



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.E6592 OF 2020

GEORGE OTIENO.....CLAIMANT

VERSUS

KENYA KAZI SERVICES LIMITED.....RESPONDENT

RULING

The claimant filed application dated 17th October, 2021 seeking for orders that the response dated 7th September, 2021 be struck out for being filed out of time and without leave of court and that the matter should proceed for formal proof and the claimant be paid costs.

The application is supported by the affidavit of Fredrick Ochwa and on the grounds that the claimant filed suit and served the respondent on 4th January, 2021 who entered appearance on 24th February, 2021 but failed to file any response for over 7 months. On 21st September, 2021 the respondent filed a response out of time and without leave of court. which should be struck out and the claimant allowed proceeding with the matter by formal proof.

The respondent filed Grounds of Opposition that the claimant did not serve summons to enter appearance as required under Order 5 Rule 1 of the Civil Procedure Rules. Notice of Appointment of Advocate was filed on 3rd March, 2021 and not a Memorandum of Appearance. The respondent then filed its pleadings to expedite the hearing.

Both parties filed written submissions which have been put into account.

The practice rules applicable in this court are the Employment and Labour Relations Court (Procedure) Rules, 2016 (the Rules).

In this regard a claimant is required to file suit pursuant to the provisions of Rule 4 and to serve summons in accordance with Rule 11 and upon which a respondent is required to abide the provisions of Rule 13.

Upon service of summons, a respondent has 21 days from the date of service to file and serve a response to the suit. where no response is filed in accordance with the Rules, the claimant is at liberty to apply under Rule 15(3) for hearing by formal proof.

The claimant's case is that despite the respondent being served with summons herein there was no response filed within the prescribed time and hence the matter should proceed for formal proof.

The respondent's case is that no summons has been served and there is only appointment of advocate and to expedite the hearing, a response has since been filed.

Rule 11 directs service of summons in the following terms;

11. (1) *The Court shall issue summons in Form 2 set out in the First Schedule.*

(2) *A claimant shall serve the summons issued under paragraph (1) to the respondent together with the statement of claim.*

(3) *Summons shall be valid in the first instance for a period of six months beginning on the date of its issue and the Court may extend the validity from time to time if satisfied that it is just to do so.*

(4) *A respondent who files any pleading in response to any suit filed in Court shall have the pleadings served on the claimant or the appellant by a qualified process server within fourteen days of filing.*

Summons us tissue to a respondent in the prescribed form. He summons must include the statement of claim. Summons is valid for the first 6 months and upon lapse the claimant must move the court for extension.

The Memorandum of Claim was filed on 31st December, 2020.

In the Affidavit of Service dated 10th October, 2021 and sworn by Fredrick Ochwa, he avers that on 4th January, 2021 he received copies of the Memorandum of Claim dated 28th December, 2020 together with the Verifying Affidavit and served the respondent who is located on 21 School Lane off Waiyaki Way Westlands Nairobi.

I have perused the entire file and no summonses were extracted, signed by an officer of the court for service upon the respondent as directed under Rule 11. A copy of the summons should be retained in the court file and a sample thereof is as prescribed under Form 2 of the First Schedule to the Court Rules.

There is therefore no matter for the respondent to enter appearance.

The attendance of the respondent by appointment of advocate and the Notice dated 25th February, 2021 is proper in the circumstances that summons were never extracted or served.

The respondent has since filed a response which is found in good standing as no summons were served.

The application dated 17th October, 2021 is without merit and is hereby dismissed; the response dated 7th September, 2021 is properly on record; parties are allowed 30 days to close pleadings with an exchange of all statements and documents to be used at the hearing and to take a hearing date at the registry. The respondent is awarded costs of this application.

DELIVERED IN COURT AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

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