



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 429 OF 2017

KENYA COUNTY GOVERNMENT WORKERS' UNION..... CLAIMANT/RESPONDENT

VERSUS

KISUMU WATER AND SEWERAGE COMPANY LIMITED...RESPONDENT/APPLICANT

RULING

1. The applicant in the amended Notice of Motion application dated 7th October, 2019 prays for Orders *interlia* that: -
 - a. The Court to grant stay of execution of the Judgment and decree delivered on 18/9/2019 pending hearing and determination of the application interpartes.
 - b. The Court be pleased to set aside orders dated 18/10/2018 and 15/01/2019 requiring the matter to proceed by way of formal proof and striking out of the applicant's/respondent's response to the claim and the judgment delivered on 18/9/2019 upon hearing the application interpartes.
 - c. That the suit to start *de novo* and time be extended for the Applicant/respondent to file response to the Memorandum of Claim out of time and the Applicant be allowed to defend the claim.
2. Interim orders were granted.
3. The application is founded on grounds set out in the supporting affidavit of Robert Ouma Njoga Advocate for the respondent/Applicant in which he deposes that he was instructed to act for the respondent in the matter on 15/12/2017.
4. That due to factors beyond the control of the firm of Ouma Njoga & Company Advocates and due to no fault on the part of the instructing client, the respondent filed its response to the claim late and after claimant's case had closed. That on 15/1/2019 the Court struck out the respondent's/Applicant's response.
5. That the mistake of Counsel ought not to be visited upon a helpless yet innocent client.
6. The applicant seeks leave to defend the suit which has serious ramifications on its operations.
7. That no prejudice would be suffered by the respondent which an award of costs would not compensate if the Orders sought are granted in the interest of justice.

Response

8. The claimant filed a replying affidavit to the amended application sworn to by Solomon Oguta, the grievant in the suit who deposes that the firm of Ouma Njoga & Company Advocates entered appearance in the suit on 15/12/2018.
9. It is not in dispute that the suit was mentioned on 8/12/2018 when Mr. Njoga sought leave to file a defence to the claim out of time.
10. The Court granted the respondent 14 days within which to file the statement of defence and matter was set for mention on 20/2/2018.
11. That as at 20/2/2018 when matter was mentioned, the respondent had not filed a statement of defence.

12. The respondent was to file a statement of defence by 22/2/2018 and the suit was granted a hearing date on 18/10/2018.
13. That Mr. Njoga did not file any statement of defence.
14. That Mr. Njoga was served with a hearing notice dated 24/8/2018 for hearing on 8/10/2018 but he did not attend the hearing.
15. That on 19/10/2018, Mr. Njoga was served with the Claimant's final submissions and he found out that the matter had proceeded to formal proof on 8/10/2018 when he failed to attend Court.
16. Mr. Njoga then filed, without leave of Court a memorandum of response dated 15/1/2019 after the claimant had closed his case and filed final submissions.
17. The matter was mentioned on 15/1/2019 to confirm filing of final submissions and the claimant applied for the statement of defence to be struck out having been filed out of time and without leave of Court. The same was duly struck out and the matter proceeded for judgment which was delivered on 18/9/2019.

Determination

18. The issue for determination is whether the application to set aside the judgment of the Court and have the suit heard *de novo* has any merit.
19. There is no dispute that at all material times, the respondent and its advocate were aware of the pendency of the suit filed on 30/11/2017 and served on them. There is no dispute that the respondent through its advocate entered appearance in the matter on 15/12/2017.
20. It is admitted by the applicant that they did not file any defence on time.
21. The respondent admits that on 8/2/2018 the Court granted leave to the respondent to file a statement of defence out of time within 14 days.
22. It is not in dispute that when matter was mentioned in 20/2/2018, the respondent had not yet filed a statement of defence and was allowed to file the defence on or before the 22/1/2018.
23. The Court granted the suit a hearing date of 18/10/2018. It is admitted by the respondent that when the matter came for hearing on 18/10/2018 more than six (6) months later, the respondent had not filed any statement of defence and did not attend the hearing of the suit.
24. The matter proceeded to formal proof *ex parte*.
25. The delay exhibited by the respondents and their advocates, who do not deny knowledge of the existence of the suit is so inordinate as to be termed unconscionable.
26. It is equally unpalatable for the respondent to sneak a statement of defence in Court after the closure of the claimant's case and filing of final submissions without leave of the Court.
27. This is not the kind of conduct that favours grant of a discretionary Order by the Court long after the judgment of the Court which was delivered on 18/9/2019.
28. The Court is satisfied that it is not only the negligence of the advocate for the respondent which led the respondent not to defend the matter. The respondent who was at all material times aware of the matter did not ensure a statement of defence was filed for more than a year after the respondent was served with summons and its advocate entered appearance in the suit on 15/12/2017.
29. The claimant/respondent has waited now for more than three years from date of filing suit to enjoy the fruits of its judgment.
30. The claimant shall suffer immense prejudice if this matter were to start *de novo* due to apparent disregard of the proceedings by the respondent and its advocate.
31. The Court is not satisfied that there are any compelling reasons to set aside the judgment of the Court and direct the matter to start *de novo*.
32. Accordingly, the application lacks merit and is dismissed with costs.

Dated and delivered at Nairobi this 17th day of December, 2020.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Ann Njoga for respondent/Applicant

Mr. Odero for claimant/respondent

Chrispo – Court clerk