



**Shiloya v Vintage Africa Ltd t/a Sense of Africa (Cause E311 of 2024)
[2025] KEELRC 348 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELRC 348 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E311 OF 2024
L NDOLO, J
FEBRUARY 13, 2025**

BETWEEN

ALLAN LUKA SHILOYA CLAIMANT

AND

VINTAGE AFRICA LTD T/A SENSE OF AFRICA RESPONDENT

RULING

1. This ruling determines the Notice of Motion dated 9th October 2024, by which the Claimant asks the Court to direct that his claim proceeds as an undefended cause, pursuant to Rule 31(1) of the Employment and Labour Relations Court (Procedure) Rules.
2. The Motion is supported by the Claimant's own affidavit and is premised on the grounds that:
 - a. The Claimant filed a Memorandum of Claim dated 22nd April 2024;
 - b. On 12th June 2024, the Claimant served the Respondent with the Statement of Claim, together with Notice of Summons dated 6th June 2024;
 - c. The Respondent, through the firm of Kaplan and Stratton Advocates, entered appearance by filing a Memorandum of Appearance dated 25th July 2024;
 - d. The 28 days provided under Rule 29(1) of the Employment and Labour Relations Court (Procedure) Rules for the Respondent to file a defence have since lapsed;
 - e. Since the Respondent has neither entered appearance nor filed a defence Rule 31(1) of the Employment and Labour Relations Court (Procedure) Rules allows the Claimant to apply to the Court for directions to have the matter proceed to formal proof as an undefended suit;
 - f. It has been more than three (3) months since the Statement of Claim dated 22nd April 2024 was served and the Respondent has refused and/or neglected to file a defence as required by law;



- g. It has been more than five (5) months since the Statement of Claim was filed;
 - h. It is clear that the Respondent is not keen to defend the suit after terminating the Claimant's employment and since the suit is yet to start, the Claimant continues to suffer prejudice having been rendered jobless since the year 2021;
 - i. It is the overriding objective of this Court to facilitate the just, expeditious, effective and proportionate resolution of disputes in line with the law;
 - j. Upon filing and serving the Statement of Claim, it was and still is the Claimant's legitimate expectation that having been unfairly terminated by the Respondent, her case would be expeditiously heard and determined in accordance with the law;
 - k. It was and still is the Claimant's legitimate expectation that having served the Respondent with the pleadings as required by law, the Respondent would enter appearance and file its defence within 28 days as per Rule 29(1) of the Employment and Labour Relations Court (Procedure) Rules;
 - l. There is no overwhelming difficulty that may prevent the Court from granting the prayers sought since no party's right to be heard will be curtailed in any way. The Respondent was duly served but has slept on his right to file a defence;
 - m. It is a maxim of equity that equity aids the vigilant and not the indolent;
 - n. No prejudice will be occasioned to the Respondent if the application is allowed and it is therefore in the interest of justice that the orders sought in the application be granted.
3. The Respondent's response is contained in a replying affidavit sworn by its Chief Financial Officer, Lawrence Njuguna on 6th November 2024.
 4. Njuguna depones that the Respondent has every intention of defending the claim filed by the Claimant. He states that the termination of the Claimant's employment was premised on his complete disregard of his contractual and fiduciary duty to the Respondent, resulting in the fraudulent and irregular transfer of Kshs. 80,673,324 from the Respondent's account to unauthorised third party mobile money accounts.
 5. Njuguna avers that the delay in filing a Memorandum of Defence is regrettable and was not due to wilful ignorance of the provisions of the law.
 6. He adds that although the Respondent was served with the Statement of Claim, it has been trying to collate all relevant and necessary documents, which effort was hampered by the unavailability of documents which had been handed over to the police in the investigation of the fraud, in which the Claimant had been questioned as a person of interest.
 7. According to the Respondent, Rule 31(1) of the Employment and Labour Relations Court (Procedure) Rules applies where a party completely fails to enter appearance in a suit or file a defence. It is deponed that the Respondent had already entered appearance and it was the filing of its defence that was pending.
 8. It is further deponed that whether a matter proceeds as an undefended claim is at the discretion of the Court, which discretion ought to be exercised judiciously.
 9. In mitigation, the Respondent proceeded to lodge its Memorandum of Defence and Counterclaim dated 6th November 2024, together with a bundle of documents.



10. The Respondent asks the Court to admit its Memorandum of Defence and Counterclaim as properly filed.
11. The Respondent concludes that the Claimant will not suffer any prejudice if it is allowed to defend the claim.
12. The Claimant swore a further affidavit, reiterating the contents of his earlier affidavit in support of the application.
13. The Claimant's application is brought under Rule 31(1) of the Employment and Labour Relations Court (Procedure) Rules which provides as follows:
 31.
 - (1) Where a respondent has failed to enter appearance or file a defence, the claimant may apply to the Court for directions that the matter proceeds to formal proof as an undefended suit.
14. It is not in dispute that the Respondent did not file a response to the claim within the 28-day period set under Rule 21(1) of the Employment and Labour Relations Court (Procedure) Rules which requires that:
 29.
 - (1) If a party served with a statement of claim intends to respond, the party shall, within twenty-eight days from the date of service (or such shorter time as the Court may direct in urgent matters for reasons given in writing), enter appearance and file and serve a response to the claim.
15. Rule 40(3) provides that:
 - (3) Where no defence or response is filed in Court within the prescribed period, the Court may, upon application by the claimant, direct that the matter proceed for formal proof.
16. By its language, this Rule gives the Court discretion to decide whether to lock out the Respondent from rendering a defence on account of expiry of time.
17. It is a general principle of substantive justice that locking out a party in a matter in which they have shown interest to participate is an extreme action (see *Bai Lin (K) Limited & 2 others v Zingo Investments Limited & another* [2016] eKLR)
18. Further, as held by Ringera J (as he then was) in *Microsoft Corporation v Mitsumi Computer Garage Ltd & another* [2001] eKLR rules of procedure are handmaidens and not mistresses of justice. Their role is to facilitate and not hamper the administration of justice.
19. In this case, the Respondent has already filed its defence, albeit out of time. Balancing the rights of the parties and being minded to render substantive justice, I will admit the Memorandum of Defence and Counterclaim dated 6th November 2024, together with a bundle of documents, as duly filed.
20. In the end, the Claimant's application dated October 9, 2024 is declined with costs in the cause.
21. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025

LINNET NDOLO



JUDGE

Appearance:

Mr. Otieno for the Claimant

Mr. Rao h/b for Mrs. Opiyo for the Respondent

