



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 2 OF 2020

DOUGLAS WAMBUA MUTULA.....CLAIMANT

VS

KENYA PORTS AUTHORITY.....RESPONDENT

RULING

1. By his Notice of Motion dated and filed in court on 21st February 2020, the Claimant seeks the following orders:

- a) An order barring the Respondent from filing any Memorandum of Appearance and/or Response to the Statement of Claim outside the prescribed period of 21 days which expired on 18th February 2020;
- b) An order declaring the Memorandum of Appearance filed in court on 19th February 2020 irregular, unlawful, incompetent and/or fatally defective in that it was filed without leave of the Court and should therefore be struck out for being improperly on record;
- c) An order entering judgment against the Respondent and setting down the matter for formal proof.

2. The application, which is supported by the Claimant's affidavit, is based on the following grounds:

- a) The Respondent was served with Notice of Summons and Statement of Claim on 29th January 2020 and was required to respond to the pleadings on or before 18th February 2020 but no response had been filed by close of business on that date;
- b) The Respondent, without leave of the Court, filed its Memorandum of Appearance on 19th February 2020, which was in violation of Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 in that it was filed outside the prescribed period of twenty-one (21) days;
- c) The Respondent did not comply with Rule 13(5) of the Employment and Labour Relations Court (Procedure) Rules, 2016 before filing its Memorandum of Appearance on 19th February 2020;
- d) The Respondent is guilty of breaching Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 in that it did not respond to the Statement of Claim within 21 days from the date of service, did not enter appearance within the prescribed period and did not file and serve a response to the suit within the prescribed period;
- e) The Respondent's Memorandum of Appearance is incorrectly on the court record and should therefore be struck out as no leave was sought before its filing on 19th February 2020;
- f) The Claimant fears that the Respondent may be considering filing an application seeking for an extension of time in order to correct its mischief and continue punishing and subjecting the Claimant to suffering;
- g) Unless the orders sought are granted, the Claimant will suffer irreparable loss by being deprived of the right to fair and efficient administration of justice.

3. In response to the Claimant's application, the Respondent filed Grounds of Opposition on 28th February 2020 and a replying affidavit sworn by its Principal Human Resource Officer, Linda Shako on the same date.

4. In the Grounds of Opposition, the Respondent states the following:

- a) That the Claimant's application seeks to restrain the Respondent from filing any Memorandum of Appearance and/or Response outside the prescribed period of 21 days;
- b) That the application is designed to deny the Respondent a right to defend the claim;
- c) That the Court is required to administer justice without undue regard to procedural technicalities as provided under Section 3 of the Employment and Labour Relations Court Act and Article 159(2)(d) of the Constitution of Kenya, 2010;
- d) That the Respondent is entitled to a fair hearing on merit;
- e) That the application dated 21st February 2020 is frivolous, vexatious and an abuse of the court process.

5. In her affidavit, Linda Shako concedes that the Respondent filed a Memorandum of Appearance on 19th February 2020.

6. Shako depones that the Respondent's delay in filing a response to the claim was occasioned by the need to collect required information, key in responding to the claim.

7. By his application, the Claimant seeks an order barring the Respondent from filing a response to the claim because the time within which it ought to have been filed has lapsed.

8. The Claimant relies on of Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which requires that a response be filed within 21 days after service of the claim.

9. In its response, the Respondent relies on Article 159 (2) (d) of the Constitution of Kenya, 2010 and Section 3 of the Employment and Labour Relations Court Act which command the Court to render substantive justice without undue regard to procedural technicalities.

10. If I were to grant the Claimant his wish, I would effectively lock out the Respondent from these proceedings.

11. In *Sabei District Administration v Gasyali & others (1968) E.A 300* it was affirmed that to deny a party the opportunity to be heard should be an action of last resort.

12. The right to be heard therefore ranks high up. This was well captured in *Mbaki & others v Macharia & another (2005) EA2006* where it was held:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being offered an opportunity to be heard. “

13. The Claimant filed his Memorandum of Claim on 24th January 2020 and the Court issued Notice of Summons on 27th January 2020.

14. According to an Affidavit of Service sworn by Stephen Ndung'u Njonjo on 19th February 2020, service was effected upon the Respondent on 29th January 2020. The 21-day period provided by Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules would therefore have lapsed on 18th February 2020.

15. The Respondent filed a Memorandum of Appearance on 19th February 2020 and the Claimant filed his application two days later on 21st February 2020.

16. The rules of procedure are not to be taken as idle instructions. However, to deny a party the opportunity to be heard simply because they are late by a few days, would in my view, be a great injustice.

17. In this case, the delay was not inordinate and was duly explained. To lock out the Respondent from participating in the proceedings would therefore occasion an injustice.

18. Consequently, the Claimant's application dated 21st February 2020 is declined. The Response filed by the Respondent on 28th February 2020 is admitted as duly filed.

19. The costs of this application will be in the cause.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF JULY 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Ngunjiri for the Claimant

Mrs. Ikegu for the Respondent