REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 106 OF 2020

CHRISTINE WAMBUI KAGAI.....CLAIMANT

VERSUS

1. LANGATA HOTEL DEVELOPMENT LIMITED

2. THE TAMARIND GROUP

3. TAMARIND TREE HOTEL

4. TAMARIND MANAGEMENT LIMITED.....RESPONDENTS

RULING

1. The Application by the Respondents is one seeking the extension of time to file response and in the alternative to have the memorandum of response dated 15th December 2020 be deemed to be properly on record. It seeks that the orders of 16th December 2020 directing the cause to proceed as an undefended cause be set aside for the reason that by the time the order was issued a defence had been filed. The case of **Salome Maina *v* Chief Officer Laikipia County [2018] eKLR** was cited in support of the arguments by the applicant.

2. The Respondents/Applicants' advocate argues that the Claimant will also have a right of reply and can challenge the defence and testimony and can further get costs for the delay and therefore no prejudice will be suffered. He argues that the Response the Respondent has filed raises triable issues that the Court should consider the same in order to come up with a just and factual decision. He submits that they should be allowed to ventilate the merits of the case. The Respondent relies on the case of **Toshike Construction Company Limited *v* Harambee Co-operative Savings & Another [2019] eKLR** where the Court of Appeal cited the case of **Sebei District Administration *v* Gasyali (1968) EA 300** with approval. Counsel for the Applicant submitted that the nature of the application should be considered and the defence brought however irregularly. He argued that a court should remember that denying a subject hearing should be the last option of a court. He cited the case of **Kiai Mbaki & 2 Others *v* Gichuhi Macharia & Another [2005] eKLR** and argued that the right to be heard is a valued right and it would offend the right if it is denied without grant of opportunity to be heard. The Respondent submitted that justice requires they be allowed to ventilate their cause despite delay. Counsel for the Respondents/Applicants further submits that as per Article 159 the Court should allow thus by finding without undue regard to procedure and prayed the Court applies the Oxygen Principle. The Respondent referred to social justice hat of the court and argue that to condemn the employer without hearing in proving the procedure in termination would be injustice. The Respondent prayed that the Motion be allowed and defence be deemed on record to allow the case to proceed on merit.

3. The Claimant was opposed and reiterated the objections to the grant of the order. Counsel for the Claimant/Respondent in response stated that the Court should inquire if there is requisite jurisdiction to set aside or vary orders granted in open court upon hearing both Counsel. He submitted that the Court rendered its decision on 16th December 2020 after an application for case to proceed to formal proof. Counsel submitted that under the provision of Rule 15(d) Employment and Labour Relations Court (Procedure) Rules 2016, the Claimant is required to make an application to court to allow cause to proceed to formal proof where Respondent fails to file Memorandum of Response under the Rules. The Claimant submitted that this is well captured in their Preliminary Objection dated 12th February 2021 where they argue that the court is *functus officio* having pronounced itself on whether or not the case to proceed on formal proof. The Claimant's Counsel submitted that the Court cannot sit on appeal of its own decision. He submitted that in the case of **Shakila Begum Ali (as personal representative of the Estate of the Late Mehboob Mohamed Abdul Gafoor Mohamed Mulah also known as Mehboob Mohamed Abdulgafoor and Mehboob Mullah) *v* Vescon Properties Limited & Another [2019] eKLR Mombasa ELC 171 of 2017** where the court held that upon hearing both parties in an application for dismissal for want of prosecution it was rendered *functus officio* and could not be in a position to entertain reinstatement and the said court then invited review or appeal against the decision. He referred to the case of **Chacha Mwita Mosenda *v* Baya Tsuma Baya & 2 Others [2017] eKLR Malindi HC Civil Appeal No. 23 of 2014** which Counsel submitted shows the principles that show a court being *functus officio*. He submitted that having become *functus* the Court should dismiss the Respondent's application. He further submitted that even if the Court is vested with requisite jurisdiction to hear the Motion, the application has not met the threshold for the Court to exercise discretion to allow filing of response out of time. He submitted that upon a perusal of the Applicant's

application the Court should find there is no excusable mistake and or compelling reason for the court to exercise this discretion. He submits that para 8 of the Replying Affidavit by the Claimant captures the event that led to the orders given to proceed to formal proof and invited the Court to look into the said paragraph. He also notes that the matter has previously been mentioned in court and the mention notices served on the Respondents' advocates and that on both occasions the said advocates appeared, they sought leave of court to file their response. That the Respondents should have taken advantage of the online filing system despite the assertion that their client's offices were closed and that court will note that they served on 16th April 2020 a letter requesting for fixing of the Cause for Mention. He further submits that it is upon the Applicant to demonstrate and prove to the satisfaction of court the reason for the delay and for Court to have its jurisdiction invoked. The Claimant submits that the Respondents/Applicants have generally been indolent and not keen in defending the case before court and that it should not hide under the curtain of Article 159(2) of the Constitution which is only available to a party that has demonstrated reasons beyond its own control. He argues that the Claimant has already suffered prejudice because of the time and time again beseeching for leave to file and extension granted despite there being no provision in the Rules. That it is not unlawful for Court to proceed to formal proof as courts have done so where defence is struck out.

4. In a rejoinder, Counsel for the Respondents/Applicants submits that the Court has inherent jurisdiction which ensures the ends of justice are met. The Counsel submitted that Rule 13(5) provides power to extend the time a party may respond and that it is not correct to say there is no authority to extend. They assert that Covid-19 caused closure and pray that the Court takes cognisance of it. He argues that in the case cited on the list of 15th February, the court went ahead to allow the filing of defence and he reiterates that the requirement for grant of Motion has been met.

5. The Respondents' motion being one that seeks the interposition of the Court in the intended formal proof, it is vital to consider the challenge by the Claimant which is to the effect that the Court is *functus officio* having rendered its determination that the suit was for formal proof. At the date directions were given, the Court stated thus *as defence was filed out of time and without leave it is struck out. Parties should seek leave where such delay occurs. In the premises, suit to proceed to formal proof on 2nd February 2021.* As can be gleaned from the foregoing, the suit did not proceed to formal proof. Is a Court *functus officio* upon pronouncing itself at the stage of directions? Black's Law Dictionary Tenth Edition defines *functus officio* as *"[having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."* In my determination that the case was to proceed to formal proof, this Court was not *functus officio* as it is still seized of the suit and has yet to perform its duties. The functions of the Court were not to pronounce the directions the case was to take but to hear and determine the suit. This is yet to happen and as such the Court is not *functus officio*.

6. The Respondents' motion is therefore for consideration having surmounted the jurisdictional challenge. The Respondents' have filed a defence. Applying the principles enunciated by the Court of Appeal in the case of **CMC Holdings Limited *v* Nzioki [2004] 1 KLR 173**, where the Court of Appeal considered the grant of discretionary orders to set aside, the learned judges of appeal, Tunoi, O'Kubasu JJA, Onyango Otieno Ag. JA (as they then were), held as follows:-

> 1. In an application before a court to set aside an ex parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and judiciously.
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> 2. On appeal from the decision, the appellate court would not interfere with the exercise of the discretion unless such discretion was exercised wrongly in principle or the Court acted perversely on the facts.
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> 3. In law, the discretion on whether or not to set aside an ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error.
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> 4. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.
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> 5. In the instant case, the trial magistrate did not exercise her discretion properly when she failed to address herself to a matter which might have very well amounted to an excusable mistake visited upon the appellant by its advocate.
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> 6. In an application for setting aside ex parte judgment, the Court must consider not only the reason why the defence was not filed or why the appellant failed to turn up for the hearing, but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed raised triable issues. (emphasis mine)

7. The Respondents have filed a defence which defence raises triable issues. In that regard and the fact that the Court's discretion is to be so exercised so as to excuse the conduct of the Respondent which is an excusable mistake, inadvertence, accident or error. There was inadvertence in strict compliance with the directives to file and as a result the Respondents can be mulcted in costs which I assess at Kshs. 20,000/- payable to the Claimant's Counsel within 14 days of today. The Respondent is also to file a fresh defence as the Court takes the previous defence which was struck out as the draft defence. The said defence to be filed within 7 days of this Ruling. Any failure to comply with the directive on costs or filing the defence as above will mean that upon the cause coming for directions on 14th April 2021 if there is non-compliance by the Respondents then the suit will proceed as undefended.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH 2021

NZIOKI WA MAKAU

JUDGE