



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 371 OF 2017

JOHN KITEMA.....CLAIMANT

VS

CARGILL KENYA LIMITED.....RESPONDENT

RULING

1. The Respondent's application under certificate of urgency dated 6th April 2018 seeks orders to set aside the *ex parte* judgment entered by my brother **Rika J** on 8th March 2018. The Respondent further seeks unconditional leave to defend the claim.

2. The application, which is supported by an affidavit sworn by the Respondent's Human Resource Manager, Linet Anyika is based on the following grounds:

- a) Judgment was entered *ex parte* against the Respondent on 8th March 2018;
- b) Failure to file defence was on account of the Respondent's Human Resource Manager being out of office from March 2017;
- c) The absence of the Human Resource Manager, who was solely responsible for dealing with employee issues, resulted in the Respondent failing to file its Response within time;
- d) The Claimant succeeded in obtaining judgment in his favour by misrepresenting material facts pertaining to his employment;
- e) The Respondent is desirous of defending the suit as evidenced by its draft Response which raises triable issues, and which should be heard and determined on merit;
- f) Substantial loss will result to the Respondent unless the judgment is set aside;
- g) The Respondent is willing to deposit the decretal sum in a joint interest earning account in the names of the Advocates on record.

3. The Claimant's response is contained a replying affidavit sworn by his Advocate on record, Bonface Otieno on 20th April 2018. He states that there is no evidence to support the averments made in the affidavit of Linet Anyika, save for a letter which in his view, has been drafted for purposes of the application.

4. Counsel points out that the Respondent is a well-established company with enough personnel engaged in its usual daily operations, even in the absence of the Human Resource Manager. He adds that the Respondent ought to have detailed someone to execute the duties of the Human Resource Manager

5. It is further deponed that the draft Response filed by the Respondent raises no triable issues and is an afterthought meant to frustrate the Claimant and to delay him from enjoying the fruits of his litigation.

6. Counsel gives the following chronology of process service on the Respondent:

- a) Demand letter served on 8th March 2017;
- b) Memorandum of Claim, annexures and Summons served on 16th May 2017;
- c) Hearing Notice served on 6th September 2017;

- d) Hearing Notice served on 31st October 2017;
- e) Hearing Notice served on 8th December 2017;
- f) Notice of Change of Advocates dated 1st March 2018;
- g) Judgment Notice dated 1st March 2018;
- h) Letter on judgment breakdown.

7. The Respondent admits having been duly served with court process in this matter. The issue of service is therefore not up for determination. The question before the Court is whether the reason given by the Respondent for its failure to defend the claim, in spite of due service, merits the exercise of the discretion of the Court to set aside the *ex parte* judgment entered in the Claimant's favour.

8. Discretionary powers bestowed upon the Court are to be exercised judiciously not whimsically. Regarding the setting aside of an *ex parte* judgment, the rule of thumb is that the discretion of the Court is not intended to aid a party out to obstruct or delay justice (see ***Shah v Mbogo & another [1968] EA 93***).

9. In ***James Kanyita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR*** the Court of Appeal held that in determining whether there exists sufficient cause for setting aside an *ex parte* judgment, the main concern of the Court should be to do justice to the parties.

10. In the case before me, all the Respondent states is that its Human Resource Manager was absent for a prolonged period of time, hence the failure to file defence. I do not think this is a sufficient cause as contemplated in law.

11. As observed by Counsel for the Claimant, the Respondent is a body corporate with human resource capacity to run its operations, including receiving and responding to court process, in the ordinary course of business. For the Respondent to seek the exercise of discretion on the basis of the absence one of its employees, is to invite the Court into the realm of management prerogative, which the Court has neither the capacity nor the mandate to execute.

12. Overall, the Court finds no reason to interfere with the judgment entered on 8th March 2018. The Respondent's application dated 6th April 2018 is therefore declined with costs to the Claimant.

13. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MAY 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Otieno for the Claimant

Miss Mwangi for the Respondent