



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

**AT NAIROBI**

**CAUSE NO 1800 OF 2014**

**PAUL ODHIAMBO OGUNDE.....CLAIMANT**

**VS**

**MAERSK KENYA LIMITED.....RESPONDENT**

**RULING**

1. The Respondent's application brought by Notice of Motion dated 22nd February 2016 seeks the following orders:
  - a. That the proceedings herein be stayed;
  - b. That the orders made on 5th October 2015 be set aside and the Respondent be granted leave to file its Statement of Response and the attached Response be deemed as duly filed.
2. The application which is supported by the affidavit of John Mulika Mbaluto, Advocate is based on the following grounds:
  - a. That on 5th October 2015, the matter came up for mention before Nzioki wa Makau J;
  - b. That on the mention date, the learned Judge proceeded to enter default judgment against the Respondent notwithstanding that there was no such application made;
  - c. That it is trite law that the matter having come up for mention, no substantive orders ought to have been issued;
  - d. That the Respondent has a good Defence on the merits and this Court should be slow to shut out a party from being heard;
  - e. That the Claimant will not suffer any prejudice that cannot be compensated by an order for costs if the application were to be allowed;
  - f. That the failure to file a Response was attributable to earnest attempts to settle the matter out of court which attempts have ultimately failed to bear any fruit;
  - g. That it is fair and in the interest of justice that the application be allowed as prayed.
3. The Claimant's response is contained in a replying affidavit sworn by Sospeter Opondo Aming'a,

Advocate on 7th March 2016. He depones that the claim herein was filed on 14th October 2014 and served on the Respondent on 23rd October 2014.

4. The Respondent's Advocate entered appearance on 11th November 2014. On 30th April 2015, Counsel for the Claimant served a pre-trial notice on the Respondent's Advocates for a hearing scheduled for 4th May 2015. The Respondent did not file a Response but its Counsel appeared in Court on 4th May 2015.

5. In order to allow the Respondent time to file a Response, the matter was set for further mention on 12th May 2015 but the Respondent yet again did not file a Response. The matter came up for mention again on 6th July 2015 on which date the Respondent did not appear in Court. Further, the Respondent had not yet filed a Response.

6. On 5th October 2015, the matter came up for mention again and although the Respondent was represented by Counsel, no Response had been filed prompting Counsel for the Claimant to seek a default judgment which the Court duly granted.

7. Counsel further depones that even after the default judgment was entered, the Respondent took four (4) months to file the present application which is clearly an afterthought and an abuse of the court process.

8. In response to the Claimant's assertion that there were ongoing out of court negotiations, Counsel depones that the said negotiations did not act as a stay of the proceedings herein.

9. The main issue for determination in this application is whether the Respondent has made out a case for setting aside of the default judgment entered on 5th October 2015. Proceedings before this Court are governed by the Industrial Court (Procedure) Rules, 2010. While Rule 22 of the Rules provides for proceedings in the absence of a party, there is no specific provision for default judgment. I think this omission is deliberate. In a claim arising out of an employment relationship, the Claimant is obligated to prove certain ingredients irrespective of whether the claim is defended or not.

10. In my view, once a Respondent fails to file a Defence, the correct position is to fix matter for hearing as an undefended claim and it is perfectly in order for an undefended claim to be lost.

11. A related issue is whether it is in order to enter default judgment on a mention date. It is settled in law that substantive orders are not to be granted on the date a matter comes up for mention ((see ***Rahab Wanjiru Evans v Esso Kenya Limited (Civil Appeal No. 13 of 1999)*** and ***Kenya Commercial Bank Limited v Naphtaly J.B. Hawala (Civil Application No. 240 of 1997)***). In light of this jurisprudence, it seems to me that it is not open for the Court to make substantive orders on a mention date. This is mainly because parties do not have an opportunity to make substantive submissions on a mention date and orders thus made could well occasion an injustice.

12. The final issue has to do with the Respondent's failure to file a Response. The Respondent justifies its failure with attempts of an out of court settlement which did not yield fruit. The Claimant's answer is that out of court negotiations do not operate as stay of proceedings before the Court. The Court agrees with the Claimant on this score. However, justice demands that a party should not be locked out of proceedings except in exceptional circumstances.

13. I have considered the Respondent's application against the foregoing and make the following orders:

- a. The default judgment entered on 5th October 2015 is hereby set aside;
- b. The Respondent is granted leave to file a Response out of time and the Response attached to the application is deemed duly filed;
- c. The Respondent will pay the costs of this application.

14. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF  
MAY 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Opondo for the Claimant

Mr. Mbaluto for the Respondent