



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 7 OF 2020

KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT

v

LE-SAVANNA COUNTRY LODGE & HOTEL.....RESPONDENT

RULING

1. The Cause herein proceeded undefended on 18 January 2021, and the Court reserved judgment to 7 April 2021.
2. On the morning of the judgment, the Respondent filed a Motion under a certificate of urgency seeking the arrest of the judgment and grant of leave to defend.
3. However, the Court proceeded to deliver the judgment as scheduled.
4. In the judgment, the Court entered judgment for the Union as follows:
 - (i) The Respondent to commence the deduction of union dues from the employees who signed the Form Ss and remit the same to the Union with effect from 30 April 2021.
 - (ii) In default, the Respondent to pay the dues from its own funds until compliance with (i) above.
 - (iii) The Respondent to sign a recognition agreement with the Union within 30 days of today.
5. After the delivery of the judgment, the Court directed the Respondent to serve the Motion.
6. The parties were also directed to file and exchange responses and submissions within set timelines ahead of the giving of further directions on 7 May 2021.
7. Instead of waiting for the giving of further directions, the Respondent filed another Motion dated 14 April 2021 seeking orders:
 - (1) ...
 - (2) THAT pending the *inter-partes* hearing and determination of this application, there be a stay of execution of the ex-parte judgment dated 7th April 2021 and decree therefrom.
 - (3) THAT pending the hearing and determination of this application, there be a stay of ex-parte judgment dated 7th April 2021 and decree therefrom.
 - (4) THAT the Court be pleased to set aside the *ex-parte* proceedings and judgment herein in its entirety and the Respondent/applicant be granted leave to file and serve its Statement of Defence out of time.
 - (5) THAT the costs of this application be provided for.
8. The Court directed the Respondent to serve this latter Motion, and the Union filed a replying affidavit in opposition thereto on 25 May 2021.
9. The Respondent filed its submissions on 18 June 2021, while the Union filed its submissions on 28 July 2021.

10. The Court has considered the Motion, affidavits and submissions.

Arguments

11. In support of the Motion to set aside the judgment, the Respondent contended that the delay in filing a Response was not deliberate or intentional because its proprietor had been taken ill from 2 December 2020 to 3 January 2021, and therefore he could not give comprehensive instructions to the advocate on record to file a Response.

12. It was also asserted that the Union had not effected proper service.

13. The Respondent further urged that it had a defence that raised triable issues as some of the Union's members who had subscribed for membership had left employment.

14. In opposition to the application, the Union stated that the ill health explanation was not genuine because the Respondent had on 9 December 2020 sought leave to file a Response out of time. There was no mention of the director's illness as one of the reasons for the delay.

15. In the same vein, the Union argued that the Respondent did not attend the Court on 18 January 2021 when the Cause came up to confirm compliance and further directions to reveal to the Court about the purported ill health of the director as an intervening factor.

16. Further, the Union contended that the Respondent's defence did not set out an arguable case. In this regard, the Union exhibited a copy of the Respondent's payroll for September 2019 to demonstrate that it had recruited as members, employees of the Respondent.

17. The orders sought by the Respondent are discretionary.

18. The discretion should be exercised judiciously but based on satisfactory grounds. To enable the Court to exercise the discretion judiciously, the party seeking the exercise of the discretion ought to make candid and full disclosure.

19. The Respondent was served with Notice of Summons and a copy of the Memorandum of Claim on 23 January 2020.

20. It entered Appearance on 20 February 2020.

21. In terms of Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016, the Respondent should have filed a Response within 21 days of service that is on or before 13 February 2020.

22. Therefore, the explanation tendered by the Respondent of the illness of its director in December 2020 as the cause of the delay to file a Response was more of a lame excuse.

23. The Respondent also challenged the competency of service of pleadings upon it.

24. It did not raise any concerns about the service when it entered Appearance on 20 February 2020 or during its appearances in Court on 22 September 2020 or 9 December 2020.

25. The service, according to the Court, was sufficient and proper.

26. Lastly, the Respondent urged that there were triable issues. The triable issue was the question of whether the employees who had been recruited by the Union had left employment, and therefore, it was sought to be argued that the Union had not achieved the simple majority threshold as required by the Labour Relations Act.

27. The Respondent did not give particulars of the employees who had left employment. In any case, the parties had gone through conciliation, and the Conciliator, as a primary establisher of facts, had made a finding in his report dated 15 July 2019, that the Union had recruited 71 employees out of 100 unionisable employees.

28. By attempting to re-open the debate on the simple majority threshold, the Respondent was attempting to revise finding of facts which existed at a particular point in time and which point in time is the material and relevant time for determining whether a simple majority threshold had been met.

29. The Respondent herein did not make a candid and full disclosure of the reasons, which made it a challenge for it to file a Response within the timelines prescribed by the Rules of this Court.

Conclusion and Orders

30. The Court finds no merit in the Motion dated 14 April 2021, and it is dismissed with costs to the Union.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN NAIROBI ON THIS 17TH DAY OF NOVEMBER 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Union Ms Mwaka, Industrial Relations Officer

For Respondent S.M. Onyango & Associate Advocates

Court Assistant Chrispo Aura