

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 451 OF 2017

PATRICK KAMUNYA WAMBUI.....CLAIMANT/APPLICANT

VERSUS

WANANCHI SACCO SOCIETY LIMITED.....RESPONDENT

RULING

1. The application before me is the Claimant/Applicant's notice of motion dated 31st January 2018 expressed to be brought under Order 2 Rule 15 of the Civil Procedure Rules. Through it, the Claimant/Applicant seeks for the response and counter-claim by the Respondent filed on 25th January 2018 be struck out and judgment entered for the Claimant/Applicant as prayed for in the statement of claim. The Claimant/Applicant's motion is premised on the grounds on the face of it which are to the effect that the Claimant/Applicant filed the statement of claim on 27th November 2017 and served the claim upon the Respondent on 30th November 2017; that the Respondent filed the response and counterclaim on 25th January 2018, some 55 days from the date of service without leave of the court and no reason was given for this inordinate delay; that the Claimant/Applicant believes that this is an abuse of the court process and a plan to cause unnecessary delay towards the realization of justice as the Claimant/Applicant was ready to reply immediately if the Respondent had filed the reply within the stipulated time of 14 days; that the Claimant/Applicant believes the delay was occasioned by the Respondent to try and find evidence to convict the Claimant/Applicant over two hundred days after the B.O.M of the Respondent unlawfully and without any evidence decided to terminate the employment of the Claimant/Applicant on 2/6/2017; that per documents exhibited in the response filed on 25th January 2018, the Respondent was seeking evidence long after the Claimant/Applicant's employment had been terminated and after the Claimant/Applicant had filed his statement of claim; that the Respondent would like the court to believe that a manager of an institution managing several factories would write a handwritten and undated letter; and that the Claimant/Applicant was of the view per Article 162(2) of the Constitution the court had no jurisdiction to hear matters raised in the counterclaim. The application was supported by the affidavit of the Claimant filed contemporaneously with the motion. The affidavit was to the same tenor and effect as the grounds advanced.

2. The motion was opposed by the Respondent through a replying affidavit sworn on 6th February 2018 by the advocate for the Respondent Duncan Waweru Macharia and filed on 19th February 2018. In it, the deponent asserts that the Claimant/Applicant's application has no legal basis as the rules relied on by the applicant are not applicable to employment disputes; that the rules of this court do not provide for striking out of proceeding or entry of judgment in default of pleadings in any event; that there is a response to the claim on record and duly served on the Claimant and that he would not suffer any prejudice by the late filing or service; that the Respondent is entitled to a fair hearing and due process under the principle objective of this court and Articles 48 and 50(1) of the Constitution of Kenya; that the Respondent instructed counsel on 5th December 2017 and the counsel's office was closed 15th December 2017 to reopen on 2nd January 2018; that the preparation of the response was very involving and the same was filed on 25.1.2018 and served on the Claimant on 26th January 2017 in court as he has no physical address; and that the time for filing the defence be extended to 25.1.2018 when the defence was filed by the Respondent's counsel and the defence on record be deemed as duly filed.

3. The application was heard on 19th February 2018 and the Claimant/Applicant argued that the filing of a response on 25th January 2018 was out of time and no explanation was given nor leave sought. In his view, this is an abuse of the process and the reasons given were an afterthought. He stated the Respondent cannot be heard to say that it would be denied a hearing if it disobeys court timelines. The Claimant asserts that the Respondent had stated that it could not trace him yet he has an active phone and the Respondent's counsel had not attempted to contact him. He prayed that the court notes the action by the Respondent was seeking to delay justice and thus should grant the orders sought in his application of 1st February 2018.

4. The Respondent's counsel argued that the application had no legal basis as it was filed under Order 2 Rule 15 of the Civil Procedure Rules which are not applicable to this court. He stated that under the Employment and Labour Relations Court Rules 2016 do not provide for the drastic remedy of striking out. He submitted that the court is guided by the principle objectives of Section 3 of the Employment and Labour Relations Court Act which aim at achieving a just, expedient and proportionate determination of a dispute. These principles as read with Article 46, 50(1) and 159 of the Constitution entitle the Respondent to a fair hearing. He argued that what the Claimant was relying on now is a technicality and that he was not engaging in a fair contest. He submitted that if the Claimant's fear is delay, it was his application that was causing delay in the determination of the cause. He stated that he had given the time lines of the filing of proceedings and that the 55 days spoken of are not well calculated as there was the Christmas period intervening. He asserted that he could not serve the Claimant as he had not made available a physical address and service was effected when the parties met in court on 26th January 2018. For those reasons and what was deponed to he prayed that the application be dismissed and the case be confirmed for hearing after compliance.

5. The application is one that seeks the striking out of the response and counterclaim filed herein. The court is established under Article 162(2) of the Constitution. The court is one of two specialized courts under the Constitution. The court has its own set of rules being the Employment and Labour Relations Court (Procedure) Rules 2016. The Rules do not have provision for or contemplate the application of the Civil Procedure Rules under the Civil Procedure Act which apply to other courts. In the premises, the application by the Claimant/Applicant is misplaced. On the issue of striking out pleadings, the Rules of the Court do not provide for such a drastic measure and where it may become necessary to strike out a pleading the same would be on the motion of the Court under its inherent powers. In the case before me, the grouse is that the Respondent took inordinately long to file a defence. In reckoning time, the period during the Christmas recess is excluded and computing time from the date the Memorandum of Appearance was filed which was 8th December 2017, the recess commenced on 21st December 2017 and ended on 14th January 2018. The 21 days given to the Respondent to file appearance and defence would have lapsed on 15th January 2018. The defence and counterclaim was filed on 25th January 2018 which is 10 days outside the time contemplated under Rule 13 of the ELRC Procedure Rules 2016. The delay of 10 days is not so grave as to warrant the striking out by the Court and in any event the case was scheduled for mention on 18th January 2018 for directions and the same was deferred by the Court due to absence of the judge to 26th January 2018. No prejudice will be suffered by the Claimant who now has 14 days from today to file and serve a reply to defence and defence to counterclaim. In the premises the application is not fit for grant and is dismissed. I will make no order as to costs. The suit will be mentioned on a date to be given in court after this Ruling for pre-trial directions in terms of Rule 15 of the Rules of this Court.

It is so ordered.

Dated and delivered at Nyeri this 12th day of March 2018

Nzioki wa Makau

JUDGE