



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 55 OF 2020

DR. JOHNSON KAZUNGU.....CLAIMANT

- VERSUS -

KENYA MARINE AND FISHERIES RESEARCH INSTITUTE.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th November, 2021)

RULING

The respondent (applicant) filed on 28.04.2021 an application by way of the notice of motion dated 27.04.2021 and filed through learned Litigation Counsel Rukiya A. Ibrahim, for Attorney General. The application was under order 7 rule 1, order 51 rules 22 and 8, section 3A, 1A, and 1B of the Civil Procedure Act Cap 21 Laws of Kenya, sections 13, 21 of Government Proceedings Act, Article 48 and 50 of the Constitution of Kenya, 2010, and all other enabling provisions of the law. The applicant prayed for orders:

- 1) (Spent).
- 2) That the ex-parte orders granted on 26.03.2021 be set aside.
- 3) That the claimant to bear the costs of the application and the suit.

The application is based on the annexed supporting affidavit of Henry Nyabuto, Senior Human Resource Management Officer for the applicant, and upon the following grounds:

- 1) The claimant grossly violated the mandatory provisions of the law of service upon all defendants as stipulated in Order 5 rule 7 and 9 of the Civil Procedure Rules which are subject to section 13 of the Government Proceedings Act by failing to serve the office of the Attorney General with the application dated 24.03.2021.
- 2) The application proceeded ex-parte and final orders were made against the respondent. The orders have occasioned great prejudice as against the respondent and have specifically contravened the respondent's right to a fair hearing.
- 3) That the right to a fair hearing is an absolute right as enshrined in Article 25 of the Constitution.
- 4) The right to a fair hearing is at the cornerstone of the principles of natural justice and the rule of law and the provisions of the Employment Act invoked in the application leading to the orders granted on 26.03.2021 cannot override the fundamental provisions of the Constitution.
- 5) The Honourable Attorney General had entered appearance and filed a response to the claim on behalf of the respondent which the claimant ignored. The memorandum of claim was served on 07.01.2021. On 18.01.2021 the Attorney General entered appearance for the applicant. The response to the claim was dated 23.03.2021 and filed on 24.03.2021. The claimant filed (on 25.03.2021) the application dated 24.03.2021 and which was allowed ex-parte on the same 25.03.25 when Nzioki wa Makau J ordered "**ELRC 55 of 2020 (Mombasa) Suit to proceed to formal proof in the absence of defence. Matter be placed before ELRC Mombasa for a date for the formal proof.**"
- 6) The application dated 24.03.2021 seeking directions for formal proof was not served upon the respondent despite the fact that it sought to bar the respondent from defending the suit. The application was heard ex-parte without knowledge and participation by the respondent.
- 7) On 26.03.2021 counsel for the claimant send an email to counsel for the respondent conveying that the Court had ordered the matter be heard by formal proof.

8) The application should be allowed in the interest of justice since the applicant has an arguable response and the claimant will have an opportunity to be heard on merits. It is only fair, just and in the interest of the overriding objective that the Court exercises its discretion and grants the orders sought herein.

The claimant opposed the application by filing on 21.05.2021 his replying affidavit through S. Musalia Mwenesi Advocates. The claimant urged and stated as follows:

1) The applicant has failed to invoke the Court's jurisdiction under Article 162(2) of the Constitution, 2010, the Employment and Labour Relations Court Act and the Employment and Labour Relations Court (Procedure) Rules, 2016 made under section 27 of the Employment and Labour Relations Court Act. Articles 48 and 50 of the Constitution, 2010 are not provisions of law which confer jurisdiction to set aside the orders of 25.03.2021. Thus the application dated 27.04.2021 is not properly before the Court.

2) There exists no response filed by the applicant within the time prescribed under Rule 13(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provides, "**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.**" The memorandum of appearance and summons to enter appearance were served upon the respondent on 07.01.2021. The applicant entered appearance on 20.01.2021. The applicant was required under the Rule to file and serve the response to the claimant's suit within 21 days being on or before 28.02.2021. The applicant has not applied to extend the time to file and serve a response to the memorandum of claim. Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides, "**Where no defence or response is filed in Court within the prescribed period, the Court may, upon application by the claimant, direct the matter proceed for formal proof.**"

3) On 24.03.2021 the claimant applied for the suit to proceed to formal proof. The applicant had been served with the claim on 07.01.2021 but failed to file and serve a response to the suit within 21 days allowed under Rule 13(1). On 25.03.2021 the Court properly exercised its jurisdiction under Rule 15(3) and directed that the matter to proceed to formal proof. No response has to date been filed in Court within the prescribed time.

4) Under rule 17(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016, the Court may for good cause, hear an application *ex-parte* and make an order upon terms as the Court considers just. The Court had good cause to hear the claimant's application dated 24.03.2021 *ex-parte* and direct that the suit proceeds to formal proof.

5) Upon receipt of the order made on 25.03.2021, the respondent was served on 26.03.2021 via G4S with a copy of the application dated 24.03.2021.

6) On 25.03.2021 the Court did not make an *ex-parte* judgment as alluded to at paragraph 10 of the supporting affidavit of Henry Nyabuto sworn on 27.04.2021. The suit proceeding to formal proof does not prejudice the respondent (applicant). The respondent has an opportunity at formal proof to argue its case and to cross-examine if need be.

7) To date there is no response that has been filed in Court within the prescribed time. The response purportedly filed on 24.03.2021 is not a valid response in law.

8) The respondent's letter appointing the said Henry A. Nyabuto (being exhibit HN-1 on the supporting affidavit) to undertake legal work is dated 27.05.2020. As at 07.01.2021 when the respondent was served directly with the claim, there was an officer designated to deal with the respondent's legal matters and the officer ought to have ensured that a response to the claim was filed in Court within the prescribed time and no explanation has been made why he failed to act within the prescribed time.

9) The applicant has made no explanation why the response was filed out of time and in absence of such explanation, the overriding objective cannot be exercised in favour of the applicant and the application dated 27.04.2021 should be dismissed with costs.

Submissions on the application were filed for the parties. The Court has considered the respective submissions and positions taken for the parties. The Court makes the following pertinent findings.

First, the applicant laments that the order given on 25.03.2021 was made *ex-parte* contrary to the rules of natural justice and because the applicant ought to have been heard on the application. The applicant says it ought to have been served with the application and then heard on the application. It is submitted for the applicant that the right to a fair hearing cannot be limited as provided in Article 25(c) of the Constitution. It is further submitted that under Article 50 of the Constitution, 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 a Court or, if appropriate, another independent and impartial tribunal or body. It is also submitted for the applicant that the case should be allowed to go to full hearing in absence of an interlocutory judgment and both parties should be allowed to adduce evidence and the formal proof as ordered will not afford the applicant the full opportunity to adduce evidence. It is further submitted for the applicant that Article 159(2) (d) of the Constitution guides the Court that justice shall be administered without undue regard to procedural technicalities.

For the claimant it is submitted that the Court was entitled to exercise discretion on 25.03.2021 as had been prayed for in the application dated 24.03.2021 and filed on 25.03.2021. The prayers made were that the application be heard *ex-parte* in the first instance and further, "**That under rule 15 (3) of the Employment and Labour Relations (Procedure) Rules, 2016 this suit shall proceed to formal proof within 30 days of this order on a date to be given by the Deputy Registrar, the Respondent having been served with the Claim on 7th January, 2021 and having failed within the 21 days allowed under Rule 13(1) of the Employment and Labour Relations (Procedure) Rules to file and serve a Response to the Claim.**" It is submitted for the claimant that the Court had jurisdiction to make the order as was done on 25.03.2021 because there was no valid response on record and further, Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides, "**Where no defence or response is filed in Court within the prescribed period, the Court may, upon**

application by the claimant, direct the matter proceed for formal proof.”

The Court has considered the respective submissions. The Court considers that for it to exercise jurisdiction to set aside the orders given ex-parte on 25.05.2021, the applicant must show that it had an arguable ground of opposition to the claimant’s application date 24.03.2021 and filed on 25.03.2021. The Court finds that the applicant has not exhibited grounds of opposition or a replying affidavit, even in draft form, that would suggest to the Court the applicant’s arguable opposition to that claimant’s application. The Court further finds that in making the order that the suit shall proceed to formal proof, the Court was satisfied that the respondent in the suit had failed, within the 21 days allowed under Rule 13(1) of the Employment and Labour Relations (Procedure) Rules, to file and serve a response to the Claim. To date and upon the material on record, that failure is not denied and there is no application for leave that the belated response to the claim be deemed duly filed and served. The Court finds that there being no established arguable ground of opposition to the claimant’s application date 24.03.2021 and filed on 25.03.2021, there is no good cause for the Court to set aside the ex-parte orders of 25.03.2021. On 25.03.2021, the respondent in the suit had not filed and served the response to the claim within the prescribed time and the claimant satisfied the precondition for an order or direction by the Court that the matter proceeds to formal proof and as was ordered by Nzioki wa Makau J.

Turning to the alleged breach of rules of natural justice and violation of the right to fair hearing (that cannot, by constitutional provision, be limited at all) the Court makes findings as follows. As urged for the claimant, the applicant had erroneously stated in paragraph 10 of the supporting affidavit that there was an ex-parte judgment on record. The applicant has corrected itself by stating at paragraph 12 of the submissions that the claimant does not have an interlocutory judgment in his favour and therefore no prejudice shall be suffered should the matter proceed to full hearing. By that submission, it should be clear that the applicant has not been condemned un-heard merely because on 25.03.2021 the Court directed that the matter proceeds to formal proof. The Court finds that both parties are in agreement that there is no judgment on record and the order of 25.03.2021 was a directive on the further steps in the suit – it was a directive to expeditiously facilitate the principles of natural justice or fair hearing and not a derogation from the same. Thus, Rule 15(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides, **“Where no defence or response is filed in Court within the prescribed period, the Court may, upon application by the claimant, direct the matter proceed for formal proof.”** The Court considers that the provision is rooted in Article 159 (2) (b) that justice shall not be delayed – so that a respondent in a suit who fails to file promptly, a defence or response to the suit and within 21 days from service as prescribed, cannot thereby delay the hearing and disposal of the suit. The Court further finds that Rule 15(3) is also in furtherance of subsection 3 (1) of the Employment and Labour Relations Court Act, 2011 which provides that the principal objective of the Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of the disputes governed by the Act. The Court therefore returns that Rule 15(3) and therefore the orders made by the Court on 25.03.2021 do not amount to limitation of the right to a fair hearing but indeed, cherish that right.

Second, the Court finds that as submitted for the claimant, the application dated 27.04.2021 is not properly before the Court because the applicant invoked inapplicable provisions of the Civil Procedure Act and the Rules thereunder instead of the applicable provisions of the Employment and Labour Relations Court Act and the Rules of the Court thereunder. As submitted for the claimant and as was held in Speaker of the National Assembly –Versus- James Njenga Karume [1992]eKLR, **“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”** The applicant failed to invoke the Rules of the Court as the specifically designed written law applicable to the disputes brought before the Court. The Court observes that despite the claimant raising the issue in the replying affidavit, the applicant failed to make submissions in that regard and the applicant is deemed to concede that indeed, the application invoked inapplicable provisions while disregarding the applicable constitutional and statutory provisions as urged for the claimant.

Third, as submitted for the claimant and which is not in dispute, the applicant prayed for an order, **“THAT the ex-parte orders granted on 26th March, 2021 be set aside.”** The Court finds that as submitted, there being no order given on 26.03.2021 on record, the applicant is bound by its pleadings and the application is found incompetent.

In conclusion, the application by the notice of motion dated 27.04.2021 and filed on 28.04.2021 for the respondent in the suit is hereby dismissed with costs and parties to take further steps towards the expeditious resolution of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 19TH NOVEMBER, 2021.

BYRAM ONGAYA

JUDGE