



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CASE NO. 35 OF 2018**

**SALOME MAINA.....CLAIMANT**

**VERSUS**

**CHIEF OFFICER DEPT. OF EDUCATION,**

**LAIKIPIA COUNTY GOVERNMENT.....RESPONDENT**

**RULING**

1. The Respondent/Applicant seeks leave to file a response out of time. The motion is expressed to be brought under Section 3 and 20(1) of the Employment and Labour Relations Act, 2011 and Rule 13(5) of the Employment and Labour Relations Court (Procedure) Rules 2016. The application is supported by the affidavit of Charles Gakuhi Chege the advocate for the Respondent as well as grounds set on the face of the motion. In brief, the averments and grounds are to the effect that the court struck out the replying affidavit and reply to memorandum of claim on 16<sup>th</sup> May 2018 for being filed out of time and without leave. The Respondent asserts that it failed to file the documents on time due to factors beyond the control of the Respondent and that allowing the application will facilitate the just and expeditious resolution of the dispute between the Claimant and the Respondent. The Supreme Court decision in the case of **Nicholas Kitoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** was cited in support of the proposition that the delay was not inordinate.

2. The Claimant is opposed and filed her reply through Samuel A. Opiyo who asserts that the extension of time is not a right of a party and the remedy is only available at the discretion of the court to a deserving party. It was argued that a party who seeks extension must lay out a basis for the discretion to be exercised in their favour and that the application was not brought without undue delay. It was stated that the replying affidavit and reply were struck out on 15<sup>th</sup> May 2018 and the present motion was presented on 3<sup>rd</sup> July 2018 therefore the delay was clearly unjustified. The Claimant urged the dismissal of the motion.

3. The court is being asked to exercise discretion in favour of a party who is stated to have been indolent in the matter. The court struck out the reply to the memorandum of claim on 16<sup>th</sup> May 2018. The Respondent seeks leave to file the reply to memorandum of claim so that the matter can be expeditiously heard and determined. The Claimant asserts that the Respondent has delayed the disposal of the matter. In deciding whether the Respondent's motion for extension of time should be granted or not, I should consider whether the delay has been inordinate, what the reason for the delay was, the *prima facie* merits of the defence raised and whether prejudice will be suffered by the other party should extension of time be granted. In this matter, the Respondent moved court in a month and a half after the striking out. It is asserted that the person who was to sign the statement was out of office for an extended period of time necessitating the late filing. It was argued that the delay was not deliberate and that the grant of leave to the Respondent to file the documents will not occasion the Claimant any prejudice as the matter can now proceed to hearing.

4. The learned Judges of the Supreme Court (Ibrahim SCJ & Wanjala SCJ) held as follows in relation to the principles for consideration in an application such as this

...we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;*

4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*

5. The Respondent has to surmount the first six parameters set out in this decision. It is common ground that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court. The Respondent had the burden of laying a basis to the satisfaction of the court. It is deposed that the documents were signed after some delay as the person to execute them was not at their workplace. I find this to be unsatisfactory. The advocate should have employed other means to obtain the signed documents in time for the filing. The time period given by the court was not a mere suggestion to be aspired to. As to whether there is a reasonable reason for the delay, the delay in filing the motion had to be explained to the satisfaction of the Court. This was not done. As to whether there will be any prejudice suffered by the Claimant if the extension is granted, the Claimant will have occasion to file a reply if need be to the Respondent's response. The application was brought without what we could call undue delay. There was delay no doubt as the advocate took 1½ months to move the court. In the interests of justice as guided by Article 159 of the Constitution, the court will grant leave to the Respondent to file their documents. The said documents must be filed and served within 14 days of this Ruling failing which the matter will proceed as an undefended cause. The Respondent will pay thrown away costs of Kshs. 10,000/- to the Claimant within 14 days of the delivery of Ruling failing which the documents filed will be deemed to be filed out of time.

It is so ordered.

**Dated and delivered at Nyeri this 27<sup>th</sup> day of September 2018**

**Nzioki wa Makau**

**JUDGE**