



REPUBLIC OF KENYA

IN EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1007 OF 2015

JONATHAN MUTUKU MUTUA.....CLAIMANT

VERSUS

PEMCO AGENCIES.....RESPONDENT

RULING

1. The application before me is the respondent's Notice of Motion dated 1.11.2019. It is brought under Article 159(2) of the Constitution section 3A of the Civil Procedure Act and section 20 of the ELRC. Act and it seeks the orders for the setting aside of the ex parte proceedings of 30.10.2019 against the respondent and any consequential orders thereof, and allow the respondent to unconditionally defend this suit. The respondent also seeks to have the costs of the application provided for. Costs of the application be provided for.

2. The claimant has opposed the application by filing his replying affidavit sworn on 1.11.2019.

3. The application is premised on the grounds set out on the body of the motion and it is supported by the affidavit sworn Mr. Obara Niicholas Andrew, the counsel for the respondent.

Applicant's case

4. The applicant contended that the impugned proceedings should be set aside and she be granted leave to defend the suit because it is in the interest of justice to do so. She contended that failure to grant the orders sought will prejudice her because she would be condemned unheard contrary to the rules of natural justice. She further argued that the court has unfettered discretion to set aside the ex parte proceedings because the claimant will not suffer prejudice beyond the scope of costs.

5. The respondent justified her failure to attend the hearing by contending that the parties had asked the court for an out of court settlement and her offer was rejected a day before the hearing date. That it was not possible to file a witness statement at that time and avail the witness. That on the day of the hearing her counsel agreed with the claimant's counsel to have the file placed aside but the latter proceeded with the hearing.

Claimants case

6. The claimant contended that the application is unmeritorious and a waste of time. He contended that the suit was fixed by consent for hearing on 30.9.2019 but when the matter was called out the respondent and her counsel were absent. That the suit was placed aside until 11.00 a.m. when it was called out again but the respondent and her counsel were still absent. As a result, the matter proceeded by tendering of the claimant's evidence after which the hearing was declared closed and parties granted leave to file submission.

7. He denied the request for settling aside the proceedings and contended that the far the court should go if the need arises is to recall him for cross examination.

Issues for determination

8. There is no dispute that the court has unfettered discretion to set aside ex parte orders (proceedings) for a good cause being shown and upon terms. The issues for determination are:-

(a) Whether the applicant has shown a good cause to warrant this court's discretion as prayed.

(b) Whether the claimant will be exposed to any prejudice beyond costs.

9. As regards the first issue above, the court has considered the explanation tendered by the counsel for the respondent, that is, the parties were involved in an out of court settlement until 29.10.2019 when the claimant's counsel declined the respondent's computation of damages payable in settlement of the claimant's suit. The defence counsel also explained that he agreed with the claimant's counsel to place the matter aside while he prepared and filed the witness statement for the respondent.

10. The claimant's counsel has not disputed the explanations given by the defence counsel. I therefore find that the failure by the respondent and her counsel to attend the hearing on 30.10.2019 before the close of the proceedings was not through wilful neglect and as such a good cause has been shown to warrant the exercise of this court's discretion in her favour.

11. As regards the second issue for determination, the claimant has not demonstrated that he will suffer prejudice which cannot be compensated by costs.

Disposition

12. In view of the finding above that a good cause has been shown to warrant this court's discretion and that no prejudice will be suffered by the claimant beyond what costs can compensate, I allow the application in the following terms:

- (a) The hearing is reopened to the extent that the respondent will have the leave to cross examine the claimant, and thereafter prosecute her defence.
- (b) The respondent shall pay the claimant throw away costs of Kshs. 15,000 before the next hearing date.
- (c) The suit shall be heard on priority basis due to its age.

Dated, signed and delivered in Nairobi this 26th day of June, 2020.

ONESMUS N. MAKAU

JUDGE