



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 1181 OF 2010
ESTHER KERUBO MANOTI.....CLAIMANT
V
KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

RULING

Introduction

1. The Respondent's application brought by Notice of Motion dated 25th January 2016 seeks dismissal of the Claimant's claim for want of prosecution. The application which is supported by the affidavit of Edwin Moni Mukele, Advocate sworn on 25th January 2016 is based on the following grounds:
 - a. That the Claimant has failed to prosecute her claim;
 - b. That the delay has been inordinate and inexcusable;
 - c. That the Respondent stands to suffer prejudice if the orders sought are not granted.
2. In the supporting affidavit sworn by Edwin Moni Mukele, Advocate, it is deponed that the Claimant's claim was filed in Court on 6th October 2010. The matter came up for hearing on 15th October 2013 but was adjourned because the Court was not sitting. As a result, it was fixed for mention on 14th November 2013 but the Presiding Judge was indisposed.
3. At a further mention on 21st November 2013, the matter was taken out because the Presiding Judge was not sitting. Since then, the Claimant has not taken any steps towards setting the claim down for hearing.
4. Mukele states that the Claimant's delay in prosecuting the claim is inordinate and inexcusable. It is therefore only fair and just that the suit be dismissed for want of prosecution.
5. In a replying affidavit sworn by Joseph Mboya Oguttu, Advocate, he depones that the delay in finalising the claim was not exclusively caused by the Claimant. When the matter came up for hearing on 15th October 2013 the trial court was not sitting, prompting a mention on 14th November 2013. It came up for hearing on 21st November 2013 but again the Court was not sitting.
6. Oguttu further depones that in view of the travel costs being incurred by the Claimant, Counsels for the parties had discussed the possibility of having the matter transferred to Kisumu Employment and Labour Relations Court, given that the cause of action had arisen within that jurisdiction. Counsel for the

Respondent, Edwin Moni Mukele sought time to explain to his client the implications of having the matter transferred to Kisumu.

7. There was no further communication from Counsel for the Respondent and Oguttu believed that discussions on transfer of the matter from Nairobi to Kisumu were still alive. Counsel for the Claimant apportioned blame between himself and his colleague.

8. Oguttu goes on to state that the delay occasioned herein is not inordinate and/or inexcusable to the extent that the evidence of the parties has been compromised. He takes the view that the matter should not be disposed of on a technicality but should be heard on merit.

9. The issue for determination in this application is whether there has been such inordinate and inexcusable delay in prosecuting the Claimant's claim to warrant dismissal for want of prosecution. It is a well settled principle of administration of justice that cases filed in court should be dispensed with expeditiously and as held by **Lord Denning in *Regentine v Beechholme Bakeries Ltd [1967] 111 Sol. Jo. 216*** and ***Fitzpatrick v Batger & Co. Ltd [1967] All ER*** it is the duty of every plaintiff to take active steps towards prosecuting their case.

10. Section 3 of the Employment and Labour Relations Court Act enjoins this Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes. Moreover, Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 empowers the Court *suo moto* to issue a notice to show cause why a suit that has not been listed for a year should not be dismissed for want of prosecution. Similarly, under Sub Rule (3) a party may apply for dismissal of the suit.

11. The Employment and Labour Relations Court exercises a special jurisdiction and it would appear that while expedition is an important segment of the principal objective of the Court, it is not the only consideration. In exercising its discretion therefore, the Court must be guided by the peculiar circumstances of each case. Whatever the Court does, it must not sacrifice justice at the altar of expedition.

12. I have looked at the history of this case and noted that on more than one occasion, it was adjourned at the instance of the Court. I have also taken note that both the Claimant and her Advocate reside outside Nairobi with the obvious consequence that physical contact with the Court for purposes of taking a hearing date is constrained.

13. Counsel for the Claimant has agreed to take part of the blame for the delay and taking all factors into consideration I think that justice will best be served if the Claimant's case is saved for hearing on merit. The result is that the Respondent's application is declined.

14. I direct the parties to take immediate steps towards fixing the main claim for hearing on a day to day basis.

15. The costs of this application will be in the cause.

16. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF MAY 2016

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JUDGE

Appearance:

Mr. Oguttu for the Claimant

Mr. Mukele for the Respondent