



**Rachuonyo v Jaramogi Oginga Odinga University of Science and Technology
(Cause E053 of 2022) [2024] KEELRC 1642 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1642 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E053 OF 2022
CN BAARI, J
JUNE 27, 2024**

BETWEEN

GEORGE ONYANGO RACHUONYO CLAIMANT

AND

**JARAMOGI OGINGA ODINGA UNIVERSITY OF SCIENCE AND
TECHNOLOGY RESPONDENT**

RULING

Introduction

1. Before Court is the Applicant's motion dated 15th December, 2023 brought pursuant to Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 45 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules and Articles 48, 50 & 50 (2)(c) of the Constitution. The Applicant seeks the following orders: -
 - i. Prayers 1, 2 & 4 are spent.
 - ii. That the Honourable Court be pleased to review its orders directing that the hearing of the matter had been closed and a judgment in the current suit would be delivered on the 19th December, 2023
 - iii. That the Court be pleased to grant leave to the Respondent to file and serve its statement of defense.
 - iv. That the Honourable Court be pleased to issue further or better orders as shall meet the ends of justice.
 - v. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of the Motion and the Supporting affidavit of Ivor Aska Nyamita, the Legal Officer of the Applicant.



3. The crux of the motion is that parties have entered into a partial consent in the amount of Kshs. 1,162,941 .00 and which monies have been paid out to the Claimant eliminating three (3) prayers in the memorandum of claim.
4. The Applicant avers that the Respondent has demonstrated good faith in trying to settle the matter out of court and is desirous of being heard on the merits, and the delay in filing the defence in time was inadvertent as the Respondent was adamant in settling the matter out of court.
5. It is the Applicant's assertion that the delay in filing the defence was by no means inordinate, and could thus be cured and that the Claimant will not be prejudiced if the Respondent is given leave to defend.
6. The Applicant argues further that it has a good defence which raises triable and substantive issues of law and fact, and that if the Judgment is delivered, it will be prejudicial to the Respondent as it has already settled part of the Claim.
7. The Applicant avers that the Respondent is ready and willing to comply with such terms as the Court may deem just and that there exist substantive and proper grounds upon which the order sought ought to be granted.
8. The Applicant prays that this application ought to be granted in the interest of equity and justice.
9. The Claimant/Respondent opposed the motion vide an undated replying affidavit sworn by George Onyango Rachuonyo, the Claimant/Respondent.
10. The Claimant/Respondent states that he admits attending a consultative meeting with the Respondent/Applicant held on 15/9/2023 aimed at reaching a mutual settlement on the matter, but whose deal breaker was the requirement that he pays costs.
11. The Claimant/Respondent states that the prayers in the Statement of Claim were not settled and that at no point did he demand payment of terminal dues and any such payment from the Applicant/Respondent was out of their own initiative and which does not and should not prejudice his right to pursue this claim.
12. It is the Claimant/Respondent's position that he pressed the Applicant on knowing the status of his appeal and that the Applicant/Respondent acknowledged that it never reviewed the appeal. He states that there was an agreement that the Applicant would commit to set up an independent committee to review his appeal.
13. The Claimant/Respondent further avers that no consent was reached or intended to be reached on the matter and that the Applicant has not produced any evidence to that effect. The Claimant/Respondent states further that the law only recognises written consents concluded and filed pursuant to Order 25 Rule 2 of the *Civil Procedure Rules*
14. The Claimant/Respondent states that the fact that the Respondent made partial payment of dues after an unsuccessful dialogue, did not and should not prevent him from pursuing his claim before this court.
15. It is the Claimant/Respondent's assertion that the Respondent/Applicant has not demonstrated that it merits leave to file a response, as is their burden in law. He further states that its inability to promptly file their response is inadequately justified especially in light of the numerous adjournments at their instance, while he stands to suffer prejudice if leave is granted as the matter was at an advanced stage.
16. Parties filed submissions on the motion and which have been duly considered.



Determination

17. I have considered the application, the grounds and the affidavit in support, the replying affidavit in opposition and the parties' submissions. The issue for determination is whether the Applicant is deserving of the orders sought.
18. Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules* states thus on review: -
 1. A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - a. if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - b. on account of some mistake or error apparent on the face of the record;
 - c. if the judgment or ruling requires clarification; or
 - d. for any other sufficient reason.
 2. An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.”
19. The Applicant has urged the Court to review its orders directing that the hearing of the matter had been closed and a judgment in the current suit would be delivered on the 19th December, 2023, which date is now past.
20. The only part of this prayer that is alive the subject judgment having since been arrested, is whether the court should review its order declaring the matter as closed.
21. This court ordered that this matter proceeds as being undefended on 18th October, 2023, when several attempts to have the Respondent/Applicant comply failed to yield fruits.
22. The Applicant has both in its supporting affidavit and the submissions intimated an out of court settlement process that was on-going between the parties, as the ground for which it failed to defend the suit.
23. The record indicates that indeed, parties attempted an out of court settlement on the matter as shown by email exchanges between the Applicant and the Claimant/Respondent, and which culminated in payment of what the Applicant terms as 'final dues' to the Claimant/Respondent in the sum of Kshs. 1, 162,941.
24. The court further notes that the Claimant/Respondent has not denied there being an attempt at settling the matter out of court nor did he deny receiving part payment in respect of the claim.
25. The out of court settlement from the email exchanges, begun vide an email sent to the Claimant/Respondent on 13th September, 2023. It is therefore questionable that the Claimant/Respondent and his counsel made no mention of this occurrence when they sought to proceed with the matter undefended.
26. It is also clear that the negotiations progressed past October, 2023, the payment to the Claimant/Respondent having been made in November, 2023.



27. In light of the foregoing, I find the Applicant's prayer to set aside the order that the suit proceed undefended, together with the subsequent order closing the suit and reserving a judgment date merited and is allowed as prayed.
28. On whether the Applicant deserves leave to file a defence out of time, it is the Applicant's contention that it has a good defence which raises triable and substantive issues of law and fact, and which should be heard and determined on merit.
29. The Court of Appeal in *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR had this to say on what constitutes a triable issue:
- “A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”
30. Again, in *Lalji t/a Vakkep Building Contractors v Casousel Ltd* (1989) KLR the Court of Appeal held:
- “A trial must be ordered if a triable issue is found or one which if fairly arguable is found to exist”
31. The issues aforesaid, together with the draft response to the memorandum of claim attached to the instant motion, do in my view raise triable issues and which meets the threshold for reopening this matter for hearing and determination on merit in the interest of justice.
32. In the premises, I decree as follows: -
- a. That the order of this court directing that this matter proceeds undefended is set aside in its entirety.
 - b. That the Applicant/Respondent is granted leave to file its defence out of time, and the annexed draft response to the memorandum of claim is deemed as duly filed and the same to be served upon payment of the requisite court fees.
 - c. That parties to move with speed to have the matter heard on priority basis.
 - d. Costs shall be in the cause.
33. Orders of the Court.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF JUNE, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Okumu present for the Claimant/Respondent

N/A for the Respondent/Applicant

Ms. Anjeline & Debra-C/As

