REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 638 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 11th November, 2020)

JEREMY KIRIMI RITHAA.....CLAIMANT

VERSUS

THE TECHNICAL UNIVERSITY OF KENYA...RESPONDENT

JUDGEMENT

1. The Respondent/Applicant, Technical University of Kenya filed a Notice of Motion application dated 11th March 2020 seeking to be heard for orders that: -

1. Spent.

2. Interim stay of execution to issue pending the hearing and determination of this application.

3. The ex-parte judgment delivered herein on 20th January 2020 be set aside.

4. The Respondent be granted leave to file and serve its defence outside time.

5. Costs of the application be in the cause.

2. The Application is supported by the grounds that the Federation of Kenya Employers (FKE) entered appearance on behalf of the Respondent on 20th April 2017. That the matter came for pre-trial directions on 13/07/2017 before Abuodha J. and the Court directed that if the Respondent did not file its defence within 21 days, the suit would proceed undefended. That the Respondent's advocates notified the Respondent of the courts orders and sought instructions but no instructions were issued within the 21 days. That given the Respondent was at that time, and still is a bona fide member of the FKE, advocates for the Respondent, filing a motion to cease acting was ill advised.

3. That the Respondent's advocates on record discovered this matter had come up for hearing ex-parte before Wasilwa J on 14/10/2019 which was also established upon inquiring from the registry. That a further inquiry established that the matter was mentioned on 24/11/2019 but the Respondent was not served with any mention notice and that Judgment date had been reserved for 20/10/2020 but no judgment notice had been served upon the Respondent. That despite the Respondent filing an application seeking to arrest the delivery of judgment, judgment was nonetheless delivered as scheduled and without determining the Respondent's application seeking to arrest delivery thereof. That the Claimant has since initiated the execution process by filing a notice of taxation scheduled for 16/04/2020 but if execution proceeds, this application will be rendered moot and the Respondent will have been condemned unheard.

4. Further, that the Respondent's advocates have since obtained instructions and are desirous to defend the Claim and have the suit determined on merit and not procedural technicalities and that the Claimant is equally guilty of laches as he took more than 2 years to prosecute. That the Application has been brought without any delay, the reasons advanced for failure to file a defence within time are sufficient to warrant exercise of discretion in favour of the Respondent and the attached draft defence raises triable issues. That it is trite law that every accused person has a right to face their accuser and every person has an inalienable right to a fair hearing. That the overriding consideration guiding the Court in determining such applications is the interest of justice and that justice shall be administered with undue regard to procedural technicalities. That the Claimant will not suffer any prejudice if the orders sought herein are granted.

5. The Application is supported by the Affidavit sworn by a Legal Officer at FKE, Anthony Kilonzo who avers that failure by the Respondent's advocates on record to comply with the orders issued on 13th July 2017 was occasioned by lack of Instructions from the Respondent. That it would be a miscarriage of justice if this suit was heard undefended because the Respondent would be denied its day in

Court and its right to have the suit determined on merit.

6. The Claimant/Respondent, Jeremy Kirimi Rithaa filed a Replying Affidavit sworn on 24th July 2020 averring that while he filed the claim against the Respondent on 03/04/2017, the Respondent entered appearance on 20/04/2017 but had not filed a Defence as at 19/05/2017. That therefore his advocates requested for a mention for direction purposes vide their letter dated 19/05/2017 and the matter was fixed for 13/07/2017, and the Respondent was served. That he has been advised by his advocate that there were no hearing dates for the year 2017 as the registry was giving dates for older matters and that the date for this matter was set for 14th October 2019. That after judgment was delivered the Respondent through FKE then sought certified copies of the proceedings and Judgment for purposes of filing Appeal.

7. He further avers that the Application filed in Court on 16/12/2019 was struck out on 27/02/2020 and that the Applicant/Respondent has admitted it failed to comply with a very clear and specific Court order of 13/07/2017. That the matter consequently proceeded as undefended claim and the Applicant/Respondent does not seek to set aside the said order and that judgment delivered from such circumstances cannot be termed as exparte when it is evident the Respondent had chosen not to participate in view of the Court Order issued in their presence. That the Applicant did not take advantage of the long period before the matter was finally heard on 14/10/2019 for it to seek extension of time to file the Defence nor did it take any action. That the Applicant only rushed to court to arrest delivery of judgment and filed the instant application which is unacceptable and that the Application is an abuse of the process of court and intended to delay the Claimant from enjoying the fruits of judgment.

8. The Claimant/Respondent further believes that delay in paying legal fees and a dispute between advocates and client is not a good reason to set aside a judgment and that the Court process cannot be held at ransom by an Advocate-Client dispute. That there is further no evidence and/or allegation to show when the fees was paid and when and how the Claimant/Respondent contributed to the issue and that the Applicant/Respondent has not also confirmed the allegation made by its advocates or given any grounds why the judgment should be set aside. That clearly the attempt to set aside the judgment is a scheme by M/s FKE purporting to be the advocates for the Applicant/Respondent which has also not offered to comply with any terms or to pay any sums as security. That there is no miscarriage of justice or breach of any alleged trite laws since the Applicant was well aware of the consequences of not defending the suit as ordered by Court.

9. He contends that the purported defence has no triable issues and does not address the issues and the terms of the judgment e.g. the Applicant has no dispute with the 3 months' notice as at paragraph 12 of draft defence and that the same will be wasting Court's time in reopening the matter. He further avers that the Respondent dismissed him unfairly and employed illegal labour practices on him.

Respondent/Applicant's Submissions

10. The Applicant submits that this Court has the power to extend or reduce the time within which a responding party may respond to a pleading on application by a party to any proceedings as under **Rule 13 (5) of the ELRC Rules 2016**. That the same was reiterated in **Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega SC another [2018] eKLR**. It contends that there were no notices (mention, hearing or judgment) served on the Respondent to elicit action before delivery of judgment and it cites the case of **Sugow Aden Abdi v Kamil Dagane Abdi & another [2017] eKLR** where the Court observed there was no evidence on record showing that the appellant was served with a hearing notice for the formal proof and held that the appellant was entitled to be served for formal proof.

11. It submits that the paramount consideration when determining an application seeking to set aside ex-parte judgment is whether the defence raises triable issues and that it has annexed a draft defence to the application demonstrating chronic absenteeism by the Claimant. That this is a triable issue as it would determine whether or not there was a valid reason for termination under section 44(3) and section 44(4) (a) of the Employment Act. The Applicant relies on the case of **Toshike Construction Company Limited v Harambee Co-operative Savings & another [2019] eKLR** where the Court of Appeal cited the case of **Sebei District Administration vs Gasyali (1968) EA 300** where the Court held that the defence brought to the notice of the court however irregularly should be considered and that the court should further consider whether the plaintiff can reasonably be compensated by costs for any delay occasioned before denying the subject a hearing as a last resort. The Court of Appeal in the said case held that the learned judge made an error in principle when he failed to consider the 'draft defence and counterclaim'.

12. The Respondent/Applicant submits that its desire to defend the suit was let down by its advocates failure to manifest a reasonable cause and that it is however no longer necessary for the cause shown to be sufficient since the discretion whether or not to set aside is unfettered. It further relies on the case of **Winnie Wambui Kibinge & 12 Others v Match Electricals Limited [2012] eKLR** where Odunga J set aside the interlocutory judgment and deemed the defence as filed within time.

13. It is the Respondent/Applicant's submission that the oxygen principle advocates for justice to all and that having this suit proceed as an undefended suit is going against the oxygen principle. That **Article 159 (2) (d) of the Constitution of Kenya** amplifies this principle by providing that Courts ought not be bogged down with procedural technicalities. That **Article 50** further provides that every person has a right to have a dispute resolved in a fair and public hearing before a Court of law. It states that costs of the application ought to await the outcome of the trial.

Claimant/Respondent's Submissions

14. The Claimant submits that the Applicant has not brought any application under **Rule 13(5)** and that if the Respondent was aggrieved that the matter proceeded without inviting them for hearing, the Application ought to be brought under **Rule 22 of the Employment and Labour Relations Court (Procedures) Rules 2016**. He contends that the Respondent/Applicant has not shown good reasons why the delivery of the judgment should be stayed. Further, that the Notice of Appeal annexed to the Claimant's replying affidavit has not been withdrawn and therefore for all purposes and intents the Appeal is pending before the Court of Appeal for determination and the application herein is clearly an abuse of the process of court. That it is also clear from the record that no official of the Applicant has participated in these proceedings with all the allegations and affidavits having been filed by the legal officer of FKE who has purported to swear on facts that are contested and

that consequently the said evidence cannot be relied on.

15. It is the Claimant/Respondent's submission that the order of the Court of 13/07/2017 is still on record and the matter proceeded as such and that there is nothing irregular on record that can allow the Applicant to set aside the Judgment. That the Court cannot thus grant the Applicant the order to file a defence without applying to set aside the order of 13/07/2017 and especially after three years since the said order was made. That ***Appendix 1*** by the Applicant's advocate reveals that the failure by the Advocate to act was for non-payment of fees as expressly indicated in letters that are not signed by the deponent of the affidavit in support. That the Respondent's response to the issue of fees is also not shown and there is nothing on record to show that the Respondent is even aware of the proceedings to set aside the judgment. He further submits that the Advocates Act has set out a clear procedure on how to tax Advocates client's Bill and that Advocate-client disputes cannot therefore be a reason to set aside judgment.

16. The Claimant/Respondent submits that the Defence does not at all address his claim and does not deny his entitlement nor prove that he was indeed paid his salary and that the Applicant has not shown any good will to settle this Claim. He notes that the Applicant has not submitted on the effect of its failure to obey a court's express direction and submits that the Court may excuse an inadvertent oversight but not a willful neglect. He urges this Court to dismiss the Respondent's Application with costs to the Claimant.

17. I have examined the averments of the Parties herein. Under rule 13(5) of the ELRC Rules 2016, this Court has power to extend time for responding to pleadings. This Court also has power to set aside or vary a judgement or order upon such terms as it deems fit.

18. In **Patel vs E.A Cargo Handling Services Limited (1974) E.A** page 75, Sir Duffus stated 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."***

19. Of course, in the current Claim, the Respondents never filed a defence since this matter was filed in 2017. The Respondents were even given a chance to file the defence within 21 days on 13/7/2017 by J. Abuodha with a rider that in default the matter was to proceed as an undefended Claim. At the end of the allocated period no defence had been file and so the matter proceeded undefended on 14/10/2019. Even during the intervening period of over 2 years, the Respondents never filed a defence.

20. However, under this application, the Respondents/Applicants have attached a draft defence in which they raise issues about the Claimant's conduct as a Lecturer which warranted his dismissal. This indeed is a triable issue which the Respondent should be given a chance to ventilate.

21. Despite the Respondents own laches, I find issues raised are triable. I therefore allow the application to set aside the exparte judgement with all consequential orders on condition that the Respondents pays the Claimant thrown away costs of Kshs.100,000/= within 30 days and set down this case for hearing within 90 days. In default these orders be vacated and execution to proceed.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kilonzo for Applicant – Present

Mbabu for Claimant – Absent