



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.E6509 OF 2020

MARY EMILY ATIENO.....CLAIMANT

VERSUS

RAJKUMAR S. PATIL.....1ST RESPONDENT

KIRLOSKAR KENYA LIMITED.....2ND RESPONDENT

RULING

The respondent filed application dated 11th December, 2020 under the provisions of order 40 Rule 4; Rule 7 of the Civil Procedure Rules and seeking for orders that;

- a) *Spent.*
- b) *Spent.*
- c) *The ex parte order issued on 4th December, 2020 be vacated and/or set aside to allow interparties hearing for the applicants/respondents to state their case.*
- d) *The respondents/applicants be given leave to file their responses to the notice of motion dated 1st December 2020.*
- e) *Costs of the application be provided for.*

The application is supported by the Affidavit of Rajkurmar S Patil, the 1st respondent and on the grounds that the respondents were not properly served with the notice of motion dated 1st December, 2020 and he only saw the application on his desk on 4th December, 2020 very late and upon investigations he realised the applicant who is his secretary received the document and never brought it to his attention and this led to the issuance of the ex parte orders without the court hearing the respondents.

In his affidavit, Mr Patil avers that the claimant has been aid all gratuity in accordance with the policy and the respondents cannot afford Ksh.550, 000 from its business due to the current economic hardship. A deposit of such sum in court would negatively affect the 2nd respondent's operations and only fair that the orders issued be set aside and the respondents be allowed a right to a fair hearing.

In reply, the claimant filed her Replying affidavit and avers that the respondents were dully served with application dated 1st December, 2020 through the secretary who accepted service and stamped the copy with the process server and there was no attendance in court as required. The court was satisfied that there was proper service before application was allowed.

To set aside the interlocutory judgement given on 4th December, 2020 will be tantamount to denying the claimant justice pursuant to her gratuity pay amounting to ksh.550, 000 and the judgement should be upheld.

The court allowed application dated 1st December, 2020 seeking for interlocutory judgement on the sum of ksh.550, 000 being claimed gratuity owing to the claimant. The respondent was served with the application and Mr Patil indeed confirms that he saw the application on his desk late on 4th December, 2020 after the secretary had accepted service and placed it on his desk. He however contests that the claimant has been paid her full gratuity and that the respondent is faced with financial hardship and is not able to pay and deposit such sum in court.

The purpose of clothing the court with discretion to set aside ex-parte judgment is to avoid injustice or hardship resulting from accident,

inadvertence or excusable error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice as held in the case of **Jomo**

Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal (2014) e KLR.

The main concern of the court is to do justice to the parties, and it will not impose conditions on itself to fetter the wide discretion given to it by the Rules.

Where a claimant has made a liquidated claim and the respondent fails to appear in court, the Rules allow the court to issue judgement.

What is apparent in this case is that the application dated 1st December, 2020 was heard on the same date and the respondent directed to attend court on 4th December, 2020 for hearing. Ordinarily under Rule 17 read together with Rule 13 and 14 of the Employment and Labour Relations Court (Procedure) Rules, 2016 a respondent should be given at least 14 days right of reply before an application is heard unless there are prevailing exceptional circumstances and which must be stated.

A best practice thus set out in the Court Rules, the respondents herein were only allowed 2 clear days to be served with the application dated 1st December, 2020 and to attend court for hearing. There was no right to a reply.

Such right to reply to pleadings once served is well secured under Article 50 of the Constitution, 2010.

The claimant in reply does not state what prejudice she shall suffer where the court is to allow the respondent to attend court and be heard on the matter.

The court thus finds merit in the application dated 11th December, 2020 it was filed without delay and taking the circumstances of the matter, it is only fair that the respondents be allowed time to file defence, reply to application dated 1st December, 2020 and the matter be heard on the merits.

Accordingly, Orders issued on 1st December, 2020 are hereby set aside. The respondent is given 14 days to file a response to the claim, file a Replying Affidavit to application and notice of Motion dated 1st December, 2020; the claimant shall have a right of reply thereto and within 14 days of service and after which time parties shall attend and be allocated a hearing date. The claim shall be heard on the merits. Costs in the cause.

DELIVERED IN COURT AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2021.

M. MBARU

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT: OKODOI

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and

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