



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.575 OF 2013

MARICUS ODETE ATANGA CLAIMANT

VERSUS

MUTHAIGA MINI MARKET LIMITED RESPONDENT

RULING

1. On 10th June 2015 the Respondent filed application through Notice of Motion seeking the dismissal of suit herein for want of prosecution or that the same be struck out. The application is supported by the annexed affidavit of Vrajesh Bhagwandas Ruparel and on the grounds that the Claimant appears to have lost interest in this matter as it has been over one (1) year since 24th March 2013 when the claim was filed and has done nothing else to prosecute the suit. That this has left the Respondent anxious since they entered appearance on 28th August 2013 and no step has been taken to prosecute the suit. That the claim does not disclose any reasonable cause and should be dismissed.

2. In the affidavit of Vrajesh Bhagwandas Ruparel he avers that as the director of the Respondent upon service of the claim a defence has since been filed but the Claimant has not done anything to prosecute the claim and should be dismissed for want of prosecution. There is no hearing date set and this has caused the Respondent anxiety to defend the suit and it is only fair that the suit be dismissed with costs to the respondent.

3. In reply, the claimant filed Replying Affidavit and avers that he was employed by the Respondent for over 12 years but was terminated without any just cause. The claim was filed on 24th July 2013 and a hearing date agreed for the 18th September 2014 but the court was then not sitting.

4. The Claimant also avers that after 18th September 2014 *they have been unable to trace their client it was not until 15th April 2015 when the client was traced when they went to fix hearing dates but the diary was closed.* The Claimant has not lost interest in the matter and keen to prosecute it.

5. Only the Claimant filed his written submissions.

6. From the record and as averred by the Respondent I note the claim was filed on 24th July 2014 and the defence on 28th August 2013. Hearing was scheduled for 18th September 2014. What the Claimant avers in his Replying Affidavit is either not true/correct or this affidavit was not done by the claimant. At paragraph 7 and 8 he avers;

7. *THAT from then we were not able to get instructions from our client.*

8. THAT on 15th of April 2015 after we traced our client we went to the registry to fix a hearing date and there were no dates at the registry until further notice as the diary was closed.

7. Such averments cannot be explained by the claimant. Rather this should have been by the advocate whose client could not be traced. Such averments are therefore escapist not giving a true disposition of the facts the Claimant ought to have deponed of his own knowledge and belief. I find such averment are made in a manner so as to abuse the court process. It is equally not clear as to the person who appeared before the Commissioner for Oaths M. MURIUKI MWANGI, COMMISSIONER FOR OATHS, on the 13th July 2015 to take the oath. Even where the Claimant has singed this Replying Affidavit, there is something amiss!

8. On the substantive issues raised, the practice of the court is to ensure justice to all parties who come before this court. A suit will not be dismissed unless there is a clear demonstration that a party has simply taken their time unreasonably to delay taking action so as to move the hearing and disposal of the matter. The court has been busy for the last 3 years and it is possible that the court diary has been closed for a while now without new hearing dates being available. But effort to get such hearing dates must be seen when a party writes to the court registrar or deputy registrar seeking to be allocated such hearing dates. I find no such evidence with regard to the Claimant in his Replying Affidavit.

In the interests of justice, the suit shall not be dismissed at this juncture, save that the Claimant has to move the process within the next 14 days. Failure to abide in the time set out, the suit shall stand dismissed forthwith. The Claimant shall meet the respondent's costs herein.

Orders accordingly.

Delivered in open Court at Nairobi this 30th day of November 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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