



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 49 OF 2013

MISHECK KIRIMI MWITHIMBU..... 1ST CLAIMANT

KITHINJI MBERIA.....2ND CLAIMANT

JUSTUS GIKUNDA.....3RD CLAIMANT

SILAS KINOTI.....4TH CLAIMANT

GEOFFREY KIRIMI.....5TH CLAIMANT

LAWRENCE MAGAJU.....6TH CLAIMANT

JUDITH RIMA.....7TH CLAIMANT

ZAKARIA KIRUKI.....8TH CLAIMANT

VERSUS

**THE LIQUIDATOR NKUENE FARMERS CO-OPERATIVE
SOCIETY.....1ST RESPONDENT**

**COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT.....2ND
RESPONDENT**

**KIERU FARMERS CO-OPERATIVE SOCIETY.....3RD
RESPONDENT**

**KAUBAU FARMERS CO-OPERATIVE SOCIETY.....4TH
RESPONDENT**

**KAGURU FARMERS CO-OPERATIVE SOCIETY.....5TH
RESPONDENT**

**TAAU FARMERS CO-OPERATIVE SOCIETY.....6TH
RESPONDENT**

MUTEGO FARMERS CO-OPERATIVE SOCIETY.....	7 TH
RESPONDENT	
MUGURU FARMERS CO-OPERATIVE SOCIETY.....	8 TH
RESPONDENT	
MUNANI FARMERS CO-OPERATIVE SOCIETY.....	9 TH
RESPONDENT	
NKUMARI FARMERS CO-OPERATIVE SOCIETY.....	10 TH
RESPONDENT	
NTEMWENE FARMERS CO-OPERATIVE SOCIETY.....	11 TH
RESPONDENT	
KANGURWE FARMERS CO-OPERATIVE SOCIETY.....	12 TH
RESPONDENT	
GITUNE FARMERS CO-OPERATIVE SOCIETY.....	13 TH
RESPONDENT	
NUGU FARMERS CO-OPERATIVE SOCIETY.....	14 TH
RESPONDENT	
NKUNGUGU FARMERS CO-OPERATIVE SOCIETY.....	15 TH
RESPONDENT	
KANDIGI FARMERS CO-OPERATIVE SOCIETY.....	16 TH
RESPONDENT	
RUGETU FARMERS CO-OPERATIVE SOCIETY.....	17 TH
RESPONDENT	

(Before Hon. Justice Byram Ongaya on Friday 5th June, 2015)

RULING

The 5th, 7th, 8th, 9th, 10th, 12th, 14th, 15th, 16th, and 17th respondents filed a notice of motion on 21.05.2015 through Carlpeters Mbaabu & Company Advocates. The application was filed pursuant to Article 25(c), 50(1), 159 and 162(2)(a) of the Constitution of Kenya, sections 1A, 1B, 3A and 63(c) and (e) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 10 Rule 11 and Order 51 Rules 1, 3 and 4 of the Civil Procedure Rules, 2010 and all enabling provisions of the Industrial Court Act, No. 20 of 2011 and the rules there under and the Labour Institutions Act, No.12 of 2007.

The substantive prayer in the application was that the judgment of the honourable court dated 30.09.2014, the consequential decree and all orders flowing therefrom be set aside and the 5th, 7th, 8th, 9th, 10th, 12th, 14th, 15th, 16th, and 17th respondents be granted leave to defend the cause. The application was supported by the affidavit of Joseph Kinoti M'rinchuni filed on 21.05.2015. The applicants further filed on 27.05.2015 the supplementary affidavit of Joseph Kinoti M'rinchuni.

The claimants being the respondents in the application filed the replying affidavit of Misheck Kirimi Mwithimbu sworn on 25.05.2015 to oppose the application.

The grounds and submissions in support of the application are as follows:

- a. The applicants, except the 7th applicant were not served with the summons or other suit papers.
- b. The applicants were not notified about the hearing date.
- c. The claim is for a sum of Kshs. 53, 351, 491.05 and the applicants will suffer profound, monumental and irreparable loss and damage.
- d. The applicants were condemned unheard, contrary to rules of natural justice, constitutional underpinning and fair play as they were not served at all.
- e. The claimants will not suffer prejudice if the application is allowed.

The claimants opposed the application on the following grounds and submissions:

- a. The applicants were served with the summons to enter appearance and the service was personal as per the affidavit of service on record by Joseph Mwangi Advocate filed on 9.12.2005.
- b. The 7th respondent entered appearance through Joan W.G. Ndorongo who is still on record for the 7th respondent.
- c. The hearing proceeded on 27.07.2014 and the 7th respondent failed to attend court despite service of the hearing notice upon the 7th respondent's advocate.
- d. The applicants were served but chose not to defend the suit.
- e. The interlocutory judgment entered was proper and should not be set aside.

The court has considered the submissions and the grounds as urged for the parties to the application for setting aside the judgment and for leave to defend the suit. The court has revisited the judgment on record. The court observes as follows:

1. At paragraph 6 of the judgment the court found that all the defendants except the 7th neither entered appearance nor filed defence to the suit. The 7th defendant on its part did not attend court at the hearing despite filing a defence and being served with a hearing notice. That finding by the court has not been set aside in a review application and there is nothing before the court to warrant a different finding in that regard.
2. As to whether the defendants had a defence to the suit the court at paragraph 9 found thus **“9. There seem to be no dispute that the plaintiffs were to be paid their terminal benefits by the defendant. Further these benefits had been computed and partly paid. The only issue and one which prompted the plaintiffs to bring the present suit is that the 1st respondent has failed and or ignored to pay the plaintiffs the balance of their terminal benefits as had been agreed. The court would not want to speculate but perhaps the placement of the 1st defendant in liquidation and the attendant processes could have had a role in delay in paying the claimants. However their claim had been acknowledged by the liquidator and partially settled.”** The court observes that the findings by the court have not been set aside consequential to a review application and the findings are that the claimants' claim had been acknowledged.

The record shows that all respondents including the applicants were served with summons to enter appearance but they chose not to oppose the suit except the 7th respondent who filed a defence but failed to attend the hearing despite service of the hearing notice.

The court finds that the application was based on misleading facts that the applicants had not been served as required under the rules. The court further finds that the prayer to defend the suit was misconceived as far as the 7th respondent had filed a defence but failed to attend the hearing. In view of the finding in the judgment that the claim had been acknowledged, it is the opinion of the court that there is no serious issue that would justify reopening of this suit. Taking all the facts and circumstances of the application into account, the court finds that the applicants have failed to establish a valid and just reason as a basis to allow the application.

In conclusion, the application brought by the notice of motion filed on 21.05.2015 is dismissed with costs.

Signed, dated and delivered in court at **Nyeri** this **Friday, 5th June, 2015.**

BYRAM ONGAYA

JUDGE