



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO 8 OF 2020**

**EVELYN CHEPKOECH RONO.....CLAIMANT**

**VERSUS**

**THE KENYATTA INTERNATIONAL CONVENTION CENTRE....RESPONDENT**

**RULING**

1. On 13<sup>th</sup> January 2020, the Claimant filed a Statement of Claim seeking relief for wrongful dismissal by the Respondent. The Respondent filed a Memorandum of Appearance on 25<sup>th</sup> February 2020 but did not file a Response.
2. Pursuant to an application by the Claimant dated 11<sup>th</sup> June 2020, **O.N Makau J** directed that the matter proceeds to formal proof. Having taken over the matter, I heard the Claimant *ex parte* on 28<sup>th</sup> September 2021.
2. Subsequently, the Respondent filed a Notice of Motion under Certificate of Urgency dated 22<sup>nd</sup> October 2021 seeking the following orders:
  - a. That the orders issued by **O.N Makau J** on 11<sup>th</sup> June 2020 that the matter proceeds for formal proof be set aside;
  - b. That the *ex parte* proceedings be set aside;
  - c. That the Respondent's Memorandum of Appearance and Memorandum of Response be deemed as duly filed and properly on record;
  - d. That the Respondent be allowed to proceed with defence hearing;
  - e. That the Respondent be allowed to cross examine the Claimant and to call its witness to testify.
4. The Motion is supported by an affidavit sworn by Senior State Counsel, Wangeci Gichangi and is based on the following grounds:
  - a. That the Claimant filed her Statement of Claim in January 2020 and served it, together with Summons to Enter Appearance, on the Respondent on 14<sup>th</sup> January 2020;
  - b. That the Respondent, vide letter dated 10<sup>th</sup> February 2020 and received on 12<sup>th</sup> February 2020, instructed the Hon Attorney General to enter appearance on its behalf;
  - c. That the Hon Attorney General entered appearance on behalf of the Respondent on 25<sup>th</sup> February 2020 vide Memorandum of Appearance of the same date;
  - d. That the Memorandum of Appearance was given to the office Process Server to serve on the Claimant's Advocates but service was not effected as the offices were closed due to COVID-19 in March 2020;
  - e. That due to the closure of offices, the Hon Attorney General did not file any further documents as he was yet to receive instructions from his client;

f. That the Respondent was not served with any other documents in relation to this case and this is the reason it did not contact the Hon Attorney General to follow up on the case;

g. That upon receipt of the Respondent's instructions, the Hon Attorney General filed a Response to Memorandum of Claim dated 1<sup>st</sup> September 2021;

h. That upon checking the e-filing portal, the Respondent discovered that the matter had proceeded for formal proof on 28<sup>th</sup> September 2021;

i. That the Court, in its ruling dated 11<sup>th</sup> June 2020, stated that there was an Affidavit of Service showing that the Respondent had been served on 14<sup>th</sup> January 2020. The service referred to in the Affidavit of Service relates to the Statement of Claim and Summons to Enter Appearance;

j. That under Rule 17(2) of the Employment and Labour Relations Court (Procedure) Rules, it is mandatory for a party filing a Notice of Motion application to notify all parties and in this case, the Claimant did not serve the Respondent with the Motion seeking to have the matter proceed for formal proof;

k. That the Respondent is apprehensive that should the matter proceed to judgment, it will be condemned unheard and therefore seeks that the application be allowed and the matter do proceed to hearing on its Response to Memorandum of Claim, which has raised triable issues that warrant going to trial for adjudication.

5. The Claimant's response to the Respondent's application is contained in a replying affidavit sworn by her Counsel, Mwaniki Gachuba on 5<sup>th</sup> October 2021. The Claimant also filed an affidavit sworn by the Process Server, Moses Ambaka on 23<sup>rd</sup> June 2021.

6. Counsel depones that the Respondent's Memorandum of Appearance was not served on him for one and a half years after it was filed.

7. Counsel states that he did not close his office and adds that by the time the Court suspended physical operations on or about 16<sup>th</sup> March 2020, the Respondent had had the Summons and Statement of Claim for two months.

8. Counsel accuses the Respondent of being an indolent suitor and points out that the Respondent's Counsel did not explain why she did not apply for extension of time within which to respond to the Statement of Claim, pursuant to Rule 13(5) of the Employment and Labour Relations Court (Procedure) Rules.

9. The Claimant's Counsel maintains that the Reply to Statement of Claim dated 1<sup>st</sup> September 2021 and filed on 30<sup>th</sup> September 2021 is null and void and ought to be struck off the record.

10. Regarding the *ex parte* proceedings, Counsel depones that the Respondent was served with a hearing notice but elected not to participate in the formal proof proceedings.

11. On the Notice of Motion dated 11<sup>th</sup> June 2020, upon which the order for formal proof was granted, Counsel states that he did not receive directions from the Court on service on the Respondent.

12. Counsel adds that on 23<sup>rd</sup> June 2020, he was informed by the Court Registry that his plea for the matter to proceed by way of formal proof had been granted.

13. He takes the view that the order granted on 11<sup>th</sup> June 2020 was lawful as Rules 15(3) and 17(3) of the Employment and Labour Relations Court (Procedure) Rules empowered the Judge to hear the Claimant's Notice of Motion *ex parte* and direct that the matter proceeds for formal proof.

14. Counsel states that in the circumstances, it was pointless and an unnecessary cost to serve the Notice of Motion dated 11<sup>th</sup> June 2020, upon the Respondent.

15. By its application, the Respondent seeks an order to set aside the *ex parte* proceedings in this case. The order sought is discretionary and the standard to be applied in considering such a plea was set in *Shah v Mbogo (1967) EA, 166* as follows:

**“This discretion.....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 own 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.”**

16. In opposing the Respondent's application, the Claimant relies on Rules 15(3) and 17(3) of the Employment and Labour Relations Court (Procedure) Rules which provide as follows:

**15. (3) Where no defence or response is filed in court within the prescribed period, the Court may, upon application by the**

**Claimant, direct that the matter proceed for formal proof.**

**17. (3) The Court may, for good cause, hear an application ex parte and make an order upon terms as to costs and subject to such undertaking, if any, as the Court considers just.**

18. On its part, the Respondent relies on Rule 17(2) which requires that a Notice of Motion be served on the opposite party.

19. The Claimant does not deny that the Notice of Motion which gave rise to the order for formal proof was not served on the Respondent. It is therefore safe to conclude that the Respondent was not aware of this order.

20. Moreover, according to the affidavit of service sworn by the Claimant's Process Server, the hearing notice was served on some unnamed lady at the Respondent's premises. Assuming that the Hon Attorney General had not notified the Claimant's Counsel that he was acting for the Respondent, service ought to have been effected on an identifiable officer of the Respondent.

21. In light of the lapses in service and despite the delay in bringing this application, it seems to me that it would be a travesty of justice to lock out the Respondent from participating in these proceedings.

22. The Respondent's application dated 22<sup>nd</sup> October 2021 is therefore allowed on the following terms:

- a. The Respondent's Memorandum of Response is deemed duly filed;
- b. The Claimant will be recalled for the purpose of cross examination only;
- c. Thereafter the Respondent will present its witnesses;
- d. The costs of the application will be in the cause.

23. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Gachuba for the Claimant

Miss Wangeci for the Respondent