

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 66 OF 2015

JYOTI SHARMA ALUANGA.....CLAIMANT/RESPONDENT

VERSUS

PRIME BANK LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant seeks, through the Notice of Motion application dated 13th July 2017 expressed to be under Rule 16(3) of the Employment and Labour Relations Court (Procedure) Rules 2016, for the dismissal of the Claimant/Respondent's suit for want of prosecution. The application is premised on the grounds on the face of it and is supported by the affidavit of one Josephine Macharia the senior manager Human Resources at the Respondent/Applicant. The Claimant filed a Replying Affidavit sworn on 30th August 2017 in which she stated that the Respondent/Applicant was the complainant in a criminal trial which she is facing and which trial had delayed due to incessant applications for adjournment. She deponed that it would be prudent and in the interest of all parties involved in the criminal trial that the case pending before the Chief Magistrate's Court in Nairobi be finalised before this cause proceeds to hearing. She asserts that no prejudice will be suffered by the Respondent/Applicant if this case awaits the outcome of the criminal trial whose finalisation is in the very near future.

2. The parties urged and opposed the motion before me on 28th September 2017. Mr. Kimani urged that the claim ought to be dismissed for want of prosecution under Rule 16(3) of the Rules of the Court. He stated the principles upon which the Court would consider such an application were set out in the case of *Kivita v. Kyungu* [1984] KLR and submitted that the Claimant/Respondent had inordinate delay in the prosecution of the case. He submitted that the case was last in Court on 23rd March 2016 when it was taken out at the instance of the Court and since then there had been no attempt to set down the case for hearing for over one year. He submitted that the prejudice suffered by the Respondent/Applicant is one which will impair justice as the Claimant/Respondent is unwilling to prosecute the claim. He prayed that for the foregoing reasons the application be granted with costs to the Respondent/Applicant.

3. The Claimant/Respondent through her counsel Mr. Ng'ang'a submitted that the Claimant/Respondent was still interested in pursuing this claim save that she is facing four counts in a criminal trial at the Magistrate's Court being Cr. Case No. 1308 of 2011 where the Bank is the complainant. He submitted that she could not instruct her advocates due to financial constraints and further that the case before the Chief Magistrate's Court is material to this case as the Claimant/Respondent is accused of stealing. He submitted that the submissions on no case to answer were made in the case and a ruling on that now expected on 6th October 2017. He sought that this case be stayed pending the outcome in the criminal case. He urged the Court to consider Article 159(2)(d) and administer justice without undue regard to technicality. He submitted that the Respondent/Applicant will not suffer any prejudice if the case is dismissed and that the Court should allow the Claimant/Respondent to have a year's hiatus and if the case is not prosecuted in one year then the application may be granted.

4. In a brief response, Mr. Kimani for the Respondent/Applicant submitted that there was admission the cause was last in Court on 23rd March 2016 and there was no evidence of the allegations of delay as a result of the criminal trial. He submitted that there was no formal application for stay and the oral application made from the bar should not be allowed.

5. On matters relating to non-prosecution, the Rules of this Court being the Employment and Labour Relations Court (Procedure) Rules 2016 make provision under Rule 16(1) and (3) as follows:-

(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).

6. The Rules therefore permit the filing of such an application as the one before me. In my view, Article 159(2)(d) cannot come to the aid of a party in the face of clear provisions of statute. The application is not a mere technicality nor is application of the provisions of the Rules giving undue regard to technicality. The Claimant/Respondent admits that the suit has been inactive for over one year. She advances as reason the existence of a criminal trial now pending before the Chief Magistrate's Court at Nairobi, a trial in which she is accused of theft by the Respondent/Applicant. In my view, the nexus between the two cases may have some evidentiary import but such nexus is not *ipso facto* sufficient cause for the delay of the civil case. The Respondent/Applicant has moved Court seeking the dismissal of the suit on account of the delay that is admitted. However, in the interests of justice and because the Claimant/Respondent asserts that she is very interested in this suit, the Court will grant the Claimant/Respondent one last chance to prosecute her case. The Court will upon rendering the Ruling grant a hearing date to the parties and should the cause not proceed at the date fixed for hearing on account of the Claimant/Respondent, the application will

stand allowed with costs against her.

It is so ordered.

Dated and delivered at Nairobi this 16th day of October 2017

Nzioki wa Makau

JUDGE