



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 725 OF 2014

SILAS OKOME.....CLAIMANT

- VERSUS -

PANESARS KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th May, 2019)

RULING

The respondent Panesars Kenya Limited filed a notice of motion on 30.01.2019 through Musa Boaz & Thomas Advocates. The application was under rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016, Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules 2010 and sections 1A, 1B, and 3A of the Civil Procedure Act and all other enabling and applicable provisions of the law. The application was for orders:

- 1) That the application be certified as urgent and the same be heard ex-parte in the first instance.
- 2) That the firm of Musa Boaz & Thomas Advocates be granted leave to come on record for the respondent or applicant in place of Ibrahim, Issack Advocates after judgment and the Notice of Change of Advocates from the said Firm be deemed as properly filed.
- 3) The Honourable Court be pleased to order stay of execution against the respondent or applicant in respect of judgment and the decree of the Court herein and all the consequential orders pending hearing and determination of the application.
- 4) That the Honourable Court be pleased to set aside the judgment and the decree of the Court herein and all the consequential orders made herein against the respondent or applicant and grant the respondent leave to defend the claim and further be granted leave to file its response out of time.
- 5) That the Honourable Court be pleased to declare that the purported or intended execution against the respondent or applicant by way of attachment or any other mode whatsoever is unlawful, premature, null and void.
- 6) That the respondent or applicant be allowed to file and serve the response.
- 7) That the Court be pleased to make such further orders as are necessary for the ends of justice to be served.
- 8) That the costs of the application be provided for.

The application was based on the supporting affidavit of Grace Nzula and upon the grounds set out in the body of the application.

The claimant opposed the application by filing on 05.02.2019 the replying affidavit of Tom Omaso Advocate and through Omaso & Omosa Advocates.

The parties filed their respective submissions for and against the application.

The Court has considered the material on record as filed for the parties. The Court makes findings as follows:

- a) There is no dispute that the respondent was served the summons to enter appearance together with the memorandum of claim. The respondent entered appearance through its advocates but failed to file a response or a defence.

- b) The claim was dismissed for non attendance on 07.11.2017 and the claimant's application to reinstate the suit was subsequently allowed by the Court.
- c) The applicant's counsel was served with a mention notice to attend Court on 29.05.2018 but failed to do so and the Court made directions on the hearing of the suit including on fixing of the hearing date.
- d) The applicant's counsel was served a hearing notice but failed to attend the hearing fixed for 16.10.2018 and the Court directed, **"The hearing to proceed ex-parte as there is no defence and despite service of hearing notice the respondent is absent at time and place appointed for hearing."**
- e) The judgment was delivered on 02.11.2018 and the applicant filed the present application.
- f) The applicant has exhibited a draft response raising serious triable issues but which have so far not been attacked by the claimant. Amongst the triable issues is whether the claimant was employed on piece work arrangements.
- g) The applicant's case is that its advocate failed to notify it about the crucial steps in the suit and in particular, about the hearing date. The Court observes that no explanation was given for the failure to file the statement of response in accordance with the rules of the Court. In view of the triable issues established and in view of the unexplained failure to file the defence the Court will allow the application with orders that the applicant pays the claimant's thrown away costs including costs of the application to be agreed upon or to be taxed in the usual manner after conclusion of the suit.

In conclusion, the application dated 30.01.2019 and filed the same date is hereby determined with orders as follows:

- a) The judgment and the decree given herein on 02.11.2018 are hereby set aside together with all processes flowing thereof towards satisfaction of the decree.
- b) The applicant to file and serve the statement of response, the witness statement and the list and copies of documents not later than 24.05.2019.
- c) The claimant may file a reply to response, further list and copies of documents and witness statements by mention date on 30.05.2019 for directions on the hearing of the suit including fixing of a hearing date on priority basis.
- d) The applicant to pay the claimant's thrown away costs including costs of the application to be agreed upon or to be taxed in the usual manner.

Signed, dated and delivered in court at Nairobi this Friday 17th May, 2019.

BYRAM ONGAYA

JUDGE