



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

CAUSE NO 1140 OF 2010

MORRIS CHETILE MACHUNJILU.....CLAIMANT

VERSUS

REIME KENYA LIMITED.....RESPONDENT

RULING

1. The respondent/applicant filed a notice of motion application on 13th August 2014 seeking the suit filed be dismissed for want of prosecution. The application is based on the following grounds;
2. That the claim was filed on 30th September 2010 seeking payment of terminal benefits and compensation for wrongful termination.
3. That the matter was last in court on 5th September 2012 before Hon. O. N. Makau J when the claimant testified but was stood down for lack of identification card and other documents. That no other step has been taken since then for over a year.
4. That the respondent is highly prejudiced by the delay and indolence of the claimant as its legal costs continue to accrue. That the claimant has no justifiable reason as to why the suit should not be dismissed for want of prosecution.
5. The application is opposed vide a notice of preliminary objection filed on 3rd October 2014 to the effect that the application is bad in law, totally defective and devoid of merit. That it offends the provisions of the Industrial court Act No, 20 of 2011.

Determination

6. It is noteworthy that the employment and Labour Relations Court (procedure) Rules 2010, do not provide for dismissal for want of prosecution. However, the Order xvi Rule 5 of the Civil Procedure Rules provides that if within three months after the close of the pleadings or removal of the suit from hearing or the adjournment of the suit generally, the plaintiff or the court, on its own motion if it does not set down the suit for hearing, the defendant may either set the suit down for hearing or apply for its dismissal.

7. The High court in **Mwangi S Kimenyi Vs Attorney General & Another [2014] eKLR** held as follows;

“I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:

- i. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;*
- ii. Where the delay is intentional contumelious and, therefore in excusable;*
- iii. Whether the delay gives rise to substantial risk to fair trial or cause serious prejudice to the defendant;*
- iv. What prejudice will the dismissal occasion to the plaintiff?*
- v. Whether the plaintiff has offered a reasonable explanation for the delay;*
- vi. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?"*

8. In the present case, the claimant/respondent did not file a replying affidavit to the application. No explanation has been given for this omission. Instead, a preliminary objection of a general nature was filed without specifying the legal basis for the objection.

9. Instead, the claimant's advocate has proceeded to place facts in the written submissions to the effect that the termination of employment has placed the claimant in financial constrain with no source of income and hence could not access legal services to prosecute the matter timeously.

10. That the court should find that the delay is not intentional, is excusable and grant the matter an early hearing date. That the respondent has not demonstrated the prejudice it will suffer if the matter proceeded to hearing except incurrence of further costs, a matter usually incidental to prosecution of any suit.

11. From the record, it appears that on 7th October 2014 the court gave directions to the claimant to set down the suit "for hearing on priority basis in the new term" failing which the application to dismiss for want of prosecution be reinstated.

12. It would appear that instead of setting down the main suit for hearing as directed by the court on 7th October 2014 the parties have been pursuing this application. Given that the rules of this court have no provision for dismissal for want of prosecution and considering that the parties appear to have misunderstood the order of the court made on 7th October 2014 directing that the matter be set down for hearing of the main suit, the court while applying the principles set out herein before, is inclined in the interest of justice to use its discretion to grant the claimant a last opportunity to have this suit heard and determined on the merits.

13. Accordingly, the application to dismiss the matter for want of prosecution is not allowed provided the parties appear before me for taking of a hearing date within 14 days from the date of this ruling failing which the suit will stand dismissed for want of prosecution.

Dated and delivered at Nairobi this 24th day of June 2016

MATHEWS N. NDUMA

PRINCIPAL JUDGE