Kenya Concrete, Structural Ceramic, Tiles, Wood Ply and Interior Design Workers Union v Waren Concrete Company Limited (Cause E246 of 2022) [2025] KEELRC 3214 (KLR) (13 November 2025) (Ruling)

Neutral citation: [2025] KEELRC 3214 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E246 OF 2022

NJ ABUODHA, J

NOVEMBER 13, 2025

BETWEEN

KENYA CONCRETE, STRUCTURAL CERAMIC, TILES, WOOD PLY AND INTERIOR DESIGN WORKERS UNION ..... CLAIMANT

AND

WAREN CONCRETE COMPANY LIMITED ..... RESPONDENT

RULING

1. The Applicant filed application dated 28th May, 2025 which is brought under Article 48, Article 50(1) and Article 159(2)(d) of *the Constitution*, Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 of the Civil Procedure Rules 2010 seeking for orders of the court to grant leave to the Respondent/ Applicant to file a response to the statement of claim, list and bundle of documents, list of witnesses and witness statement out of time, the same documents to be deemed as properly on record and the court to set aside the order directing that the suit does proceed as an undefended suit.

2. The application was supported by the grounds set on the face of the application and Affidavit of JEREMIAH NZIOKA the Human Resource Manager of the Respondent /Applicant who averred as follows: -

    i. That upon filing this suit by the Claimant they appointed the Federation of Kenya Employers (herein referred as FKE) to act on their behalf and to defend their interest.

    ii. That the FKE put in an application dated 16th September, 2022 seeking for the claim to be struck out for not disclosing any cause of action.

    iii. That unknown to them that was the only response that would be filed by the FKE as they failed to put in a response to statement of claim and the supporting pre-trial documents.

iv. That they were unaware of the direction by the court ordering that the matter proceed as an undefended cause and only came to learn of the same upon extraction of documentation from case tracking system portal once the firm of Okwach & Company Advocates was appointed to take over the matter following the application to cease acting by the FKE.

v. That it is imperative to note that upon engagement of the FKE to represent their interest, FKE informed them that the claim as filed by the Claimant was defective, for reasons captured in the application they filed on their behalf dated 16th September,2022 and assured them of success in striking the suit out.

vi. That they were therefore oblivious of the non-compliance by their representatives that jeopardized their position against the Claimant as they were guided although erroneously that the suit would be struck out.

vii. That the non-compliance was not occasioned by the Respondent but rather by the representation they had acquired and therefore that mistake ought not to be visited upon the Respondent company as the litigant.

viii. That they have a bona fide defense against the Claimant's claim that raises triable issues and it is in the interest of justice that they be allowed a chance to be heard pursuant to Article 48 and Article 50 of *the Constitution*.

ix. That the Claimant shall suffer no prejudice whatsoever if the order to have the matter proceed as an undefended cause is set aside and the matter proceed to trial with the Respondent's participation in order to have the controversy between the parties decided on its merit.

3. In reply the Claimant/Respondent filed its Replying Affidavit sworn on 29th May, 2025 by Dishon Angoya the Company Secretary of the Claimant herein who averred as follows: -

i. The suit was filed with an application under certificate of urgency and the same was certified urgent on 21st April,2022 and directions for response issued, orders were also issued amongst others that pleadings close in 30 days with the Respondent being granted 21 days to file a response to claim.

ii. That the Respondent did not enter appearance but their advocates filed a notice of appointment of advocates dated 27th April,2022. That a notice of appointment of advocates is not synonymous with a memorandum of appearance. That no response was filed 3 years down the line despite service.

iii. That the single paged Notice of Motion dated 16th September, 2022 unsupported by affidavit was anchored on quicksand and could not be referred to as a response either.

iv. That the Respondent cannot have sat back and only discovered 3 years down the line that the only response to their claim was an incomplete Notice of Motion filed without any supporting affidavit; indolence could not be described any better whereas the Respondent had the latitude to elect how to respond to a claim their options could not be allowed to delay a justiciable cause certified urgent for 3 years.

v. That the Respondent is lashing out and transferring their responsibility to FKE who have no right of rejoinder and therefore choosing the easy way out of knowledge of court orders directing that the suit be heard as undefended. It cannot be true that they were unaware that after pleadings closed on 21st May,2022 the suit would proceed as undefended and only magically realized this position after court directed as such.

vi. That the alleged assurances granted by FKE that the suit would still be struck out irrespective of failure to properly enter appearance and failure to file response for over 3 years and based on a defective application brought without any affidavit cannot be relied on as explanation to fail to respond to the claim in time or at least within reasonable time for reason that delay is unreasonably long and further nothing is placed before court to confirm that FKE who seconded Advocates would issue such an unreasonable and legally defective advisory.

vii. That when FKE seconded counsel for the Respondent appeared before court the said advocates variously blamed the said Respondent for failure to issue instructions which Respondent now wants to play ping pong and surrender valid explanation for their inequities back to the said Advocates who are now being blamed without any material before court to show that they are blameworthy and not their client who is the Respondent.

viii. That whereas it is a very easy escape route employed by indolent litigants to shout "it was a mistake of my counsel blame them and let us move" the length of delay being three years in the present case changes the dynamics and especially in circumstances where the said counsel being blamed were previously before the court and blamed the Respondent. If court were to allow the habit it would mean a litigant would instruct counsel and hide behind counsel for as long as they would wish and resurface at their own pleasure.

ix. That save for mischaracterizing the conciliator's report as misguided and incapable of execution the response preferred by the Respondent does not explain what is pleaded as wrongful termination and lockout.

x. That the very fact that the Respondent believes delay for 3 years occasions no prejudice to poor workers of little means who were receiving a salary of Kshs 15,609/= that ended abruptly and source of livelihood disrupted is proof of a Respondent who cares less; definitely a prejudice that will continue if the court would allow the Respondent to drag the Claimant back for three years lost with over 26 appearances before court which mostly were for allowing the Respondent do one thing or the other up until the court opted to fix the matter for formal proof hearing and the Respondent only responding to the claim after a date for formal proof hearing has been fixed three years down the line.

xi. That despite the Respondent having knowledge of the matter they chose to bring the present application on 28th May,2025 the eve of hearing for formal proof scheduled for 29th May,2025; from this it was obvious that the present application was delayed to coincide with the formal proof hearing with the single objective of dislodging the said hearing for formal proof.

xii. That the present Notice of motion filed by the Respondent should be declined with costs awarded to the Claimant.

4. The court directed it would review the application and deliver a ruling on the application without filing submissions.

Determination

5. This court has considered the application by the Respondent and the response by the Claimant and notes that Rule 13 of the Employment and Labour Relations Court (Procedure) Rules 2016 provides for filing of response to claim as follows: _

    1. If a party served with a statement of claim intends to respond, the party shall, within twenty one days from the date of service, enter appearance and file and serve a response to the suit.

(5) The Court may, on application by a party to any proceedings, extend or reduce the time within which a responding party may respond to a pleading.

6. This therefore means that a party who wishes to respond to the Claim may apply to court to file the response out of time.

7. The Claimant on the other hand stated that the Applicant's Application had no merit as the Applicant did not bring any evidence before court to demonstrate that they tried following up with the then advocates on the progress of the case. That the period of delay of over three years was so long that prejudice has already been met on the Claimants. That at some point FKE complained that it is the Applicant who was not giving them instructions. In any case the Notice of Motion filed to strike out the claim had no supporting affidavit and was null and void.

8. The Applicant blamed their former advocates FKE for failure to file response. Whereas it is true mistakes of counsel should not be met to the innocent litigants this court notes that the Claimant alleged that the Applicant was not furnishing the advocates with instructions the more reason why they ceased acting for them.

9. Further the Court in Habo Agencies Limited -v- Wilfred Odhiambo Musingo (2015) eKLR stated that it is not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of litigation. This court notes that with Court Tracking System a party should be in a position to monitor the movement of their matter with ease.

10. The Applicant has anchored its application on articles 48, 50 and 159(1) of *the constitution* on the right to be heard without undue regard to procedural technicalities. The court notes that this application together with intended response was filed on the 28th May,2025 at the eve of the formal proof hearing on 29th May,2025. This was after almost three years after the Applicant's counsel filed the incomplete Notice of Motion dated 16th September, 2022. The claim was certified urgent on 21st April, 2022 with pleadings closing on 21st May, 2022. This Application has been brought 3 years after pleadings closed.

11. The period of three years is inordinate but must be weighed against the right to be heard of all parties to the proceedings. Having closely read through the intended Response to the Statement of claim, the court is of the opinion that the same raises triable issues of some Claimants' contracts having ended out of effluxion of time and the other five having being terminated for gross misconduct.

12. The court is of the view that the Respondent/Applicant explanation as to what occasioned the over 3 years of delay to act in this matter is not satisfactory. This is in consideration of the fact that the Claimant/Respondent stated that the matter has had over 26 appearances for the Applicant to do one or other things until the court decided that the matter proceeds as an undefended suit. In addition, the Applicant was not furnishing the former advocate with instructions to continue this matter and now comes to blame the same advocates who have no right of reply. The period of delay is inordinate by all reasons. This court agrees with the Claimant sentiments that the law aids the vigilant and not the indolent.

13. However, the constitutional imperative under article 50(1) read together with Article 159(2) (d) is that disputes be resolved by the application of law in a fair and public hearing before a Court and that justice shall be administered without undue regard to procedural technicalities.

14. Lady Justice Ndolo in Mutula v Kenya Ports Authority (Cause 2 of 2020) [2020] KEELRC 1940 (KLR) (16 July 2020) (Ruling) had this to say:_

> In Sabei District Administration v Gasyali & others (1968) EA 300 it was affirmed that to deny a party the opportunity to be heard should be an action of last resort. The right to be heard therefore ranks high up. This was well captured in Mbaki & others v Macharia & another (2005) EA 2006 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."

15. Having a balance of the foregoing facts, the above holding and circumstances it would be in the interest of justice to give the Respondent a chance to defend this claim since the delay can be compensated by an award of costs which considering the length of delay before bringing the present application will be assessed at Kshs. 100,000/- to before the date set for the hearing of the matter.

16. The court proceeds to find that the Applicant is entitled to the orders sought in the application dated 28th May, 2025 as follows: _

    a. The application is hereby allowed with costs to the claimant assessed at Kshs. 100,000/- to be paid before the next date set for hearing of the matter.

    b. The Respondent's bundle and list of documents, list of witnesses and witness statements are deemed duly filed and served.

    c. The matter is hereby set for mention on 6th February, 2026 for purposes of allocating a hearing date.

17. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF NOVEMBER 2025

DELIVERED VIRTUALLY THIS 13TH DAY OF NOVEMBER 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION