



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA

AT NAIROBI

CAUSE NO. 863 OF 2019

ANN WANGARI OWUOR.....CLAIMANT

VERSUS

ARTCAFFE & BAKERY LIMITED.....RESPONDENT

RULING

1. What is before me is the preliminary objection by the Claimant to the Respondent's Memorandum of Reply on the grounds that the memorandum of reply was filed out of time and without seeking leave of Court prior to filing as provided under Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules 2016. The Claimant prays that the said Memorandum of Reply be struck out with costs to her.

2. In response, the Respondent filed its Replying Affidavit sworn on 23rd February 2021 by its HR Manager, Virginia Mbiriri in opposition to the Claimant's objection. Notably, Ms. Virginia's Affidavit is also sworn in support of the Respondent's Application for extension of time to file and serve the Memorandum of Reply. She avers that the Respondent was served with pleadings in the suit on 9th January 2020 and it then instructed its Advocates, Messrs. Oraro & Company Advocates, to represent it on the same. That the said Advocates then filed a Memorandum of Appearance on 16th January 2020 and after 10 months, they filed a Memorandum of Reply on 23rd November 2020 which was served upon the Claimant's Advocates on 24th November 2020. She avers that they were unable to instruct their Advocates on record to file a response within the requisite statutory period because the Respondent required more time to investigate and understand the relevant documentation required in the suit so as to fashion an appropriate response to the same if need be, and given the large number of matters they deal with on a daily basis. That the delay was further worsened by the current COVID 19 pandemic which occasioned the closure of various branches of the Respondent and placement of a large number of its workforce on unpaid leave; thereby frustrating the efforts by the Human Resource Department to locate the relevant documentation and information relating to the suit.

3. She further avers that as soon as their operations normalized and were able to instruct their Advocates on record in mid-September 2020, they could not secure a witness who had by that time left employment with the Respondent. That when the matter came up for pre-trial mention before the Deputy Registrar on 28th September 2020, the Respondent verbally sought extension of time to file its Memorandum of Reply within seven (7) days and the Deputy Registrar directed that the matter be placed before the trial Court on 21st October 2020 for said orders. That the matter was thereafter mentioned before the Deputy Registrar two other times in October 2020 during which period the Respondent's Memorandum of Reply was ready. That after filing its Reply the Respondent saw it prudent to seek leave of court at the future mention so as to have the pleadings properly on record. She avers that this Honourable Court has the discretionary power to extend time upon which a party may respond to a pleading while considering the factors that occasioned the said delay. Further, that it is in the interests of justice that this Honourable dismisses the Claimant's Notice of Objection.

4. She deponed that when the matter came before Court for Directions on 16th February 2021, the Respondent's advocate stated that they had sought to place the reply on record and the Claimant filed a response albeit in protest to the same. She stated that they took time to file a reply to the claim due to a restructure process as the HR was not able to give a reply. That if the Court was to hear the objection by the Claimant, the Respondent seeks for its Memorandum of Reply to be deemed properly on record under Rule 13(5) of the Court Rules. In response, the Claimant's advocate argued that there was no application for extension of time and that the Court can only hear the objection. This Honourable Court then gave directions that the Objection be canvassed by way of submissions.

5. It is the Claimant's assertion that the Judge did not sit on 21st October 2020 as expected. It was submitted that the Deputy Registrar directed the Respondent to tender its request for extension of time to file the response to the Judge. The Claimant submitted that the Respondent thereafter filed a Memorandum of Reply on 23rd November 2020 and out of time and without leave. The Claimant/Applicant submitted that having been served with a response which was filed out of time and there having been no application for extension of time,

she filed a Notice of Objection on 30th November 2020 pursuant to Rule 14(5) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides: "A party may, by notice, object to a pleading stating grounds of objection except that no objection may be raised to any pleading on the ground of any want of form."

6. The Claimant further submitted that since summons were served on 9th January 2020, the Respondent had until 30th January 2020 to lodge and serve a statement of response and which date was well before the Corona Pandemic set in one and a half months later causing closure of Courts on 15th March 2020. That the delay to file a response cannot thus be blamed on the Corona Pandemic and that the period between 15th March 2020 and 23rd November 2020 when the response was filed constitutes inordinate delay. Further, that Courts continued to function albeit electronically and which is how the Claimant was able to file a request that the matter proceeds to formal proof in view of the lack of response from the Respondent. She relies on the case of **Salome Maina v Chief Officer Department of Education - Laikipia County Government [2018] eKLR** where this Honourable Court in an application for extension of time, cited the holding by the learned Judges of the Supreme Court (Ibrahim SCJ & Wanjala SCJ) in relation to the principles for consideration by Court in such an application as follows:

- i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;*
- vi. Whether the application has been brought without undue delay; and*
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

7. The Claimant further submitted that because there was no application for extension of time before the Court, time cannot be extended as a matter of course. She relies on the case of **John Ongeri Mariaria & Others v Paul Matundura, Civil Appeal No. 2013 of 2008** (cited by Kasango Ag. Judge (as she then was) in **Kinyua T/A Citadel Freighters & Another v Kenya Commercial Bank Ltd & Another [2004] eKLR**) where O'Kubasu J.A opined that the court's unfettered discretion like all judicial discretion must be exercised upon reason and not capriciously and that even sympathy alone would not assist a party. It was submitted that the learned Judge further stated that justice must look both ways as the rules of procedure are meant to regulate administration of Justice and are not meant to assist the indolent. The Claimant thus urged the Honourable Court to sustain the objection and direct that the matter is undefended and should proceed for formal proof as requested in their letter of 6th July 2020.

8. The Respondent submitted in support of its oral application for extension of time made on 28th September 2020, 26th January 2021 and 16th February 2021 under Rule 13(5) of the Employment & Labour Relations Court Rules that it fully adopts the Replying affidavit dated 23rd February 2021. The Respondent submitted that under Rule 13(5) this Court is empowered to extend or reduce the time within which a responding party may respond to a pleading on an application by any party to the proceedings. The Respondent cites the Supreme Court case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** where the learned Justices rendered themselves that it is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. As to whether there are reasonable grounds for the delay, explicable to the satisfaction of this Honourable Court, the Respondent submitted that it has duly explained in the Replying Affidavit dated 23rd February 2021 the reasons for the delay of 10 months and further shown that it made oral applications for extension of time through its advocates on record. It thus implores this Honourable Court to excuse the extenuating circumstances occasioned to it and allow its application for extension of time and deem the Respondent's Memorandum of Reply as properly filed, served and part of the Court's record. As to whether there will be any prejudice occasioned to the Claimant, the Respondent submitted that there shall be no prejudice occasioned to the Claimant as she has already filed a response to the Memorandum of Reply dated 27th January 2021, thus indicating their willingness to proceed with the hearing of the matter.

9. The Respondent submitted that it has the right to be heard as couched under Article 50(1) of the Constitution of Kenya. It cited the case of **Douglas Wambua Mutula v Kenya Ports Authority [2020] eKLR** where the Court while placing reliance on authorities affirmed that to deny a party the opportunity to be heard should be an action of last resort and therefore the right to be heard ranks high up. It further submitted without prejudice to the foregoing that in any event the delay caused is curable through the awarding of costs to the Claimant as was demonstrated in the cases of **Douglas Wambua Mutula v Kenya Ports Authority (Supra)** and **Fat-Hi Ghalib Athman Basheikh v First Community Bank Limited [2019] eKLR**. The Respondent thus urged this Honourable Court to dismiss the Claimant's Notice of Objection filed on 30th November 2020 and to allow the Respondent's oral applications to have the Memorandum of Reply deemed properly on record.

10. In the Employment and Labour Relations Court, the applicable procedure for extension of time is Rule 13(5) of the Employment & Labour Relations Court (Procedure) Rules 2016. Rule 13(5) provides as follows:

- (5) The Court may, on application by a party to any proceedings, extend or reduce the time within which a responding party may respond to a pleading.*

The Respondent sought extension of time before the Deputy Registrar on 21st October 2020. The Deputy Registrar having no power to extend time granted the provisions of Rule 13(5) above, the matter finally made its way before me whereat the Respondent renewed its

application to extend time. Rule 13(5) does not prescribe the mode of seeking the extension and only provides that the Court may, on application by a party to any proceedings, extend or reduce the time within which a responding party may respond to a pleading. The Respondent has attempted to explain the delay and though the first reason fails the test for accuracy, the fact that the Respondent had no witness to depose to the facts that it wished to bring forth in response, some degree of plausibility is found to allow the extension sought. However, granted that there was a slight delay in moving the Court, the Respondent will meet the costs of the motion which I assess at Kshs. 20,000/-. Matter shall be placed for directions for pre-trial purposes on a date to be agreed shortly after this Ruling.

It is so ordered.

Dated and delivered at Nairobi this 2nd day of June 2021

Nzioki wa Makau

JUDGE