



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 425 OF 2017

LEAH MBUYA.....CLAIMANT

VERSUS

NATIONAL NURSES ASSOCIATION OF KENYA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Monday, 6th December, 2019)

RULING

The Court gave interlocutory judgment in the case on 08.11.2017 thus, **“The Court enters judgment per the request for judgment dated 28.04.2017. The interlocutory judgment is for Kshs.707, 733.72 as well as interest and costs of the suit from today’s date till payment in full at Court rates.”**

The respondent in the suit has filed a notice of motion on 21.06.2019 through Mulondo & Company Advocates. The motion is under sections 1A, 1B, 3A, 6 and 7 of the Civil Procedure Act, Cap. 21 of the laws of Kenya, Order 10 rule 11, Order 40 rule 7 and Order 51 rule 1 of the Civil Procedure Rules, 2010 and Article 159 of the Constitution. The prayers are for orders:

- a) The Honourable Court be pleased to set aside the interlocutory judgment entered herein on 08.11.2017 against the respondent and all consequential orders and proceedings thereto.
- b) The respondent be granted leave to enter appearance and file its pleadings in response to the suit.
- c) The costs of the application be in the cause.

The application is based on the annexed affidavit of Alfred Obengo and upon the following grounds:

- a) The parties entered a contract of employment dated 01.09.2013 for a term of 3 years and which term has lapsed. The claimant was employed by the respondent as Programs’ Assistant. A one off gratuity of 31% of annual claimant’s basic salary was payable. It was also agreed that any dispute arising for the contract be settled by arbitration. The gratuity was paid.
- b) The suit was filed and Court process served upon the respondent in 2017. Due to reorganisation and internal reorganisation the process was not served upon the respondent’s official hence no appearance and defence were filed in the suit within the required time.
- c) Interlocutory judgment was entered and decree issued on 04.04.2017 for Kshs. 707, 733.72.
- d) The defence to the suit raises serious triable issues such as whether the Court has jurisdiction to determine the suit; whether the gratuity was fully paid; whether gratuity awarded per judgment and decree is due for payment.
- e) It is admitted that under the contract the gratuity due was Kshs.235, 911.24.

The claimant opposed the application by filing her replying affidavit on 11.07.2019 through Meritad Law Africa LLP Advocates. The claimant has urged the following grounds of opposition:

- a) The respondent was served numerous demand letters but failed to reply the demand for gratuity for Kshs. 707, 733.72. the letters were dated on 03.10.2016, 02.11.2016 and 16.01.2019.

- b) The suit was filed on 03.03.2019 and the summons served upon the respondent on 27.03.2019.
- c) No response or appearance was filed. The claimant applied for interlocutory judgment on 04.05.2017. A mention notice was served but the respondent failed to attend Court on 08.11.2017 and the Court entered the judgment as prayed for.
- d) On 19.03.2019 the respondents were requested to approve draft decree. They failed to do so.
- e) The Bill of Costs was filed and taxation is underway.
- f) The money in dispute has not been paid at all.
- g) The applicants admit they were aware of the suit but neglected to enter appearance and to file a response.
- h) The application lacks merits and should be dismissed with costs.

The Court has considered the material on record and makes findings as follows:

- a) The respondent has admitted that it was served the memorandum of claim and summons but failed to appear and to file a response to the claim. The respondent has not denied service of subsequent Court processes as stated in the replying affidavit. The Court returns that the respondent being aware of the suit failed to cooperate and to discharge its obligations under section 3 of the Employment and Labour Relations Court Act, 2011 towards the just and expeditious determination of the suit.
- b) The contract of service is clear on the gratuity and the respondent has by the letter dated 14.09.2016 agreed to pay the gratuity. The respondent has exhibited no evidence that the gratuity was paid. By reason of the acknowledgement and absence of reply to the numerous demand letters, the Court returns that the respondent has failed to establish a serious defence to the suit. The Court finds that by reason of the acknowledgment to pay the gratuity, obviously there was no dispute to go for arbitration.
- c) The respondent having been served the relevant Court processes including the summons and the respondent having failed to establish serious triable issues in the suit, the application is liable to dismissal with costs.

In conclusion the application dated 21.06.2019 is hereby dismissed with costs.

Signed, dated and delivered in court at **Nairobi** this **Friday, 6th December, 2019**.

BYRAM ONGAYA

JUDGE