



**Okova v Kenya Pipeline Company Limited (Cause 192 of 2020)
[2022] KEELRC 1292 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1292 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 192 OF 2020
NZIOKI WA MAKAU, J
JULY 12, 2022**

BETWEEN

DEREK WANGAKI OKOVA CLAIMANT

AND

KENYA PIPELINE COMPANY LIMITED RESPONDENT

RULING

1. The Respondent seeks through its notice of motion application for orders that:
 - A. This Honourable Court be pleased to extend the time for filing of the Respondent's Memorandum of Response, Witness Statements and Bundle of Documents.
 - B. In the alternative to prayer A above, the Honourable Court be pleased to deem the Respondent's Memorandum of Response, Witness Statements and Bundle of Documents filed on 1st February 2022 and served on the Claimant on 2nd February 2022 to be properly on record.
 - C. The costs of the application to be provided for.
The Application is premised on the grounds that:
 - 1) The Respondent's delay in filing the Memorandum of Response was inadvertent and is highly regretted. The Respondent filed its Memorandum of Response on 1st February 2022 together with the Respondent's Witness Statements and Bundle of Documents. The Respondent's pleadings were served on the Claimant on 2nd February 2022.
 - 2) The Respondent delayed in filing the Memorandum of Response because:
 - i. The Claimant instituted the instant claim vide Memorandum of Claim dated 11th May 2020 ("the Claim"). The Claim was filed together with an application seeking for orders



inter alia that the Claimant's fixed term contract of employment be extended pending the hearing and determination of the Claim;

- ii. When the Claimant's pleadings were received by the Respondent's Advocates sometime in June 2020, the Notice of Summons inadvertently escaped the Respondent's Advocate's attention as the documents were voluminous and received vide e-mail. The Respondent's Advocates therefore inadvertently filed a Notice of Appointment of Advocates dated 8th June 2020 instead of a Memorandum of Appearance. Upon coming on record for the Respondent, the Court issued directions on the hearing of the Claimant's Application;
- iii. The Respondent filed its documents in respect of the Claimant's Application in time. The Respondent's Replying Affidavit was filed on 10th July 2020, and Submissions on 28th August 2020 as directed by the Court;
- iv. On 4th August 2020, while the parties were still attending to the Claimant's Application, the Claimant filed an Amended Memorandum of Claim thereby substantially amending his claim. At that time, the Respondent's Advocates on record was also undergoing difficulties due to the persistent waves of Covid 19 and only resumed normal operations in the month of February 2022;
- v. The Respondent, in the midst of Covid 19 pandemic, was engaged in litigating the Claimant's Application which was filed under Certificate of Urgency. The application was heard and determined on 23rd October 2020;
- vi. After the hearing and determination of the Claimant's Application, there were no directions issued with respect to the further hearing of the Claim as per the Court's custom. The Claimant also did not take any action to prosecute the matter for a very long time, neither did it set the matter down for pre-trial directions;
- vii. The advocate having personal conduct of the matter was also indisposed for two months towards the tail end of the year 2021.
- viii. There is no prejudice which has been visited upon the Claimant because of the inadvertent delay in filing the Respondent's pleadings. The Claimant failed to take any precipitate action to prosecute the matter for a long time. As soon as the Claimant took out a mention date to take directions, and served the same on the Respondent, the Respondent filed its pleadings, in order to also take directions on the hearing of the matter. The Respondent's delay in filing a Response has not affected the expeditious hearing and determination of this matter.
- ix. At the time of serving the Claimant with the Pleadings, the Claimant's Advocates did not protest the service of the Pleadings. The Claimant's Advocates only protested the filing of the pleadings on 4th February 2022.
- x. The Memorandum of Response raises triable issues that the Respondent prays for this Court to determine.
- xi. The Claimant will not suffer any prejudice if the Court extends the time and admits the Respondent's Memorandum of Response as being properly on record. The Claimant will have an opportunity to respond to the issues raised in the Memorandum of Response.



- xii. As soon as the Respondent's Advocate realized the mistake, they wrote to the Claimant's Advocate, apologizing and with a view to mutually agreeing to have the pleadings be admitted out of time. This attempt was not fruitful as the Claimant's Advocates wrote back that the Respondent's proposal was unacceptable to their client.
 - xiii. On 9th March 2022, when this matter came up for mention for directions, the Claimant raised the Objection before the Judge. The Respondent's Advocate sought to address the Court on the delay in filing the pleadings but was directed to file an application to that effect and take dates at the Registry.
 - xiv. It is in the interest of justice and fairness that this Application be allowed. The mistake of an advocate ought not to be visited on the client.
 - xv. The Claimant can be compensated for any prejudice (which prejudice is denied) by way of an award of costs in respect of this application.
2. The Application is further supported by the Affidavit of Wanjirū Ngige- Advocate and raises the same grounds as above.
 3. In response, the Claimant asserts that a notice of summons dated 14th May 2020 together with a copy of the court order was served upon the Respondent/Applicant together with the pleadings on 15th May 2020 and that the matter came up before court on 26th May 2020 for mention for further directions before Hon. Justice Radido. He states that on 26th May 2020, one Ken Melly, an advocate from Gumbo and Associates represented the Respondent/Applicant where the court ordered the Respondent/Applicant to file a replying affidavit by the 12th June 2020. He asserts that on 11th June 2020 the Claimant/Respondent's advocate received a letter dated 10th June 2020 from Mohammed Muigai LLP (firm on record) stating that they had been instructed by the Respondent Applicant to take charge of the matter and sought indulgence of a further 10 days to comply with the orders issued on 26th May 2020. It is stated that on 19th June 2022 the Claimant/Respondent's advocate did a letter to Mohammed Muigai LLP (firm on record) and Gumbo and Associates raising issues on representation of the Respondent/Applicant which letter was duly served. It is deponed that on 15th July 2020, the Claimant/Respondent's advocate received a letter dated 14th July 2020 stating that the firm of Gumbo and Associates did not enter appearance and that they had served the Claimant/Respondent's advocate with a notice of appointment on 16th June 2020 and a replying affidavit to the Application dated 6th May 2020. That the Claimant/Respondent having received no response from the court sent another letter dated 17th September 2021 to the Deputy Registrar requesting for a mention date for directions to fix the matter for hearing. The Claimant states that on 18th October 2021 the he sent the Respondent/Applicant a copy of an agreed list of issues and a letter requesting for any proposed amendments within 7 days of receipt. That having received no response from the Respondent/Applicant from the date of the email, the Claimant/Respondent proceeded to file the List of Agreed Issues on 4th November 2021. The Claimant asserts that the Respondent/Applicant proceeded to file and served their pleadings in response to the Claim on 1st February 2022 and served the Claimant/Respondent on 2nd February 2022. It is asserted the Respondent/Applicant is unjustified by stating that the Respondent's Advocates on record due to Covid-19 could not act on the matter from 4th August 2020 until February 2022 when they resumed normal operations. The Claimant asserts that filing was being done electronically during the Covid-19 pandemic and that it is inexcusable to state that the Respondent/Applicant could not comply and that they were engaged in litigating the Claimant's Application. It is asserted that there are no medical records attached to show that the advocate having personal conduct of the matter was indisposed towards the tail end of the year 2021



and that this being an employment matter, the Respondent/Applicant is not justified to claim that no prejudice has been caused to the Claimant/Respondent for their delay in filing of the pleadings. That in the spirit of justice and fairness, the Respondent/Applicant cannot purport to have acted in good faith yet they proceeded to file the documents without leave of the court and without notifying the Claimant/Respondent's advocate until the same was raised in court. The Claimant asserts the Respondent/Applicant's Application is in bad faith as the Respondent/Applicant had already filed the documents without seeking leave of the court and in the circumstances, the orders sought lack merit and the same should be dismissed with costs.

4. The Respondent seeks to have an extension of time for the filing of its response to the claim by the Claimant. Reasons advanced in the motion are inadvertence and the illness of the lawyer for the Respondent which illness has not been rebutted by the Claimant. The Court has considered the rival arguments by parties and need not rehash them as principles for grant of extension of time are well settled.
5. The Court of Appeal in the case of *Central Kenya Limited v Trust Bank Limited* (2000) 2 EA 365 held as follows:

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy so as to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side”
6. Further, the Court of Appeal emphasised the general principles under which Courts may grant leave to amend pleadings in Civil Appeal Number 147 of 1991, *Ochieng & Others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR as follows:
 - a. The power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b. The amendments should be timeously applied for;
 - c. Power to amend can be exercised by the court at any stage of the proceedings;
 - d. That as a general rule however late the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side;
 - e. The plaintiff will not be allowed to reframe his case or claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Act subject however to powers of the court to still allow amendment notwithstanding the expiry of current period.
7. The motion has been made timeously and there is explanation for the delays. There is good faith on the Respondent's part as full disclosure is made of the circumstances leading to the delay. The Respondent has therefore met the threshold under the above parameters for the grant of the orders sought. The Claimant is granted corresponding leave to file any replies he may have to the documents filed and served by the Respondent within 14 days of service. The Respondent will however pay thrown away costs of Kshs. 15,000/- to the Claimant for the motion which albeit merited, was largely due to the inaction of the Respondent. Directions as to hearing to follow the Ruling.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2022



NZIOKI WA MAKAU
JUDGE

