



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2039 OF 2015

RUTH NDEGWA.....CLAIMANT

VERSUS

DEVELOPMENT ALTERNATIVES INCORPORATED.....RESPONDENT

RULING

The Respondent, Development Alternatives Incorporated by application dated 6th January, 2017 is seeking for orders that the suit by the Claimant should be dismissed for want of prosecution and costs be awarded to the respondent.

The application is supported by the affidavit of Desmond Odhiambo, the advocate for the Respondent and on the grounds that the claim was filed on 13th November, 2005, defence was filed on 21st December, 2015 and it has been 12 months since and the Claimant has not acted on the claim by seeking directions for hearing of the same. The delay in prosecuting the claim is inordinate, unreasonable and inexcusable and has caused prejudice upon the Respondent in form of costs and time. The Claimant has no interest in these matters and should be dismissed for want of prosecution.

In reply, the Claimant filed Replying Affidavit through advocate, Alex Inyangu and avers that as the one representing the Claimant in this suit, upon serving the Respondent with claim they filed Memorandum of Appearance but no defence/response to the claim. At the time the court diary was closed for the year. Due to delays at the law firm, the advocate was not able to take hearing dates for 2017. The window for taking hearing dates for 2017 was too narrow.

The parties have been negotiating the matter out of court and held a meeting in December, 2015 when the Respondent settled part of the claim at Kshs.808,696.00 on a without prejudice basis. A further meeting was held in February, 2016 but no settlement was achieved.

The Respondent has since changed advocates and technically the law firm on record does not exist. Pleadings herein have not closed and no defence has been served upon the claimant. The Rules of the Court relied upon by the Respondent only came into force in August, 2016 after this matter had been filed and cannot apply retroactively. The Claimant is keen to be heard on the claim and the application should be dismissed.

In his supplementary affidavit, Mr Odhiambo also avers that in reply, the Claimant has averred that parties met for out of court negotiations on 9th February, 2016 when the Claimant was issued with filed and served copies of defence herein. The averment that there is no defence served is not correct. The negotiations did not resolve the dispute and there is no reason as to why the Claimant has not moved the court for the hearing of the claimant. The court has power to dismiss the suit for want of prosecution.

Both parties filed written submissions.

The Respondent as the applicant submits that Rule 16(1) and (3) of the Employment and Labour Relations Court (Procedure) Rules allow a party to move the court by application to have a suit dismissed for want of prosecution where there is no action after a year from the date of filing. The suit was filed in 2015 and the rules published in August, 2016 but this does not act to shield the Claimant as the Rules now apply to all matters filed as of the date of the publication of the Rules. Amendment to procedural rules operate retrospectively unless indicated otherwise as held in **Said Hemed Said versus Emmanuel Karisa Maitha & Another, Mombasa HCEP No.1 of 1998**.

The court in exercise of its jurisdiction to dismiss suits for want of prosecution is guided by the principles laid out in **Utalii Transport Company Limited & 3 Others versus NIC Bank Ltd & Another [2014] eKLR** that the court must examine if there is inordinate delay in prosecution of the case; the delay is intentional and not excusable; delay is in abuse of court process; delay gives rise to substantial risk to fair trial or prejudice to the respondent; no prejudice shall be occasioned to the claimant; there is no reasonable explanation offered for the delay; and the court should consider what is in the interests of justice. The Claimant has thus filed these tests in terms of delay and averments that the 2016 diary was full is not supported by any evidence. Several matters for 2016 have been heard and disposed by the court.

The Claimant has not taken any steps to prosecute the claim. The on-going negotiations were on a without prejudice basis and that did not stop the taking of hearing dates. This suit belonged to the Claimant to take charge of as held in **municipal Council of Embu versus Postal Corporation of Kenya [2014] eKLR**. The Respondent is prejudiced in terms of costs and time and by maintaining this suit, there will be further costs which are unnecessary as held in **Governors Balloon Safaris Ltd versus Skyship Company Limited & Another [2013] eKLR**.

The Claimant submits the Rules upon which the Respondent has relied to file the application only came into force in August, 2016 while the suit was filed in November, 2015. Such rules do not apply retroactively on the claimant. The Rules in force at the time of filing suit did not provide for applications for dismissal of suit for want of prosecution as held in **Morris Chetile Machunjulu versus Reime Kenya Limited [2016] eKLR**.

The Claimant is not wholly to blame for the delay in failing to prosecute the claim due to out of court negotiations and due to the closed diary of the court in 2016. There is good excuse for the delay due to these factors.

Determination

The application by the Respondent is premised under the provisions of Rule 16(1) and (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and which replaced the *Industrial Court (Procedure) Rules, 2010*.

Upon publication on 5th August, 2016 the Employment and Labour Relations Court (Procedure) Rules, 2016 became applicable as of equal date. Any party filing any matter before the court or had an existing matters not settled, the Rules apply. The rationale is that Rule 40 of the Employment and Labour Relations Court (Procedure) Rules, 2016 revoked what is in place as at such date of 5th August, 2016 and the *Industrial Court (Procedure) Rules, 2010* do not apply.

As such, the Claimant cannot be found to have a valid argument that as of 5th August, 2016 where the claim was not prosecuted for a period of over one year, an application seeking to dismiss suit for want of prosecution cannot be filed with the court and the court to consider it on merits.

Rule 16(1) and (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides 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).*

Where the repealed Rules did not address the question of dismissal of suits for want of prosecution in clear and unequivocal terms, the Employment and Labour Relations Court (Procedure) Rules, 2016 now are categorical. It is not contested that the claim was filed in November, 2015 and no action has been taken in terms of taking directions for hearing and disposal of the same. The on-going negotiations are well noted by the Claimant as being on a without prejudice basis. That does not stop the Claimant from seeking the allocation of hearing dates for the claim. To fail to do so will only invite applications such as this one. The negotiations should have propelled the Claimant to seek hearing dates as a safeguard to any rights due. That has not been done since November, 2015 and no sufficient cause of explanation is given.

Rule 15 of the Employment and Labour Relations Court (Procedure) Rules, 2016 gives parties the right to move the court with regard to points of agreement and disagreement and where there are on-going negotiations and or parties wish to undertaken settlement negotiations, once suit is filed the court can be moved for a court-sanctioned negotiations to avoid falling short of rule 16 provisions where an application seeking to have suit dismissed for want of prosecution can be filed. The court on its own motion can also issue notice to parties to show cause as to why the suit should not be dismissed for want of prosecution.

To avoid falling into this trap, the Respondent on good basis has thus moved the court and the least the Claimant ought to have done is to concede and seek to do the right thing. To argue that the rules do not apply in the Claimant's case if to fail to take into account the import and impact of the Employment and Labour Relations Court (Procedure) Rules, 2016 in their entirety.

However, noting that the applicable Rules, Employment and Labour Relations Court (Procedure) Rules, 2016 only came into force on 5th August, 2016 and the rule of non-action is for one (1) a matter not previously categorically addressed but now within the Claimant knowledge, the application by the Respondent shall not be allowed at this instance save for costs.

Application by the Respondent dated 6th January, 2017 not allowed in this instance; the Claimant shall move the court within the next 30 days as appropriate; where no action is taken the suit shall stand dismissed for want of prosecution as of 7th August, 2017. Costs herein awarded to the Respondent.

Dated and delivered in open court at Nairobi this 8th day of June, 2017.

M. MBARU

JUDGE

In the presence of:

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