



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 101 OF 2016

(Before D. K. N. Marete)

KENYA UNION OF EMPLOYEES OF POLYTECHNICS,

COLLEGES AND ALLIED INSTITUTIONS – (KUEPCAI).....

.....CLAIMANT

VERSUS

THE BOARD OF

MANAGEMENT,

ST. PETERS SANG'ALO SECONDARY

SCHOOL.....RESPONDENT

RULING

This an application dated 30th March, 2017 seeking the following orders of the court;

1. *That this application be certified as urgent and the same be heard ex-parte in the first instance.*
2. *That the Honourable court do grant stay of further proceeding pending hearing and determination of this suit interparties.*
3. *That this Honourable court do order that ex-parte Judgement obtained by the claimant/Respondents herein be set aside and the Applicants be granted leave to file Response out of time.*
4. *Costs be in the cause.*

It is grounded as follows;

1. **THAT**, there exist The Employment and Labour Relations Court Act Cap 234 B of 2014, an Act of Parliament established pursuant to mandatory provisions of Article 162 (2) (a) and (3) of The Constitution of Kenya, 2010 for the purposes hearing and determining disputes related to employment and labour relations, and for connected purposes thereto.
2. **THAT**, also there exist The Employment and Labour Relations Court (Procedure) Rules, 2016

which indeed is in compatible with the existing Act, (The Employment and Labour Relations Court Act, Cap 234B of 2014).

3. ***THAT***, the Notice of Motion filed under Certificate of Urgency by the Applicants/Respondents dated 30th March, 2017 to the Respondent/Claimant Union having been effectively filed at the Honourable Court is precursor to arm-twisting the cause of justice.

4. ***THAT***, therefore, the Respondent/Claimant Union herein, having been duly provoked by the Applicants/Respondents Notice of Motion is now obligated to respond to the frivolous and vexatious Notice of Motion application filed under Certificated of Urgency dated 30th March, 2017 within the meaning of mandatory provisions of Rule 14 (5) of The Employment and Labour Relations Court (Procedure) Rules, 2016.

5. ***THAT***, the Notice of Motion filed under Certificate of Urgency dated 30th March, 2017 by the Applicants/Respondents is wrongfully before this Honourable Court and that it is in bad faith, misconceived, bad in law and fact hence, incurably defective.

6. ***THAT***, the mandatory provisions of The Civil Procedure Act, Cap 21, Laws of Kenya and The Civil Procedure Rules, 2010 are “***NOT***” applicable in matters before this Honourable Court and only save at the execution of a decree and/or warrants, within the meaning of mandatory provisions of Section 13 of The Employment and Labour Relations Court Act, Cap 234 B of 23014 and Rule 32 (2) of The Employment and Labour Realtions Court

(Procedure) Rules, 2016.

7. ***THAT***, the Applicant/Respondent had all the liberty to move this Honourable Court when aggrieved by the Judgement and/or a Decree by filing an application for review of judgement, within the meaning of mandatory provisions of Rule 33 of The Employment and Labour Relations Court (Procedure) Rule, 2016, which it did not.

8. ***THAT***, further, the Respondent/Claimant Union avers that, the Applicants’/Respondent’s Notice of Motion filed under Certificate of Urgency dated 30th March, 2017 do offend mandatory provisions of Section 14 of The Labour Institutions Act, 2007 Laws of Kenya with impunity.

9. ***THAT***, the Applicant’s/Respondent’s Notice of Motion filed under Certificated of Urgency dated 30th March, 2017 also do offend mandatory provisions of Section 3 and 20 of The Employment and Labour Relations Court Act, Ca 234B of 2014.

10. ***THAT***, indeed it true on Court record that, on the 28th July, 2016 the Honourable Judge did issued and direct the Registrar of the Court to effect service upon the Applicants/Respondents with a “Hearing Notice” slated for 2nd February, 2017 and which we believe was effected accordingly and that still the Applicants/Respondents failed to comply.

The claimant/Respondent faults the application on grounds that at all this time, the respondent was aware of the subsistence of the claimant. She having been served in the usual manner. She prays that this court do dismiss the application.

THAT, In the premises wherefore, the Respondent/Claimant Union herein avers the Honourable Court fo find the Applicant’s/Respondent’s Notice of Motion and the Supporting Affidavit dated 30th March, 2017 is grossly misplaced, frivolous, vexatious incurably defective and hence, be struck out with costs to the ***Respondent/Claimant Union, forthwith***.

These applications and counters are all out of a judgement delivered by this court on 20th February, 2017 in favour of the Claimant/Respondent. When the matter came for hearing on 24th April, 2017, the applicant did not appear and the Claimant/Respondent’s prayer was that the application be dismissed with

costs for want of prosecution.

I have scrutinized the application and the entire suit and appreciate the fact that all this is occasioned by what the Claimant/Applicant terms as non awareness of the suit during its existence and trial. It is her submission that she became aware of the suit on service of notice of judgement. No proper service was effected on them during the mainstay of the suit.

The Claimant/Respondent vehemently denies the averment and submissions of the Respondent in the circumstances and prays that the application be dismissed with costs for want of merit.

An issue of service to a party is a serious issue in litigation. When this is raised in any particular case, cautious scrutiny of the circumstances and possibilities must be had by the court. This should be so even in this case.

I find that there is a possibility that the respondent was not served or effectively served with the suit papers during the currency of these proceedings. To condemn the respondent on such circumstances would amount to gross and inexcusable injustice in the circumstances. The claimant would in any event not in any way be overtly prejudiced by a grant of this application.

I am therefore inclined to allow the application and order as follows;

- i. That a grant of stay of further proceeding be and is hereby issued pending hearing of this suit *inter partes*.
- ii. That the *ex parte* judgement issued to claimant/Respondent be and is hereby set aside.
- iii. That the Respondent/Applicant be and is hereby granted leave to respond to the suit within forty-five days of these orders of court.
- iv. That each party shall bear their own cost of this application.

Delivered, dated and signed this 26th day of April 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Japhet Agura for the Claimant Union.
2. Mr. Situma instructed by Situma & Company Advocates for the Respondent.