



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 390 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**1.KICHAMU LITTEN MUHENZI**

**2.RACHEL KADENYI MMBIHI**

**3.OLGA APONDI JAIMBO**

**4.NELIMA PHILID SAMITA**

**5.HEZEKIAH ODONDI MUSULWA**

**6.DAVID SIMIYU SAA SITA**

**7.JOSECK N. MMBOGA**

**8.KENNETH OCHIENG**

**9.LUCY ROSE WAFULA**

**10.RITA AMESO ORONJE**

**11.ELIZABETH LAMWENYA**

**12. VIOLET KIZA .....CLAIMANTS**

**-Versus-**

**VIHIGA COUNTY PUBLIC SERVICE BOARD..... RESPONDENT**

**RULING**

Before me for determination is an application dated 10th November 2016 filed under certificate of urgency. The application seeks the following orders-

- a) This application be and is hereby certified as urgent and be dispensed with in the first instance.
- b) There be a stay of further proceedings pending the inter partes hearing of this application.
- c) There be a stay of further proceedings thereafter the inter partes hearing and the hearing and determination of this application [\[u1\]](#) .

d) This Court be pleased to set aside and/or vacate the court order issued on 27/1/2016.

e) This court be pleased to set aside the entire Court proceedings of 09/11/2016 and hereby grant leave to the respondent/applicant to file its defence and defend the suit.

f) Costs of this application be provided for.

The Application is supported by the affidavit of EDWARD F OMBIMA, Principal Legal Officer of the Respondent and the following grounds-

a) The respondent/applicant was served with the Court summons in this cause.

b) The respondent/applicant entered an appearance.

c) The respective Counsel handling this matter on behalf of the respondent/applicant left the respondent's/applicant's employment in the month of June, 2016.

d) The respective Counsel inadvertently failed to hand over the office file to the County Attorney's office prior to his departure.

e) The respondent/applicant was prevented by sufficient cause from participating in these proceedings.

f) The respondent applicant has a triable defence.

g) No prejudice shall be visited upon the claimant if the application is allowed.

h) It is in the interests of justice that this application be allowed.

In the affidavit in support of the application Mr. Ombima deposes that upon the summons and application in this case being served upon the Respondent it entered appearance through the County Attorney, one Alex Amasakha, that thereafter the file was allocated to one, Joseph Barudi Kalo, an advocate and employee of the Respondent to handle. The said Burudi was subsequently appointed as Chief Magistrate and posted to Nakuru and he left without handing over the matters he was handling including this file. He deposes that the file was only discovered on 9th November 2016 upon which the deponent called counsel for the Claimants who informed him that indeed the case was heard on the said date and one witness testified. He deposes that the Respondent has a good defence as evidenced by the copy filed with the application. He prays that the application be granted as the Claimants will not be prejudiced and any delay occasioned to the Claimants can be sufficiently compensated by way of award of costs.

There appears to be no copy of replying affidavit on record though in the Claimant's written submissions there is mention of a replying affidavit of OLGA APONDI JAIMBO sworn on 1st February 2017. Due to time constraints and the need to speedily deal with this application I will rely on the submissions of the Claimants as the defence to the application as the facts herein are not contested.

This application came up for hearing on 6th February 2017 when the parties sought and were granted leave to argue the application by way of written submissions.

In the submissions filed on behalf of the Applicant it is urged that the failure of the Applicant to file its defence was neither intentional nor intended to delay the expeditious determination of the case, that the Claimants will not be prejudiced as the court reinstated them back to work by orders of 27th January 2016, an order that the applicant prays to be set aside as it was issued without the input of the applicant. The applicant invoked Article 159 of the Constitution and implored the court to focus on the substance rather than the procedural technicalities and ensure fairness by maintaining the status quo.

The applicant submitted that the court has wide discretion in granting the orders sought, that the orders

are merited and further that mistake of counsel ought not be visited upon the client. It was submitted that the applicant has a good defence raising triable issues that should be subjected to a hearing on the merits.

For the Claimants it was submitted that the application is frivolous, vexatious and an abuse of court process as the applicant has not satisfied the conditions set out in law for granting the orders prayed for. It was submitted that the applicant has been aware of this suit since inception and no reason has been advanced for failure to participate in the proceedings subsequent to the filing of the Memorandum of Appearance. It was submitted that the Applicant has come to court with unclean hands having failed to comply with the court order of 27th January 2016 restraining the Applicant from interfering with the employment of the Claimants pending the hearing and determination of this suit. It was submitted that despite being served with the court order the Applicant has refused to assign the Claimants work and/or pay their salaries from July 2015. The Claimants pray that the application be dismissed, but should the court be minded to grant the same it should be conditional as follows-

- a) That only the respondent's case be reopened and the respondent be allowed to file its statement of defence and to avail its witness in court at the earliest opportunity possible to avoid further unwarranted suffering on the claimants' part and to save the court's time.
- b) That the respondent be compelled to comply with the honourable court's order issued on 27<sup>th</sup> January, 2016.
- c) That the respondent be compelled to pay to the claimants their outstanding salary arrears from the month of July 2015 to date to cushion them against further suffering.
- d) That the respondent be compelled to pay to the claimants' counsel thrown away costs of Kshs.100,000/- to cover the costs he/she has incurred from the inception of the claim to date.

### **Determination**

I have considered the application together with the grounds and affidavit in support thereof as well as the submissions filed by counsel for the parties. The facts leading to the filing of this application are not contested and are elaborately set out in the submissions of the Claimants. The Claimants are youth polytechnic instructors appointed in 2011 on three year contracts and posted to various village polytechnics within the former Western province. The contracts were extended by 6 months upon expiry thereof in 2014 following which they were seconded to the Respondent. The Claimants aver that there was agreement that they will be absorbed into permanent service of the Respondent but in violation of this directive the Respondent advertised for their positions. It is against this background that the claimants filed this suit seeking the following orders-

- a) A declaration that the advertisement and recruitment of Youth Polytechnic Instructors for various Youth Polytechnics and other Vocational Training institutions in Vihiga County by the Vihiga County Public Service Board is illegal and unlawful.
- b) An order nullifying the recruitment of various Youth Polytechnic Instructors by Vihiga County Public Service Board carried out pursuant of the Thursday, 9<sup>th</sup> July 2015.
- c) An Order compelling The Vihiga County Public Service Board to absorb on permanent and pensionable terms the various Youth Polytechnic Instructors engaged by the Central Government under the Economic Stimulus Programme in the year 2011 and who were working within the county before the Youth Polytechnic Training was transferred to the county governments, in particular the claimants herein before advertising the positions for any other members of the public.
- d) Costs of the claim.
- e) Interest on (d) above.

f) Any other relief that the court may deem just and fit to grant.

The Respondent filed appearance but failed to file defence. The Respondent further failed to attend court on the hearing date and the case proceeded ex parte. It was while the case was pending for judgment that the Respondent filed the application under consideration.

The issues for consideration are the following-

1. Whether there was valid reason for failure by the Respondent to file defence and attend court for hearing,
2. Whether the applicant has a valid defence raising triable issues,
3. Whether the applicants are entitled to the orders sought.

On the first issue the applicant states that the officer who was assigned this case was appointed by the Judicial Service Commission as Chief Magistrate and posted to Nakuru and that he left without handing over. No evidence has been adduced to substantiate these averments. There is no evidence that Mr. Josphat Burudi was ever an employee of the Respondent, that he was assigned this case to handle or that he was appointed as a magistrate and left without handing over. There is also no explanation why the Respondent who received all mention and hearing notices did not attend court on mention and hearing dates.

On the second issue the Respondent has filed a draft defence which in the opinion of the court raises triable issues. On the final issue whether the applicant is entitled to the orders sought, this court has wide discretion under section 12 to grant any appropriate relief. In the case of **Patel v EA Cargo Handling Services Ltd** the Court stated that-

*There are no limits or restrictions on a judge's discretion except that if he does vary the judgment he does so on terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself or fetter the wide discretion given to it by the rules...*

In the case of **Maina v Muriuki** it was held that the discretion to set aside ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. The court further held that where there were triable issues in a defence it was in the interest of justice that a defendant be given an opportunity to defend the suit.

In the present case there is no judgment but the case was pending for judgment, so the principles in the cases cited can be applied to the circumstances of this case. The applicant has filed a draft defence which I have considered and confirm that it raises triable issues. However as I have pointed out above the Respondent has not demonstrated that there are valid reasons for its failure to file defence or attend court for hearing of both the Application and the suit. It is the court's opinion that in view of the draft defence on record the Respondent be allowed to defend the suit but on terms set by the court.

I therefore make the following orders:

1. That further proceedings in this case are stayed;
2. The applicant is granted leave to file defence out of time and in any event not later than 14 days from the date of this ruling;
3. The Claimant's case is reopened and the Applicant is granted leave to cross examine the Claimant's witness and to present the defence case;
4. The Applicant will have no audience unless and until it has complied with the orders of this court of 27th January 2017;

5. The Applicant will pay thrown away costs of Kshs. 30,000 within 30 days;

6. Should there be non-compliance by the Respondent the orders herein will automatically lapse on the 30th day from the date of delivery of this ruling and the Claimants will be at liberty to move the court for appropriate orders.

**Dated, Signed and Delivered this 22<sup>nd</sup> day of September, 2017**

**MAUREEN ONYANGO**

**JUDGE**

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