



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.219 OF 2015**

***(Before D. K. N. Marete)***

**KENYA UNION OF EMPLOYEES OF POLYTECHNICS,**

**COLLEGES AND ALLIED INSTITUTIONS (KUEPCAI) .....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT ILMOTIOOK SECONDARY  
SCHOOL.....RESPONDENT**

**RULING**

This is an application by way of Notice of Motion dated 15th March, 2016 where the respondent/applicant prays as follows;

- a. That this application be certified urgent and a priority hearing date of the same be fixed by this Honourable Court.*
- b. That pending hearing and determination of this application on merit inter-partes, this Honourable Court be pleased to exercise its rules of procedure and halt any execution of the judgment by way of stay.*
- c. That this Honourable Court do further stay any taxation of costs until this application is substantively and judiciously heard and determined.*
- d. That this Honourable Court do review the proceedings herein and its judgment delivered against the respondent and set aside*
- e. the same and order that the matter be heard a fresh between the parties.*
- f. The respondents be permitted leave to file a defence and witness statements for purposes of fresh hearing.*
- g. The costs of this application be provided for.*

It is grounded on;

- 1. The constitution permits all individuals and institutions access to justice by Article 48 and a fair*

hearing as per Article 50.

2. *The proceedings herein and the eventual judgment are irregular and the respondent is grossly aggrieved by the same.*
3. *That upon a diligent examination of the proceedings and the judgment, it is clear that substantial matters regarding directions on how the matter was to proceed are lacking.*
4. *There are substantial and weighty errors and mistakes of the law and procedure which have led to a miscarriage of justice to the Respondent.*
5. *There is no appeal that has been filed.*
6. *The mistakes of the respondent's former advocates should not be visited upon the respondent.*
7. *The deputy registrar did not serve the respondent on all the occasions this matter came up before the court.*
8. *The proceedings and the judgment are worthy and deserve review or variation for the sake of doing justice to both parties.*
9. *Stay of execution of the judgment will prevent miscarriage of justice.*
10. *The substance and content contained in the supporting affidavit of JOSEPH MABWAI.*

The respondent in opposition to the application sets out the following Grounds of opposition dated 11th May, 2015.

1. *That, the claimant/respondent herein is duly obligated to respond to this application by filing its "Grounds of Opposition" verified by an affidavit within the meaning of mandatory provisions of Rule 13 (3) of The Industrial Court (Procedure) Rules, 2010.*
2. *That, the Notice of Motion as filed under Certificate of Urgency by the respondent/applicant dated 15<sup>th</sup> March, 2016 is not properly before this Honourable Court and that it is misconceived, bad in law and in fact hence, incurably defective.*
3. *That, the 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 Industrial court of Kenya.*
4. *That, the respondent's/applicant's actions to move this Honourable Court by a Notice of Motion filed under Certificate of Urgency is bad in law and in fact hence, do offend the mandatory provisions of Rule 32 of The Industrial Court (Procedure) Rules, 2010 and Section 16 of The Industrial Court*

*Act, No. 20 of 2011, Laws of Kenya.*

5. *That, pursuant to the noble judgment of this Honourable Court delivered on 11<sup>th</sup> day of November, 2015, the only legal places left for the respondent/applicant if aggrieved by the Order and Decree of the Honourable Court was to apply for a review for the judgement within the meaning of Section 16 of the Industrial Court Act, 2011 Laws of Kenya.*
6. *That, the respondent/applicant's Notice of Motion filed under certificate of urgency application dated 15<sup>th</sup> March, 2016 do offend mandatory provisions of Section 14 of The Labour Institutions Act, 2007 Laws of Kenya.*

7. That, the respondent's/applicant's Notice of Motion filed under certificate of urgency application dated 15<sup>th</sup> March, 2016, do offend mandatory provisions of Section 3,4 and 21 (4) of The Industrial Court Act, 2011, Laws of Kenya.

8. That, the respondent's/applicant's Notice of Motion filed under Certificate of Urgency application dated 15<sup>th</sup> March, 2016 do offend mandatory provisions of Article 162(2) (a) and (3) of The Constitution of Kenya.

9. That, on 12<sup>th</sup> August, 2015, this Honourable Court did issue summons to the parties herein through the Registrar of the Court for a hearing on 19<sup>th</sup> August, 2015 but still, the respondent/applicant could not appear and hence, the averments of the supporting affidavit is meant to this Honourable Court mislead and a pathetic fallacy to assert that it was not aware of the proceedings of this suit.

The respondent also filed a Verifying Affidavit sworn on 11th May, 2016 in opposition to the application.

This is a fairly simple application. The respondent/applicant seeks orders of stay of execution of judgment of court on grounds of a lapse occurring in her prosecution of the claim and therefore the consequential judgment of court. It is their submission that they had instructed legal counsel who was not able to prosecute the matter and therefore called for an opportunity where the matter can be re-opened and heard afresh *inter parties*.

The claimant/respondent opposes the application in entirety but I feel that this opposition does not offer any concrete grounds for refusal of the application. It is trite law and practice that the default or failure of counsel shall not be visited on the client. I am therefore inclined to allow this application and order as follows;

- i. That there be and is hereby ordered a stay of execution of the judgment of court delivered on 11th November, 2015.
- ii. That this claim be and is hereby set for fresh *inter parties* hearing.
- iii. That the respondent be and is hereby awarded leave to file a defence and witness statements for purposes of the hearing.
- iv. That each party shall bear its own costs of this application.

Delivered, dated and signed this 6th day of June 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Japheth Anyira Agura for the Claimant/Respondent.
2. Mr. Kirwa holding brief for Mr. Mwangi instructed by Lawrence Mwangi & Mwangi Advocates for the Respondent/Applicant