



REPUBLIC OF KENYA



KENYA LAW
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**Were v Kenya Aerotech Limited (Cause 661 of 2018)
[2023] KEELRC 1804 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1804 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 661 OF 2018**

**L NDOLO, J
JULY 27, 2023**

BETWEEN

ESTHER RACHEL ANYONA WERE CLAIMANT

AND

KENYA AEROTECH LIMITED RESPONDENT

RULING

1. This claim came up for hearing on May 4, 2023 when the attention of the Court was drawn to an order issued by Maureen Onyango J on February 25, 2019, by which the Respondent's Memorandum of Response was expunged from the record.
2. Upon taking oral submissions from the parties' Counsel, I directed the Respondent to file a formal application for review of the order issued on February 25, 2019. It is that application that is the subject of this ruling.
3. The application is dated May 10, 2023 and seeks the following orders:
 - a. That the Court be pleased to review and set aside the orders issued on February 25, 2019 by Maureen Onyango J;
 - b. That the Court be pleased to admit into record as properly filed the Respondent's Memorandum of Reply dated July 6, 2018 and filed in court on December 5, 2018 as well as all the accompanying documents;
4. The application is supported by an affidavit sworn by the Respondent's Counsel, Edward Njenga Muchai and is based on the following grounds:
 - a. On May 8, 2018, the Claimant filed a Statement of Claim with accompanying documents alleging wrongful and unfair termination of employment. Consequently, the Respondent was served with the claim;



- b. On July 2, 2018, the Respondent instructed its Advocates on record to act on its behalf. Upon being instructed, the Advocates filed a Memorandum of Appearance and thereafter a Memorandum of Reply, list of documents and a witness statement dated December 3, 2018;
 - c. On 25th February 2019, Maureen Onyango J, on her own motion and without any application being made, ordered that the Respondent's Statement of Defence and the accompanying documents be expunged from the record as they had been filed out of time without the leave of the Court;
 - d. Subsequently, the Respondent instructed its Advocates to seek for review of the order. Vide a letter dated 8th March 2019, the Advocates requested for a printed copy of the order to allow for application for review, which has never been supplied to date;
 - e. The Respondent has a merited defence to the Claimant's claim that raises triable issues and it is trite law that a party should not be condemned unheard and it is in the interest of justice that the order of 25th February 2019 be reviewed and the matter be heard on its merit;
 - f. *The Constitution* of Kenya, 2010 guarantees one to be subjected to fair trial;
 - g. The Claimant's Statement of Claim involves substantial issues and an amount to the tune of Kshs. 900,000 and it cannot proceed undefended;
 - h. There exist sufficient grounds to review the order and it would be in the wider interest of justice that the orders sought herein are granted on priority basis.
5. The Claimant opposes the application by her replying affidavit sworn on May 16, 2023.
 6. The Claimant states that the application is brought in bad faith with the intention to delay the conclusion of this matter.
 7. The Claimant depones that despite being served with Summons to Enter Appearance and all pleadings on May 28, 2018, the Respondent filed a Memorandum of Appearance on July 2, 2018 and Memorandum of Reply on December 3, 2018.
 8. The Claimant adds that the Respondent has not offered any explanation for filing pleadings almost 7 months late nor sought leave to file them out of time as the law requires.
 9. The Claimant accuses the Respondent of unreasonable delay in bringing this application, more than 4 years after the adverse order was made.
 10. The Claimant points out that the Respondent has not shown steps taken to obtain the order.
 11. The relief sought by the Respondent in this application is discretionary and as a rule of thumb, a party seeking the exercise of discretion in its favour must convince the Court that it is deserving of such an order.
 12. The issue I have with the Respondent's plea is not its quest for review of the order issued by my sister Judge but rather the delay in bringing the application. While the order was made on February 25, 2019, the Respondent did not move the Court for review until May 10, 2023, a time lapse of over 4 years.
 13. This delay is inordinate by any standard and the Respondent's attempt to heap blame on the Court for the delay does not sell. Apart from a letter dated March 8, 2019 by which the Respondent's Counsel asked to be supplied with a copy of the impugned order, there was no evidence of any further action taken by the Respondent towards seeking review of the order.



14. In light of the Respondent's lethargic conduct, I find it difficult to exercise discretion in its favour. The application dated May 10, 2023 is therefore dismissed with costs to the Claimant.
15. Consequently, this matter will proceed as an undefended claim.
16. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JULY 2023

LINNET NDOLO

JUDGE

Appearance :

Mr. Maloba for the Claimant

Mr. Njenga for the Respondent

