REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 343 OF 2013

BENJAMIN KAI CHILUMO ….....CLAIMANT

VERSUS

MOMBASA WATER SUPPLY & SANITATION ….....RESPONDENT

R U L I N G

The Notice of Motion before the court is dated 12/2/2014. It is brought by the respondent in the main suit (hereinafter referred to as the Applicant). It seeks the following orders'

1. **Supply of typed proceedings dated 10/2/2014 and recalling of the claimant for cross-examination on his evidence in chief.**
2. **To be allowed to tender evidence in defence to the suit before judgment is entered.**
3. **Any other order in the interest of justice.**
4. **Costs of the application.**

The Motion is supported by the affidavits sworn by Fredrick Okeyo on 12/2/2014 and 28/4/2014. The gist of the application is that the failure by the defence to attend hearing on 10/2/2014 was due to ill-health on the part of the defence counsel. In addition the applicant have contended that her failure to file defence to the suit was occasioned by the claimants failure to comply with court orders which granted him the leave to file and serve amended claim 10 days from 26/10/2012.

The claimant has opposed the Motion by his replying affidavit sworn on 24/3/2014. the gist of the reply is that the respondent was served with a hearing notice on 13/11/2013 but took no steps to file defence to the amended claim because all along she had not had any interest in finalizing the suit. According to the claimant, the application is not brought in the interest of justice but only for purposes of delaying the suit.

The claimant has however admitted that although he filed the Amended claim within the 10 days ordered by the court, he delayed the service thereof by 10 days. The Motion was disposed of by way of written submissions.

ANALYSIS AND DETERMINATION

The court has carefully perused and considered the court record including the pleadings, proceedings, the motion , affidavits and the written submission. The only issue for determination that arises is whether the Motion has merits to warrant this court's exercise of discretion as prayed by the applicant. A flash back to the matters leading to this Motion is vital in answering above question.

On 26/10/2012, this court granted leave to the claimant to amend his claim and serve it on the respondents within 10 days of the said date. The respondent was also granted leave to amend his defence and serve within 14 days after the service of the amended claim. In so doing the court thought that a defence had already been filed. It is admitted by the claimant that although he filed the amended claim as ordered he served two weeks outside the leave time. The respondent received the late service without any objection and from her counsel's evidence and submissions she was still desirous to file defence to the amended claim save that the transfer of the suit from Nairobi to Mombasa prevented the filing. The question that arises is why then didn't she act even after receiving notice that the suit was fixed for hearing on 10/2/2014?

when the suit finally came up for hearing on 10/2/2014, about 3 months after service of the hearing notice, the defence counsel Mr. Otieno send Mr. Nyange Advocate to seek adjournment on ground that the defence counsel wished to file certain unspecified documents. The application for adjournment was opposed by the claimant counsel on ground that the respondent had not filed any defence to the claim despite the court having granted her leave to do so on 26/10/2012. In addition he contended that the respondent had all the time from November 2013 when he was served with a hearing notice to file any documents she desired. Mr. Nyange left the matter to the court to decide on his application. The court did not find merits in the said application and ordered the matter to proceed to conclusion. On 14/2/2014 the present motion was brought under certificate of urgency before the court retired to write its judgment.

From the foregoing background, it is clear that both parties herein are to blame for the quagmire wherein the proceedings have fallen. On the one hand, the claimant served the amended claim outside the time ordered by the court vide the leave order made on 26/10/12. He is therefore to blame for causing the applicant not to file defence to the amended claim.

On the other hand, the respondent did not take any steps to file defence to the amended claim from November 2012 when he was served with the amended claim to 1/8/2013 when the suit came up for hearing in Nairobi and did not even attend the hearing. Thereafter the applicant had a good reason of not filing defence when the file was transferred to Mombasa and could not be traced. However she had not good reason to fail to take any step towards filing a defence after she was served with a hearing notice to attend court on 10/2/2014 which was about 3 months away.

Never the less, the court's purpose is to do justice to all the litigants. Section 12 by which the applicant has approached the court gives this court unfettered discretion under subsection (3) (viii) to make any appropriate orders as the court may deem fit to grant. The court however appreciates the fact that discretion must only be exercised judiciously.

After considering all the matters analyzed above, the court finds that this is a good case wherein to invoke its discretion to accommodate both litigants because of their respective or mutual default as aforesaid. The court will do so by setting aside all the exparte proceedings and orders made on 10/2/2014 upon the following terms:

1. That the claimant's late service of the amended claim is excused.
2. The applicant is granted leave to file and serve her defence to the amended claim within 14 days of this ruling.
3. The applicant is granted leave to file and serve all her documentary evidence within 14 days of this ruling.
4. The claimant will also have leave to file and serve reply to defence and/or any further documentary evidence within 7 days after service of the defence.
5. The applicant is condemned to pay throw away costs of ksh.15000/ to the claimant within 15 days of this ruling and in default the claimant has the leave to execute for the same.
6. The suit shall be heard and concluded within 2 months from today.

Orders accordingly.

Dated, Signed and delivered this 25th July 2014

O.N. Makau

Judge