



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT AT MOMBASA

CAUSE NUMBER 689 OF 2016

**BETWEEN**

CHARLES NZEKI MWANGA..... CLAIMANT

**VERSUS**

SENACA EAST AFRICA LTD.....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*IRB Mbuya & Company Advocates for the Claimant*

*Kimathi Wanjohi Muli Advocates for the Respondent*

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**RULING**

1. This Claim was filed on 22<sup>nd</sup> September 2016. The Respondent filed Memorandum of Appearance on 22<sup>nd</sup> November 2016.
2. Service of the Statement of Claim, and Notice of Summons upon the Respondent is not contested, the Respondent having filed Memorandum of Appearance on 22<sup>nd</sup> November 2016.
3. Rule 13 of the Employment and Labour Relations Court (Procedure) Rules 2016, requires that a Party served with a Statement of Claim, who intends to respond to the Claim, ***shall within 21 days from the date of service enter appearance and file and serve a Response to the Suit.***
4. The Respondent entered appearance, but did not file any Response.
5. Rule 15(3) of the Court Rules, states where no Response is filed within the prescribed period, the Court may upon the application of the Claimant, direct the matter proceeds for formal proof.
6. The Claimant applied to be heard by way of formal proof, when the matter was mentioned on 15<sup>th</sup>

February 2017.

7. He was heard on 22<sup>nd</sup> March 2017. Judgment was entered in his favour, on 23<sup>rd</sup> June 2017.

8. The Claimant subsequently filed a bill of costs which has already been taxed.

9. On 30<sup>th</sup> October 2017, the Respondent filed an Application seeking stay of execution of Judgment; and that the Respondent, (incorrectly referred to as the Defendant), is granted leave to defend.

10. The Application is supported by the Affidavit of John Sanga, General Manager of the Respondent, sworn on 30<sup>th</sup> October 2017.

11. He confirms receipt of the Statement of Claim and Notice of Summons.

12. Respondent's Advocates entered appearance, and wrote to the Respondent on 23<sup>rd</sup> November 2016, seeking documents detailing circumstances under which the Claimant left employment, to enable Respondent's Advocates draft a suitable Statement of Response.

13. The Respondent states the Claimant did not serve the Respondent with the Mention Notice dated 16<sup>th</sup> January 2017, for mention scheduled on 15<sup>th</sup> February 2017, when the order for formal proof issued.

14. The Claimant's position is that Mention Notice was served by Registered Post. A Certificate of Postage was attached to Affidavit of Service sworn by Advocate for the Claimant Mr. Richard Mbuya, on 27<sup>th</sup> January 2017.

***The Court Finds:-***

15. The Respondent has not given adequate explanation why no Statement of Response was filed, 21 days within receiving of the Statement of Claim, as required under Rule 13(1) of the E&LRC Rules 2016.

16. Respondent's Advocates wrote to the Respondent on 23<sup>rd</sup> November 2016, advising they had filed Memorandum of Appearance. The Advocates asked the Respondent to supply documents, and detail of circumstances under which the Claimant left employment. This was on 23<sup>rd</sup> November 2016.

17. The Draft Statement of Response is dated 30<sup>th</sup> October 2017, about 1 year, from the date Respondent's Advocates called for the instructions from the Respondent.

18. The Respondent does not explain why it took 1 year to avail further instructions to its Advocates. Default in filing of Statement of Response can only be attributed to the Respondent.

19. The E&LRC Rules 2016, do not require that a Party who has failed to file a Statement of Response, is given a hearing notice on formal proof. Rule 15(3) only requires the Court to order the matter proceeds for formal proof.

20. The Court has not come across also, a Rule which requires a party who has ignored the process of the Court, to be involved with the application to set the matter down for formal proof. As formal proof involves *ex parte* hearing, it would not make sense to invite a defaulting Party to fix hearing. The Application to fix the date for formal proof can be done through a letter written to the Court by Claimant.

21. It was not necessary to involve the Respondent in obtaining an order, and the date, for formal proof.

Hearing, was in nature of *ex parte* proceedings, the Respondent having opted to keep away by failing to respond to the Claim

22. The Claimant nonetheless, acted with overabundant caution by serving Mention Notice, on the Respondent through registered post. The Respondent filed no Response, and did not attend Court for Mention.

23. The Senders and Recipients indicated in the Certificate of Postage, are not disputed. All details are shown in the Certificate. There is no evidence in any form, from Postal Corporation of Kenya, to suggest Mention Notice was not delivered and received, as indicated in the Certificate of Postage. The mode of service is not contested to be outside the E&LRC Rules 2016.

24. The Court does not have any reason to interfere with the Judgment on record. The Respondent ignored its Advocates' call for instructions, for 1 year. The Claimant submitted his Claim to Court, and pursued his Claim in accordance with the Rules of the Court. He obtained Judgment regularly. He ought not to be subjected to another round of proceedings.

IT IS ORDERED:-

***a) The Application by the Respondent dated 30<sup>th</sup> October 2017, is rejected.***

***b) Costs to the Claimant.***

Dated and delivered at Mombasa this 15<sup>th</sup> day of December 2017.

James Rika

Judge



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