



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 788 OF 2015**

**MAURICE OMONDI RAKIRA.....CLAIMANT**

**VERSUS**

**LOAD TRAILERS EAST AFRICA LIMITED.....RESPONDENT**

**RULING**

1. The Notice of Motion application dated 11/5/2020 seeks for orders that:-

(a) Spent

(b) Spent

(c) This Honourable Court be and is hereby pleased to set aside the orders issued on 21/7/2016 for this matter to proceed for hearing as an undefended cause.

(d) This Court be and is hereby pleased to grant leave to the Respondent to file its memorandum of Response out of time.

2. The application is premised on grounds set out in the Notice of motion and in the supporting affidavit of Jagdeep Singh Bhachu which may be summarized that the applicant failed to file a response because summons and pleadings were received by its receptionist who never conveyed the same for action by the Respondent's management.

3. That the Respondent has a viable defence which raises triable issues and since the hearing is yet to commence, no prejudice will be suffered by the claimant since he still has opportunity to file a reply to the Memorandum of Response and to canvass the suit on the merits.

4. That it is in the interest of justice that the Respondent is not condemned unheard.

5. The respondent filed replying affidavit in opposition to the application and deposes that the applicant was duly served with summons dated 16/2/2016 together with Memorandum of Claim on 15/3/2016 but have since then failed to enter appearance or file their defence despite the claimant serving them with various mention notices and invitations to fix a hearing date.

6. That on 10/6/2016, the claimant served the applicant with mention notice dated 18/5/2016, for mention on 21/7/2016. That the applicant failed to attend the mention and the Judge proceeded to give directions that the matter shall proceed as undefended cause and a date to be fixed at the registry.

7. The applicant was further served with a mention date for 9/4/2019 but the defendant again failed to attend. This mention was to confirm compliance with pre-trial matters and the Court ordered the matter to proceed to formal proof.

8. On 2/10/2019, both parties were served with Court summons to attend Court on 4/10/2019 for allocation of hearing date during service week. The Respondent failed to attend Court despite knowledge of the said mention date and hearing date of 4/12/2019 was allocated to the claimant.

9. The matter did not proceed on 4/12/2019 as the judge was not sitting and a new hearing date was set for 23/1/2020.

10. On 23/1/2020, when matter came up for hearing the Applicant did not attend and the judge was again not sitting.
11. The matter was allocated a fresh hearing date of 25/3/2020. The matter could not proceed due to COVID-19 pandemic and was allocated 1/7/2020 for hearing. Courts were closed and the matter has not proceeded to-date.
12. On 29/5/2020, five (5) years down the line, the firm of Kariuki Kiplang'at Lesaigor and Associates served the claimant with a notice of appointment of advocates together with Certificate of Urgency and a notice of motion application alleging that failure to file their defence was occasioned by their company's receptionist.
13. That the Applicant has had knowledge of this suit and is guilty of indolence and equity cannot now avail him any relief.
14. That it is clear the respondent was all along aware of the proceedings but chose to ignore the same and the application before Court is a gimmick to abuse Court process and unlawfully prolong the determination of the suit. That the application be dismissed.
15. In the HCCC at Nairobi, **Agigreen Consulting Corporation Limited –vs- National Irrigation Board [2020] eKLR, Majanja J.** opined thus at paragraph 5 of the Ruling:-

**“(5) The manner of service of summons on a Corporation is set out in order 5, rule 3 of the Civil Procedure Rules which states as follows:-**

**(3) Subject to any written law, where the suit is against Corporation, the summons may be served-**

***(a) On the Secretary, director or other principal officer of the Corporation; or***

***(b) If the process server is unable to find any of the officers of the Corporation mentioned in rule 3(a)-***

*(i) by leaving it at the registered office of the Corporation;*

***(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the Court to the registered postal address of the Corporation; or***

*(iii) if there is no registered office and no registered postal address of the Corporation, by leaving it at the place where the Corporation carries on business or*

***(iv) by sending it by registered post to the last known postal address of the Corporation, (Emphasis mine)”***

16. Order 5 rule 3 of the Civil Procedure Rules is replicated verbatim under Rule 12(1) (a) (b) and (2) of the Employment and Labour Relations Court (*procedure*) Rules, 2016 which rules are applicable to this matter.

17. The learned judge then stated that from the a foregoing rule, summons must, in the first instance be served **“on the Secretary, Director or other Principal officer of the corporation.”** before resorting to other modes of service.

18. The affidavit of service dated 29<sup>th</sup> April, 2016 by one Geoffrey Amani a duly authorized process server of the High Court of Kenya states that upon receipt of Notice of Summons together with Memorandum of Claim from M/s Namada & C0. Advocates with instructions to serve the same upon Load Trailers E.A. Limited on the same day, he proceeded to the company premises along Road ‘B’ Enterprise road, Nairobi and served a copy of the aforesaid *“Notice of Summons together with the Memorandum of Claim upon Mrs Michelle, the company’s Secretary of the said firm who acknowledged service by retaining a copy thereof.”*

19. The applicant has not disputed the aforesaid particulars by the process server nor has the applicant sought to cross-examine the process server.

20. The applicant has also not denied having on stated diverse dates been served by the Advocates for the claimant with various mention and hearing notices in respect of which Affidavits of Service indicating that the applicant corporation was duly served have been filed before Court. Example of such affidavits of service were filed on 2017/2016; 9/4/2018; and 25/9/2019 by the various process servers and the Deputy Registrar respectively.

21. The applicant has again not sought to cross-examine the named process servers.

22. This application was filed on 13/5/2020 more than five (5) years from the date the suit was filed on 12/5/2015 and service of summons and memorandum of claim served on the corporation on 15<sup>th</sup> March, 2016 about four (4) years ago.

23. The applicant has not proffered any justifiable reason why it has failed to file a Memorandum of response to the claim to date. Indeed no draft memorandum of claim is attached to the application to demonstrate that the applicant has a viable defence to the suit presenting triable

issues before the Court.

24. The Court has a discretion to enlarge the time for filing defence to the suit but the burden of proof is on the applicant to demonstrate that the delay to file the defence was caused by a reason beyond their control and that as soon as the defendant became aware of the suit, they approached Court without any further delay.

25. The applicant in the present case has failed to discharge that onus for the Court to unlock its discretion to allow filing of the suit out of time.

26. It is apparent that the applicant ignored several notices for mention and hearing of the case and only instructed an advocate in the matter at the time of filing this application.

27. It is the finding of the Court that enlarging time to file defence more than five (5) years down the line will be prejudicial to the claimant/respondent who has gone to every extent to notify the indolent applicant of this matter, but the applicant has inordinately slept on its right. The threshold established by the Court of Appeal for the Court to excise its discretion in favour of an applicant seeking enlargement of time in James **Kanyiita Nderitu & Another –vs- Marios Philotas Ghikas & Another [2016] J eKLR** has not been met by the applicant in the present case. The applicant has not demonstrated an excusable mistake, inadvertence, accident or error. This is a clear case of blatant disregard of the Court process so as to deliberately delay conclusion of this matter.

28. The application is dismissed with costs in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MAY, 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 15<sup>th</sup> 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. Kariuki for Respondent/Applicant

Mr. Namada for Claimant/Respondent

Ekale – Court clerk.