



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

ELRC NO 518 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th February, 2019)

ROBERT NYAGWANSA MIRUKACLAIMANT/RESPONDENT

VERSUS

PRESBYTERIAN UNIVERSITY OF EAST AFRICA...RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant through the firm of Ombati Otieno Opondo Advocates filed its Notice of Motion on 25th September 2018 seeking the following Orders:-

- 1. THAT this instant application be certified urgent and service of the same be dispensed with in the first instance.***
- 2. THAT the hearing of this case be deferred pending the hearing and final determination of this application.***
- 3. THAT the time for filing a response to the Memorandum of Claim be extended/enlarged.***
- 4. THAT the time of filing a response to the Claimant's Memorandum of Claim be extended by 14 days from the date of the order of this Honourable Court.***
- 5. THAT the costs if this application be provided for.***

2. The Application is supported by the Affidavit of Mugao Domenic the Respondent's Human Resource Manager and is premised on the following grounds that:-

- 1. The Respondent failed to file a response in time due to an administrative mix up in its offices. The failure to file the Response was neither deliberate nor intentional.***
- 2. The applicant has an arguable case with high chances of success.***
- 3. The Applicant should not be shut out of the corridors of justice and that it has come to court after discovering the existence of the omission.***
- 4. No prejudice will be suffered by the Claimant.***

3. In response to the application, the Claimant filed a Replying Affidavit sworn on 19th October 2018 in which he states thus:-

- 1. The Respondent was served and received the Memorandum of Claim together with the Summons to Enter Appearance on 24th March 2017 and a Mention Notice on 22nd November 2018 but no explanation had been given prior for the failure to enter appearance prior to being served with the Amended Memorandum of Claim.***
- 2. The Applicant was fully aware that a Response was required to be filed within the stipulated time and that having been served with the Summons to Enter Appearance in 2017 it knew what was required but only chose to be indolent in executing it mandate.***
- 3. The annexed draft Defence consists mere denials and has not demonstrated any triable issues. Consequently, should the orders ought herein be granted, he stands prejudiced owing that time has elapsed and the time will be spent on hearing a defence.***

4. The Application was heard by way of written submissions.

Respondent/Applicant's submissions

5. The Respondent submitted that it has a good defence which demonstrated that the Claimant did not have any outstanding leave and that it was not responsible for repaying the Claimant's loan.

6. It submitted that the delay in filing its Response was due to the reason that there was a mix up in its office when the Memorandum of Claim and hearing notice were inadvertently filed away. It submitted that the Claimant will not suffer any prejudice if the Respondent is granted orders sought and the suit is set down for hearing. It further submitted that the Respondent shall suffer prejudice should there be no extension of time.

Claimant/Respondent's submissions

7. The Claimant submitted that default judgement was entered against the Respondent for failure to enter appearance and thereafter the claim was set down for formal proof. The Claimant submitted that the Respondent ought to have filed an application seeking to set aside the default judgement. It relied on the decision in **Chaka Nyando Chidunga v Cargill Kenya Limited [2018] eKLR** where the Court held:-

“Discretionary powers bestowed upon the Court are to be exercised judiciously not whimsically. Regarding the setting aside of an ex-parte judgment, the rule of thumb is that the discretion of the Court is not intended to aid a party out to obstruct or delay justice.

In James Kanyita Nderitu & another v Marios Philotas Ghika & another [2016] eKLR the Court of Appeal held that in determining whether there exists sufficient cause for setting aside an ex parte judgment, the main concern of the Court should be to do justice to the parties.”

8. The Claimant submitted that the Employment and Labour Relations Court (Procedure) Rules 2016 do not provide for the procedure for setting a default judgment, however the Court may set down the claim or formal proof under Rule 15 (3) of the Employment and Labour Relations Court (Procedure) Rules 2016. The Claimant relied on the decision in **Kennedy Makasembo v Kenya Union of Post Primary Education Teachers [2017] eKLR** and submitted that the Claimant's application was an abuse of the Court process.

9. The Claimant submitted that the Respondent has not offered a plausible explanation as the inordinate delay on filing its response and that the delay was caused by the Respondent as some of the documents prior to the Amended Memorandum of Response were served upon the Respondent but no action was taken. The Respondent relied on the Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** in submitting that the principles laid therein were not met by the Respondent thus its application should be dismissed.

10. The Claimant submitted that it served the Respondent with the Summons to Enter Appearance together with the Memorandum of Claim on 24th March 2017 and a Mention Notice on 22nd November 2017 but no explanation has been issued by the Respondent on why it failed to enter appearance.

11. The Claimant submitted that the draft defence consisted mere denials and had not demonstrated any triable issues. Further, that since there was default judgment on record the Respondent/Applicant has not filed an application to set aside the judgement hence the application for extension of time is frivolous.

12. I have examined all the averments of the Parties. It is indeed true that there was an inordinate delay by the Applicant/Respondent in filing the Response to the claim since they were served with the Memorandum of Claim on 24.3.2017.

13. However, it would be an injustice to lock out the Respondent from prosecuting his case on account of their mistakes which do not greatly prejudice the Claimant.

14. The Claimant still has a chance to reply to the response if filed and also to put to test the evidence to be submitted by the Respondent, which he alleges, is a mere denial.

15. I will exercise my discretion and allow the application and direct the Respondents to file their response within 14 days. The Claimant will have a chance to respond within 14 days upon service.

16. Costs in the cause.

Dated and delivered in open Court this 19th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mungania for Applicant – Present

Ouko holding brief Mugambi for Respondent – Present