



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 809 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 26th July, 2016)

FRANCIS MWINA KIMATU.....CLAIMANT

VERSUS

GENERAL INDUSTRIES LIMITEDRESPONDENT

RULING

1. The Application before Court is one dated 28.09.2015, brought under Section 3, 12 (3) (i) and (viii) and 20 of the Industrial Court (Procedure Rules) 2010, Order 18 Rule 12 and Order 22 (1) of the Civil Procedure Rules 2010 and all enabling provisions of the law where the Applicant seeks the following Orders:

1. *The Application be certified urgent and be heard ex parte in the first instance;*
2. *That there be a stay of execution of the judgment delivered on 20th August, 2015, herein together with all other consequential Orders and further proceedings arising therefrom pending the hearing and determination of this application.*
3. *That an urgent date be set for the inter-partes hearing of this Application;*
4. *That this Honourable Court be pleased to set aside the judgment delivered on 20th August 2015;*
5. *That the Respondent be and is hereby granted leave to defend the Claim herein in terms of the annexed draft Reply to the Memorandum of Claim and Counter-claim and the dispute be heard on merits;*
6. *That this Honourable Court be pleased to make such further Orders as it may deem fit.*
7. *That the costs of this application be provided for.*

2. Which Application is based on the grounds that:

1. *By a letter dated 5th May, 2014, the Claimant served a demand on the Respondent claiming compensation for unlawful termination of employment against the Respondent.*
2. *On or about 14th May, 2014, the Respondent replied thereto denying the claims and advised the Claimant's advocates that the Claimant had not been terminated but deserted work without*

notice of termination or pay in lieu thereof.

3. *On or about 15th May 2014, the Respondent's former Human Resource Officer received summons to enter appearance in this claim but failed to notify and or inform the Respondent's management about the Claim in Court;*
4. *The said Respondent's officer subsequently left employment in June 2014, without notifying and or informing the Respondent's management of the Claim in Court to enable the Respondent instruct advocates and or defend the claim in Court; the said officer did not notify and or advise her successor about the summons and or claim in Court during the hand over process.*
5. *The Respondent only discovered of the existence of the Claim on or about 15th September, 2015, when it was served with a notice of taxation dated 31.8.2015.*
6. *The Respondent has never been served with any notices of hearing and mention of the matter save for the notice of taxation.*
7. *The Respondents immediately instructed advocates who discovered that the claim proceeded undefended and a judgment delivered on 25th August, 2015 awarding the Claimant a sum of Shs. 157,911 and costs of the claim.*
8. *Assessment of costs consequent to the judgment is scheduled on 7th October, 2015.*
9. *Failure to defend the Claim was not deliberate but an excusable oversight and or mistake by the Respondent's Human Resource Manager who failed to notify and or inform the Respondent's management to facilitate the Respondent's entry of appearance and filing of necessary pleadings to defend the claim.*
10. *The Respondent has a good defence in law raising triable issues with good chances of success against the claim in this dispute inter-alia as follows:-*
 - i. *The Claimant was never terminated from employment on 20th September, 2013, as alleged in the Memorandum of Claim or at all.*
 - ii. *The Claimant however absented himself from work without any lawful permission, cause and or notice to the Respondent after lapse of his annual leave on 18th September, 2015.*
 - iii. *The Claimant deserted and absconded work without any lawful permission, service of termination notice and or payment in lieu of notice after lapse of his annual leave on 18th September, 2015, and never returned to work.*
 - iv. *The claim for unlawful termination, unpaid leave and or salary in lieu of notice is otherwise an abuse of Court process and tainted with falsehood, non-disclosure of material facts.*
11. *The Respondent has a counter-claim against the Claimant for absconding, deserting and or terminating the Contract of Employment without notice and or payment in lieu of notice as required by the contract of employment and the law.*
12. *It is just and fair that the Respondent be granted leave to defend the Claim and the dispute be determined on merits and substantive justice.*
13. *The Application herein has been filed without any unreasonable delay since the discovery of this claim and matters herein.*
14. *The Respondent is ready and willing to abide by the reasonable and just terms attendant to the reliefs sought herein.*

15. ***It is in the interest of justice and the overriding objectives of this Court that this application be heard urgently and determined.***
16. ***Unless this Application is heard and determined urgently, the Claimant's will proceed with taxation of costs scheduled on 7th October, 2015, extract a decree and execute against the Respondent consequently render the instant Application and the Respondent's reply to the Claim and counter-claim nugatory and the Respondent will suffer irreparable loss as the Claimants assets are unknown hence the amounts executable flowing from the exparte judgment will not be recovered in the event the Respondent is successful.***
3. The Application is supported by the affidavit of one Dedan Omondi Waringa the Human Resource Manager of the Applicant wherein he states that he is the current Human Resource Manager of the Respondent having taken over from one Serah Wambua in June 2014.
4. He avers that during the hand over process he was informed by the outgoing Human Resource Officer that the Claimant failed to resume work upon lapse of his annual leave on 18th September, 2013, and only came back in October 2013 alleging that he was ill but without any supporting documents and still failed to avail them even after being requested to do so.
5. The Respondent state that from their records the Claimant did not have permission to be absent from work after the lapse of his annual leave and that he never served any notice of termination of employment.
6. It is further contended by the Respondent that from their records they have a demand notice from the Claimant on a claim for unlawful termination dated 5.05.2015, and a response thereto dated 10.5.2015 but no evidence of summons served upon them and only learnt of the Claim on 15.09.2015, when they were served with a notice of taxation and the Claimant's bill of costs. Upon receipt of the said documents the applicant immediately instructed their Advocates to peruse the Court file and confirm the status of the matter.
7. That the Court record showed that the Claim had been served on the Respondent on 15.05.2014 received by one Serah Wambua, the Claim proceeded undefended and judgment entered on 20.8.2015. They contend that the said Serah Wambua never informed the Applicant of service of any summons to enter appearance at any time before and after her exit thus the failure to enter appearance or file a defence was not deliberate but an excusable mistake.
8. The Respondent states that they have a good defence and should be granted leave to defend the Claim having come to Court without any unreasonable delay. They state that they are ready and willing to abide by the reasonable and just terms attendant to the reliefs sought herein.
9. The Claimant opposed the application by filing a replying affidavit wherein they state that the Respondent failed to defend the suit deliberately since they do not dispute service.
10. The Claimant also states that the application is supported by an affidavit containing of heresies since the deponent had not joined the Respondent at the time the cause of action arose. The Claimant states that he will be prejudiced if the application is allowed since the judgment on record is regular.
11. Having considered the averments of both parties, I find that the Respondents were fully served and service was effected upon their HR Manager. They chose not to defend this suit and no valid reasons were given to Court of their failure.
12. However in order for justice to be seen so that the Respondents can have their day in Court, I will allow the Application and set aside my exparte judgment on condition that the entire decretal sum is deposited in an interest earning account held in the joint names of Counsels on record within 30 days. In default execution to issue.

Read in open Court this 26th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wageche for Respondent Applicants – Present

Kabita for Claimant Respondent – Present