

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 2038 OF 2014

MISS AGNES GESARE OGUTU.....CLAIMANT/RESPONDENT

VERSUS

M/S FUN AN SHOP LIMITED..... 1ST RESPONDENT

MR. MANJUNATH PRABHU..... 2ND RESPONDENT/APPLICANT

RULING

1. The application before me is the Respondent's Notice of Motion application dated 22nd October 2015 and filed on 5th November 2015. In the motion, the 2nd Respondent/Applicant seeks the dismissal of the Claim herein and that the costs of the application be borne by the Respondent. The grounds for the application are that the Respondent or her counsel have failed and/or neglected to set down the suit for hearing for over 2 years. The Applicant also asserted that the Respondent has not set down the suit for hearing even after they were ordered to do so by the Court via a ruling delivered on 20th February 2013 and that the delay in setting down the suit for hearing and/or prosecution of the matter is inordinate, inexcusable and unwarranted. The Applicant asserted that the Respondent had demonstrated a lack of interest in prosecuting the matter and that in keeping the matter in abeyance for over 2 years and failing to pursue the claim the Respondent had continuously subjected the Applicant to unnecessary litigation and costs. The application was supported by the affidavit of Manjunath Prabhu sworn on the 22nd of October 2015.
2. The Claimant/Respondent filed a replying affidavit sworn on 15th January 2016 on 8th February 2016. In the affidavit Mr. Samuel O. Oyieko Advocate swore the affidavit in reply and deponed that the matter was set for hearing but the Respondent/Applicant made an oral application to strike out his name from the proceedings herein. The deponent stated that there have been efforts to set down the matter for hearing but the court diary was either closed or advised from the registry that hearing dates were not available. The deponent added that the counsel having conduct of the matter was appointed to the office of the Director of Public Prosecutions in August 2014 hence the delay in fixing the matter for hearing. The deponent asserted that the counsel for the Respondent/Applicant relocated from their known offices at Metropolitan Estate and attempts to locate them was unsuccessful forcing them to serve the invitation letters through postage which did not elicit any response. The deponent asserted that the Respondent/Applicant had also substantively contributed to the delay in prosecution of the suit.
3. The parties proposed to canvass the application by way of written submissions. The parties were to file submissions within a set time frame but as at the time of penning this Ruling only the Claimant/Respondent had filed submissions. Her submissions were filed 8th February 2016. The submissions made were to the effect that the Claimant/Respondent had made efforts to set down the matter for hearing and that she met challenges and unavoidable circumstances beyond her control. It was submitted that the challenges she faced included the court diary being closed or dates not being available as well as the counsel for the Respondent/Applicant having relocated their offices and not notifying counsel for the Claimant. The Claimant submitted that the delay in

fixing the matter for hearing was neither inordinate nor advertent. The Claimant/Respondent submitted that the strict rules of the Civil Procedure Rules were inapplicable to the matter. The Claimant/Respondent submitted that the application was improperly before the Court and should therefore be dismissed with costs.

4. The application before me was brought under Order 17 Rules 2(1), (3) & (4) of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Act. The application seeks in the main, the dismissal of the suit for non-prosecution. The Applicant seeks to have the suit dismissed as he asserts there has been no action on the part of the Claimant or her counsel to set down the matter for hearing. The Claimant/Respondent asserts that the delay has not been deliberate and blames the Court diary being closed and the lack of hearing dates at registry. The Claimant/Respondent also blames the Respondent/Applicant accusing the advocate for the Applicant for having failed to notify them of the change of address. It would seem there has been a series of misfortunes that has attended the matter. In the efforts to justify the dismissal of the suit on part of the Respondent/Applicant and in an effort to justify the delays and inability to obtain a date on part of the Claimant/Respondent, the parties attached the correspondence exchanged. The correspondence shows an attempt to set the matter for hearing. The effort however seems half-hearted as there is a long delay between the invites. Whereas this is so, there is no denial of the allegations made by the Claimant/Respondent in regard to the change of address by counsel for the Respondent/Applicant. In the premises the Court will be disinclined to grant the orders sought.
5. In the final analysis and considering the age of the case before the Court, it is ordered as follows:-
 1. The parties to agree to a hearing date within the next 30 days, that is before end of June 2016
 2. In case of disagreement the Court to set a date for the parties.
 3. If Claimant is unable to proceed at the next hearing the suit will be dismissed
 4. Each party will bear their own costs for the instant application.

Orders accordingly.

Dated and delivered at Nairobi this 18th day of May 2016

Nzioki wa Makau

JUDGE