



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 673 OF 2015**

**JENIFFER NZULA MWALILI.....CLAIMANT**

**- VERSUS -**

**VERT LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Wednesday 31<sup>st</sup> July, 2019)

**RULING**

The respondent Vert Limited has filed an application on 28.06.2019 through Njenga Muchai & Associates. The application is under rule 13(5), 17, 22 and 33(1) and order 10 rule 11, Order 22 rules 6 and 22 of the Civil Procedure Rules 2010 and section 1A, 1B, 3A and 63(e) of the Civil Procedure Act (Cap.21) Laws of Kenya and all other enabling laws. The application prays for the following orders:

- a) That the Honourable Court is pleased to set aside or vary the interlocutory judgment entered against the respondent herein and all other consequential orders flowing therefrom.
- b) The draft annexed defence of the respondent herein be deemed as duly filed upon the payment of the requisite Court fees.
- c) That the costs of the application be provided for.

The application is supported by the annexed affidavit of Edward Njenga Muchai Advocate and upon the following grounds:

- a) The case proceeded ex-parte on 01.04.2019 and judgment delivered on before Rika J and the judgment was delivered on 14.05.2019 by Ongaya J on behalf of Rika J.
- b) The respondent failed to file and serve a statement of response to the claim due to mix up at the office of the respondents' advocates.
- c) The respondent has a defence that the claimant was employed on contractual basis and contract was lapsing on 31.12.2014; the claimant deserted duty on 22.05.2014; and the claimant was never terminated and she failed to disclose that she had been employed elsewhere.

The claimant opposed the application by filing on 15.07.2019 the replying affidavit of Muthoni Njogu Advocate. The grounds of opposition are as follows:

- a) The suit was filed on 23.04.2015 and summons served on 25.05.2015. The respondent by itself and by its advocates failed to file and serve a notice of appearance or defence.
- b) On 09.03.2017 Njenga Muchai & Associates served appearance for the respondent but no response to the claim was filed and served.
- c) On 29.06.2017 Abuodha J ordered that the matter proceeded to hearing as undefended suit.
- d) On 22.10.2018 leave was granted for the response to be filed as orally applied for the respondent. Thereafter no response was filed.
- e) On 01.04.2019 the matter came up for hearing as duly fixed and hearing proceeded ex-parte as undefended suit as had been ordered by Abuodha J.

The material on record show that despite service of summons and the memorandum of claim the respondent failed to take steps to file a response to the claim. There was an order that the suit proceeds as undefended and which has not been set aside or reviewed. The respondent was accorded sufficient chance to file a response per the rules of the Court and as per directions by the Court but failed to do so. It was when

the demand for payment of Kshs.255, 250.00 was served on 27.06.2019 that the respondent filed the present application. The respondent's counsel was notified on 12.06.2019 by telephone from the Court Assistant that the judgment would be delivered on 14.06.2019 but no steps were taken until 28.06.2019 when the application was filed. In so far as the application is for review or in the nature of review, the Court finds that the unexplained lapsing of time from 21.06.2019 to 28.06.2019 is unjustified – especially when taken together with the applicant's previous failure to discharge its obligation to comply with the Rules and directions of the Court. The conduct by the respondent and its advocate is clear that the respondent did not take steps as expected to seriously participate in the prosecution of the suit. In the circumstances the Court finds that the respondent and its advocate deliberately failed to discharge the obligation imposed on it to comply with the rules and directions by the Court as required in section 3 of the Employment and Labour Relations Court Act, 2011.

The respondent laments that the hearing notice for 01.04.2019 had not been served but it is recorded that the suit proceeded on formal proof as undefended per earlier directions by Abuodha J. In the circumstances the application will fail.

In conclusion, the application filed on 28.06.2019 is hereby dismissed with costs.

**Signed, dated and delivered in court at Nairobi this Wednesday 31<sup>st</sup> July, 2019.**

**BYRAM ONGAYA**

**JUDGE**