



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1276 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 9th March, 2020)

MARIE CLAIRE BISAMAZA.....CLAIMANT

VERSUS

REGIONAL CENTRE ON SMALL ARMS

IN THE GREAT LAKES REGION,

THE HORN OF AFRICA AND

BOARDERING STATES (RECSA) RESPONDENT

RULING

1. The Application before this Court for determination is the Respondent's Application on dated 20/1/2020 which seeks the following orders from Court:-

- a. THAT the Honourable Court do review and set aside the orders made on 24/9/2019.***
- b. THAT the Honourable Court do set aside the proceedings of the court on 16/12/2019.***
- c. THAT the Honourable Court be pleased to grant leave to the Applicant to file the defense out of time.***
- d. THAT costs of this Application be in the cause.***

2. The Application is supported by the grounds set out in the motion and the supporting affidavit of Kenneth Munaawa sworn on 20/1/2020. The same has been opposed vide the Claimant's grounds of opposition filed on 28/1/2020 and her Replying Affidavit sworn on 23/1/2020.

Respondent/Applicant's Case

3. The Respondent/Applicant (hereinafter "the Applicant") avers that upon receipt of the memorandum of claim, its advocates filed a notice of appointment and memorandum of appearance. However, the memorandum of defence though prepared, was inadvertently forgotten hence not filed within the stipulated timelines.

4. Consequently, this Court issued orders on 30/9/2019 for the matter to proceed ex parte and thereafter the matter proceeded for formal proof on 16/12/2019.

5. The Applicant avers that it is in the interest of justice that the orders sought are allowed so that its defence is taken into consideration to enable this Court to effectually adjudicate upon the issues raised. Further, that this Court has the powers to grant leave and enlarge time for the filing of the defence.

6. It is averred that since the filing of this claim, the Applicant has made some payments to the Claimant hence it is only fair for their case to be heard. The Applicant concludes by deposing that no prejudice will be occasioned to the Claimant if the orders sought are granted.

Claimant/Respondent's Case

7. The Claimant/Respondent (hereinafter "the Respondent") avers that the application is misconceived, scandalous, vexatious, an abuse of the court's process and an attempt to delay the determination of this claim.

8. It is averred that the Applicant is guilty of laches having delayed to file its defence 2 years from the date of service of summons. No plausible explanation has been given to justify the delay.

9. The Respondent states that the Applicant was accorded an opportunity to be heard and defend this suit but failed to exercise the same. Further, that the orders of 24/9/2019 were made in the presence of the Applicant's advocate on record yet the instant Application was filed 4 months later. As such, the motion does not raise any triable issues to warrant granting of the orders sought.

10. The Respondent states that on 18/7/2017, the Applicant was duly served with the notice of summons. She further states that even after restraining orders were issued against the Applicant by dint of the Ruling delivered on 1/9/2019, the Applicant failed to attend Court for mentions despite service of the mention notices upon its advocates.

11. In particular, the Applicant's advocates were served with the mention notice for the mention scheduled on 24/9/2019. On that material date, the Court confirmed that no defence had been filed and it was directed that the matter proceeds ex parte. The matter proceeded for formal proof and the Respondent filed her submissions on the matter. As such, she is of the position that the instant application is an attempt to derail the determination of the matter.

12. The Application was disposed of by way of written submissions with the Respondent filing her submissions on 3/3/2020. There is no record of the Applicant's submissions in the Court file.

Submissions by the Parties

13. The Respondent submits that the Applicant has not met the threshold for review as set out in rule 33 (1) of the Employment and Labour Relations Court (Procedure) Rules 2016 and the case of Shah vs. Mboqo [1968] EA. In particular, the Applicant has not demonstrated the error apparent on the face of record, there is no discovery of new facts neither is there sufficient cause to warrant the review. The Respondent relies on the cases of Mwaniki Muranqiri vs. Ndwiqa Muranqiri Muruambuci & Another [2019] eKLR and Berber Alibhai Mawii vs. Sultan Hasham Lalii & 2 Others [1995] eKLR where the Courts were of the view that a counsel's inaction could not amount to a mistake which ought not to be visited upon a litigant.

14. It is the Respondent's submissions that the Applicant's defence does not raise any triable issues as it contains blanket denials, which do not address the issues raised in the Memorandum of Claim. She relies on the case of Blue Sky Limited EPZ Limited vs. Natalia Polyakova & Another [2007] eKLR where the Court was of the view that before a defence is struck out, a Court must satisfy itself that the same raises a triable issue.

15. The Respondent submits that the Applicant is not entitled to the orders sought as it has come to equity with unclean hands since it was granted the opportunity to defend the suit but failed to do so. She has cited the Court of Appeal case of Mohamed Shally Sese (Shah Sese) vs. Fulson Company Limited & Another [2006] eKLR and the case of John Niue Nvaqa vs. Nicholas Niiru Nyaqa & Another [2013] eKLR where the Courts were of the opinion that one who comes to equity must come with clean hands and failure to do so makes them undeserving of the orders sought.

16. I have considered the averments of the Parties herein. The reason this Court proceeded for the hearing of this case ex parte was that as at 16/12/2019, the Respondents had not filed their defence despite being served with summons in this case and despite them entering appearance on 19th July 2017. There is no plausible reason for not filing their defence as the reason being given by the Respondents is that "we forgot".

17. The Respondent's Counsel have been before this Court on 1/9/2017 when a ruling was delivered. They were also served with a mention notice to appear in Court on 26/7/2018 for pretrial and they were absent. The absence was also not explained.

18. In my view, the Respondents deliberately chose not to file a defence and when served with a mention notice for pre-trial directions, which would have accorded them an opportunity to correct their omission, they also ignored to attend. This Court then ruled that the matter proceeds ex parte.

19. Given the length, the hearing has gone through, to reopen this case and allow filing of a defence when the Claimant is expecting her judgement is to take this Court miles back and cause more delays in disposing of this case. Justice delayed is justice denied.

20. In the circumstances, I decline to grant orders sought and order that the matter progresses as earlier ordered by the Court for delivery of judgement on 12/3/2020.

Dated and delivered in open Court this **9th day of March, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Mwachiro for Claimant

Munaawa for Applicant