



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 9 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

MARY WANJIKU KIGURU..... 1ST CLAIMANT

**PROF. ROBERT GITUMBO GATERU..... 2ND CLAIMANT
VERSUS**

KENYA METHODIST UNIVERSITY..... RESPONDENT

RULING

The application before me for determination is dated 23rd August 2019. It is filed by the respondent and expressed to be made under Rules 13(5) and 17(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016, Sections 1A and 3A of the Civil Procedure Act, Article 159 of the Constitution of Kenya and all other enabling provisions of the law. The applicant seeks the following orders –

1. That the Court be pleased to set aside and/or review its orders of 17th July 2019 certifying the matter ready for hearing and directing that the matter does proceed for hearing as an undefended cause.
2. That the Respondent be granted leave to file its Reply to the Memorandum of Claim and supporting documents as set out in the Draft Response to Memorandum of Claim annexed hereto.
3. That the Response to Memorandum of Claim annexed hereto be deemed duly filed and served upon the payment of the requisite filing fees.
4. That the suit filed by the Claimant against the Respondent being Milimani ELRC No. 9 of 2019: Mary Wanjiku Kiguru and Prof Robert Gitumbo Gateru vs Kenya Methodist University in the Employment and Labour Relations Court at Nairobi be transferred therefrom to the High Court at Nairobi Civil Division which has jurisdiction to hear and determine this matter.
5. That the costs of this application be provided for.

The grounds in support of the application both on the face thereof and in the supporting affidavit of Lillian Mutuma, Legal Officer of the respondent, are that upon service the respondent instructed the law firm of Patricks Law Associates to defend it in the suit but was unable to trace the documents necessary for the lawyers to enable them file the defence. That the documents were in locations only known to employees who had since left employment of the respondent while others were with the 2nd respondent, that the respondent has a good defence as demonstrated by the draft defence attached to the application and that it is in the interest of justice to grant the prayers sought.

The claimant opposes the application and filed a replying affidavit of Mary Wanjiku Kiguru, the 1st claimant in which she deposes that the time for filing defence lapsed a long time ago, that Counsel for the respondent sought a copy of pleadings from claimant's Counsel by letter dated 18th April 2019 and the same were supplied vide letter of 24th April 2019, that even after receiving the pleadings no defence was filed. That Counsel for the applicant was notified of all dates when proceedings in court took place but did not attend court sessions. That the application is intended to delay the hearing of the suit on merit as the respondent has demonstrated it is not keen on participating in the proceedings. That for these reasons the application should be rejected.

The application was heard on 19th February 2020. Ms. Sikuku appeared for the applicant/respondent while Mr. Njenga appeared for the claimant. Both parties reiterated the averments in their respective pleadings with respect to the application.

The issue for determination is whether the applicant meets the threshold for grant of the orders sought.

Setting aside of ex parte orders is a matter for the discretion of the court after considering the merits of the defence, the reasons for the delay

and the interests of justice.

In the instant case the suit has not been heard, although it had been set down for hearing as an undefended case. I have considered the grounds in support of the application in the supporting affidavit. The deponent states the respondent had difficulty tracing documents as the employees who had knowledge of the whereabouts were no longer working with the respondent. I have further taken into account the defence and I am satisfied that it raises triable issues.

In the case of **Patel v East Africa Cargo Handling Services**, Duffus VP observed as follows:-

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

I am satisfied that the delay herein can be remedied by an award of costs.

For the foregoing reasons I set aside my orders of 17th July 2019 certifying the case ready for hearing as an undefended claim and grant leave to the applicant/respondent to file defence together with its bundle of documents and witness statement(s) within 21 days.

The applicant/respondent will pay the claimant Kshs.30,000 as throw away costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MAY 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE