



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1339 OF 2012**

*(Before D.K.N. Marete)*

**JACKSON KITHIMBA.....CLAIMANT**

**VERSUS**

**ROLMILL KENYA LIMITED .....RESPONDENT**

**RULING**

The respondent/applicant has come to court vide an application dated 16th April, 2013 for orders

1. **THAT** the suit herein be dismissed for want of prosecution.
2. **THAT** the costs of this application be provided for.

The application is supported by the affidavit of Pauline Muhanda sworn on 16th April, 2013 and the following are the grounds;

- a. The plaintiff has failed to appear in court for purposes of prosecuting this matter.
- b. That the plaintiff has consistently made adjournments every time the matter come up for hearing.

This claim the subject matter of this application was filed on 4th August, 2012 and seeks compensation for unfair dismissal to the tune of Ksh.101,250.00 interests and costs. It came for hearing on 5th December, 2012 but did not proceed and it was agreed *inter parties* that the respondent files a response within fourteen days. This was done.

The matter came for hearing on 4th February, 2013 but would not proceed on grounds that the claimant was not traceable despite being informed of the hearing. It was again fixed for hearing on 22nd March, 2013 when the claimant was again inaccessible. His advocates applied for withdrawal from acting on his behalf. The court granted them leave to file a formal application within fourteen days which application has not been had to date.

This application therefore comes in due to non compliance with the court order and also that the claimant has not shown steadfast interest in the prosecution of this suit. The applicant argues and submits that the claimant/respondent is indolent and cannot be assisted by equity in the circumstances.

The claimant, by a replying affidavit on 11th June, 2013 opposes the application and sets out the reasons for which he was not able to attend court during the two adjournments on 4th February, 2013 and 22nd March, 2013. He avers that this was occasioned by circumstances beyond his control. Additionally, he

submits that the application is premature in that a dismissal can only be had if a party has taken over one year without setting down a matter for hearing.

Order 17, rule 2(2) and 2(4) of the Civil Procedure Rules apply in the circumstances of this case;

O.17 (2) (1-4)

O.17 (2) (1)

*In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.*

O.17 (2) (2)

*If a cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*

O. 17(2) (3)

*Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

O. 17(2) (4)

*The court may dismiss the suit for non-compliance with any direction given under this Order.*

Dismissal of a suit for want of prosecution, as is illustrated above calls for inaction by a party in the prosecution of a suit for more than one year or alternatively non compliance with the directions of the court under Order 17. In the circumstances of this case there is evidence of dalliance by the claimant/respondent but this ends at that. The time provisions of the law have not in any way been flouted whatsoever. The matter is now fixed for hearing on 26th July, 2013 and should be given a chance. I therefore dismiss the application with no orders as to costs.

Dated, delivered and signed this 20th day of June, 2013.

**D.K Njagi Marete**

**JUDGE**

**Appearances.**

1. Makokha instructed by Namada & Co. Advocates for the claimant/applicant respondent.
2. Muhanda instructed by Mundeshi Muhanda & Co. Advocates for the respondent/applicant.