



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 463 OF 2018

BETWEEN

FAT –HI GHALIB ATHMAN BASHEIKH.....CLAIMANT

VERSUS

FIRST COMMUNITY BANK LIMITED.....RESPONDENT

RULING

1. The Claimant filed his Statement of Claim on 4th July 2018.
2. It was served upon the Respondent on 9th July 2018.
3. The Respondent entered appearance on 23rd July 2018.
4. It was not until 19th October 2018, about 2 months later, that the Respondent filed its Statement of Response.
5. Rule 13[1] of the E&LRC [Procedure] Rules 2016, stipulates that if a Party, served with a Statement of Claim intends to respond, the Party shall, within 21 days from the date of service, enter appearance, and file and serve response to the suit.
6. The Claimant filed an Application dated 29th November 2018, asking the Court to strike out the Statement of Response on the ground of delayed filing. In his Supporting Affidavit sworn on 29th November 2018, the Claimant states in addition to delayed filing, the Respondent did not seek any leave of the Court, to file its Statement of Response. The Statement of Response is illegally, irregularly and un-procedurally on record.
7. The Respondent is opposed to the Application. Respondent's Legal Officer, Claris Ajwang Ogombo, swore an Affidavit in response, on 14th February 2019.
8. She explains that the period taken in filing of Statement of Response was slightly under 2 months. Delay was occasioned by the time taken by the Respondent in putting together documents necessary to respond to the Claim. The Respondent had to collect documents from its Human Resource and Legal Departments, and file them together with the Statement of Response. The Claimant was employed in Mombasa, while some records were at the Head Office Nairobi. Delay was therefore inadvertent, not deliberate. The Respondent relies on provisions of the Civil Procedure Rules and Article 159 [2] of the Constitution to urge the Court to disregard Claimant's Application. It is argued that default is a matter of excusable, procedural technicality. Delay was not inordinate.
9. The Respondent made brief oral Submissions on its Application, on 21st March 2019. The Claimant did not make any Submissions, relying entirely on the record and in particular the Supporting Affidavit sworn by the Claimant.

The Court Finds:-

10. 21 days provided for in entering Appearance and in filing of Response, under Rule 13 of this Court Rules, are sufficient for a Party to gather documents from various departments and branches countrywide, and fully comply with the Rule.
11. Documents do not have to be gathered, scrutinized, and transmitted in a laborious and manual way, which would result in delay in filing of Pleadings. Banks everywhere have electronic transmission systems, allowing them to transmit documents all over the world within

seconds. The argument by the Respondent, about delay being attributed to having some documents in Digo road, Mombasa, and others in Nairobi, which needed to be put together and presented in Court, is a hard sell.

12. Documents do not even have to all be filed with the Statement of Claim, under the Rules governing this Court's Procedure. The Respondent repeatedly cites Civil Procedure Rules in responding to the Claimant's Application. The cited Rules have no relevance in the proceedings of the E&LRC.

13. Rule 14 [10] stipulates that where a Party intends to rely on a document which has not been filed with its Pleadings, the Party shall make sufficient copies of each document for the Court, file and serve the other Party with copies, at least 14 days before the case is set down for hearing, or such shorter period as the Court may order.

14. Delay cannot be justified on slow gathering and studying of documents to be relied on. Whereas Rule 4 [1] [f] of the Rules requires a schedule listing the documents that are material and relevant to the Claim, to be filed with the Claim, there is no requirement to have all documents intended to be relied upon, to be filed simultaneous with the Pleadings.

15. The Respondent has not shown genuine reason for delay. It cannot also be accepted 2 months' delay, to perform a task that ought to have been done in 21 days, is not inordinate delay.

16. The timelines prescribed under the Rules are not mere procedural technicalities. They must be followed. They have an effect on the time it takes for the Court to dispense justice without delay, as demanded by the very Article 159 of the Constitution cited by the Respondent.

17. Striking out nonetheless seems to this Court draconian. All the documents that needed to be filed have been filed. On 18th December 2018, the matter came up for mention. The Claimant was absent, while the Respondent was represented. It was ordered that Parties comply with Rule 15, on pretrial directions. It was not brought to the attention of the Court at the time that the Response was filed out of time, or that an Application for striking out of the Response had been filed.

18. In the interest of justice, the Court shall ORDER:-

- a. The Application to strike out the Statement of Response is refused.**
- b. The Statement of Response shall be deemed properly filed and served, upon payment of the requisite Court Fees.**
- c. The Respondent shall pay costs of Kshs. 7,500 to the Claimant before it can be granted further audience by the Court.**
- d. Parties to comply with Rule 15 of the E&LRC Rules as earlier ordered.**

Dated and delivered at Mombasa this 20th day of June, 2019.

James Rika

Judge