



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2562 OF 2016**

**IRENE JILLANI MWAMUYE.....CLAIMANT**

**VERSUS**

**RED COURT HOTEL T/A**

**THE BOMA HOTEL.....RESPONDENT**

**RULING**

**Introduction**

1. The Claimant was employed by the Respondent under a contract of service which provided for termination by either party by serving 3 months notice or paying salary in lieu of notice. On 10.9.2016, the claimant served the respondent with a termination notice of 3 months. The notice was accepted on 13.9.2016 but the Respondent offered to pay one month salary in lieu of the notice upto 9.10.2016 contending that the termination notice period was one month. The claimant was aggrieved and brought this suit on 14.12.2016 claiming the arrears of 2 months salary in lieu of notice.

2. On 30.1.2017, the Respondent's counsel on record filed a Notice of Appointment and nothing else until 11.4.2017 when the matter was mentioned before Ndolo J and direction given that the suit was to proceed by way of Formal Proof.

3. The respondent filed the Notice of Motion dated 4.12.2018 seeking the following order:-

(a) Setting aside of the order dated 6.11.2018 directing that the suit proceeds as undefended.

(b) Leave to file defence out of time

4. The claimant opposed the application and prayed for the same to be dismissed with costs because the delay to file defence for a period of 2 years was unreasonable and due to negligence. She contended that the Respondent's negligence should not be visited on her because she has acted in good faith. She further contended that the draft defence raises no triable issues and urged that setting aside the impugned order will be against the overriding objective of expeditious determination of civil litigation.

5. The application was disposed of by written submissions which I have carefully considered. The issues for determination in my view are first whether on 6.11.2018 this court made direction that the suit herein proceeds as undefended, and second, whether such orders should be set aside and the respondent be granted leave to file her defence.

**Analysis and Determination**

**(a) Order made on 6.11.2018**

6. On 6.11.2018, I made the following observation and direction:-

***“Directions were given on 11.4.2017 S.O.G. Parties to fix Formal Proof date at the registry.”***

7. The foregoing order did not include any directions that the suit shall proceed as undefended. Such orders had been made on 11.4.2017 by Ndolo J and they are not impugned by the present motion. Even if I was to set aside the order dated 6.11.2018,

the primary orders by Ndolo J. on 11.4.2017 which barred the respondent from filing defence would remain untouched. I therefore find that the application before the court to be misconceived and incapable of interfering with the orders dated 11.4.2017.

8. For the reasons that the order dated 6.11.2018 is not the one that barred the respondent to file defence; I decline to set aside the same. Flowing from the foregoing, I also decline to grant leave to file defence because that request is not well founded. As already observed above the order dated 11.4.2017 by which the respondent was barred from filing defence has not been impugned and forms no part of the present application. I therefore find no basis upon which to exercise my discretion to grant the leave sought.

### **Conclusion and Disposition**

9. I have found that the order I made on 6.11.2018 is not the one which directed the suit to proceed as undefended but the order by Ndolo J. dated 11.4.2017. I have further found that the said order by Ndolo J. dated 11.4.2017 has not been challenged and that indeed it does not form part of the application herein.

Consequently, I find no merits in the Notice of Motion dated 4.12.2018 and proceed to dismiss it with costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 17th day of May 2019**

**ONESMUS N. MAKAU**

**JUDGE**