REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

OF KENYA AT NAIROBI

CAUSE NO. 1613 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 26th September, 2016)

JOSEPH MOILO…….…….…….....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI…..……..……. RESPONDENT

RULING

1. Before the Court is an Application *via* Notice of Motion brought Under Articles 50 (1) & Section 159 (2) (d) of the Constitution of Kenya Order 12, Rule 7 Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 of the laws of Kenya together with all other enabling provisions of law for Orders that:

1. This Honourable Court be pleased to reinstate this suit dismissed in Court on 12th May 2016.

2. That it is in the interest of justice that this Honourable Court reinstates the Plaintiffs case.

3. That the costs of this Application be in the cause.

2. The Application is based on the supporting affidavit of Njeri Kariuki and on the following grounds:

1. That a Statement of Claim dated 4th October 2013 was filed against the aforesaid Respondent and Notice of Summons to enter appearance dated 7th October 2013 was immediately handed over to a process server to effect service.

2. That the Respondent filed a Notice of Appointment on the 24th of October, 2013 and a memorandum of Response on the 11th of November 2013 and served the same on the claimants advocate on the 25th of October 2013.

3. That the Claimant filed a reply to the Memorandum of Response on the 29th of January and served the same on the Respondents advocate.

4. That on the 17th of February 2014, the Claimant's advocate wrote to the firm of KTK Advocates inviting the said advocates to schedule the suit for hearing on the 21st February 2014 but a suitable date was not slotted as the court diary had been closed.

5. That the Respondent filed an application to dismiss for want of prosecution vide a Notice of Motion dated 19th March 2015 and the Claimant responded.

6. That the Notice of Motion came up for hearing on the 18th of June 2015 and was dismissed by the court who ordered that the Claimant set down a hearing date within 60 days and if not the matter would be dismissed.

7. That on the same date that is 18th June 2015, the Claimant wrote to the Deputy Registrar of the court as per the courts direction but no response was received.

8. That the Claimant then took a mention date at the Registry for purposes of issuing a hearing date in the court, however, the court ordered that a hearing date be taken at the registry.

9. That on the 16th of November 2015, the Claimant wrote to the firm of KTK Advocates inviting them to schedule the suit for hearing on the 24th of November 2015 at the Honourable Courts Registry, but upon visiting the registry, the clerk was informed that the Court Diary had been opened for only one week then closed on 23rd November 2015 and would reopen in March 2016.

10. That on 10th March 2016, the Claimant wrote to the Respondent firm of KTK Advocates inviting them to schedule a hearing on the 23rd of March 2016 at the Honourable Courts Registry, but the clerk was informed that the diary was already closed and he should take another mention date for purposes of taking a hearing date in court.

11. That the Mention date was 12th May 2015 when the court dismissed the matter for want of prosecution.

12. That the Claimant has been diligent in seeking a hearing date in compliance with the Courts directive and it is in the interest of justice that the Suit is reinstated.

3. The Respondents have filed a Replying Affidavit dated 1st July 2016 deponed to by Catherine N. Ngunjiri *via* the firm of KTK Advocates as follows:

1. In it they state that, the Claimant had not taken any material steps to prosecute its claim neither had it set it down for hearing and more than one year had lapsed since pleadings closed.

2. That when the Notice of Motion application dated 19th March 2015 which sought the dismissal of the suit for want of prosecution came up for hearing, the Hon. Lady Justice Wasilwa declined to grant the motion and directed that the matter be set down for hearing within 60 days or the suit would be automatically dismissed.

3. That on the 17th of August 2015, 15th of September 2015 and 16th of February 2016 when the period of 60 days had lapsed, the Respondent wrote to the Deputy Registrar, Employment and Labour requesting for a confirmation of the judges direction and the suit was dismissed for want of prosecution.

4. That the Claimant had continuously blamed the court diary for being closed/full and has been indolent in prosecuting his case and the continued existence and uncertainly of the suit is prejudicial to the Respondent.

5. That it is the primary duty of the Claimant to take steps to progress his case since they are the ones who dragged the Respondents to court and his intertia runs contrary to the overriding objections of the court.

6. That they are opposed to this application.

4. In their submission the Claimants state that the delay was of no fault of their own, but was occasioned by the Courts Diary which has been full or opened for a short period without appropriate notice to Litigants. Moreover, the claim was filed in October 2013, slightly more than two years prior to the dismissal which is not too long.

5. They submit that they would be prejudiced should the case be dismissed as the Claimant was forced to retire over 10 years before his time and what he is seeking is to be paid up to the date of retirement plus interest thereon at Court rates.

6. They submit that the access and promotion of justice is enshrined in the Constitution under Article 159 and achieving just resolution of disputes filed in Court through a fair and public hearing is under Article 50(1). Court should therefore focus on doing substantive justice as opposed to concentrating on technicalities that may deviate the course of justice.

7. They rely on the case of **NAGLE vs FIELDEN [1966] 2 QBD 633 at 648** where Lord Diplock in **BIRKET vs JAMES [1978] AC 297** a number of principles were developed to guide the exercise of discretion by the Court in an application for dismissal of suit for want of prosecution that:

> ***1. Whether there had been inordinate delay on the part of the Plaintiff prosecuting the case;***
>
> ***2. Whether the delay is intentional, contumelious and therefore inexcusable;***
>
> ***3. Whether the delay is an abuse of the court process;***
>
> ***4. Whether the delay gave rise to substantial risk to fair trial or causes serious prejudice to the defendant;***
>
> ***5. What prejudice will the dismissal occasion to the plaintiff;***
>
> ***6. Whether the plaintiff has offered a reasonable explanation for the delay;***
>
> ***7. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court.***

8. The Applicant submits that there was no inordinate delay in this matter, sufficient explanation has been given and the delay is not one that is beyond acceptable limits in the prosecution of cases.

9. They refer to the case of **ALLEN vs. ALFRED McALPHINE & Sons [1968] 1 ALL ER 543** where a delay of fourteen (14) years was considered inordinate and inexcusable and in the case of **AGIP (KENYA) LIMITED vs. HIGHLIANDS TYRES LIMITED [2001] KLR 630** and **SAGGO vs. BHARI [1990] KLR 459** where a delay of eight and five months respectively was considered not to be inordinate.

10. They submit that a delay is inexcusable if it shows that it was intentional. An example of this is if there was disobedience of a Court order, in this matter the application states that this has not been the case. The Claimant has sought to schedule the matter for hearing but has been unable due to circumstances beyond his control.

11. They submit that the Respondent has not proved that the delay has exacerbated his position in this suit. They submit that it is unlikely that the Respondent will suffer prejudice. They submit that the Court should focus on substantive justice and not the technicalities, if the matter is dismissed, the Claimant will suffer greatly as justice will not be carried out. They urge the Court to allow the application.

12. The Respondent submits that the Claimant/Applicant has not taken any steps to prosecute this case for a period of over one year as was contemplated by Order 17 Rule 2 of the Civil Procedure Rules 2010 as read together with Section 12 of the Industrial Court Act 2011.

13. They submit that whether this application should not be allowed is a matter of discretion of the judge who must exercise it judicially. Each case on its own facts and circumstances as held in **Shah vs Mbogo [1967] EA 116.**

> ***"this discretion is intended so inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."***

14. They rely on the case of **Josephat Muthui Muli v Ezeetec Ltd [2014] eKLR** where Justice Nzioki wa Makau decline to reinstate a suit that had been dismissed and stated as follows:

> ***"The inference one can draw is that there is a pattern to deliberately or otherwise delay the expeditious disposal of the suit. Is the advocate fixing the case for hearing just to ensure the cause is not dismissed for want of prosecution? We cannot discern this but it is clear the claimant has been absent on 2 occasions. As has been his lawyer. Justice cuts both ways. There are rights that have accrued to the Respondent and on the basis of Shah vs. Mbogo* I *would be misplaced to exercise my discretion as there was no excusable mistake or error."***

15. They submit that the Court already gave the Claimant the final chance to set down the suit for hearing. In complete disregard of that order, the same was not done. They reiterate that it has been over one year since the Court gave those directions. By the Claimant's own admission, the Court diary opened several times and the Claimant failed to get a date. They therefore submit that the delay is indeed inordinate and inexcusable.

16. In deciding if there is substantial risk to fair trial or serious prejudice to the Defendant they ask the Court to refer to the case of **Ivita vs. Kyumbu (1984) KLR** 44 where Chesoni J held that:

> ***"the rest is whether the delay is prolonged and inexcusable, and if it is can justice be done despite such delay. Justice is justice to both the plaintiff and defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time."***

17. They also refer to the cases of **Venture Capital and Credit Ltd vs. Consolidated bank of Kenya Ltd (2006) eKLR** where Ochieng J quoted Lord Denning Mr in the case of **Allen vs. Sir Alfred McAlpine (1968) 1 ALL ER 543** as follows:

> ***"The delay of justice is a denial of justice....***
>
> ***To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as a grievous wrong hard to bear. Shakespeare ranks it among the whips and scorns of time. (Hamlet, Act 3 Sc 1) Dickens tells how to exhaust finances, patience, courage hope (Bleak House C1). To put right this wrong, we will in this court do all in our power to enforce expeditions; and if need be, we will strike out actions when there has been excessive delay. This is a stern measure, but it is within the inherent jurisdiction of the court, and the rues of court expressly permit it. It is the only effective sanction that they can contain".***

18. They submit that the dismissal of the suit for want of prosecution had it usefulness, the object getting rid of litigation which merit lies fallow with the likely prejudice which may flow from delays such as loss of memories, and documents, unavailability of witness and increase in costs.

19. They finally submit that the constitution advocates for justice that must be dispensed with without delay, and that this matter is keeping the Respondent in limbo and should be dismissed for want of prosecution.

20. Having considered submissions of both parties, I note that I am being asked to exercise my discretion

and reinstate the claim that was dismissed for want of prosecution. I note that on 18/6/2015, I directed that the Claimant Respondent sets down the case for hearing within 60 days. In default the matter was to stand dismissed.

21. I note from the Court record, that the Claimant tried this attempt on 1/7/2015 and on 27/7/2015. I ordered a hearing date be taken at the registry. There is no indication that the Claimant ever moved the Court or requested the registry to fix case for a hearing date or a mention thereof.

22. It is Respondent who was vigilant and requesting for a date either for mention or for direction. It is apparent that from July 2015 to May 12th 2016 when case was dismissed, no action was taken by the Claimant. The Court cannot aid an indolent and this is what this Court should proceed and do by dismissing this claim.

23. However, relying on Article 159 of the Constitution where the Court has a mandate to ensure substantive justice is achieved, I will indulge the Claimant once and reinstate this claim so that he can be heard and determined and that justice be done. I allow the application accordingly.

24. Costs in the cause.

Read in open Court this 26th day of September, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Respondent

No appearance for Claimant