



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.656 OF 2016**

**SIMON MOLU ODIPO.....CLAIMANT**

**VERSUS**

**NAIROBI WOMEN'S HOSPITAL.....RESPONDENT**

**RULING**

1. The Respondent, Nairobi Women Hospital by application and Notice of Motion dated 6<sup>th</sup> April, 2017 and seeking for orders that the court issue and order to set aside orders issued on 8<sup>th</sup> March, 2017 for the court to re-open the case and the Claimant be recalled for purposes of cross-examination and the Respondent be granted leave to file an emended defence.
2. The application is supported by the annexed affidavits of George Masese and Consolata Ndegwa and on the grounds that the Claimant filed claim on the grounds of unfair termination of his employment by the respondent, the Respondent entered appurtenance and filed defence through the human resource office attaching various documents leading to the claimant's dismissal. Later the Respondent instructed the Federation of Kenya Employers (FKE) to come on record and defend the Claimant which appearance was filed on 22<sup>nd</sup> November, 2016. Later a representative of FKE while in court attending to other matters saw the same on the cause list and addressed court and directions were given for parties to take hearing dates at the registry. An amended defence was filed on presumption that leave had been granted.
3. During mention on 28<sup>th</sup> March, 2017 the Claimant challenged the respondent's position as defence was filed without leave and hence the application before court.
4. In his affidavit, Mr Masese avers that upon the Respondent noting the true position prevailing in the matter and that judgement was due, the Respondent filed the current application before the same was read and thus seeking orders sought to enable the Respondent file an amended defence and have the Claimant recalled for cross-examination.
5. Ms Consolata Ndegwa also avers that as the human resource manager of the Respondent she handled the matter at the shop floor until the Claimant was dismissed form his employment with the respondent. She attended court without legal representation but later instructed FKE to take up the matter. The matter was inadvertently not diarised and was not present in court during the hearing. This was not intentional and seeks the orders set out in the application.
6. The Claimant field Grounds of Opposition noting that the application by the Respondent is incompetent and bad in law as the court has not given any orders capable of being set aside on 28<sup>th</sup>

March, 2017. Only a date for judgement has been allocated. There is no provision in law to require the setting aside or to reopen a case which is pending judgement for purposes of cross-examination of a witness. The Respondent cannot seek to amend defence which had already been irregularly filed without leave on 17<sup>th</sup> January, 2017.

7. The Claimant was heard on 22<sup>nd</sup> September, 2016 when the Respondent had a defence on record and hearing date had been allocated in the presence of the Respondent representative but failed to attend.

8. Rule 26(2) of the Court Rule is not applicable in this case. The legal provisions cited are not relevant in this case. The due judgement on 15<sup>th</sup> June, 2017 should not be stopped as the Respondent is only keen to stall the course of justice by filing this application.

9. Both parties made their oral arguments in court.

### **Determination**

10. The Respondent in the application before court has relied on Rule 26(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and which Rules relates to;

*26. (1) Upon completion of the hearing and presentation of the facts, evidence and statements by the parties, witnesses and experts, if any, the Court shall declare the hearing closed.*

***(2) The Court shall not re-open a hearing unless, for sufficient reason, it considers it fit to do so.***

11. The court on 28<sup>th</sup> March, 2017 closed the hearing and directed judgement shall be read 15<sup>th</sup> June, 2017. This followed the appearance of parties on various dates after the Claimant had closed his case.

12. The Respondent has also relied on Rule 28(1) (g) which rule, requires the court to issue *any other order to meet the ends of justice.*

13. Amendment of pleadings should be readily allowed by the court but the same must be done within the rules and without prejudice to either party. To apply to set aside proceedings, or stay reading of judgement and have the Claimant recalled for cross-examination and for filing of an amended defence are heavy matters to seek. Such can only be done in the clearest of cases and where the court would be able to meet the overriding objective of access to justice and ensure rule of law.

14. On 26<sup>th</sup> May, 2016 when the matter came up for hearing, the Respondent officer Ms Consolata Wairimu was in court and stated that she was aware of the proceedings having received summons as the human resource manager of the respondent. This officer had been seated in court when the matter was called and never bothered to respond when the case was called and it took the prompting of the claimant's counsel to alert court of her presence.

15. The court was magnanimous, noting the Respondent officer was not an advocate but carrying a big position of the human resource manager of the Respondent and directed that all documents in response to the claimant's claim should be filed and served upon the Claimant within 7 days and further that hearing would proceed on 22<sup>nd</sup> September, 2016. The hearing date was thus allocated in the presence of the Respondent officer.

16. A human resource officer/manager in any establishment is not an ordinary person. This is an officer seized with the duty to ensure that all human capital operations of the entity is taken care of in terms of management, administrative and legal compliance. The attendance of Consolata Wairimu in court was thus taken by the court as the overall responsible officer for the Respondent conversant with matters before court. The averment thus made in the affidavit filed by Ms Ndegwa confirm that this is the officer who was aware of the claim and was ready to defend the same and that is why she was in court at the hearing but was directed to regularise the responses that had not been filed.

17. On 22<sup>nd</sup> November, 2016 the FKE entered appearance for the respondent. Nothing else was filed at this juncture. Where indeed Ms Ndegwa was in court on 26<sup>th</sup> May, 2016 and failed to properly diarise the hearing date, she does not state which other dates were diarised. She does not attach anything to support such averments that she did not record the 22<sup>nd</sup> September, 2016 but took a record of any other date.

18. The taking of instructions by FKE is thus an indicator that the Respondent was aware of this matter and at the time of filing such notice of appointment, a good perusal of the record should have informed the Respondent that hearing had taken off on 22<sup>nd</sup> September, 2016 and what was due was filing of submissions. The Respondent counsel was in court on 21<sup>st</sup> November, 2016 when the Claimant was absent and on the next day, 22<sup>nd</sup> November, 2016 Notice of Appointment was filed as noted above. It was not until 6<sup>th</sup> March, 2017 when the current application was filed when the matter was already reserved for judgement.

19. The conduct of the Respondent does not show any diligence at all. In court before the hearing there was a senior officer of the Respondent in whose presence the court gave clear directions with regard to what was to be filed and this officer failed to attend. Upon the Respondent exercising its right to legal representation and filing Memorandum of Appearance on 22<sup>nd</sup> November, 2016 nothing was done with regard to the Respondent securing its right to be heard in an expeditious and speedy manner.

20. To thus seek the court at this point to have the Claimant recalled for cross examination and further to seek that the Respondent be allowed to file amended defence is highly prejudicial to the claimant.

21. However, as judgement is not yet read, and to ensure the Respondent has their day in court, the Claimant can be placed back to his original step at the start of the hearing by payment of all his attendant costs so as to have the Respondent file the amended defence, have the Claimant reply to the same and both parties be heard on their merits. The costs to be paid should not only be to ensure equity but punitive as the conduct of the Respondent particularly the officer in attendance on 26<sup>th</sup> May, 2016 is a sheer demonstration of a party keen to stall the course of justice.

**Accordingly, For the single reason that judgement is not yet read, the Respondent application is allowed on the following conditions;**

- (a) The Respondent shall meet Claimant costs all assessed at 50,000.00 and shall be paid within 14 days;**
- (b) The Respondent shall file and serve an amended defence within 14 days;**
- (c) The Claimant shall reply thereto;**
- (d) Costs awarded to the claimant.**

Dated, signed and read in open court at Nairobi this 15<sup>th</sup> day of June, 2017.

**M.  
JUDGE**

**MBARU**

In the presence of:

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