REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 632 OF 2019

EVERLYN CHEROTICH MAIYO..CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.................................1ST RESPONDENT

KEVIN ASWANI...2ND RESPONDENT

RULING

1. The Applicant herein is the Respondent's Notice of Motion dated 27.5.2020 seeking the following orders, THAT: -

a. Directions by the court issued on 4.3.2020 that the matter proceeds by formal proof be set aside.

b. Time for filing Response to the Memorandum of Claim be extended/enlarged by 14 days from the date of the order of this court.

c. Costs of this application abide in the cause.

2. The Application is premised on the grounds set out in the body of the motion and the supporting Affidavit sworn by Mr. Mahinda Denis Makori, Applicant's Advocate on 27.5.2020. In brief, the Applicant's case is that, it entered appearance on 14.9.2019 but failed to file and serve a Memorandum of Response; that when the matter was fixed for pre-trial directions on 4.3.2020 when the impugned directions were made; that the failure to file defence within the required time was not intentional but due to the delay in securing important information concerning the claimant's case from Kitale where the cause of action arose; that it has now obtained the needed information and drawn a draft defence which is annexed to the application; that the intended defence raises triable issues which ought to be ventilated inter-parties because the claim raises very serious allegations; that it is the interest of justice that the application be allowed and finally, the claimant will not be prejudiced because the matter is yet to be set down for hearing.

3. The Respondent filed his Replying Affidavit sworn on 10th July, 2020 to oppose the application. He contended that while the matter was filed on 25.9.2019, the Applicant only entered appearance on 17.10.2019 but failed to file its defence; that on 4.3.2020 its counsel attended pre-trial but as at that time no defence had been filed and served; that the alleged difficulty in securing relevant documents for purposes of filing defence is not true as the applicant is a big bank with a good information system; that no evidence has been tendered to prove that the respondent made any efforts to get the requisite documents; that the application has been brought after unreasonable delay of over 8 months and it has occasioned loss to her because she has been travelling 325 Kms from Kitale to Nairobi to attend the court for mentions and hearing; that she is not responsible for the delay in filing defence and as such she should not be punished for the respondent's mistake; that she has remained without employment since losing employment with the respondent and Covid-19 has made things worse for her; that the intended counter claim is time barred; and that in the interest of justice the application should be dismissed and the suit should proceed by formal proof.

4. The application was canvassed by written submissions which I have carefully considered herein.

Applicant's Submissions

5. The Applicant submitted that this court has a wide discretion to set aside its orders as long as the same is done on such terms as may be just. It contended that it has met the legal threshold for granting the order sought as it was set out in **James Kanyiita Nderitu & another v Mario Philotas Ghikas & another [2017] eKLR, Wachira Karani v Bildad Wachira [2016] eKLR** and **Martha Wangari Karua v IEBC Nyeri Civil Appeal No.1 of 2017** and other cited precedents. It therefore prayed for the application to be allowed as prayed.

Respondent's Submissions

6. The Respondent submitted that the Applicant has not shown sufficient cause to warrant granting of the orders sought and relied on the case of **Wachira Karani v Bildad Wachira [2016] eKLR** where Mativo J held that sufficient cause is the cause for which the defendant could not be blamed for his absence and went on to opine that sufficient cause is a question of fact and it depends on the special circumstances in the case at hand.

7. The Respondent distinguished this case from **James Kanyiita Nderitu & another v Mario Philotas Ghikas & another [2017] eKLR** contending that in the said precedent the court was dealing with an irregularly obtained judgment. She also distinguished this case from the other cited precedents and prayed for the application to dismissed with costs.

Issues for determination and analysis

8. There is no dispute that the applicant's counsel filed a Memorandum of Appearance but failed to file defence and the court directed the matter to be canvassed by formal proof. The main issue for determination is whether the applicant has met the legal threshold for granting of the orders sought.

9. The legal threshold for setting aside a regular judgment or court order was discussed in **James Kanyiita Nderitu & another v Mario Philotas Ghikas & another [2017] eKLR**, where the Court of Appeal held that: -

> **"…the has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure to file his memorandum of appearance or defence on time as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues;the3 respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment among others."** [emphasis added]

10. In **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** Duffus P. held that:

> **"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 to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on 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."**

11. In **Shah v Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa held that:

> **"This discretion (to set aside decisions) is intended so 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."** *(emphasis added)*

12. From the foregoing binding precedents, it is clear that setting aside of judgment or court orders is not a matter of cause but one that must be grounded on demonstration by the applicant that the impugned decision was not occasioned by wilful negligence on his part. It therefore behoves of the applicant to establish by affidavit evidence a sufficient cause to warrant granting of the order. In **Wachira Karani v Bildad Wachira [2016] eKLR** Mativo J held that:

> **"Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."**

13. The Supreme Court of India in ***Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011)*** observed that:

> **"sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently …"**

14. In this case the reason given for the respondent's failure to file defence is that the Head office had not received the required information from the Kitale Branch were the claimant was based when the cause of action arose. The Court has not been told what information was required concerning the resignation of the claimant that took more than 5 months to secure from the same institution. The court also notes that the applicant took almost 3 months after the impugned application before making the instant application. Such delay is unreasonable by all standards and it has the potential of delaying the finalization of this suit. The delay has not been adequately explained by the applicant.

15. I have however considered the draft defence and found that it is not frivolous but it is raising triable issues which are better canvassed effectively through inter partes hearing. The issues in contention include whether or not the Respondent voluntarily resigned or was she constructively dismissed; whether she was a victim of sexual harassment by the 2nd respondent; and whether she is entitled to the relies sought by the suit.

16. In addition, I have considered the prejudice that the respective parties may suffer should the court grant or decline to grant the orders sought and find that the Applicant will suffer irreparable harm by being condemned without a hearing compared to the Respondent who can be adequately compensated by costs. Considering the totality of the material presented to the court, I am therefore satisfied that notwithstanding the said default by the applicant, the interest of just demands that the application be allowed.

17. Finally, it is trite law that the discretion to set aside regular orders of the court must be done upon terms. In this case, the suit has not been set down for hearing and as such an award of costs will remedy the inconveniences caused to him by allowing the application. Consequently

I allow the application dated 27.5.2020 in the following terms:

a. The directions by the court issued on 4.3.2020 that the matter proceeds by way of formal proof be and is hereby set aside.

b. The Applicant has 14 days hereof to file and serve Response to the Memorandum of Claim herein.

c. The Applicant is condemned to pay thrown-away costs of Kshs. 20,000 within 14 days and in default leave is hereby granted her to execute for the said costs.

Dated and delivered at Nairobi this 22nd day of October, 2020.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE