



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1290 OF 2014**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 20<sup>th</sup> December, 2018)**

**HESBON MACKENZIE.....CLAIMANT**

**-VERSUS-**

**FOR YOU CHINESE.....RESPONDENT**

**RULING**

1. The Claimant filed his Application on 6<sup>th</sup> September 2018 seeking the following Orders:-

- 1. THAT the order of the Honourable Judge made on 20<sup>th</sup> June 2018 dismissing the Claim filed herein be reviewed, varied and/or set aside.***
- 2. THAT the claim filed be reinstated.***
- 3. THAT the costs of this application be in the cause.***

2. The Application is supported by the Affidavit of Evanson Njue Ndwiga, the Claimant's Advocate and is premised on the following grounds:-

- 1. The parties to this suit and the Claimant in particular, were not properly afforded a chance to be heard before the said Order was made.***
- 2. Neither the Claimant nor its Advocates on record received the Notice to Show Cause why the suit should be dismissed as envisaged under Order 17 Rule 2. The said Notice has not been received to date.***
- 3. This application has been made without unreasonable and/ or undue delay.***

3. The Respondent neither filed a response to the application nor submissions. The Application was heard by way of written submissions.

4. The Claimant submitted that neither him nor his former Advocates Osero and Company Advocates received the notice to show cause under Order 17 Rule 2 of the Civil Procedure Rules. The Claimant submitted that under Order 17 Rule 2 of the Civil Procedure Rules it is mandatory that the notice to show cause be received by the Claimant or its advocate before the Order is made. Further, that the rules of natural justice demand that no party should be condemned unheard.

5. The Claimant submitted that the law on review is provided under Order 45 of the Civil Procedure Act and that there was an apparent error in the face of the record as the notice to show cause was not received by the Claimant or his Advocates before the order was made. The Claimant relied on the cases of **Jacob Mundia Macharia v John Waithaka Kimundu [2005]eKLR** and **Ernest Motanya Nyaboga v John Masita [2010] eKLR**.

6. I have examined the averments by the parties. I note that Lesinko Njoroge & Gathogo Advocates were served on 3/3/2015 with a Notice to show cause (NTSC) indicating that they were to appear before Court on 20/6/2018.

7. I however note that the Claimant's Counsels on record are E. N. Njue & Company Advocates who filed Notice of Change of Advocates dated 9/2/2015. It was therefore an error for this Court to assume that the proper counsels on record had been served.

**8.** In the circumstances, I do find that it is true that the Claimants were condemned unheard. I exercise my discretion and review this Court's orders made on 20/6/2018 dismissing the Claimant's case. The Claimant's case is therefore reinstated with a condition that the same be set down for hearing within 90 days. In default the case to stand dismissed again.

Dated and delivered in open Court this **20<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of**

No appearance for Parties