



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NUMBER 1926 OF 2014

HENRY NG'ANG'A KAMANO.....CLAIMANT

VERSUS

AGRICULTURAL FINANCE CORPORATION.....RESPONDENT

RULING

1. On 8th February, 2007 Justice J.L.A. Osiemo struck out the defendant's defence on grounds that the same was filed out of time without leave. The learned Judge proceeded to enter interlocutory judgment against the defendant as a consequence thereof.
2. By chamber summons dated 30th November, 2007 the defendant brought an application for orders that the interlocutory order be set aside or varied and that time be enlarged to enable the defendant file its defence. This application was argued before Justice H.P.G. Waweru and in his considered ruling dated 3rd December 2009, he dismissed the application stating in the main that the issues raised in the application were issues that ought to have been raised and urged before Osiemo J when he heard the application to strike out the applicant's defence. The Judge was of the view therefore that the issues raised in the application before him were res judicata.
3. The respondent has once more brought a similar application through Notice of Motion dated 9th December, 2014 seeking similar orders as were sought before Waweru J.
4. The applicant contends that in the intervening period there has been the legislation of overriding objectives of the judicial system and promulgation of the Constitution of Kenya 2010 both of which require judicial bodies to administer substantive justice without due regard to procedural technicalities. Consequently, the respondent/applicant argued that allowing the application would meet the end of justice as it will enable the Court to hear both sides of the argument and reach a fair and just decision.
5. Counsel for the applicant submitted that the application had merit and ought to be allowed because the retirement of the plaintiff on medical grounds was consensual and the plaintiff compensated in full and continues to draw monthly pension to date.
6. According to Counsel, unless the application is allowed the respondent would not be able to produce documents or call witness to rebut the claimant's allegations.
7. One of the fundamental principles of natural justice is that a party must not be condemned unheard. Courts of law are guided by this long tested principle and more often lean towards hearing cases than disposing of the same on procedural technicalities. That is not to say Court

procedures and rules serve no useful purpose. They are the handmaidens of substantive justice since they ensure that pursuit of justice is done in an orderly and structured manner. However, there are times when in order to respect and uphold substantive justice a Court of law can waive or relax the strictures imposed by procedural rules if to do so would not occasion the party adversely affected loss or prejudice.

8. The defendant's defence was struck out for having been filed out of time without leave of Court. The Judge then proceeded to enter judgment in default of defence. At the risk of being perceived as sitting on appeal on a decision of a Judge of concurrent jurisdiction, rules of natural justice demand that defence once filed ought to be considered since it gives the Court the other view of the dispute before it. It is for this reason that I think Order IX rule 1 of the old Civil Procedure Rules which was applicable at the time, provided that a defendant may appear at any time before final judgment, and may file a defence at any time before interlocutory judgment is entered against him or before final judgment.

9. Further Order 10 Rule 2 of the Civil Procedure Rules provide that where a defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service. Rule 4 further provide that where a plaintiff makes a liquidated demand only and the defendant fails to appear, the Court shall on request enter judgment against the defendant for the sum claimed. There is no corresponding rule dealing with unliquidated claims. The claim herein is unliquidated hence gives the defendant a leeway to file his defence at any time before the matter proceeds to hearing.

10. As stated earlier, there is risk in being taken as sitting on appeal over a decision of a Judge of concurrent jurisdiction however where such decision is made per incuriam then such Judge or in his absence a Judge of concurrent jurisdiction can review and or set aside such judgment ex debito justitiae without the risk of being accused of sitting on appeal on a decision of such Judge.

11. This is an old case with very unfortunate circumstances however in the interest of justice, I will allow the application and set aside the interlocutory judgment of Osiemo J. and deem the defence herein as duly filed and direct that the parties prepare the suit for hearing on merit.

12. It is so ordered.

Dated at Nairobi this 19th day of June 2015

Abuodha J. N.

Judge

Delivered this 19th day of June 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge