



**Ogolla v Maasai Mara University (Cause 59 of 2019)
[2022] KEELRC 13347 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13347 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 59 OF 2019
HS WASILWA, J
DECEMBER 1, 2022**

BETWEEN

FREDRICK OGOLLA CLAIMANT

AND

MAASAI MARA UNIVERSITY RESPONDENT

RULING

1. Before this court for determination is the respondent/applicant's notice of motion dated October 5, 2022, filed pursuant to article 159(2)(d) of the Constitution, sections 1A, 1B, 3A, 11, 18(1)(b) of the Civil Procedure Act, sections 3(1) of the Employment and Labour Court Act, order 40 rule 6 & 7, order 50 rule 1 of the Civil Procedure Rules and all other enabling provision of law, seeking the following orders; -
 1. Spent.
 2. That the honourable court be pleased to grant leave to the applicant/ respondent to file their response to the memorandum of claim and witness statement out of time.
 3. That the applicant/ respondent do file and serve its response to the memorandum of claim and witness statement within seven (7) days after leave to file out of time is granted.
 4. That the court be pleased to grant the applicant/ respondent leave to cross-examine the respondent/ claimant on the claimant's case.
 5. That the court be pleased to grant the applicant/ respondent the right to be heard and its case heard on merit.
 6. That the costs of this application be in the cause.
2. The grounds upon which the application is premised is as follows; -



- a. That pre-trial in this case was conducted on the June 23, 2022, where the advocate on record gave instructions to another advocate to hold its brief and the matter was erroneously certified ready for hearing.
 - b. That the failure to file a response to claim in this cause was occasioned by an oversight on the part of the applicant's advocates who have all along been dealing with the preliminary objection filed herein.
 - c. Upon realizing that there was no response to claim filed, the advocates for the applicant informed the claimant's advocates that it shall be seeking leave of court to file a response to claim out of time.
 - d. On September 21, 2019 when this matter was slated for hearing, the applicant's advocate Ms Moraa had a medical emergency to attend to and requested Mr Nyambega to hold his brief and request for adjournment which he did but that the court decline to grant the adjournment. That the claimant's case proceeded for hearing and was closed on the same day.
 - e. The applicant states that it is and has always been keen to prosecute its case to its logical conclusion. He added that the adjournment sought on the September 21, 2022 was the first one and thus urged this court to allow the application and give it a chance to defend this case.
 - f. He stated further that the claimant will not suffer any prejudice if the application is allowed as judgement is yet to be delivered.
3. The application is supported by the affidavit of Andrew Maina, the advocate ceased of the conduct of this matter of behalf of the applicant, which is sworn on the October 5, 2022. The affidavit basically reiterated the grounds of the application.
 4. The application is opposed by the claimant, Prof Fredrick Ogolla, who swore a replying affidavit on the October 26, 2022. According to the respondent, this case was mentioned in court on the June 23, 2022 where both parties were represented and hearing slated for September 21, 2022.
 5. He avers that this matter had initially been mentioned before this court and the applicant failed to appear on several occasions, causing delay in the hearing and final disposition of this matter.
 6. He also took issue with the fact there is no evidence to affirm the allegation that Mr Moraa's young member was unwell on the very day the suit herein was proceeding for hearing, therefore that the reason for failing to proceed with hearing is unfounded.
 7. He urged this court to disallow the application and proceed to deliver the judgement as earlier slated.
 8. The application was disposed of by way of written submissions with the applicant filling on the November 7, 2022 and the respondent on the November 11, 2022.

Applicant's Submissions.

9. The applicant identified three issues for determination; whether the applicant/ respondent should be granted leave to file their response to the memorandum of claim and the witness statements out of time; whether the applicant should be granted leave to cross examine the claimant and whether it should be granted leave to be heard on its case.
10. On the first issue, it was submitted that the applicant's advocate had unforeseen emergency which made her seek for adjournment. He argued that section 95 of the *Civil Procedure Act* as read with order 50 rule 6 of the *Civil Procedure Rules* gives this court powers to enlarge time to allow for the filling



of the defence and supporting documents therein. Moreover, that section 3(1) of [Employment and Labour Relations Act](#), provides for objectives of this court to include, just, expeditious, proportionate and affordable resolution of disputes. To further reinforce that point, they cited the case of [Vivian Muia v Mzoori Limited](#) [2017] eKLR where this court held that;-

“That notwithstanding in consideration of the provisions of article 159(2) (d) of the Constitution that “justice should be administered without undue regard to procedural technicalities”, it is the duty of this court to administer substantive justice. Though the defence was filed out of time it would be beneficial for both parties if this court were to consider it in order to determine this matter substantively. I will therefore allow the defence filed to be properly filed and on record and the claimant can now file any response within timelines allowed under the rules.”

11. Also in [Salome Maina v Chief Officer Dept of Education, Laikipia County Government](#) [2018] eKLR, the court held that;-

“... In the interests of justice as guided by article 159 of the Constitution, the court will grant leave to the respondent to file their documents. The said documents must be filed and served within 14 days of this Ruling failing which the matter will proceed as an undefended cause.”

12. On whether the applicant should be granted leave to cross examine the claimant, they relied on the case of [Henry Wasike Tumbu V China Jiangxi International \(Kenya\) Limited](#) [2017] eKLR where the court held that;-

“The primary duty of this court is to dispense justice. The court also has a role to ensure access to justice and therefore it would not be in the interest of justice to lock out the respondents at this time having filed a response.”

13. It also relied on the case of [Law Society of Kenya v Faith Waigwa & 8 others](#) [2015] eKLR , where the court gave the importance of cross examining witnesses and held that;-

“Let me once more restate the rationale of cross-examination of witnesses. First, it is a mechanism which is used to bring out desirable facts to modify or clarify or to establish the cross-examiner’s case. In other words, cross-examination is meant to extract the qualifying facts or circumstances left out by a witness in a testimony given in examination in chief. Secondly, the exercise of cross-examination is intended to impeach the credit worthiness of a witness.”

14. On that basis, the applicant urged this court to allow it cross-examine the claimant in order to bring clarity to the case before court to deliver justice for both parties.

15. On whether leave should be granted to defend this claim, the applicant urged this court to be persuaded by the principle of natural justice, ‘audi alterem partem’ and provisions of article 50 of the [Constitution](#) on the right to fair hearing and allow the application so that their case may be heard in court. To support this, he relied on the case of [Douglas Wambua Mutula v Kenya Ports Authority](#) [2020] eKLR where the court held that; -

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

16. In pleading with the court to allow the application, the applicant submitted that, it was the first time the matter was coming up for hearing and also that it was the first time, it sought for an adjournment, he thus prayed for the court to exercise its discretion and allow the application as prayed.

Respondent’s Submissions.

17. The respondent on the other hand submitted on only two issues; whether the application is merited and who should bear costs of the application.
18. On the first issue, the respondent relied on the Supreme Court decision in *Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others* (Application 12 (E021) of 2021) [2022] KESC 3 (KLR) where the apex court gave the guiding principles with regards to applications for extension of time as follows;
- a. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
 - b. A party who sought for extension of time had the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, was a consideration to be made on a case-to-case basis;
 - d. Whether there was a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there would be any prejudice suffered by the respondents if the extension was granted;
 - f. Whether the application had been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
19. On that basis, the respondent submitted that the applicant had ample time to file a response to claim and supporting documents from 2019 when this suit was instituted. He argued that section 13(1) of the *Employment and Labour Relations Court Rules*, 2016 gives respondent 21 days to file the said response. Therefore, that there is inordinate delay on the part of the applicant and to allow this application will further delay this claim that has been in the system from 2019. To support this position, he relied on the case of *Rayat Trading Co Limited V Bank of Baroda and Tetezi House Limited* [2018] eKLR where the court held that; -

“It’s an old adage that, justice delayed is justice denied and that justice is weighed on a scale that must balance. Therefore, as much as the court is obligated to promote the provisions of article 159(2) (d) of the Constitution of Kenya, 2010 and uphold substantive justice against technicalities, the law must protect both the applicant and the judgment creditor for justice to be seen to be done... In the same vein the provisions of section 1A and 1B of the Civil Procedure Act obligates the parties assist the court in the expeditious disposal of cases.”

20. Similarly, that the preliminary objection raised by the applicant was dismissed on October 21, 2021 and the court directed the applicant herein to file their response to the claim within 14 days, which the failed. Therefore, that the excuse given for failing to file a defence is an afterthought.



21. The respondent also argued that the application herein is an omnibus application with a mongrel of prayers governed by different provisions of the law, practice and procedure and judicial principle and are incapable of any proper response or adjudication, making the application incurably defective and a candidate for dismissal. In this he relied on the case of *Rajput v Barclays Bank of Kenya Limited and 3 others* [2013] eKLR.
22. On costs of the application, the respondent submitted that costs of this application should be borne by the applicant and they suggested to be paid throw away costs of Kshs 50,000.
23. I have examined all the averments and submissions of the parties. The applicants have submitted that they have been willing to defend this case and requested the court to allow them file their defence out of time.
24. For the reason that a man should not be condemned unheard, I allow the application sought to allow the applicant respondents file their defence out of time and in any case within 3 days.
25. The respondent will be allowed to cross-examine the claimant.
26. The respondent will pay claimant's thrown away costs of 20,000/= before the next hearing date.
27. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 1ST DAY OF DECEMBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Miss Lyonah holding brief for Maina for respondent/applicant – present

Awuor for claimant – present

Court Assistant – Fred

