

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 511 OF 2016**

**ELISAVANSON K. KAREGA .....50<sup>TH</sup>**  
**CLAIMANT/APPLICANT**

**VERSUS**

**UNIVERSITY OF NAIROBI .....1<sup>ST</sup>**  
**RESPONDENT**

**FRANK ESEVWE & 56 OTHERS .....1<sup>ST</sup> TO 49<sup>TH</sup>, 51<sup>ST</sup> TO**  
**56<sup>TH</sup> CLAIMANTS/RESPONDENTS**

1. The 50<sup>th</sup> Claimant/Applicant herein filed application dated 7<sup>th</sup> April, 2025 brought Under Order 1 Rule 10 and Order 10 Rule 11, Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules 2010 and sections IA, IB and 3A of the Civil Procedure Act seeking for the following orders

- a. **THAT the firm of MIS Nyamira Mbugua & Co. Advocates be granted leave to appear on record for and on behalf of the 50<sup>th</sup> Claimant/Applicant post judgement.**
- b. **THAT this Honorable court be pleased to strike out the 50<sup>th</sup> Claimant/Applicant's name from its**

**judgment delivered on 19<sup>th</sup> May 2022 for misjoinder.**

**c. THAT this Honorable court be pleased to set aside the judgment entered against the 50<sup>th</sup> Claimant/ Applicant herein and all consequential orders thereto.**

**d. THAT upon grant of prayer (c) above, this court issues an order directing the 1<sup>st</sup> Respondent to reimburse the 50<sup>th</sup> Claimant/ Applicant all monies deducted from the Applicants' House Allowance from the date of the judgment.**

**e. THAT this Honorable court issues an order directing the 1<sup>st</sup> Respondent to pay the Applicant a basic salary as per the recommended C/A salary scale of KUSU (GRADE 5) as at 2025.**

2. The application is granted by grounds on the face of the Application herein and the Affidavit of ELISAVANSON K. KAREGA the 50<sup>th</sup> Claimant/Applicant sworn on 7<sup>th</sup> April, 2025 who averred that:-

a. He was employed on the 13<sup>th</sup> July 2003 by the 1<sup>st</sup> Respondent herein, in the capacity of a Teacher Grade A on permanent and pensionable terms.

b. He worked under the said grade until the year 2010 when he was promoted to Grade B Teacher which he has been working to date.

c. At the University of Nairobi, the 1<sup>st</sup> Respondent herein, there are three registered trade unions namely, Kenya University Staff Union (KUSU), University Academic State Union (UASU) and Kenya Union of Domestic Hospitals, Educational Institutions & Hotels Workers Union

(KUDHEIHA), that assist in regulation of the Members welfare.

d. Since employment, he has been a registered paid-up member of KUSU-UON Nairobi Branch trade union, within the university whose terms of service and Remunerations are determined through the Collective Bargaining Agreement.

e. In the year 2016, there arose a dispute between the 1<sup>st</sup> Respondent herein and the members of KUDHEIHA trade union, 1<sup>st</sup> to 49<sup>th</sup> and the 50<sup>th</sup> Claimant/Respondents herein, which dispute led to filing of the instant suit against the 1<sup>st</sup> Respondent herein for discrimination, unlawful reduction of house allowance from Kshs 17,013 to Kshs 10,000/- and non-payment.

f. He is neither a member nor has he ever been a member of KUDHEIHA trade union. Despite his name being wrongly joined into the proceedings as the 50<sup>th</sup> Claimant, the suit proceeded and was heard and determined.

g. Judgement was entered in favour of the 1<sup>st</sup> Respondent herein allowing it to deduct from the Claimants House Allowance from Kshs 17,013 to Kshs 10,000/- on the grounds that the Claimants were not unionized thus could not be regulated by CB or the return-to-work formula agreement entered with the union on 19<sup>th</sup> March, 2014.

h. He got to know about the existence of the suit when he was served with a letter dated 21<sup>st</sup> June, 2022, by the 1<sup>st</sup> Respondent, notifying him of the implementation of the orders issued by this court on deduction of house

allowance against the Claimants in this suit from Kshs 17,013 to 15% of the basic salary.

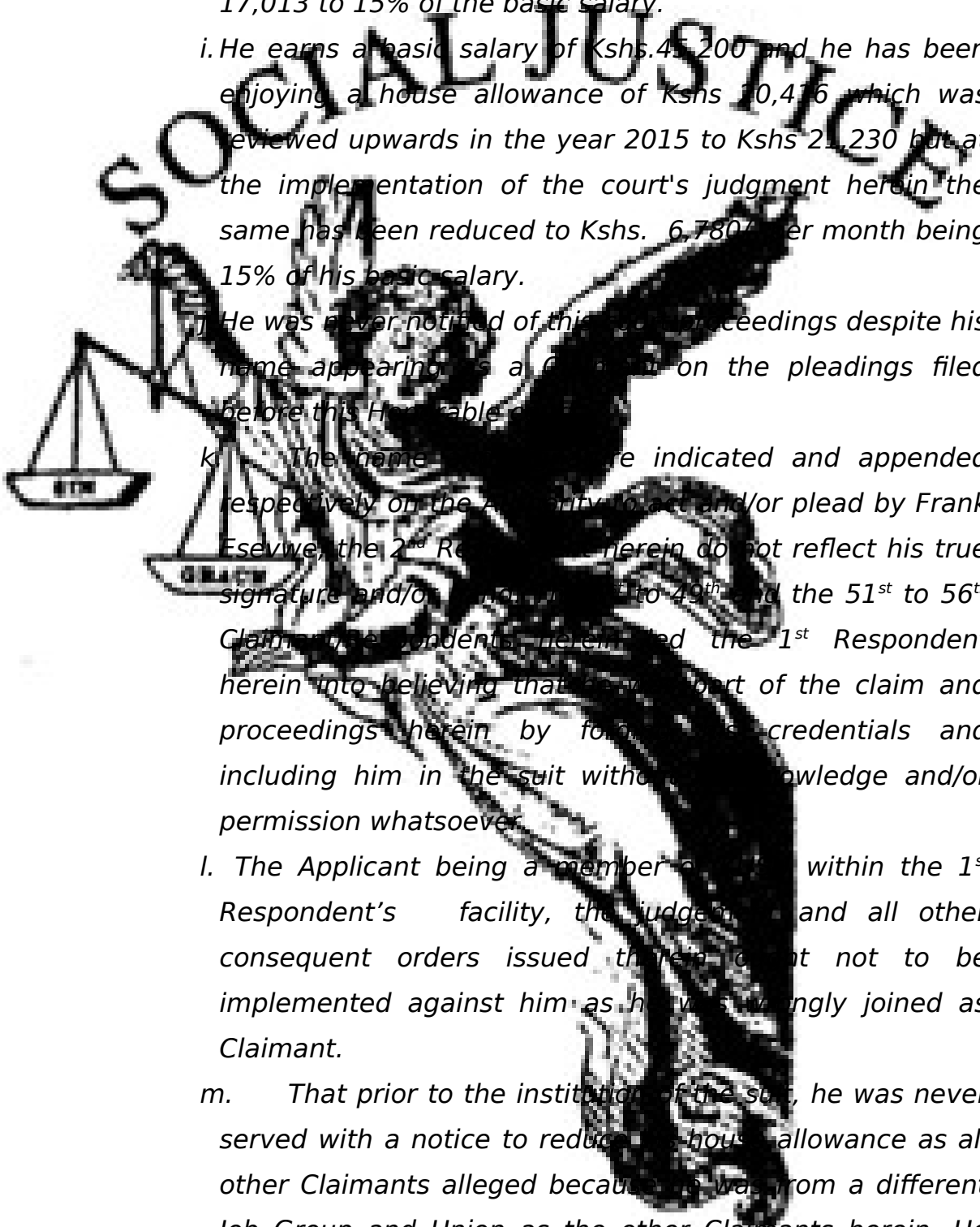
i. He earns a basic salary of Kshs.45,200 and he has been enjoying a house allowance of Kshs 10,416 which was reviewed upwards in the year 2015 to Kshs 21,230 but at the implementation of the court's judgment herein the same has been reduced to Kshs. 6,780 per month being 15% of his basic salary.

j. He was never notified of this suit or proceedings despite his name appearing as a Claimant on the pleadings filed before this Honorable court.

k. The names of the Respondents indicated and appended respectively on the Affidavit to act and/or plead by Frank Esewe, the 2<sup>nd</sup> Respondent herein do not reflect his true signature and/or initials from the 1<sup>st</sup> to 49<sup>th</sup> and the 51<sup>st</sup> to 56<sup>th</sup> Claimants respondents herein led the 1<sup>st</sup> Respondent herein into believing that he was a part of the claim and proceedings herein by forging his credentials and including him in the suit without his knowledge and/or permission whatsoever.

l. The Applicant being a member of staff within the 1<sup>st</sup> Respondent's facility, the judgment and all other consequent orders issued therein do not to be implemented against him as he was wrongly joined as Claimant.

m. That prior to the institution of the suit, he was never served with a notice to reduce his house allowance as all other Claimants alleged because he was from a different Job Group and Union as the other Claimants herein. He was not aggrieved as per the allegations filed before this



court neither did, he has any beneficial interest in the suit as his house allowance was higher than what the other Claimants herein were seeking for in the suit.

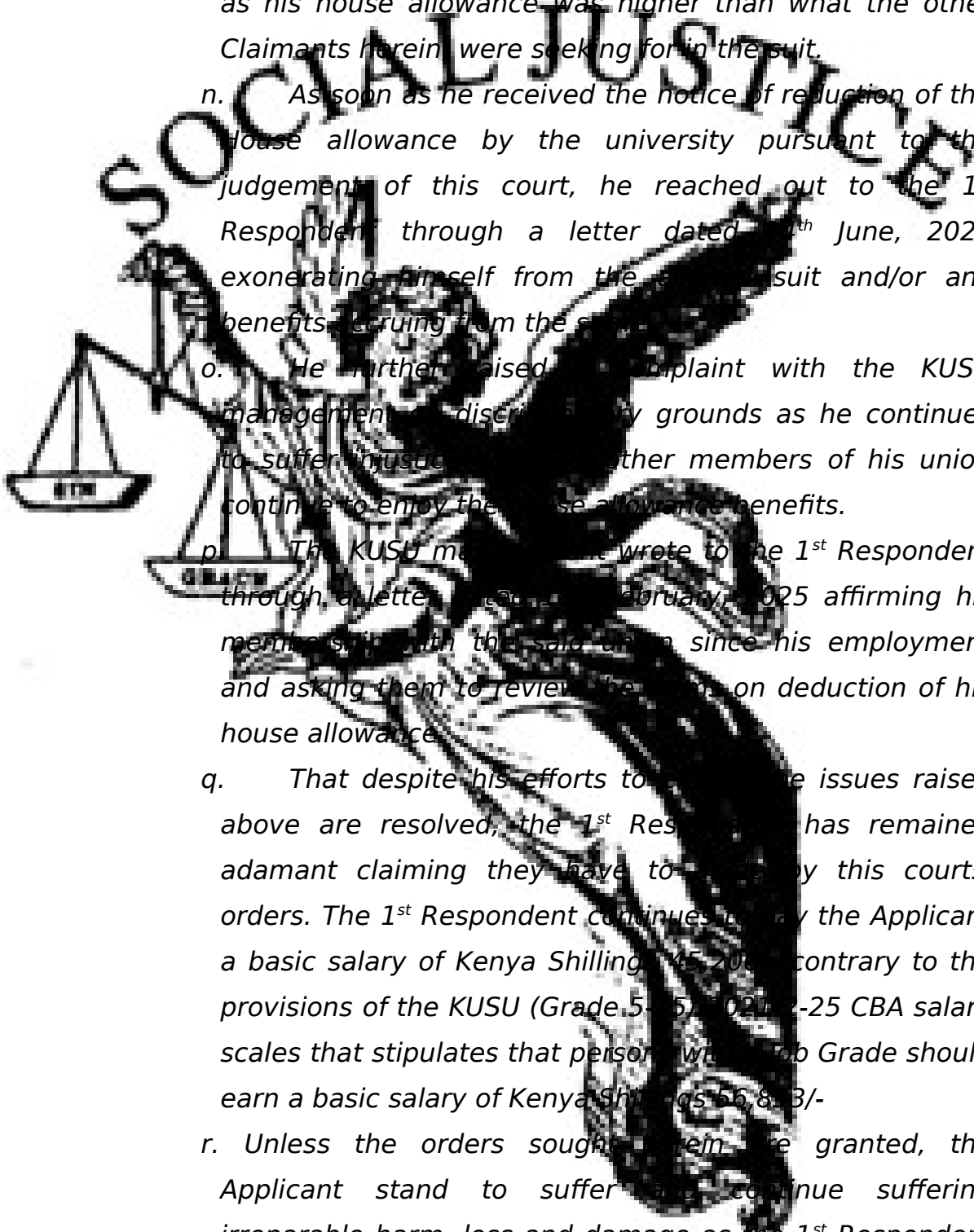
n. As soon as he received the notice of reduction of the house allowance by the university pursuant to the judgement of this court, he reached out to the 1<sup>st</sup> Respondent through a letter dated 14<sup>th</sup> June, 2022 exonerating himself from the said suit and/or any benefits accruing from the suit.

o. He further raised a complaint with the KUSU management on discriminatory grounds as he continues to suffer injustice as other members of his union continue to enjoy the house allowance benefits.

p. The KUSU management wrote to the 1<sup>st</sup> Respondent through a letter dated 14<sup>th</sup> February, 2025 affirming his membership with the said union since his employment and asking them to review the decision on deduction of his house allowance.

q. That despite his efforts to resolve the issues raised above are resolved, the 1<sup>st</sup> Respondent has remained adamant claiming they have to comply by this courts' orders. The 1<sup>st</sup> Respondent continues to pay the Applicant a basic salary of Kenya Shilling 45,200/- contrary to the provisions of the KUSU (Grade 5-6) 2021-25 CBA salary scales that stipulates that persons with Job Grade should earn a basic salary of Kenya Shillings 56,813/-

r. Unless the orders sought herein be granted, the Applicant stand to suffer and continue suffering irreparable harm, loss and damage as the 1<sup>st</sup> Respondent



*continues to deduct his house allowance contrary to what he is rightly entitled to.*

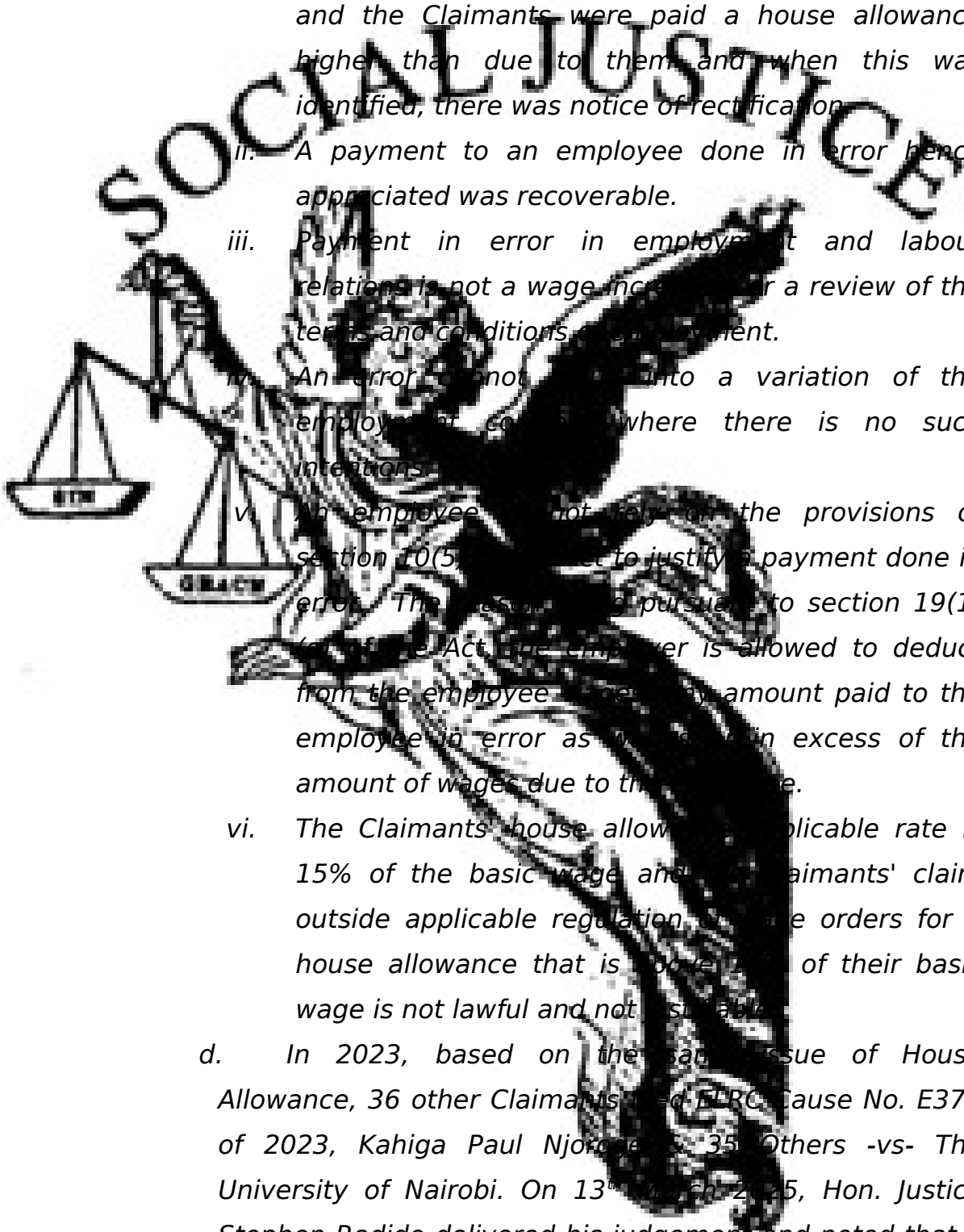
*s. The Respondents will not suffer any harm or damage should this application be allowed as prayed.*

3. In response the 1<sup>st</sup> Respondent filed its Replying Affidavit sworn on 23<sup>rd</sup> May 2025 sworn by HARRISON S. AKO, the Ag. Deputy Registrar Industrial Relations of the 1<sup>st</sup> Respondent herein who averred that:

*a. In October 2022, occurred an accounting error in payment of house allowance and the 50<sup>th</sup> Claimant/Applicant was one of the beneficiary of such erroneous payment of house allowance higher than what he was entitled to.*

*b. The erroneous payment of house allowance to 50<sup>th</sup> Claimant/ Applicant continued for some time until the error was noted and when attempts were made to correct the error, all the 58 Claimants moved to court in this matter to stop the 1<sup>st</sup> Respondent from correcting the error. The interim order by Hon. Judge Justice Hellen Wasilwa dated 16<sup>th</sup> February 2025 granted the Claimants interim orders to continue earning erroneous House Allowance of Kshs. 17,013/- pending the hearing of the application inter-parties.*

*c. On 19<sup>th</sup> May 2022, the judgement by Hon. M. Mbaru, Judge was delivered upon which the court noted that:-*



- i. The First Respondent admitted an accounting error and the Claimants were paid a house allowance higher than due to them, and when this was identified, there was notice of rectification.
  - ii. A payment to an employee done in error hence appreciated was recoverable.
  - iii. Payment in error in employment and labour relations is not a wage increase for a review of the terms and conditions of employment.
  - iv. An error does not amount into a variation of the employment contract where there is no such intention.
  - v. An employee cannot rely on the provisions of section 10(5) of the Act to justify a payment done in error. The basis of the payment pursuant to section 19(1) of the Act, the employer is allowed to deduct from the employee the excess amount paid to the employee in error as well as an amount in excess of the amount of wages due to the employee.
  - vi. The Claimants' house allowance applicable rate is 15% of the basic wage and the Claimants' claim outside applicable regulation of the orders for a house allowance that is above 15% of their basic wage is not lawful and not justifiable.
- d. In 2023, based on the same issue of House Allowance, 36 other Claimants filed ELRC Cause No. E378 of 2023, Kahiga Paul Njoroge & 35 Others -vs- The University of Nairobi. On 13<sup>th</sup> March 2025, Hon. Justice Stephen Radido delivered his judgement and noted that if the Claimants were not satisfied with the above

*judgements and findings, the appropriate option would have been to appeal to the Court of Appeal and it was not open to the court to revisit, recall or review its findings and judgements.*

*e. At no point in time has the 50<sup>th</sup> Claimant/Applicant brought to the attention of the Honorable court that his name and particulars were fraudulently acquired and used in the above cases. If at all there was any fraudulent use of the applicant's particulars in the above case, then the 1<sup>st</sup> Respondent was not a party to such fraudulent scheme and in any event, when the 50<sup>th</sup> Claimant/ Applicant was enjoying a high allowance as a result of an accounting error and interim court orders, he never complained. It is too late to complain after two judgements in favour of the Respondent.*

4. The Applicant filed a supplementary affidavit sworn on 5<sup>th</sup> June, 2025 where he reiterated that he was a member of KUSU trade Union where he was enjoying a house allowance of Kshs 21,230/= and not Kshs 17,013 as alleged by the 1<sup>st</sup> Respondent since this amount was negotiated through the CBA between the union and the 1<sup>st</sup> Respondent. That he was not a party to ELRC Cause No. E378 of 2023 and any consequent orders issued therein. That he was not a member of KUDHEIHA and could not join the rest of 57 Claimants to file the suit or be a

party to their claim. That he came to know of the of the proceedings at the implementation stage.

5. The Application was dispensed of by written submissions.

### **APPLICANT'S SUBMISSIONS**

6. The Applicant through his advocates Nyambura Mbugua & Co. Advocates filed written submissions dated 15 November, 2025 and on the issue of whether the Applicant was properly joined as a party to these proceedings. Counsel submitted that the Applicant was wrongly and fraudulently joined as a party to these proceedings, resulting in judgments being entered against him in error. This has caused him immense and continuing financial prejudice, for not in his own. The Applicant does not seek to re-open or litigate the merits of the main suit. His case is solely that he was never a proper party to these proceedings and his consent was fraudulently procured.

7. Counsel relied on Order 1 Rule 10(2) of the Civil Procedure Rules which provides for striking out a party improperly joined in proceedings. That this position was affirmed by the court in **Zephir Holdings Limited v Mimosa Plantations Limited, Jeremiah Matagarro & Ezekiel Misango Mutisya**

**[2014] KEHC 1981 (KLR)**. That the applicant being a member of the KUSU Union never received any notices from the 1<sup>st</sup> Respondent in respect of erroneous payments on the house allowance which would not have made him to foresee a suit by the 1<sup>st</sup>, 49<sup>th</sup> and 51<sup>st</sup> - 56<sup>th</sup> Claimants. Consequently, the Applicant being a member of a different union and operating under a different CBA was a complete stranger to this dispute. His joinder was therefore improper and his name must be struck out.

8. Counsel further submitted that the Applicant provided a Forensic Document Examination Report confirming that the signature on the authority to act was in substance guided by the Court observations in *Zephir Holdings* (supra). That the 1<sup>st</sup> Respondent's Replying Affidavit regrettably avoids addressing the core issues of fraud and misdirection and instead takes an irrelevant detour into the merits of the main case, matters that are neither related to nor applicable to the Applicant and his application herein.

9. It was submitted that the issue before this court is not whether KUDHEIHA members were overpaid; it is that the Applicant was

never one of them. His terms were negotiated under KUSU CBA and not through any erroneous payment. The attempt to lump him together with other Claimants herein is not only misleading but also contrary to documentary evidence. The 1<sup>st</sup> Respondent's argument that the Applicant delayed in raising his complaint is untenable. He only became aware of the proceedings upon receipt of the notification letter in June 2022 after which he acted promptly by writing to both the 1<sup>st</sup> Respondent and KESU. The doctrine of laches cannot therefore apply where a party has been kept in the dark through fraud, as in the present case.

10. On the issue of whether, consequent to proper joinder, the Applicant continues to suffer prejudice, entitled to the orders sought counsel submitted that putting full reliance on the submissions tendered above, the Applicant has demonstrated through pay slips that his house allowance has, since the judgment and decree of this court, been unlawfully underpaid at Kshs. 6,780/= from the total of Kshs. 21,230/= thus resulting in continuing financial loss.

11. It was further submitted that the Applicant is being paid a basic salary of Kshs. 45,200/-, contrary to the KUSU (his Union)'s CBA which stipulates Kshs. 56,833/- for his grade. This not only amounts to an ongoing violation of his contractual right but also his constitutional rights under Article 41. That judgment entered erroneously against the Applicant should be set aside as there was no causal connection between the 1<sup>st</sup> Respondent and the Applicant. The Applicant relied on the case of **Republic v Vice Chancellor, Kenyatta University of Agriculture and Technology** (2014) 1 eKLR on a party not been condemned unheard.

12. It was further submitted that the Applicant's salary and allowances be reimbursed and corrected accordingly to reflect the terms of the KUSU CBA, which rightly binds him. The Applicant's case is one where the court is called upon to set the record straight and right a wrong born of deceit and misjoinder. The Applicant's prayers are not merely equitable but restitutory in nature, intended to restore him to the position he would have been but for the deceitful acts and wrongful joinder.

13. On the issue of whether this court should set aside the judgement issued against the Applicant counsel relied on Rule 25 of the Court Rules which provides that the Court shall not re-open hearing or review facts unless there are sufficient reasons it considers fit. That the circumstances that are just to set aside judgement obtained *ex parte* are elaborated in the case of **Shah vs Mbogo** 1967. That the Applicant has demonstrated to his court of his delay to appear before this court for setting aside the order issued against him. The failure to raise the issues immediately was inadvertent. The applicant continues to suffer injustice.

#### **1<sup>st</sup> RESPONDENT'S SUBMISSIONS**

14. The 1<sup>st</sup> Respondent through its Director and Corporate Board Services CS Fredrick Collins Onyiah filed written submissions dated 25<sup>th</sup> November, 2025. The Respondent submitted mostly on why the Claimant's house allowance was reduced from Kshs 17,013 to Kshs10,317. That the Claimants were entitled to 15% of their basic salary while relying on the case of **Grain Pro Kenya Inc. Ltd V Adrew Waithaka**

**Kiragu(2019) eKLR** in support of the Kshs 10,317 house allowance.

15. It was submitted that the Applicant's supplementary Affidavit of 5<sup>th</sup> June 2025 was filed without leave of court and it introduces fresh evidence that was not available during the trial of the main cause on several matters. Judgments have already been issued against all the Applicant's in favour of the Respondent. That the said Affidavit be struck out from the records.

16. The 1<sup>st</sup> Respondent prays that the Applicant's application be struck out with costs and charges from the Applicant's under section 19(1)(e) of the Employment and Pensions House Allowance and interest thereon paid to the Respondent from 2016 to date.

### **DETERMINATION**

17. The court has considered the 50<sup>th</sup> Claimant's Application, his supplementary affidavit, the 1<sup>st</sup> Respondent's Replying Affidavit and the submissions as well as authorities relied by both counsels above and proceeds to find whether the Applicant's application is merited. The Employment and Labour Relations

Court Act Procedure Rules, 2016 and 2024 Rules do not provide for striking out of a party improperly joined in the proceedings. The court will therefore revert to the Civil Procedure Rules 2010.

18. Order 1 Rule 16(2) of the Civil Procedure Rules 2010 is the guiding law which provides as follows:

*The court may at any stage of the proceedings, either upon or without the application of either party, and in such cases as may appear to the court to be just, order that the name of a party improperly joined, whether as plaintiff or defendant, be struck out and the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*

19. The court notes that a party who was joined in the proceedings may be struck out at any stage. The Applicant herein alleged that they became aware of the proceedings at the implementation stage when they were served with implementation letter in June 2022. That he was erroneously joined with the other Claimants in the proceedings who were members of KUDHEIHA while he was a member of KUSU. That his signature was forged.

20. The court has perused the documents before the court and it is clear from the payslips the Applicant was a member of KUSU and his house allowance was Kshs 21, 230/= as per the CBA and not the generalized amount of Kshs 17,013/= which was reduced to Kshs 10,317/= as per the court judgments. The Claimants contended that their house allowance was reduced to Kshs. 16,780/= from the right amount of Kshs. 21,230/= yet the Applicant herein was paid the same as the Claimants. That this reduction of house allowance would have excluded the Applicant whose house allowance was different from the rest of the Claimants.

21. It was wrong for the 1<sup>st</sup> Respondent to reduce the Applicant's house allowance when it was clear his house allowance was way above the one claimed by the Claimants. That he was a member of KUSU Union while the Claimants were members of KUDHEIHA. That the Applicant's house allowance was governed by the CBA between the 1<sup>st</sup> Respondent and KUSU not the regulated 15%. The court also notes the Basic Document Examination Report dated 1<sup>st</sup> April, 2025 which showed that the Signature used in this case was different from the known

signatures of the Applicant hence his authority to file the case was fraudulently sought.

22. The Applicant was notified of the implementation of the proceedings in June 2022. He first wrote to the 1<sup>st</sup> Respondent vide the letter dated 24<sup>th</sup> June, 2022 and secondly 9<sup>th</sup> October, 2024 not to implement the house allowance reductions as well as his union on 6<sup>th</sup> July, 2022. The Applicant as well wrote to the 1<sup>st</sup> Respondent to rectify the payment on 18<sup>th</sup> February, 2025. The 1<sup>st</sup> Respondent acknowledged receipt of the Applicant's letter on 18<sup>th</sup> November, 2024 that they would respond to the issue but still they did not rectify the same necessitating the Applicant to seek court's redress.

23. In the case of **Kundu v Mbugua & 3 others (Civil Appeal E051 of 2023) [2025] KEHC 5404 (KLR) (April 2025) (Judgment)** the court held as follows on the scope provision of the law;

*From an appreciation of the law as espoused above, it goes beyond any peradventure that the issue as to whether a party ought to be substituted, added or struck out of civil proceedings is an issue of fact. As such, evidence must be availed to that end.*

24. Further this court is guided by what was stated by Madan J, in the case of **DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another (1982) KLR** :-

*"The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."*

25. Order 10 Rule 14 provides:-

*"Any application to add or strike out a party to a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner."*

26. Even though the Applicant approached the court vide a notice of motion and not chamber summons, the same is not fatal since the court is to administer justice without undue regard to technicalities under Article 159 of the Constitution. The above cases show that striking out a party improperly before the court should be done in exceptional circumstances based on the facts available and the court should not go in to merits of the case.

27. In this case it was clear the Applicant was improperly joined with the rest of the Claimants and it is only just that he be

struck out and returned to the position he was before these erroneous proceedings. The same judgment should be set aside against the Applicant having found that he was improperly joined in the proceedings.

28. However, on the request of the Applicant that the 1<sup>st</sup> Respondent ought to pay him his basic salary as per the existing CBA of Kshs 56,183/= instead of Kshs 45,200/= paid to him this court is of the opinion that since the Applicant has been struck out of the proceedings he cannot claim on the same. The above proceedings are such that the court cannot go in to merits of the case. The Applicant can only claim back the house allowance deducted during the erroneous proceedings. He can raise the issue of the basic salary through his union or from the court on a separate cause of action.

29. **In the upshot the Applicant's application partially succeeds and is hereby allowed with costs in the following terms: -**

a. The Applicant be and is hereby struck out from the Judgment delivered on 19<sup>th</sup> May, 2022 for misjoinder.

b. The Judgment entered against the Applicant herein is hereby set aside with together with all consequential orders.

c. The 1<sup>st</sup> respondent to reimburse the Applicant the expended monies from his house allowance from the date of Judgment.

d. The court grants the prayer for payment of basic salary claimed by the Applicant.

30. It is so ordered.

Dated at Nairobi this 13<sup>th</sup> day of March 2026  
Delivered virtually this 13<sup>th</sup> day of March 2026

**Abuodha Nelson Jorum**  
Presiding Judge-Appeals