



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1100 OF 2011**

**SAMSON KINYANJUI MWAURA.....CLAIMANT/RESPONDENT**

**VERSUS**

**NAKUMATT HOLDINGS LIMITED..... RESPONDENT/APPLICANT**

**RULING**

1. The application before me is the Respondent's Notice of Motion application dated 11<sup>th</sup> November 2015. The Respondent seeks through the motion expressed to be brought under Order 17 Rule 2(1) and (3) of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act, for dismissal of the suit. The Application for is supported by a supporting affidavit of Francis Kimotho sworn on 19<sup>th</sup> October 2015. The deponent who is the Human Resource and Development Manager of the Respondent, deposes that the suit was filed in 2011 and the Claimant has not taken any substantial step to ensure disposal of the suit by the Court. The Respondent asserts that the Court gave the Claimant a last adjournment and ordered that the suit be fixed for hearing. He deponed that the matter was then fixed for hearing on 29<sup>th</sup> January 2015, and that the Claimant's counsel was not ready to proceed and was granted leave to amend claim after he sought the said leave. The deponent stated that the Claimant is disinterested in the suit as he has not taken any steps to prosecute the matter since then. He therefore sought dismissal of the suit for want of prosecution.
2. The Claimant/Respondent was opposed and duly filed a replying affidavit sworn on 25<sup>th</sup> January 2016 and filed on 27<sup>th</sup> January 2016. In it, he deponed that he had taken steps to have the matter prosecuted and that he was keen to have the suit heard and determined. The Claimant asserted that he had taken steps to this end and attached copies of hearing notices, mention notices and invitations to fix the matter for hearing as proof. The Claimant thus sought to have the application seeking dismissal of his suit to be dismissed with costs.
3. The parties filed submissions in support and opposition of the application. The Applicant filed its submissions on 1<sup>st</sup> March 2016 while the Respondent filed his submissions on 6<sup>th</sup> May 2016. The Respondent/Applicant submitted that there was indolence on the part of the Claimant/Respondent and cited in support the decision of the Court in **Municipal Council of Mavoko v Athi Stores Limited & Uniken Stores [2015] eKLR** where the Court held that no reasons for the delay in prosecuting that case had been given by the Plaintiff and neither had it indicated any interest in continuing with the matter after filing of the Defendant's application. The Respondent/Applicant submitted that the Claimant/Respondent failed to file and serve the amended claim as stipulated by the Court upon the grant of leave to file an amended claim. The Respondent/Applicant thus

submitted that the suit be dismissed with costs for want of prosecution.

4. The Claimant/Respondent on his part submitted that there is a reasonable explanation for the delay and that the Respondent/Applicant will not be prejudiced in any way by the refusal of the application and that the Respondent/Applicant can be compensated by an award of costs in the event the Court finds that the claim lacks merit. He urged the Court to rely on Article 159 of the Constitution and give substantive justice and not be clogged by procedural technicalities. He thus submitted that the application be dismissed with costs to him.
5. The Claimant's suit was filed on 7<sup>th</sup> July 2011 almost 5 years ago. The Respondent asserts that the Claimant has since filing the suit ceased having an interest in the suit being prosecuted and has not taken any substantial step to ensure disposal of the suit. From the documents attached in the application and the reply, it is clear some steps have been taken though it is apparent the Claimant's attempts at hearing or disposal of the suit have failed. The coercive powers of Court have to be exercised judiciously, not capriciously or on a whim. The Claimant herein is accused of dilatoriness in the conclusion of his suit and the Respondent thus seeks to have the suit terminated by dismissal for want of prosecution.
6. The Application has been brought under Order 17 Rule 2 (3) of the Civil Procedure Rules 2010 *inter alia*. Order 17 Rule 2(3) provides as follows: -

*“any party to the suit may apply for its dismissal as provided for in subrule 1.”*

7. The Rules provide under Order 17 Rule 2(1) as follows: -

*“In any suit in which no Application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”*

8. Under sub-rule 1 above, the law does not give a party the right to apply for the dismissal of the suit for want of prosecution. Only the court can give a notice in writing to the parties to show cause why the suit should not be dismissed yet sub-rule 2(3) gives the discretion to a party to apply for dismissal under sub-rule 1. In my view this is a contradiction as the power the party exercises under sub rule 2(3) is extrapolated from the judicial power to call and dismiss matters with notice to parties to show cause. Be that as it may, summary dismissal of a suit without hearing the merits is a draconian judicial act and this power should not be exercised unless there are sufficient reasons for the dismissal for want of prosecution as the suit is not heard on merits.
9. In the case of **Allen v Sir Alfred McAlpine [1968] 1 All ER 543 it was held that**

*“To put right this wrong, we will in this court do all in our power to enforce expedition; if need be we will strike out actions where there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court, and the rules of the court expressly permit it. It is the only effective sanction that they contain.”*

The above case often referred to as the Alpine case, sets out a three part test. Firstly that there has been inordinate delay, secondly, that the inordinate delay is inexcusable and as a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable; and thirdly the Defendants are likely to be seriously prejudiced by the delay.

10. In this case there has not been a demonstration that there has been inordinate delay and that the inordinate delay is inexcusable and that the Respondent/Applicant will be seriously prejudiced by the delay. In my view there has been effort by the Claimant/Respondent in prosecuting the suit. He may not be the standard of diligence but he made some effort. He failed to amend and in light of the time lines, the door has been shut. The suit shall be fixed for hearing after this Ruling as it is a 2011 matter and must be disposed of within the next 45 days.

11. The order that commends itself for me to make is an order dismissing the application but I will make no order as to costs. Should the Claimant be the cause of adjournment at the hearing to be set, the Court will be at liberty to dismiss the suit with costs for said failure.

Orders accordingly.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of May 2016**

**Nzioki wa Makau**

**JUDGE**