



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 37 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**EMILY WANJIRU KINYUA..... CLAIMANT**

**VERSUS**

**GITHUNGURI DAIRY FARMERS**

**COOPERATIVE SOCIETY..... RESPONDENT**

**RULING**

1. Before me, for determination is the Respondents application dated 26<sup>th</sup> February 2021. It seek the following orders –

i) Spent

ii) Pending the hearing and determination of this application interpartes, the Court be pleased to arrest the delivery of judgement slated for 5<sup>th</sup> March 2021.

iii) Pending the hearing and determination of this application, the Court be pleased to arrest the delivery of the judgement slated for 5<sup>th</sup> March 2021.

iv) The court be pleased to set aside the exparte proceedings in this matter and direct that it be heard on merit.

v) The Memorandum of Appearance and Reply to Statement of Claim filed herein be deemed duly filed and properly on record.

2. The grounds in support of the application are that –

(i) The Claimant filed its statement of claim on 23<sup>rd</sup> January 2020 and served it together with the summons to enter appearance on the Respondent on 3<sup>rd</sup> February 2020.

(ii) The Respondent entered appearance on 26<sup>th</sup> February 2020 later filed and served its Reply to Statement of Claim on 24<sup>th</sup> June 2020 which delay was caused by closure of courts due Covid 19 pandemic.

(iii) The Respondent since the filling of its response to the claim was never served with any additional documents by the Claimant therefore was not aware the matter was active in court until 26<sup>th</sup> February 2020 when perusing the courts cause list for a different matter found that this matter had been listed for judgment.

(iv) The matter proceeded for formal proof hearing and a judgment date given which is against the provisions of Rule 17(2) of the Employment and Labour Relations Court (Procedure) Rules 2016 that makes it mandatory for a party filling a motion application to notify all parties.

(v) The Respondent is apprehensive that should the matter proceed to judgment it will be condemned unheard therefore seeks the application be allowed and the matter do proceed to hearing on its merit as its Statement of Response to the claim has raised triable issues that warrant going to trial for adjudication.

(vi) *The Respondent states that the Claimants can be compensated by costs for any delay in filling the defence on time.*

3. The application is supported by the affidavit of **BARBRA KWANG'A** the Respondents Advocate in which she reiterates the grounds in support of the application.
4. The Claimant opposed the application by way of a replying affidavit sworn by **MARTHA GICHUKI** an advocate representing the Claimant. The Affiant states that the Claimant filed the current claim on 23<sup>rd</sup> January 2020 and served the same together with the Notice of summons to enter appearance on the 3<sup>rd</sup> February 2020. The Affiant states that the Respondents did not file their response within 21 days as stipulated by law therefore prompting the Claimant to file an application dated 27<sup>th</sup> February 2020 seeking that the matter be directed to proceed for formal proof as an undefended claim.
5. She further states that by the time the Respondents filed their pleadings the Claimant had already filed their application to have the matter proceed for formal proof as an undefended suit, the same was allowed and certified ready for hearing on 15<sup>th</sup> July 2020 As per Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules 2016.
6. The Affiant avers that the Response to the statement of claim is not properly on record as it was filed out of time and without leave of court.
7. The Affiant further states that the Respondent is guilty of laches and the application should not be allowed as the rules governing proceedings of the court must be followed without exception.
8. The Affiant avers that the Respondents are not keen to defend the suit and urges the court to dismiss the instant application with costs as it is a delay mechanism on the part of the Respondents.
9. On the 5<sup>th</sup> May, 2021 the court directed the application be disposed of by way of written submissions.

#### **Applicant/Respondents Submissions**

10. The Applicant admits to a two day delay in filling its Memorandum of Appeal and failing to file the Response to the Statement of claim within the prescribed timelines but attributes the same to the closure of courts due to the COVID 19 pandemic. It submits that the delay is not prejudicial to the Claimants to warrant the denial of the Applicant's right to hearing.
11. It further submits that at the time the Claimant were fixing the application for formal proof hearing it had already filed its documents therefore the Claimant was aware that the Respondent was keen on having the matter heard on merit.
12. The Applicant submits the delay in filing its pleadings was not inordinate as to be prejudicial to the Claimant and can be compensated by way of costs.
13. It relied in the case of **Richard Murigi Wamai v Attorney General & Another [2018] eKLR**, where the Court in setting aside an ex parte judgement found that throw away costs were sufficient to compensate the Plaintiff for any prejudice suffered by failure to file and serve the defence within the prescribed time relying on the case of **Sebei District Administration v Gasyali & Others (1968)EA** where the Court stated:

*“In my view, the Court should not solely concentrate on the poverty of the Applicant's excuse for not entering appearance or filing a Defence within the prescribed time. The nature of the action should be considered. The Defence if one has been brought to the notice of the Court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court. It is wrong under all circumstances to shut out a Defendant from being heard. A Defendant should be ordered to pay costs to compensate the Plaintiff for any delay occasioned by the setting aside and be permitted to defend.*

14. The Applicant further urges the court to set aside ex parte judgment or, proceedings to ensure justice between the parties to avoid hardships and relies in the case of **Shah v Mbogo (1967) EA 166**, where it was stated:

*“This discretion to set aside an ex parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error.... however, the discretion of the Court must always be exercised judicially with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to consider is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit. It therefore calls for interrogation of the Applicant's case as to whether it raises triable issues.”*

15. It submits that the only condition to set aside proceedings is whether the defence raises triable issues.
16. The Applicant submits that indeed it has a defence through its reply to the statement of claim that raises triable issues which warrants full hearing before the court thus urges the court to grant the application.
17. The Applicant relied on the case of **Richard Murigi Wamai v Attorney General & Another (2018) eKLR**, where the Court was not convinced of the Applicant's reasons for failing to file its Defence within the prescribed timelines. However, recognizing the Applicant's

sacrosanct right to be heard, the Court noted:

*“However, the Discretion of the Court must always be exercised judicially with the sole intention of dispensing justice to both or all parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to consider is whether the Applicant will suffer any prejudice if denied an opportunity to be heard. It therefore calls for the interrogation of the Applicant's case as to whether it raises any triable issue.”*

18. The Applicant urges the court to set aside the *ex parte* proceedings and have the matter heard on merit as there was no inordinate delay to prejudice the Claimant as should the court decline the same the Applicant will be condemned unheard.

#### **Claimant's/Respondent's Submissions**

19. The Claimant submits Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (1) provides that if a party served with a statement of claim intends to respond, the party shall, within twenty one days from the date of service, enter appearance and file and serve a response to the suit.

20. The Claimant submits that the Respondent's failure to file their response to the claim was utterly inordinate and therefore should not be allowed to benefit from it at the expense of the Claimant who stands to suffer great prejudice as the matter is at the judgment stage.

21. The Claimant relies in the case of **Simba Coach Limited v Kiriuyu Merchants Auctioneers Kakamega Civil Appeal No. 137 of 2018**, the Court dealt with the issue of unreasonable delay and held as follows: -

*“The court in **Jaber Mohsen Ali & Another v Priscillah Boit & Another E&L No. 200 of 2012 (2014) eKLR** was of the view that unreasonable delay depends on the circumstances of the case. The court stated:-*

*“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of **Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012** the Applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that the application ought to have come before expiry of the period given to vacate the land.”*

22. The Claimant submits that the Respondent's reasons that the delay in filing the response was caused by Covid 19 Pandemic is untrue as the 1<sup>st</sup> Covid 19 case in Kenya was announced on 13<sup>th</sup> March 2020 which was more than two months from the time the Respondent was to file the response and urges the court to disregard the said excuse.

23. The Claimant further relied on rule 15(3) of Employment and Labour Relations Court (Procedure) Rules that states “where there is no Response filed within the prescribed period, the Court may, upon the Application of the Claimant, direct that the matter proceeds for formal proof”.

24. The Claimant filed a request as per the above provision requesting the court to direct the matter to proceed as undefended suit since the Respondent did not file the response as required by law. It relied on the case of **Charles Nzeki Mwanga v Senaca East Africa Ltd [2017] eKLR**, the Court observed in this regard as follows:

*“The E & LRC Rules 2016, do not require that a Party who has failed to file a Statement of Response is given a hearing notice on formal proof. Rule 15(3) only requires the Court to order the matter proceeds for formal proof. The Court has not come across also, a Rule which requires a party who has ignored the process of the Court, to be involved with the application to set the matter down for formal proof. As formal proof involves ex parte hearing, it would not make sense to invite a defaulting Party to fix hearing. The Application to fix the date for formal proof can be done through a letter written to the Court by Claimant. It was not necessary to involve the Respondent in obtaining an order, and the date for formal proof hearing was in nature of ex parte proceedings, the Respondent having opted to keep away by failing to respond to the Claim.”*

25. The Claimant submits that the Respondent having willingly failed to respond to the claim it was not entitled to be notified of or involved in the formal proof hearing.

26. The Claimant further submits that procedural rules governing proceedings of a court must be followed without exception and that Article 159 of the Constitution is not a panacea for deliberate irregularities and mistakes that parties make. The Claimant relies on the decision in the case of **Jaldesa Tuke Dabelo v IEBC & Another [2015] eKLR**, where the Court held inter alia that:

*“Rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed as Article 159 of the Constitution was not aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action.*

27. In conclusion the Claimant submits that there was inordinate delay by the Respondent in filling its response to the claim. Further the Claimants submit that Respondents cannot rely on the provisions of Article 159(2)(d) of the constitution as this will only serve to defeat the course of justice.

## Analysis and determination

28. I have considered the application together with grounds and affidavit in support thereof. I have further considered the replying affidavit and submissions of both parties.

29. The issue for determination is whether the application is merited.

30. Rule 13 of the Employment and Labour Relations Court (Procedure) Rules 2016 states that:- **If a party served with a statement of claim intends to respond, the party shall, within twenty one days from the date of service, enter appearance and file and serve a response to the suit.**

31. The Claimant filed her statement of claim and served it upon the Respondent on 3<sup>rd</sup> February 2020. The Respondent filed its Memorandum of Appearance on 26<sup>th</sup> February 2020 which is 3 days after the expiry of the time.

32. It is admitted that the Respondent filed pleadings out of time and without the leave of court as by law required hence prompting the Claimant to file an application dated 27<sup>th</sup> February 2020 seeking directions to have the matter proceed as undefended claim.

33. In this case, the appearance was filed on 26<sup>th</sup> February 2020, some four days after the lapse of the prescribed period while the defence was filed on 24<sup>th</sup> June 2020. I do agree with the Applicant that the delay in filing appearance was not inordinate while the delay in filing defence has been sufficiently explained, the Court having taken judicial notice in the disruption of filing pleadings and generally in Court business following the outbreak of COVID-19 pandemic and the associated containment measures taken by the Government.

34. As was held in the case of **Sebei District Administration v Gasyali & Others (1968) E.A 300** the circumstances of each case must be considered and denial of a party to the opportunity to be heard should be an action of last resort.

35. The right to be heard therefore ranks high up as stated in **Mbaki & Others v Macharia & another (2005) EA 2006** where it was held:

*“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being offered an opportunity to be heard. “*

36. In this case I find the delay in filing appearance was not inordinate while delay in filing defence was duly explained. To lock out the Respondent from participating in the proceedings would therefore occasion an injustice.

37. Guided by Article 159(2)(d) of the Constitution of Kenya, 2010 which commands the Court to render substantive justice without undue regard to procedural technicalities. I find the application dated 26<sup>th</sup> February 2021 merited and allow the same. I find that the Claimant will not suffer any inconvenience that cannot be compensated with costs. **The Respondent shall pay the Claimant throw away costs together with the costs of this application which I assess at Kshs.20,000/= to be paid within 30 days from the date of this ruling.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9<sup>TH</sup> DAY OF JULY 2021**

**MAUREEN ONYANGO**

**JUDGE**

### ORDER

In view of the declaration of measures restricting court 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 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 had 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 1B 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.

**MAUREEN ONYANGO**

**JUDGE**