



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1349 OF 2014**

**KAMBO KAMAU MAHINDA.....CLAIMANT**

**- VERSUS -**

**CHAIRMAN, SECRETARY A.C.K DIOCESE**

**OF MOUNT KENYA SOUTH EMMANUEL**

**CHURCH KIERENYE PARISH.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 25th October, 2019)**

**RULING**

The Court entered judgment against the respondent in favour of the claimant on 02.11.2018 for:

- a) Payment of Kshs.818, 086.90 by 31.12.2018 failing interest at Court rates to be payable thereon from the date of filing of the suit 13.08.2014 till full payment.
- b) The respondent to deliver the claimant's certificate of service by 01.12.2018.
- c) The respondent to pay the claimant's costs of the suit.

The respondent filed an application on 28.12.2018 through Njuguna Kamau Advocates for the respondent. The application was by the notice of motion under Article 50 of the Constitution of Kenya, 2010, section 1A, 1B, 3A, & 3B of the Civil Procedure Act, Cap.21; Order 12 Rule 7, Order 45 & 51 of the Civil Procedure Rules 2010 & all other enabling provisions of law. The respondent prayed for change of advocates and was allowed to do so. The respondent further prayed that the ex parte judgment and orders of the Honourable Court made on 02.11.2018 against the respondent herein and all consequential orders be set aside or vacated and the suit be set down for hearing – or in alternative the judgment is reviewed and set aside; the respondent is granted leave to amend the response to the memorandum of claim; and the Court to give directions on the hearing of the suit.

The application was supported with the affidavit of Bedan Gichuki Kamau, the Vice Chairman of the respondent and upon the following grounds:

- a) The respondent appointed Kairu Kimani & Company Advocates to represent it in the suit and who filed a memorandum of appearance and response to the claim dated 05.09.2014.
- b) The advocates failed to update the respondent about the progress in the suit until the respondent discovered that judgment in the suit had been delivered. The advocates also failed to attend Court at the hearing date.
- c) The respondent is entitled to be heard as per Article 50 of the Constitution of Kenya.
- d) The respondent wishes to file an amended defence raising triable issues.
- e) The balance of convenience and justice favour granting of the application.

The claimant filed his replying affidavit on 31.01.2019 through Okemwa & Company Advocates. The application is opposed upon the following grounds:

- a) The respondent and the respondent's advocates on record were served with all due processes including summons, the statement of claim, hearing notices, and mention notices.
- b) The respondent's advocates alleged they were not on record but the claimant faithfully served the process upon the Advocates.
- c) The present application is calculated to derail justice after the claimant served the judgement and the bill of costs for taxation.
- d) The claimant's advocate had all times tried to serve the respondent directly but who advised that Kairu Kimani & Company Advocates be served.
- e) The respondent or applicant does not disclose when and how it came to know about the judgment.
- f) The respondent's advocates should be held culpable of any negligence without unfairly denying the claimant the enjoyment of his successful litigation.

The respondent filed the further affidavit of Bedan Gichuki Kamau denying that there were attempts of direct service upon the respondent after the respondent appointed advocates to act. The respondent nevertheless admitted that the claimant had served some Court process upon it by substituted service but without leave to do so.

The Court has considered the parties' respective cases and submissions and finds as follows:

- a) There is no dispute that the claimant had filed a response and there is an error on record when the Court stated in the judgment thus, **"Despite service the respondent did not file a defence and did not attend the hearing."** To that extent the Court finds that the judgment is liable to review by deleting **"....did not file a defence..."** accordingly.
- b) The respondent has not urged that the response on record raised serious triable issues. Instead the respondent seeks leave to file an amended response long after the delivery of the judgment. The Court has considered the defence on record and indeed it amounts to a sham denial and the Court would not grant leave to defend the suit on the basis of such a defence.
- c) Indeed the annexed proposed amended defence raises would be triable issues but as at the time of the judgment, the Court returns that the respondent had not raised any triable issues.
- d) As submitted for the claimant the suit was about minimum wages and service pay and the respondent has not placed material before the Court to show that minimum wages were paid and NSSF remitted. In such circumstances, the Court finds that the claimant is entitled when it is submitted that the respondent essentially has not established triable issue and there is no reason to reopen the case. While seeking directions on hearing of the case, the respondent has not placed before the Court proposed witness statement and documents that would enable the Court to make such directions. The Court finds that reopening of the suit will not serve ends of justice.
- e) The material on record shows that despite service, the respondent's advocates on record and the respondent failed to attend the hearing. It is clear that the respondent and the advocate failed to cooperate with the Court towards the expeditious, just and proportionate determination of the suit as envisaged in section 3 of the Employment and Labour Relations Court Act, 2011. In such circumstances and as urged for the claimant, the respondent and its advocate should be able to deal with the emerging failures between themselves.
- f) In view that Court processes were served upon the respondent or the respondent's advocate, the defence was a mere sham denial, and, in seeking leave to amend the response and directions on hearing of the suit the applicant has nevertheless failed to demonstrate and disclose evidence that would lead to the setting aside and in support of the alleged triable issues, the application will fail as a mere afterthought calculated to deny the claimant enjoyment of his successful litigation.
- g) In view of the partial review allowed, each party will bear own costs of the application.

In conclusion the application dated 27.12.2018 and filed on 28.12.2018 is hereby determined with orders:

- a) The judgment is hereby reviewed by deleting **"....did not file a defence..."** where it appears in **"Despite service the respondent did not file a defence and did not attend the hearing."**
- b) The application otherwise fails with orders each party to bear own costs of the application.

**Signed, dated and delivered in court at Nairobi this Friday 25th October, 2019.**

**BYRAM ONGAYA**

**JUDGE**