



**Women's Link Worldwide v Muthiana (Petition E193 of 2021)  
[2022] KEELRC 1434 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1434 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E193 OF 2021  
AN MWAURE, J  
JUNE 21, 2022**

**BETWEEN**

**WOMEN'S LINK WORLDWIDE ..... APPLICANT**

**AND**

**LYDIA MUNYIVA MUTHIANA ..... PETITIONER**

**RULING**

1. By the Notice of Motion dated the 23<sup>rd</sup> February 2022 and filed on the 24/2/2022 and brought under Section 3A of the Civil Procedure Act, Rules 16(2), 19 A and 30 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013, the Respondent/ Applicant seeks the following Orders from Court:-
  - a. That the Court extends time to the Respondent/Applicant to respond to the Petition filed herein dated 30<sup>th</sup> November 2021.
  - b. That the Notice of Preliminary objection dated the 15/2/2022 be deemed duly filed and properly on record.
2. The Application is premised on the grounds stated on the face of the application that the Respondent instructed the firm of Omollo Advocates LLP to come on record and prepare a response to the Petition. The firm filed the Memorandum of Appearance on the 2/12/2021.
3. The Respondent had then 14 days to prepare and file a response which they failed to do. The deadline for filing a response lapsed on the 16/12/2021 without a response being filed. As of 22<sup>nd</sup> January, 2022 despite numerous enquiries from the Respondent's officers, there was no formal communication from the firm except for an indication that the advocate handling the matter was indisposed.
4. Subsequently the Respondent terminated its engagement with the firm of Omollo and Omollo & Company Advocates and appointed the firm of Munyao-Kayugira & Co, Advocates by which time the



deadline for filing a response had already elapsed. The firm of Munyao & Kayugira filed their notice of change of advocates dated 4<sup>th</sup> February 2022.

5. That the Respondent has prepared and together with this application filed a Notice of Preliminary Objection in response to the said Petition. The preliminary objection is dated February 15<sup>th</sup> February 2022. The Respondent's prayed that the honourable Court extend the time for the filing of the response and the Preliminary Objection. The Respondent also relied on the supporting affidavit of Viviana Waisman and the Supplementary affidavit in support of the application.
6. The Petitioner filed Replying affidavit deponed by Victor Orandiher advocate in response to the application dated 23<sup>rd</sup> February 2022 whereby she says that the extension of time is not a right of a party but an equitable remedy available at the discretion of Court. She depones that although the Court is clothed with the power and discretion to extend the time stipulated under the rules, the discretion should be exercised on the basis of evidence and sound legal principles, with burden of disclosing the material falling squarely on the Respondent for such orders.
7. The Petitioner avails that the Respondent failed to file any reply or application to the Petition until 23<sup>rd</sup> February, 2022 a full two months after the Notice of Appointment of their Advocates. That as at 22<sup>nd</sup> January, 2022 the firm of Omollo & Omollo Advocates LLP failed to pursue this matter comprehensively without due course and communication.
8. She further says that the Respondent failed to present before Court any material or evidence to support the follow ups the Petitioner made with the their advocates on the issue of filing of the response nor present proof of the communication to their advocate on the issue of the indisposition of the advocate.
9. Further, the Petitioner says that there is no proof the Respondent furnished the firm of Omolo & Omolo Advocates with proper instruction or at all. The failure to respond to the Petition within the stipulated timeline was simply based on the inaction on the part of the Respondent and its advocates. The Advocate's lack of diligence and inaction is no ground for circumventing the clear provisions of the Rules.
10. The petitioner avers that the Respondent's/applicant's failure to file its Response within 14 days after service is fatal because statutory principles are not mere procedural technicalities capable of being cured with mere assertions or the Oxygen principle. No evidence has been presented to show that the firm of Omollo & Omollo was served with Notice of Change of Advocates to confirm that the current advocates are properly on record. The Petitioner further says that the preliminary objection does not show that it has probability of success and does not raise serious legal issues that are supported by the law.

### **Submissions by the Respondent/Applicants**

11. The Respondent/Applicant submits that not only would it be unfair but also unjust to pin responsibility on the client for the wrongs done by the advocate. The Respondent has relied on the case of Catherine Njoguini Kenya & 2 Others versus Commercial Bank of Africa Limited Civil Application No. 366 of 2009, where it is said the Court declined to visit wrongs committed by advocates and their staff on innocent clients where it had been sufficiently demonstrated that the clients were not to blame for such default.
12. The Respondent/Applicant submits that it would not only be unfair but unjust to pin responsibility on the client for the advocate's noncompliance and use this as a basis for withholding the exercise of discretion in favour of the applicant.



13. The Respondent also draw support on the Court of Appeal case of Richard Nchapi Leiyagu versus IEBC & 2 Others where it was held, inter alia, that a right to hearing is not only constitutionally entrenched but it is also the cornerstone of the rule of law that the right to be heard is a valued right and that the right of a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because violation is considered to be a breach of natural justice.
14. The Respondent also draws support from the case of *Muiru Kamau & Another versus National Bank of Kenya Ltd* (2009) for the proposition that the Courts when interpreting the [Civil Procedure Act](#) or the Appellate Jurisdiction Act or exercising any power must take into account consideration the overriding objective as defined in the two Acts. Some of the principal aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the Courts by ensuring that the principle of equality of all is maintained and that as far as it is practicable to place the parties on equal footing.
15. The Court according to the Respondent has mandate to invoke the inherent power of the law enshrined in Article 159 (2) (d) of [the Constitution](#) to cure procedural defaults for ends of justice to be met in the matter. The Applicant in support of this cites the case of *Margaret Njoki Njunge & Another versus the Agakhan Health Services Kenya & 2 others* (Civil Appeal 122 of 2016) (2021) KECA 135 KLR where it was held, inter alia, that a Court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the circumstances of a particular case. The exercise of the jurisdiction under Article 159 of [the Constitution](#) is unfettered especially where the procedural technicalities pose an impediment to the administration of justice.
16. The Respondent contends that there was no inordinate delay in the filing of the Response by the Respondent/Applicant. In any event, the Petitioner has not taken any steps to have the matter set down for hearing. No harm, whatsoever, will be suffered by the Petitioner/Respondent if the application is allowed he submits.
17. The Respondent/Applicant will, however, be extremely prejudiced should it be denied an opportunity to be heard as it suffers the risk of being ordered to pay cumulative monetary reliefs of \$ 229,000 to the Petitioner unless the Court extends the time for the Respondent to file a response. The Respondent urged the Court to allow the application as prayed.

#### **Petitioner/Respondent's Written submissions**

18. The Petitioner/Respondent submits that whilst she agrees that the honourable Court is clothed with the power and discretion to extend time stipulated under the Rules, the discretion being judicially exercised should be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the Respondent for such orders. The Petitioner submits that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.
19. The Petitioner relies on the case of Charles N Ngugi versus ASL Credit Limited where the Court held that whilst the discretion to extend time is unfettered, it is incumbent upon the applicant to



explain the reasons for delay in making the application for extension and whether there are extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“The principles which are to be derived are that the extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court, whether the Court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis, where there is reasonable cause for the delay the same should be expressed to the satisfaction of the Court, whether there will be any prejudice suffered by the Respondent if extension is granted and whether the application has been brought without undue delay.

20. The Respondent/Petitioner says the applicant has not presented any evidence before the Court to prove that failure to file the response was occasioned by the wrongs committed by its then advocates. The statutory timelines are not mere procedural technicalities capable of being cured with mere assertions, the oxygen principle and/or the overriding objective as envisaged under the provisions of the *Civil Procedure Act* and /or Civil Procedure Rules, 2010.
21. The applicant being aware that the deadline to file a response was on the 16<sup>th</sup> December, 2021, failed to file any reply or application to the Petition until 23<sup>rd</sup> February, 2022 a full two months after the Notice of Appointment of Advocate. The Applicant has failed to demonstrate to the Court the basis for such delay in appointing new advocates who filed a Notice of Change on 4<sup>th</sup> February, 2022 and filed application for extension of time on 23<sup>rd</sup> February 2022.
22. The Respondent/Petitioner submits that the Applicant’s advocates were negligent and failure to file a response within the required period was deliberate and inexcusable as they were conversant with the facts of the case. The Petitioner relied on the case of *Bi Mach Engineers Ltd versus James K Mwangi* 2011 eKLR where it was stated that the:-

“The Applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the Applicant bothered to follow up the matter with erstwhile advocates. It is not enough simply to accuse the advocates of failure to inform as if there was no duty on the part of the client to pursue his matter.”

23. The Respondent has also made submissions on the Notice of Preliminary Objection which it is to be noted does not fall for determination as per the prayers in the application.

## Decision

24. Under Rule 13(1) of the Employment & Labour Relations Court Rules 2016, If a party served with a statement of claim intends to respond, the party shall within twenty-one (21) days from the date of service, enter appearance and file and serve a response to the suit. Rule 13(6), 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.
25. In Cause No 2 of 2020 *Douglas Wambua Mutula versus Kenya Ports Authority* 2020 eKLR the Court held that:-

“The rules of procedure are not to be taken as idle instructions. However, to deny a party opportunity to be heard simply because they are late by a few days would in my view, be great



injustice. In this case the delay was not inordinate and was duly explained. To lock out the Respondent from participating in the proceedings would in my view occasion injustice”.

26. In ELRC Cause No 470 of 2017 *Rose Matunda versus Hi tech Opticians* 2021 eKLR Wasilwa J had the following to say regarding an application to extend time for filing the response to the claim:

“I have considered the submissions of the parties in respect of this application. It is apparent that there has been inordinate delay in prosecuting this matter by the claimant who filed his case in 2017 and went to sleep. The Applicant/Respondents though coming to Court this late in the day the fact that they are ready to proceed will not prejudice the claimants in any way but would enable this Court reach a just and fair determination of this matter. I find the application merited and I allow it as prayed”.

27. The Petitioner filed the Petition on the 1<sup>st</sup> December 2021. The application seeking extension of time was filed on the 23<sup>rd</sup> February 2022. There is a deposition to the effect that after filing the appearance, there was no formal communication from the then Respondent’s advocate on the filing of response to the memorandum other than on the issue of indisposition of the advocate handling the matter. This obliged the Respondent to look for another advocate to file the response by which time the period for filing the response had elapsed.
28. The delay in the circumstances has been duly explained and the Respondent being ready to proceed as in the Rose Matunda case (supra) won’t occasion any prejudice to the claimant other than allowing full ventilation of the issues relating to the Petition before Court. *The Constitution* of Kenya 2010 provide and in particular Article 50 that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or if appropriate another independent and impartial tribunal.
29. Further Article 159 (2) (d) of the same Constitution of Kenya 2010 provide that justice shall be administered without undue regard to procedural technicalities.
30. The Applicant delayed to put a response for about two (2) months and that is unacceptable. The Court however is considering that rules of natural justice are paramount. I will allow the Applicant extension of time to respond to the petition filed herein. I will also order that the preliminary objection dated 15<sup>th</sup> February 2022 be deemed to be duly filed and properly on record.
31. The Applicant will pay Petitioner advocates cost of Kshs. 10,000/- within 30 days from today’s date.
32. The Respondent is also ordered to put in their submissions to the preliminary objection dated 15<sup>th</sup> February 2022 within 14 days from today’s date. Thereafter the Petitioner will file their submissions within 14 days and upon service. Mention on 21/7/2022 to confirm compliance and give a date for ruling. Service of the mention date on the Petitioner.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE, 2022.**

**ANNA NGIBUINI MWAURE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

