



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 245 OF 2015

(Before D. K. N. Marete)

JOB BOSIRE OSEKO.....CLAIMANT

VERSUS

KIPKEBE COMPANY LTD.....RESPONDENT

RULING

This is an application by the respondent/applicant dated 26th April, 2018 seeking the following orders of court;

1. **THAT** this suit be dismissed for want of prosecution.
2. **THAT** the costs of this Application be borne by the Claimant in any event.
3. **THAT** such further/other orders be made as the Court may deem just and expedient.

The application is grounded as follows;

1. **THAT** the suit was last in court on the **7th day of December 2015** when it was stood over generally due to non attendance of both advocates.
2. **THAT** since the said date the Claimant has not bothered to set down the suit for hearing.
3. **THAT** it is now approximately **two years six months** since the suit was in Court and the claimant has taken no steps to invite the defendant to the suit to fix a hearing date or set down the suit for hearing.
4. **THAT** the continued pendency of this suit is causing a lot of anxiety on the part of the Respondent Applicant and hence same ought to be dismissed.
5. **THAT** this is a fit and proper case to be dismissed under Order 17 Rule 2(3) Civil Procedure Rules.

The Respondent in a Replying Affidavit sworn on 21st May, 2018 opposes the application and prays that this be dismissed with costs.

The matter came for hearing on 21st May, 2018 when Mr. Langat, counsel for the respondent/applicant submitted a case for dismissal for want of prosecution. This is on grounds that the claimant has not been diligent enough to prosecute the claim. The last time the matter was in court was on 7th December, 2015, two and half years down the line.

The respondent in support of her case relied Article 159 (2) (b) which provides that justice shall not be delayed and also Order 17 rule 2(1) on dismissal of suits where no action has been had for over one year. Again, he submitted that Order 3 rule 1 (3) (b) provides that a Fast track must be finalized within 180 days after compliance with rule 11. Litigation must, in all, come to an end.

The respondent/applicant further submits that equity aids the vigilant not the indolent. In the circumstances, the claimant has been overtly indolent in the prosecution of his cause is therefore not deserving of the eye of equity. He does not proffer any evidence or proof of personal issues that inhibited his proactive prosecution of the claim and therefore a case for dismissal for want of prosecution.

The claimant/respondent's counsel Miss Sitati chose to rely on the Reply

Affidavit as set out. In this, the claimant pleads and avers that he had lost touch with his advocate on record and further that it was not easy for them to locate him. He also recited that he had overwhelming personal issues which inhibited his ability to issue further instructions to his advocate. These are not disclosed.

I find that this is not a matter deserving of mercy. It was filed on 25th September, 2015 and has been on the system ever since. Thanks to the lethargy and bureaucracy of the system, this was not noticed for two and half years until the prompting of the respondent/applicant through this application. The system should have employed the provisions of Order 17 rule 2(1) to institute a case for dismissal for want of prosecution but did not.

In the absence of a tangible case in rebuttal of the application: The reason for this massive delay in the attendance of the matter. I am inclined to find in favour of the respondent/applicant. This matter should come to a close, one way or the other. This is the right way forward.

The application is therefore allowed with orders that each party bears their own costs of the same.

Delivered, dated and signed this 12th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Langat instructed by O.M. Otieno & Company Advocates for the respondent/applicant.
2. Miss Sitati instructed by E.M. Orina & Company Advocates for the claimant/respondent