



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 735 OF 2017

JARED NYAMWEYA MATUNA

CLAIMANT

v

KABANSORA MILLERS LIMITED

RESPONDENT

RULING

1. On 1 November 2017, the Court being satisfied that Kabansora Millers Ltd (Respondent) had been served with Notice of Summons and Memorandum of Claim but had failed to enter Appearance and/or file a Response ordered that the Cause proceed as undefended.
2. Consequently, on 23 September 2019, the Deputy Registrar scheduled the Cause for hearing on 3 December 2019.
3. The Cause was heard and Jared Nyamweya Matuna (Claimant) testified and the Court delivered Judgment on 17 January 2020.
4. On 19 February 2020, the Respondent filed an application under a certificate of urgency seeking orders
 1. ...
 2. **THAT** there be a stay of execution of the judgment/decreed dated 17th January 2020 pending the hearing and determination of this application.
 3. **THAT** the ex-parte proceedings conducted on 3rd December 2019 and the consequential judgment entered against the Respondent on 17th January 2020 be set aside.
 4. **THAT** the Respondent be granted leave to file a Response to the Claim and to defend the Claim.
 5. **THAT** in the alternative, and without prejudice to prayer No. 3 above, hearing of the suit herein be re-opened and the Respondent be granted leave to file a Response, to cross-examine the Claimant on his evidence already given and to also adduce evidence in rebuttal of the Claim.
 6. ...
 7. ...
5. The Claimant filed a replying affidavit in opposition to the application on 27 February 2020, and the Court took submissions on 3 March 2020.
6. The main grounds/reasons advanced in support of the application were that although a Notice of Appointment of Advocate was filed, a Response was not filed because the advocate's Clerk failed to bring up the file to the attention of the dealing advocate; the Clerk had misfiled the case documents among closed files and that a copy of the Notice of Appointment had been served upon the Claimant's advocate through the post and that there was a good defence to the Claim.
7. In resisting the application, the Claimant asserted that the Respondent did not serve a Notice of Appointment of Advocate; that notwithstanding, the Respondent was served with mention notices for 1 November 2017, an invitation letter dated 15 November 2018 to attend the registry to fix a hearing date, a hearing notice dated 8 March 2019 and another dated 1 October 2019.

8. Case law setting out the legal principles a Court should consider when dealing with an application as the instant one are legion.

9. In *Esther Wamaita Njihia & 2 Ors vs. Safaricom Ltd* (2014) eKLR, the Court cited relevant case law and stated

The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered.

10. In the view of the Court, one of the determinative questions herein is whether the Respondent and its advocate were not aware of the progression of the Cause.

11. The Claimant asserted that he served the Respondent directly with the mention and hearing notices through the post and he exhibited records from Postal Corporation of Kenya.

12. The Claimant had also contended that the Respondent had failed to respond to formal attempts to resolve the dispute through the Ministry of Labour.

13. The Respondent was eerily quiet and did not attempt to explain or deny that the notices exhibited by the Claimant were received. Assuming that the Respondent received the notices, it is alarming that it would not have brought the same to the attention of its advocate. Equally, there was no explanation on the response made to the demands from the Ministry of Labour.

14. The conduct of the Respondent in the circumstances demonstrated herein show a litigant who was not diligent and, the Court declines to exercise its discretion in its favour.

15. The Court has also looked at the proposed defence.

16. One of the main defences proposed is that the Claimant was not entitled to some of the reliefs awarded such as *service pay*.

17. If there was an error, such can be cured through the review jurisdiction, if at all.

18. The application is dismissed with costs.

Delivered through video/email, dated and signed in Nairobi on this 22nd day of May 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muli instructed by Muli & Co. Advocates

For Respondent Mr. Mogire instructed by Amuga & Co. Advocates

Court Assistant Judy Maina