



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 300 OF 2020 (E015 OF 2020)

ANNE KAROKI.....CLAIMANT

VERSUS

THE KENYA HOSPITAL ASSOCIATION

T/A THE NAIROBI HOSPITAL.....RESPONDENT

RULING

1. The applicant filed Notice of Motion application dated 24/2/2021 seeking for an order in the following terms: -

(i) Spent

(ii) Spent

(iii) That this Honourable Court be pleased to set aside the exparte proceedings of 14th October, 2020, 16th November, 2020 and 25th January, 2021 and all other proceedings and/or orders consequential therefrom.

(iv) That the Respondent's statement of Response dated 4/12/2020 and filed in Court on 27/1/2021 be deemed as properly filed.

(v) That in the alternative the Respondent be and hereby granted leave to file its witness statements, supporting documents and submissions so that it is not denied chance to defend itself.

2. The application is premised on grounds set out on the face of the notice of motion and in the supporting affidavit of John Murimi Njomo, the advocate on record and in conduct of this matter.

3. The respondent's advocate deposes that he was instructed by the respondent on this matter on 17/11/2020 and proceeded to enter appearance in the matter on 17/11/2020 but same was reckoned by the E-filing system on 26/11/2020. That service of Memo of Appearance was done on the Claimant's Advocate on 26/11/2020.

4. That it took time to obtain proper instructions from the defendant, being a large corporate in order to file a defence and obtain relevant documents and witness statements.

5. That the matter was complicated by the COVID – 19 now obtaining in the Country especially in view of the fact that the respondent is a hospital whose operations are greatly affected by the pandemic.

6. That the advocate subsequently learned that the matter was mentioned before the Deputy Registrar on 14/10/2020 and before the Judge on 16/11/2020 a day before the advocate received instructions to come on record.

7. That the matter was subsequently mentioned on 25/1/2021 before the Judge but the advocate for the claimant did not serve the respondent with the mention notice despite having been served with the Memorandum of Appearance.

8. That the statement of Response was filed on 27/1/2021.

9. That the delay in filing was not intentional but was due to the aforesaid difficulties in obtaining instructions.

10. That failure by the claimant's advocate to serve the respondent with mention notice was highly prejudicial to the Respondent.
11. That the claimant will suffer no prejudice if the prayers sought are granted that cannot be remedied by an order for costs.
12. That it is in the interest of justice and in line with Article 50 of the Constitution of Kenya, 2010, that the respondent be heard before the matter proceeds to judgment.
13. The Court directed the claimant/respondent to file a replying affidavit to the application within 7 days from 3/3/2021.
14. There is no response to the application on record nor is there evidence on record that the applicant served the advocate for the claimant with the court Order dated 3/3/2021 made in the absence of the claimant's advocate giving directions aforesaid.
15. Furthermore, the allocated mention date on 25/3/2021 fell on Easter Vacation and so the Court did not sit, even though a general notice was issued by the Deputy Registrar regarding matters that had erroneously been listed during Easter Vacation.
16. The above notwithstanding, the Court has considered the merits or otherwise of the application by the Respondent/Applicant and has come to the finding that; it would be in the interest of justice to give the Respondent/Applicant, who has since filed a defence to the suit opportunity to be heard before the matter proceeds to judgment.
17. This ruling is in line with the dictates of Article 50 of the Constitution which provides

“(i) 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 court or, if appropriate another independent and impartial tribunal or body.”

18. Furthermore, the prayers sought are discretionary in nature and the Court in exercising that discretion has taken into consideration that the application was brought without inordinate delay from 25/1/2021 when the Court concluded the process of formal proof and directed that Exparte judgment be delivered on 31/3/2021, a date which also fell during Easter Vacation and so the said judgment was not delivered.
19. Before the 31/3/2021 the Court had already on 3/3/2021 given direction with regard to the present application.
20. The Court has also considered the likely prejudice the claimant is likely to suffer if the application is granted despite absence of a replying affidavit by the claimant.
21. In the final analysis, the Court has deemed it fair and just to allow the applicant opportunity to be heard before a judgment is rendered by the Court in the matter.
22. The Court deems the alternative prayer sought by the Respondent/Applicant appropriate in the circumstances of the Court and makes the following orders: -
 - (a) The honourable Court sets aside its orders issued on 16/11/2020 and 25/1/2021 only to the extent that the suit was to proceed to formal proof in the absence of the respondent and that Exparte judgment be delivered in the matter.
 - (b) Notwithstanding Order (a) above, the Affidavit Evidence and submissions filed by the claimant are deemed to be properly filed. The same be served on the respondent within 7 days of this Ruling.
 - (c) The respondent to file in terms of prayer 5 of this application its witness statements in Affidavit form and list of documents and final submissions within 14 days of this Ruling.
 - (d) Directions to be taken as to the need to cross-examine any of the witnesses in this matter on 17th may 2021.
 - (e) Costs in the cause.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 of the Civil 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Jomo for Respondent/Applicant

Mr. Kago for Claimant/Respondent

Ekale – Court clerk.