

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 803 OF 2017

GEORGE BUORO.....CLAIMANT

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT

RULING

Introduction

1. The claimant brought this suit on 28.4.2017 seeking damages for unfair termination of his employment contract by the respondent. The respondent entered appearance on 5.9.2017 but defaulted in filing her defence until 8/5/2018 when the suit came up for pretrial directions and the court directed that the same shall proceed by formal proof on 13.6.2018.

2. In the meanwhile the respondent brought the Notice of Motion dated 17.5.2018 seeking the following orders:

- a) Hearing of the suit be stayed pending the hearing and determination of this application.

- b) The Memorandum of Defence, witness statement, list of documents, list of witnesses and list of issues annexed hereto be deemed to have been properly filed and served.

- c) The court gives directions as to hearing of the suit.

3. The application is supported by the affidavit of Antony Kilonzo Advocate for the respondent. The main ground raised for the default in filing defence is that M/s Lorraine Oyombe Advocate who was assigned the brief went for her maternity leave after FKE closed offices for the December 2017 holiday but although she was to resume after 4 months, she never did so. It is further contention by the respondent that she has a right to fair hearing to face her accuser and unless he is given to defend herself, there will be a miscarriage of justice.

4. The Application was opposed by the through the Replying affidavit sworn by his counsel Mr. Okweh Achiendo on 13.6.2018. The gist of the said affidavit is that the respondent was served with summons on 28.8.2017 and she entered appearance on 4.9.2017 but thereafter failed to file her defence. That on 21.2.2018, the claimant requested for and got a mention before the court being 8.5.2018 when on his request the court directed that the suit proceeds by formal proof on 13.6.2018. He contended that the defence and the supporting evidence filed on 22.5.2018 was without the leave of the court and it is null and void. It is further contended that the defence is not a good defence and it does not raise any triable issues and it is otherwise a ploy to delay trial. Finally, it is contended that there is no procedural technicalities involved in this matter that invites Article 159 of the constitution and such the defence should be struck out because equity does not and the indolent.

Submissions by Applicant

5. The respondent submitted that the delay in filing defence and the supporting documents was through inadvertence. It was submitted that the counsel who was assigned the brief, Ms Oyombe went for maternity leave at the end of December 2017 and she as expected back before the matter came up for pretrial. However, she never did so by 8.5.2018 when the suit came up for pretrial directions prompting the court to set it down for formal proof. The respondent expressed her desire to be heard on her defence and should not be locked out from her day in court because of the delay in filing her documents. She cited ***Chairman, Secretary and Treasurer of Sir Ali Bin Salim Primary School & another Vs Francis Bahatic Diwani & 2 others [2014]eKLR*** and ***Winnie Wambui Kibinge & 2 others Vs Match Electricals Limited [2012]eKLR*** where the court allowed the defendant to file defence out of time.

6. He prayed for leave to enlarge time within which to file defence and contended that the claimant will not suffer any prejudice because in fact the suit will be determined on merit as opposed to the default.

She urged that under Article 159 (2)(d) of the Constitution of Kenya, the Court ought not be bogged down with procedural technicalities while by dint of Article 50 of the constitution every person has a right to have his dispute resolved in a fair and public hearing before a court of law. She concluded by submitting that her defence raises triable issues and has overwhelming likelihood of success.

Claimant's Submissions

7. The claimants submitted that the applicant has not denied or challenged the fact that from 28.8.2017 when she was served with summons to 5.6.2018 when the applicant applied for leave is almost 9 months; that M/s Oyombe who is cited as the reason for the delay in filing the defence has not sworn any affidavit on the matters; that the failure to file defence was deliberate and thus undermining the overriding objective of the Employment and Labour relations Court Act as set out in section 3 of the Act and as such she is not entitled to the discretion of this Court as prayed in the Act.

8. The claimant cited *Maria Vs Muriuki [1984]KLR 407* and *Beatrice Wanjiru Kamuri Vs John Kibira Muriuki [2016]e KLR* where the court declined to grant leave to file defence out of time.

In the claimant's view, the reason cited for the delay to file defence is not plausible because even before M/s Oyombe went for her maternity leave in December 2017, the respondent had delayed filing defence for 4 months which delay has not been explained. In addition, the claimant contends that the respondent's law firm ought to have a system of handing over before the counsel handling the respective brief proceeds on maternity leave for 4 months. He prayed for the Application to be dismissed and if the court decides otherwise, he prayed for thrown away costs of Kshs.30,000.

Analysis and Determination

9. There is no dispute that the respondent was served with summons to enter appearance on 28.8.2017 and entered appearance on 4.9.2017. There is further no dispute that no defence was filed until 8.5.2018 when the suit came up for pretrial mention and with the claimant's request, the court directed that the suit was to proceed as undefended by way of formal proof. The issue for determination herein is whether the delay by the respondent to file defence within the prescribed time is excusable.

Excusable delay

10. The applicant believes that the delay is excusable because she has a good defence which raises triable issues and which has high chances of success. She further opines that the delay to file defence in the prescribed time is a mere procedural technicality which does not go to the jurisdiction of the court or the merits of the case, and as such the court should uphold the overriding principle under Article 159 (2) (d) of the constitution.

11. The claimant has on the other hand contended that the delay is not excusable because the delay in bring the application for leave is inordinate, Ms. Oyombe who is being blamed for the delay by going on leave by the respondent has not sworn any affidavit on the same; the period between 4.9.2017 when the respondent entered appearance and December 2017 when M/s Oyombe went on maternity leave has not been accounted for; that the delay in filing defence before the pretrial directions, 9 months after service of summons is against the principle objective set out by section 3 of ELRC Act, efficient and proportionate disposal of disputes governed by the Act.

12. After careful consideration of the material presented to the court, I am in agreement with the claimant that the delay in filing defence was inordinate and short of proper explanation. The respondent has not accounted for the reason for the failure to file defence after filing appearance on 4.9.2017 and before M/s Oyombe went for her maternity leave at the end of December 2017. That period of about 3 months has not been accounted for by the respondent or Ms. Oyombe through affidavit. All what the respondent has done is to explain the delay after December 2017 when M/s Oyombe went on 3 months maternity leave plus one month annual leave and later failed to report back altogether. Consequently, I find and hold that the respondent acted negligently through her legal representative (FKE) by failing to file a defence within

the prescribed time. If at all the respondent was desirous to defend the suit, her legal representative should have acted after being served with mention notice on 1.3.2018 inviting her for pretrial directions on 8.5.2018. Such notice of two months was sufficient enough for a defaulting party like the respondent to regularize her pleadings. She however continued with her slumber until the date set for the pretrial Directions when her counsel attended court and confirmed that defence was yet to be filed and the court found that no just reasons had been shown for the delay and directed that the matter proceeds as undefended.

13. This court still finds that the explanation advanced by the applicant for the delay in filing the defence unsatisfactory. The defence legal team has obviously acted negligently after filing memorandum of appearance but failed file defence within the 21 days provided under the rules of procedure of this court. The legal team (FKE) blames one of their own for delaying to file the defence and proceeding on leave with the hope of returning before the pretrial directions. Does that mean that the defence lawyer knew that Ms. Oyombe had not filed the defence before going for leave at the end of December 2017? The answer is yes and they still failed to file the same after being served with mention notice for pretrial directions scheduled 2 months down the road.

14. This Court is minded that the respondent may not have been aware of her lawyer's professional negligence because she has not even filed affidavit in this application. I have also considered the defence filed on 5.6.2018 and found that it raises triable issues. The suit herein is founded on procedural unfairness in terminating the claimant's contract of service through redundancy. The defence filed pleads that the procedure for redundancy provided for under section 40 of the Employment Act was followed and correspondences to that effect have been filed with the late defence. I therefore find that this is a good case for me to exercise discretion in favour of the applicant by excusing the delay to file defence due to her Advocate's professional negligence. Other than the delay in the trial, the court finds that the claimant will not suffer any other prejudice. I will remedy that delay by condemning the guilty party to pay thrown away, cost. In doing so I have been persuaded by the judicial precedents cited by applicant above which I found relevant.

Disposition

15. For the foregoing reasons, I allow the application by granting prayer 2 of the Notice of Motion dated 22.5.2018 and directing that the suit shall now proceed inter partes on merits on a date to be fixed at the registry. However, I condemn the defence Advocates, Federation of Kenya Employers (FKE) personally to pay the claimant thrown away costs of Ksh.20,000 within 14 days of today and in default the claimant shall be at liberty to execute for the same.

Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018

ONESMUS N. MAKAU

JUDGE