



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 52(N) OF 2009**

**EMMA CAROL WANJIRU ..... CLAIMANT**

**-VERSUS-**

**AIRWORKS (K) LIMITED ..... RESPONDENT**

Mr. Ongolo for Respondent/Applicant

Mr. Kimathi for Claimant

**RULING**

1. The Applicant seeks an order for review of the order made on 23<sup>rd</sup> July, 2013 marking the hearing of this claim closed and order re-opening of the hearing of this matter to allow the Respondent to present its evidence, statements and submissions in opposition of the Claimant's claim.
2. The Respondent states it has three (3) witnesses to call and the Advocate previously on record failed to appear in Court on the 30<sup>th</sup> July 2013 to present the Respondent's case.
3. That the Respondent has strong defence to the Claimant's case and it would be in the interest of justice and fair play that the Court allows the application.
4. The Applicant relies on the decision of **L. Njagi J. in Mwaluko Mwanjili V. Universal Bank Ltd. Milimani HCC No. 588 of 2000** to the effect that:

*“it is an elementary principle of law that a person should not be condemned unheard.”*

5. Furthermore reliance is placed on the dicta of **Apollo. J.A. in Rao Virsinthinji and others V. Prudential Dry Cleaners Ltd. Milimani H.C.C. No. 830 of 1997** as follows:

*“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits ..... I think the broad equity approach is that unless there is fraud or intention to overreach there is no error or default that can not be put right by payment of costs. The Court as is often said exists for the purpose of deciding the rights of the parties and not for purposes of imposing discipline.”*

6. The Claimant strongly opposes the Application by the Respondent and submits that the same is mischievous and incompetent.

That the Applicant did not adhere to Rule 32 (3) and (4) of the Industrial Court Rules (2010) in that it does not conform to Form 6, which requires the Application to be made by way of a memorandum.

7. The Court will at the outset state that it is not given to place emphasis on the form but on substance. That indeed the Application as presented serves the purpose for which it is intended. The issue of filing the matter during Court Vacation falls in this category of technicalities which the Court is not beholden to provided the Application has substance and is arguable.
8. The issue for the Court to determine at this stage is whether there is justification to re-open the matter.

I am persuaded by the reasoning by **Justice Ringera (Rtd) in Trust Bank Vs. Portway Stores [1993] Ltd. (2001) IEA** as follows;

*“I am yet to be persuaded that errors of commission and omissions by a duly instructed Advocate who is obviously the agent of the instructing party should not be visited on its principal. If the acts and omissions of other agents with actual or ostensible authority in other sphere of life are not without consequence to their principals, why should it be different in the legal profession. In short, if this application turned only on the explanation given for the default I would be inclined to dismiss it.”*

9. However, the Court is satisfied that this Application is made in good faith and the Respondent has demonstrated that it has a sound defence against the claim. That the Application was brought without delay and the Applicant is willing to pay costs to remedy the delay occasioned the matter by the failure by the Respondent to appear at the hearing.

The fact that there was a change of Advocates confused matters and the Court is satisfied that the failure to appear was not deliberate or meant to delay the conclusion of the matter.

Accordingly, I allow the application and costs will be in the cause.

10. The matter be allocated a hearing date on a priority basis and if the Respondent fails to attend the hearing date set, the defence will be deemed closed and matter will automatically be reserved for judgment.

The Court apologises for delay in delivering the ruling due to heavy workload.

***Dated and delivered at Nairobi this 21st day of March, 2014***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**