



REPUBLIC OF KENYA

IN THE EMPLOYEMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 209 OF 2018

BETWEEN

KEVIN GUMBA MUMBO.....CLAIMANT

VERSUS

PHIBERT ODIWUOR ODUOL T/A TIME

SHARP ENTERPRISES.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Okello, Kinyanjui & Company Advocates for the Claimant

Respondent in Person

RULING

1. The Claimant filed his Statement of Claim on 6th April 2018. The Statement was served upon the Respondent, who entered appearance on 31st May 2018. After filing Memorandum of Appearance, the Respondent did not file a Statement of Response, as required under the Employment and Labour Relations Court [Procedure] Rules 2016. The Claimant therefore requested on 7th June 2018, to have the matter proceed by way of formal proof. The Court gave 12th March 2019, as the date of formal proof.
2. The Claimant gave evidence on 12th March 2019. He told the Court that he was employed by the Respondent as a Customer Attendant, on 15th May 2015. On 20th December 2017, a boda boda Rider went to fuel at the Respondent's Petrol Station. He was served by the Claimant. There was a push and shove incident involving the Rider and the Claimant. The Rider alleged to the Respondent the following day that the Claimant had beaten him. As a result, the Respondent terminated Claimant's employment. The Claimant alleges that termination was unfair, and seeks Judgment against the Respondent for notice pay, compensation, pro-rata leave, and salary for days worked- all added up at Kshs. 262,582. He also prays for costs and interest.
3. The Claimant sought and was granted adjournment on 12th March 2019, to enable him call the boda boda Rider as his Witness. Further hearing was set for 10th June 2019.
4. On 10th June 2019, the Respondent attended Court. He informed the Court that he, on 21st May 2019, filed an Application praying to have *ex parte* proceedings set aside, and that he is allowed to file his Statement of Response out of time. He does not deny receiving the Notice of Summons and the Statement of Claim. He agrees that he did not file his Statement of Response, as required.
5. He explains, rather unconvincingly, that he could not trace the Court file to enable him file his Statement of Response. He travelled to his rural home, and was unable to follow up the dispute. His Draft Statement of Response raises triable issues. The Application was heard on 13th June 2018.
6. The Claimant is opposed to the Application. Relying on a Replying Affidavit sworn and filed by the Claimant, the Claimant submits that

setting aside can only be allowed to avoid injustice, in cases where the Respondent had defaulted on account of accident, inadvertence or excusable error. The discretion of the Court is not available for Parties who are bent on obstructing the course of justice. The Respondent has sworn a false Affidavit alleging non-availability of the Court File. How was he able to move the Court, if the file was untraceable? He filed, but did not serve upon the Claimant, his Memorandum of Appearance. There is no good Response to the Claim shown. The Court should not exercise its discretion in favour of the Respondent.

The Court Finds:-

7. The Respondent has not given satisfactory explanation for his default. He has not given clear reasons why he did not file his Statement of Response, after he filed the Memorandum of Appearance. He has not exhibited any letter written to the Court, complaining that the file was missing, or asking the Court to reconstruct the file. The file has been available at all times to all Parties. The Claim has been mentioned in Court, and come up for hearing in open Court. The Claimant has written letters to the Court, and filed his Pleadings without hindrance. There is free and open access to the Court File. It cannot be that the file only went missing when it was Respondent's turn to act. Defaulting Parties must not create stories about missing files, and add fuel to the false narrative about judicial corruption and inefficiencies, that such falsehoods generate. It is also irrelevant to the proceedings that the Respondent travelled to his rural home. He travelled fully aware of the Claim in Court, and his travel should not have prevented him from filing his Statement of Response.

8. He has however shown that he has an arguable Response, complete with a bundle of documents, which would persuade the Court to grant him an opportunity to be heard. The Claimant has given evidence, but has not rested his case. The boda boda Rider, whose evidence is central to the Claim, is yet to give evidence. The Claim was filed in 2018. It is noted that the Respondent acts in person, and may not have fully appreciated the consequences of not filing his Pleadings on time. As the Employer, it is his legal obligation to justify termination. The Judgment of the Court would be enriched by hearing what justification the Respondent has to offer. Any prejudice to the Claimant can be redressed through an order for costs, and recall of the Claimant to give evidence if he so wishes.

9. In the end, the Court exercises its discretion in favour of the Respondent and orders:-

- a. The Respondent shall file and serve his Statement of Response, within 14 days of this Ruling.**
- b. The Claimant may file additional Pleadings and/or Documents within 14 days of receiving the Statement of Response.**
- c. The Claimant may be recalled to give additional evidence.**
- d. Costs of Kshs. 7,500 to be paid to the Claimant by the Respondent, before the Respondent is granted further audience by the Court.**
- e. Parties shall move the Court for further orders on the hearing of the Main Claim.**

Dated and delivered at Mombasa this 18th day of July 2019.

James Rika

Judge