



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE 14 OF 2019**

- JOHN MWANINKI.....1<sup>ST</sup> CLAIMANT
- JAMES WAWERU.....2<sup>ND</sup> CLAIMANT
- EVANS OMBONGI.....3<sup>RD</sup> CLAIMANT
- MOSES BIWOTT.....4<sup>TH</sup> CLAIMANT
- PETER KANEGENI.....5<sup>TH</sup> CLAIMANT
- JOSEPH DENNIS WAMOTO.....6<sup>TH</sup> CLAIMANT
- EMILY WAMOTO.....7<sup>TH</sup> CLAIMANT
- LUCY ANN KARANI.....8<sup>TH</sup> CLAIMANT
- MARGARET SIELE.....9<sup>TH</sup> CLAIMANT
- WILFRED NYAGAKA MBECHÉ.....10<sup>TH</sup> CLAIMANT
- JOYCE MUMBI KAMAU.....11<sup>TH</sup> CLAIMANT

**-VERSUS-**

**KENYA INSTITUTE OF MANAGEMENT.....RESPONDENT**

**RULING**

1. Before me for determination is the Respondent /Applicant application dated 22<sup>nd</sup> October, 2021 filed under certificate of urgency on the 25<sup>th</sup> October, 2021 pursuant to section 3(1) of the Employment and Labour Relations Court Act, section 1A, 1B & 3 A of the Civil Procedure Act, Rule 13(5), 17(1)(3) of the Employment and Labour Relations Court(Procedure) Rules 2016, Article 159(2)(a) (d) of the Constitution of Kenya and all other enabling Provisions of law seeking the following Orders;-

- 1) **THAT the Application herein be certified urgent, service thereof be dispensed with and the same be heard ex parte in the first instance.**
- 2) **THAT the Honourable Court be and is hereby pleased to grant leave to the firm of Rene & Hans Advocates LLP to come on record and act for the Respondent in place of Muli & Company Advocates.**
- 3) **THAT pending the inter-partes hearing of this Application, the Honourable Court be and is hereby pleased to stay the taxation of the Claimants' Party & Party Bill of Cost dated 13<sup>th</sup> September 2021 scheduled before the Honorable Deputy Registrar on 26th October 2021.**
- 4) **THAT the Honourable Court be and is hereby pleased to set aside the interlocutory Judgment entered on 13th July 2021 against the Respondent and the Decree issued on 13th August 2021.**

5) **THAT the Honourable Court be and is hereby pleased to enlarge the time within which the Respondent is to file its statement of Response to the Claimants' Memorandum of Claim dated 21<sup>st</sup> February 2021.**

6) **THAT the Honourable Court be and is hereby pleased to grant leave to the Respondent to file its Statement of Response to the Claimants' Memorandum of Claim dated 21 February 2021 out of the statutory provided time.**

7) **THAT in the alternative and without prejudice to prayer 5 above, the Honourable Court be pleased to Order that the annexed Statement of defence be deemed as being properly on record and that the same be served upon the Claimants within a specified timeline.**

2. The application is based on the following grounds; -

a) That the applicant has tried to have a consent executed by its previous advocates on record to no avail, informing the decision to seek leave of this Court.

b) That the applicant/ Respondent had previously instructed the firm of Muli and company advocates to defend this suit on its behalf which advocates filed a notice of Appointment of advocates on the 27.3.2019 and never filed any response to claim therefore the suit proceeded as undefended.

c) That the applicant was unaware that their former advocates on record had not filed any response and only learnt of the judgment entered against them on 13<sup>th</sup> October, 2021 when they employment a new legal officer who discovered that judgement had been entered in this matter against them and that the matter had proceeded undefended.

d) Upon further perusal of court record, the applicant found out that there was a party to party bill of costs filed by the claimant on 13.9.2021 which is scheduled for taxation on the 26.10.2021.

e) It is averred that the Respondent/ Applicant has a defence that raised triable issue and urged this Court to allow it ventilate the issue therein.

f) According to the applicant all lecturers were paid salaries on the basis of a duly filled and signed claim form and attendance sheet to support any claim for salary earned and that the claimant were not owed the pleaded sum of monies.

g) The Applicant avers that it will suffer great injustice if the interlocutor judgment is not set aside and it be granted an opportunity to defend itself.

h) It was stated that the sum of money in issue is a colossal one and if paid to the claimant a refund if the suit is decided in their favour might not be realised.

i) That no prejudice will be visited upon the claimant if the suit is heard on its merits.

3. The Application is also supported by the affidavit deposed upon on 22<sup>nd</sup> October, 2021 by **Judy K. John**, the company secretary and legal officer of the Applicant. The affidavit reiterated the grounds of the application stated above.

4. The Claimants/Respondents have not filed any response to the Application herein.

5. I have examined the averments of the applicant herein. By consent between the applicant Rene & Hans Advocates LLP & Muli & Co. Advocates the firm of Rene & Hans were allowed to come on record and prosecute this application.

6. The applicant also sought an order to stay taxation of the bill of costs scheduled for 26/10/2021. These 2 prayers are therefore overtaken by events.

7. The applicant also sought prayers that the court sets aside the interlocutory Judgment against the respondent entered on 13<sup>th</sup> July 2021 and the decree issued on 13<sup>th</sup> August 2021 and allow the respondents file as defendants in this matter.

8. The respondent applicant avers that their previous counsel on record failed to file the defence and also prosecute their case and they only learnt of his inaction after they were served with a copy of Judgment and decree herein.

9. Given that a party should not be punished for mistakes of counsel, and given that the claimants will not be prejudiced in any way by allowing the respondents to file their defence and prosecute their case, I will allow the application and set aside the Judgment entered on 13/7/21 and the decree issued on 13<sup>th</sup> August 2021. The draft defence so filed will be deemed to be the defence in this case.

10. All the above are subject to the respondent paying to the claimants thrown away costs equivalent to 110,000/= within 15 days in default taxation to proceed.

11. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 18TH DAY OF JANUARY, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Hans Ochaе for Applicant Respondent – present

Wachira for Respondent Claimant – present

Court Assistant – Fred