



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC CAUSE NO. 470 OF 2017**

**ROSE MATUNDA.....CLAIMANT**

**-VERSUS-**

**HI-TECH OPTICIANS.....RESPONDENT**

**RULING**

1. This ruling is in respect of the Respondent/applicant's undated application filed in this court on 23<sup>rd</sup> October, 2018 via the firm of Aminga, Opiyo, Masese & Company Advocates pursuant to section 3A and 95 of the Civil Procedure Act and all other enabling provisions of the law, seeking the following orders;

- a) That leave be granted to the Respondent to file its statement of response, list of documents, list of witnesses and accompanying witness statements respectively, out of time.
- b) That the Respondent's statement of response dated 10<sup>th</sup> August, 2018, list of documents, list of witnesses and accompanying witness statements all dated 27<sup>th</sup> August, 2018 and filed herewith be deemed as duly filed and served.
- c) That the costs of this Application be in the cause.

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 23<sup>rd</sup> October, 2018 by **Jayaram Ankala**, the director of the Respondent and based on the following grounds: -

- (a) That, the Respondent advocate was instructed to act for the respondent sometimes December, 2017 who filed a Memorandum of Appearance on 21<sup>st</sup> December, 2017 however they did not file a response to the Memorandum of claim as the relevant officers were away at the time and that the Respondent did not have full instructions to direct the advocate to file a response.
- (b) That the director of the Respondent who was to give instruction extended his stay abroad in India and Uganda and only visited the Country sometimes in July, 2018.
- (c) That he was not aware of what is required of him in a suit and that he left the country after giving his advocate the Pleadings served upon him without any other instructions.
- (d) That he has been away from Kenya for a while and in August 2018 while going through correspondences he stumbled upon one from his advocate summoning him to his office which he acted upon and visited the advocate who informed him that they required to file responses to the claim herein.
- (e) That they worked round the clock to prepare the said documents and since time to file the said documents had lapsed, he was informed that they ought to seek leave of court to file the same which they now do.
- (f) That the delay is excusable and that he is desirous to have this suit heard on merit and therefore prayed that they be allowed to file their responses and documents.
- (g) He alleged that there is no prejudice that will be visited upon the claimant if the application herein is allowed.

3. In opposing the application, the Claimant **Ms.Rose Nyaboke Matunda**, swore a replying affidavit dated 23<sup>rd</sup> January, 2019 and filed in this Court on even date on the following grounds;

- i. That the application is devoid of merit and an abuse of court process only meant to delay the determination of the claim herein.
- ii. That the summons to Enter appearance and all pleadings were served upon the respondent on 11<sup>th</sup> December, 2017 and the Respondent failed file a response within the requisite time frame till time lapsed.
- iii. That on 10<sup>th</sup> April, 2018 the Respondents advocate was served with a mention Notice to appear before Court but he failed to attend Court.
- iv. That the allegation of the Respondent that the director was abroad is not backed up with any evidence of travel itinerary.
- v. He stated further that the allegation by the respondent that he did not know the procedure in defending a suit is baseless as ignorance of the law is no Defence.
- vi. That the delay in filing the current application is inordinate with no sufficient reason advance before the court to explain the delay.
- vii. That he will be immensely prejudiced if the Application is allowed and therefor prayed that the same be dismissed for lacking merit.

4. The application was disposed of by way of written submission with the applicant filing on 3<sup>rd</sup> June, 2021 and the Respondent filed their dated 7<sup>th</sup> October, 2020.

#### **Applicant's submissions**

5. The applicant's advocate submitted that the Employment and Labour Relations Court (Procedure) Rules does not provide for striking out of suit rather states under section 3 of the Employment and Labour relations Court Act, that cases shall be determined in a just, expedient manner which provisions are enshrined under Article 46, 50 and 159 of the Constitution of Kenya 2010.

6. On whether the application was inordinately filed, the Applicant cited the case of **Robert Nyagwansa Miruka –v- Presbyterian University of East Africa [2019] eKLR** where the Court held that;

**“It would be unjust to lock out the Respondent from prosecuting his case on account of mistake which did not greatly prejudice the claimant. The claimant still has a chance to reply to the Response if filed”**

7. He argued that no prejudice will be visited upon the Claimant and that in any case it is ready to pay costs incurred by the claimant as a result of the delay to file its response.

8. Counsel also cited the case of **Vivian Muia –v- Mzoori limited [2017] eKLR** where the Court faced with a similar application allowed it holding that;

**“All factors notwithstanding, Article 159 (2)(d) of the Constitution provides that justice should be administered without undue regard to procedural technicalities. The court proceeded to say that, it was its duty to administer substantive justice even though the defence was filed out of time as it would be beneficially for both parties if the court could consider the case substantively.”**

9. He therefore prayed that the application be allowed and the defence filed on 10<sup>th</sup> August, 2018 and supporting documents filed on 30<sup>th</sup> August, 2018 be deemed as properly filed and the matter proceed for hearing of the substantive issues.

#### **Respondents submissions.**

10. The respondent on the other hand submitted that Rule 13 of this Court's Rules requires the Respondent to enter appearance and file its response within 21 days from the date of service and argued that the respondent was served on 12<sup>th</sup> December, 2017 who entered appearance but failed to serve till 4<sup>th</sup> April, 2018 when he learnt of the advocate appearing for the defendant.

11. He submitted that under Rule 15 of this Court Rules, when a party once served fails to enter appearance and file a response then the Court on an application by the claimant may direct the suit to proceed for formal proof which was the case in this suit. Additionally, that after filing the current application the applicant failed to prosecute the same till now which according to him indicate that the respondent does not have an interest to defend this Suit.

12. The claimant wants the application filed dismissed and the matter proceeding as earlier ordered by the Court.

13. I have considered the submissions of the parties in respect of this application. It is apparent that there has been mediate delay in prosecuting this matter by the claimant who filed his case in 2017 and went to sleep.

14. The applicant respondents though coming to court this late in the day the fact that they are ready to proceed will not prejudice the claimants in any way but would enable this court reach a just and fair determination of this matter.

15. I find the application merited and I allow it as prayed.

**RULING DELIVERED VIRTUALLY THIS 21ST DAY OF JULY, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Ooga for claimants present

Kamau for respondents absent

Court assistants – Fred and Wanyoike