman Chaudhary [2018] eKLR** where the applications for dismissal for want of prosecution were consequently dismissed for that reason.

22. The Claimant/Respondent submits that even if there was no backlog of cases in the ELRC, the Applicants have not satisfied the one year threshold set under **Rule 16(3) of the ELRC Procedure Rules** because the last action taken in prosecuting this matter was 26th February 2019.

23. That the Court in the ***George Gatere Kibata case*** above held that the one year threshold is mandatory and where it has not been satisfied, then the application for dismissal for want of prosecution ought to be dismissed without the need to consider whether the delay was inordinate or whether the applicant will suffer any prejudice if the matter proceeds to hearing.

24. As regards striking out the case against the 1st Respondent, she submits that the definition of an employer under **Section 2 of the Employment Act** is wide and has been defined to include a “firm”.

25. She relies on the case of **Zachariah Sambay –v- Narok University College [2013] eKLR** where the Court in observing that a campus was a mere collection of buildings belonging to an institution and not an institution itself nonetheless held that a campus could validly be deemed to be an employer on its own and that bringing a suit against a campus could not affect the validity of a claim.

26. The Court stated at para 15 thereof that:-

“...it would be impossible for Sambay to know the exact details of the relationship between Moi and Narok, or even know the different stages of the reincarnation that is Narok University. He was appointed by Moi University and was told to report to work at a Campus...The Campus as a component of the Moi University academic and economic enterprise could validly be deemed to be an employer of Sambay on its own...The acts of parliament and the common law explain the term employer broadly, so that employment wrongs do not become irremediable, in this age of fast evolving business formations...”

27. I have examined all the averments of both Parties.

28. On issue of delay in persecuting this case, it is in this Court’s knowledge that due to backlog in Court, this Court embarked on a programme to clear cases in the system that were 5 years and older. Case 838 of 2016 was not in the list as of December 2018 and still is not in the system currently for quick disposal.

29. The Respondent/Claimant has explained why she could not set down this case for hearing. In the circumstances, failure to set down the case for hearing was excusable.

30. As concerns the real identify of the Respondent and whether he is the right Party to be sued or not, this is a matter to be clarified through evidence, which can only be presented during the hearing. I do not therefore find this application as the right forum to resolve the issue.

31. I therefore find the application before Court is not merited and I therefore dismiss it accordingly.

32. In the meantime, I direct that the Parties proceed to set down this case for hearing in the new term within 60 days.

33. Costs of this application to be in the cause.

Dated and delivered in open Court this 16th day of December, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of

Mugi holding brief Kamotho for Applicant – Present

Respondents – Absent