



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 124 of 2012**

**WALTER WANYAMA**

**JOHN KAMBINI KEVOLWE**

**GEARLD OLOO**

**JOSHUA OUMA**

**ERNEST OLULO.....CLAIMANTS**

**VERSUS**

**ITA MARINE CO. LIMITED.....RESPONDENT**

**RULING**

This is a ruling on the objection raised by Mr. Osewe learned counsel for the claimant against the manner in which defence pleadings were commenced. According to him the respondent after being served with the Memorandum of Claim, ought to have filed a Memorandum of Appearance followed by a response to the claim.

Instead she filed a Notice of Appointment through Federation of Kenya Employers (FKE) on 24.9.2012 and then on 1.2.2013 filed and served a response to the claim. According to him he believed that the chronology of events was irregular and rendered the response incompetent and therefore a nullity.

Mr. Nduna is of a different view and insists that the response was properly before the court. Nevertheless, he has apologized for the failure to serve the notice of appointment on the claimant's counsel.

The issues for determinations are:-

1. What is the correct procedure of filing defence in Industrial Court proceedings?
2. Whether failure to file and serve any pleadings within the statutory period renders the pleading a nullity.

The answer to the first issue is in rule 13 of the Industrial Court procedure rules 2010, quote

***“13(1) if a party served with a statement of the claim or memorandum of appeal intends to respond to the claim or appeal, the party shall, within fourteen days from the days of the date of service, file and serve a response to the claim or appeal.***

***(4) The court may on application by a party to any proceedings, extend or reduce the time***

*within which to a responding party may*

*respond to the pleading to a pleading”.*

From the above quotation, it is clear that a responding party need not file a memorandum of appearance or Notice of appointment before filing a response. The rules provide for filing of only response which in essence is the defence. To that extend, I find that the objection is not merited. In my view, the filing of the Notice of Appointment by the FKE was unnecessary and not informed by the law or practice. Possibly that is the reason she did not serve it upon the claimant and instead she filed the response and which she served promptly.

As regards the second issue of statutory limitation for filing and service of defence, the answer is again in the rule 13(1) and (4) of the court's rules. The provision of the law is in mandatory terms that the response must be filed and served within 14 days of service of the claim or appeal on the respondent. Subrule(4) then provides a leeway to any party that leave can be sought to either extent or reduce the limitation period stipulated in subrule(1).

In the present case, the respondent was served with claim in September 2012 and then appointed the FKE who filed a Notice of Appointment on 24.9.2012. No response was filed until 1.2.2013 which is well over 90 days after service of the claim. No leave was sought prior to the filing of the response which means that the response was filed out of time. In my view the response is incompetent.

Nevertheless, in view of the article 159 of the Constitution and section 20(1) of the Industrial Court Act, this court will not be bound by the legal technicalities to just terminate proceedings especially when no precipitate action has been taken like entry of judgement. I am also persuaded by Mr. Osewe's attitude of excusing the response if granted leave to reply thereto.

I will therefore not strike the Response but I will grant liberty to the claimant to file and serve any reply to the response as requested by Mr. Osewe Counsel for the claimant.

As a way of parting shot, I think the rules of procedure for this court should be amended to allow filing of a memorandum of appearance before the response is filed. This will allow a party to assume audience before the court even before filing the response. This will become even more reasonable when an advocate appears before the court to seek leave to file response to claim out of time.

The final decision herein is that the objection is dismissed for the reasons stated above and leave granted to the claimant to file and serve reply to the response within 7 days from today. I make no order as to costs.

**Signed, Dated and Delivered** on the 21<sup>st</sup> day of February 2013

**Onesmus N. Makau**  
**JUDGE**