

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 118 OF 2008

AVIATION & ALLIED WORKERS UNION.....CLAIMANT/RESPONDENT

VERSUS

KENYA AIRWAYS.....RESPONDENT/APPLICANT

RULING

1. The application before me is the Respondent/Applicant's Notice of Motion Application dated 6th October 2014. The Application seeks the dismissal of the suit for want of prosecution. The Application was supported by the Affidavit of Lucy Muhiu sworn on 6th October 2014. The Application was opposed by the Respondent who filed a Replying Affidavit sworn on 5th November 2014.

2. Mr. Burugu urged the Application and submitted that there was no action in the suit for an inordinately long period and the delay had not only been admitted but there was no answer for it. He submitted that there was not even a single letter by the Claimant/Respondent to the Registrar asking for the file to be traced. He thus submitted that the alleged submissions attached were not filed and were an effort to hoodwink the Court.

3. Mr. Kitheka opposed the Application and submitted that there is no provision in the Rules of this Court for the application which was brought under Rule 16 of the Rules of this Court. He submitted that there is an attempt to bring in the Rules of Civil Procedure. He submitted that the application of civil procedure was not permitted. He further submitted that the case had proceeded and only the decision of the Court after submissions remained. He stated that they had eaten the whole cow and only the tail remained and urged the Court to allow the case to be concluded.

4. Mr. Burugu in a brief reply submitted that where there is a lacuna in the procedure, parties are allowed to fall back on the provisions of Civil Procedure. He submitted that the application was made after no step was taken for 1 year 10 months. He submitted that it mattered not the stage of the suit.

5. In this Court, there is a plethora of decisions made that where there is lacuna in the Rules of this Court the Court may resort to Civil Procedure Rules or other rules of procedure permitted. The only caveat is that the rules of evidence are not strictly to be followed. See Section 20 of the Industrial Court Act 2011. The Application by the Respondent is therefore properly before the Court.

6. Mr. Burugu submits that there has been no action or step taken and the suit should be dismissed for want of prosecution. Mr. Kitheka on the other hand submits that the file was missing and the submissions were bespoken but not filed. He has appended them to his affidavit.

7. In the absence of any letter indicating there was an attempt to either progress the matter or locate the file it seems that the Claimant had gone to sleep. Whether the submissions annexed as JMK 1 were prepared and ready for filing in 2012 we will never know for sure. What is clear is that there was no filing of submissions made. The last order of the Court before the application before me was on 30th October 2012 where the Court stated that parties were to make oral submissions. As the Respondent/Applicant has not demonstrated that the Claimant/Respondent was served for the myriad mentions in 2011 and 2012, I will allow the Claimant to make submissions by way of filing the submissions dated 15th August 2012.

The justice of the case supports a final conclusion of the issues herein as opposed to dismissal of the suit at the point of final submissions or judgment delivery. I state this as the Court could as well have decided the case without the submissions of the parties.

8. The Claimant has been indolent and as a consequence will pay costs assessed at Kshs. 10,000/- to the Respondent who was forced to make the Application before me.

Orders accordingly.

Dated and delivered at Nairobi this 15th day of **January** 2015

Nzioki wa Makau

JUDGE