



**Mutashi v Kerai t/a Amity Enterprises (Cause 2110 of 2016)
[2023] KEELRC 728 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 728 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2110 OF 2016
JK GAKERI, J
MARCH 21, 2023**

BETWEEN

ROYLAND INDANGASI MUTASHI CLAIMANT

AND

KISHOR KERAI T/A AMITY ENTERPRISES RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Respondent dated June 19, 2022 filed under Certificate of Urgency seeking Orders That:-
 1. Spent.
 2. The court be pleased to grant leave to the Respondent/Applicant to file response to the statement of claim, list and bundle of documents, list of witnesses and witness statement out of time.
 3. The response to the Statement of Claim, list and bundle of documents, list of witnesses and witness statement annexed to this application to be deemed as properly on record.
 4. The court be pleased to set aside the order directing that the suit does proceed as an undefended suit.
 5. The costs of this application be provided for.
2. The Notice of Motion is expressed under Article 159(2)(a) (b) and (d) of *the Constitution of Kenya*, provisions of the *Civil Procedure Act*, the Civil Procedure Rules and all other enabling provisions of law and is based on the grounds expressed on its face and the Affidavit by Kerai Karsan Kalyan sworn June 9, 2022.



3. The affiant deposes that on September 1, 2017, he received a letter from the Claimant's counsel informing him that the suit would proceed as an undefended suit as directed by the Court and would proceed on September 17, 2018.
4. That the order was given without affording the affiant an opportunity to respond to the claim.
5. The affiant states that the issues in his proposed response could only be heard and determined during the trial including the allegation that the Claimant was not an employee of Amity Enterprises as it did not exist in 2012, the year the Claimant claims to have been employed or terminated in 2016.
6. The affiant states that he stood to suffer irreparable loss and damage if the suit proceeds as undefended.
7. That it was just and fair for the court to set aside its orders for the applicant to raise his defence.
8. The affiant further states that he has a prima facie defence and prays for the same to be allowed to be filed out of time.

Claimant's response

9. In opposition to the Notice of Motion, the Claimant/Respondent filed a Replying Affidavit sworn on July 12, 2022 stating the it was fatally defective and an abuse of court process owing to the long delay since 2016 and having entered appearance on August 23, 2017 and had been sleeping on his rights.
10. That on August 4, 2021, the Respondent was represented in court and counsel had expressed the client's intention to settle the matter out of court.
11. The affiant states that his counsel's letter to the applicant's counsel seeking a proposal was not responded to.
12. That on September 16, 2021, the applicant's counsel requested for a copy of the statement of claim from the Claimant's counsel but the request was declined.
13. That the court granted the Applicant's counsel leave to file the current application on September 28, 2021 but the same was not filed and on October 18, 2021, the applicant's counsel was not in court notwithstanding the fact that the date was taken by consent and formal proof was scheduled for December 16, 2021 but the Claimant was not ready.
14. The affiant states that the instant application was intended to delay this matter as the applicant had the opportunity to do so since 2019 and had thus not come to court with clean hands.
15. Finally, the affiant states that the application is frivolous and should be dismissed with costs.

Applicant's submissions

16. The Applicant's counsel identified three issues for determination including costs namely, leave to file a response to the claim out of time, setting aside of orders that the suit proceeds undefended and costs.
17. On the 1st issue, counsel submitted that Section 3A of the *Civil Procedure Act* gave the court discretion to enlarge the duration fixed or granted after expiry.
18. Counsel submitted the applicant stood to suffer irreparable loss and damage should the suit proceed as undefended and his defence raised triable issues and a full trial was necessary.
19. Reliance was made on the provisions of Article 159(2)(d) of *the Constitution of Kenya, 2010* as well as the decisions in *Rose Matunda v Hi-Tech Opticians* [2021] eKLR as well as *Vivian Muia v Mzoori Ltd* [2017] eKLR.



20. As regards the setting aside of the order that the suit proceeds as undefended, counsel relied on the decision in *Noniko Holdings Ltd & 2 others v Atticon Ltd & 5 others* (2020) eKLR on what the court considers in determining such an application i.e merits of the defences or triable issues and sufficiency of reasons for the delay.
21. Counsel urged that the applicant's defence raised triable issues that Amity Enterprises did not exist when the Claimant was employed.
22. That it was just and fair that the orders be set aside.
23. Counsel urged that costs of the motion abide by the outcome of the main suit.

Claimant/respondent's submissions

24. Counsel urged the court to dismiss the application on the premise that it was intended to delay conclusion of the matter and mislead the court in that the draft defence denied that there was any employment relationship between the parties yet counsel for the applicant had on August 4, 2021 informed the court its intention to settle the matter out of court.
25. Reliance was made on the provisions of Order 7 Rule 1 of the *Civil Procedure Rules, 2010* on filing of defence after service of summons to urge that the Respondent/Applicant ignored the provision and was accorded many opportunities to file the application for leave to file defence out of time but failed to do so as shown by the Replying Affidavit.

Determination

26. The issue for determination is whether the orders sought by the applicant/respondent are merited.
27. It is common ground that the Claimant/Respondent filed a suit against the Respondent/Applicant on October 13, 2016 alleging wrongful dismissal and non-payment of terminal dues and the documents were served on the Respondent via its Control Manager on Aviation Road on December 6, 2016 as evidenced by the Affidavit of Service filed on February 2, 2017.
28. The Respondent has not alleged that service was not effected.
29. Subsequently, the Claimant's counsel caused service of a Mention Notice on April 13, 2017. The mention was scheduled on June 14, 2017 as the Affidavit of service reveals.
30. The matter came up before Abuodha J. and the respondent was unrepresented. The judge ruled that:

“The Respondent having been served with summons to enter appearance but have failed to do so and file a defence, the mater shall proceed as an undefended cause on a date to be fixed at the Registry.
31. The Respondent did not attend court until 4th March, 2019 when counsel appeared and a hearing date was to be taken at the Registry.
32. Puzzlingly, although the Applicant/Respondent was represented by counsel before the Deputy Registrar on November 19, 2019, counsel holding brief for counsel for the Claimant told the Deputy Registrar that the Respondent had not filed its response, the counsel did not raise any issue and directions were given that the matter proceeds as undefended. The Respondent was directed to make a proper application.



33. Hearing was scheduled for December 18, 2019 but hearing did not take place and the court directed the parties to move the court and the directions were reiterated on January 29, 2021.
34. On July 26, 2021, the Deputy Registrar fixed the hearing on August 4, 2021 by which date the Respondent had instructed the firm of Anguko, Osman & Company Advocates, Cianda House, Koinange Street who filed a Notice of Change of Advocates and notified the Claimant's counsel by letter dated August 3, 2021 indicating that they wished to adjourn the hearing scheduled the following day, ostensibly to peruse the file and familiarize themselves with the matter.
35. A hearing notice had already been served upon the previous counsel. Strangely, the firm of Kamunda Njue & Co. Advocates filed a notice of Change of Advocates dated October 12, 2021 stating that they were replacing Anguko Osman & Co. Advocates.
36. On August 4, 2021, Anguko appeared for the Respondent while Miss Wavinya held brief for Nyabena for the Claimant.
37. Mr. Anguko told the court that his firm had come on record the day before and sought 30 days as the client had intimated that he was amenable to resolving the dispute out of court. Counsel for the Respondent had no objection and the court acceded to the Respondent Counsel's request for 30 days. The 30 days lapsed without action on the part of the Respondent.
38. During the mention on September 28, 2021, Mr. Kamunda appeared for the Respondent and informed the court that he was the Applicant/Respondent's counsel and prayed for time to file the Respondent's documents. Mr. Nyabena objected submitting that the Respondent had been accorded the opportunity to apply for leave by the Deputy Registrar but failed to do so. Counsel lamented that the suit was filed in 2016 and the Respondent had occasioned the delay. Counsel urged that the suit be fixed for formal proof.
39. The court granted the Respondent time to file the instant application.
40. Sometime in June, 2022, the Applicant/Respondent's counsel fixed a Chamber Summons application for leave to cease acting which the court granted on September 20, 2022.
41. Counsel notified the court that a Mr. Muriithi would come on record.
42. No notice of change was filed but on January 31, 2023, a Mr. Muriithi appeared in court for the Applicant/Respondent. He informed the court that he had received instructions from the Applicant/Respondent. A ruling date was scheduled.
43. Rule 11, 12, 13 and 15 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* make provisions for service of summons, response to pleadings, extension or reduction of time to respond to pleadings and related matters.
44. Rule 13(1) provides that;
If a party served with a statement of claim intends to respond, the party shall, within 21 days from the date of service enter appearance and file and serve a response to the suit.
45. Although the Respondent was served with the statement of claim on December 6, 2016, he had not responded by June 14, 2017, more than 6 months later and did not seek leave until June, 2022 notwithstanding clear directions by the Deputy Registrar on November 19, 2019.
46. Rule 13(5) confer upon the court discretion to extend the time within which a party may respond to a pleading, on application by the party.



47. Finally, Rule 15(3) provides that;
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.
48. In the court's view, since the Applicant/Respondent had neither entered appearance nor filed a defence within the prescribed duration, the order that the matter proceeds as an undefended suit was warranted.
49. Surprisingly, the Applicant/Respondent has not provided evidence or reasons for the inordinate delay in filing of the instant application, to set aside an order made in June 2017 not even the apparent indecisiveness on representation in July, August 2021.
50. Indeed the Respondent has furnished no scintilla of evidence as to why it did not file its defence or application for leave to do so in 2019, 2020 or 2021.
51. As Kiage JA stated in *Ecobank Kenya Ltd v Minolta Ltd & 2 others* [2018] eKLR;
“I am not in the least persuaded that Article 159 of *the Constitution* and the Oxygen Principles were even meant to aid the overthrow or destruction of rules of procedure and to create an anarchical free for all in the administration of justice . . .”
52. As correctly submitted by the applicant's counsel and as held in the decision in *Noniko Holdings & 2 others v Atticon & 5 others* (supra)
“Further, the court will consider inter alia whether the draft defence has merits and or raises triable issues, whether the Respondent will suffer prejudice, if any, and whether there is sufficient reasons for the delay.
53. While it is arguable that the draft defence raises at least one triable issue on employment, the Respondent/Claimant stands to suffer immense prejudice as he has been waiting for justice since 2016 and the Respondent has substantially contributed to the delay by failure to act. It would in the court's view prejudice the Claimant if the orders sought were granted. Similarly, the Applicant has not adduced sufficient reasons for the inordinate and unjustified delay.
54. The court is alive to the centrality of the right to be heard as held in *Martha Wangari Karua v Independent Electoral & Boundaries Commission & others*, Nyeri Civil Appeal No. 1 of 2017 and reiterated in *Mbaki & others v Macharia & another* [2005] 2 EA 2006.
55. Equally, the court is cognizant of the fact that mistake of counsel should not be visited on the client as held by the Court of Appeal in *Philip Chemolo & another v Augustine Kubede* [1982-88] KLR 1040.
56. In the instant case, the Respondent cannot deny that he was aware of what was going on and contributed to the delay by instructing two counsels.
57. Bearing in mind that the Applicant was directed by the Deputy Registrar to file the instant application in November 2019 but failed to do so, hired another counsel in August 2021, was directed by the court to file the application on September 28, 2021 but failed to do so alleging technical hitches and counsel eventually withdrew from representing him in late 2022, the court is of the view that it would be injudicious to accommodate the applicant any further at the expense of the Claimant.
58. For the foregoing reasons, it is the finding of the court that the applicant has failed to establish that the Notice of Motion dated June 19, 2022 is unmerited and the same is accordingly dismissed with costs.



59. Costs shall be in the cause.
60. The suit shall be fixed for formal proof.
61. The Respondent's counsel is at liberty to cross-examine the claimant and file submissions.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF MARCH 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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