



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

**AT NAIROBI**

**CAUSE NO. 1031 OF 2011**

**JAMES MWANIKI KINGORI ..... CLAIMANT**

**VERUS**

**ST. ELIZABETH ACADEMY ..... RESPONDENT**

Mr. Thangei for Respondent / Applicant

Mr. Mwangi for Claimant / Respondent

**RULING**

1. The suit was filed on 29<sup>th</sup> June 2011 seeking for payment of various terminal benefits and compensation for wrongful termination of employment.

2. It is common cause that the Respondent was served with the memorandum of claim dated 27<sup>th</sup> June 2011 and entered appearance in the matter.

However, the Respondent did not file a statement of Response to the claim.

3. The matter proceeded exparte and Judgment was delivered on 26<sup>th</sup> February 2014 in favour of the Claimant.

4. The Respondent / Applicant has brought this application dated 27<sup>th</sup> February 2014 and amended on 10<sup>th</sup> March 2014 seeking a temporary stay of execution of the Judgment delivered on the 26<sup>th</sup> February 2014 and / or set aside the same and meanwhile grant leave to the Respondent herein to file its Reply to the Memorandum of claim out of time.

**Reason advanced**

5. The Applicant failed to file a statement of response as it inadvertently submitted all its records, books of accounts and documents to the Kenya Revenue Authority for an independent audit and in the process forgot to file a response to the claim as the file containing the pleadings of this claim was with the Kenya Revenue Authority.

6. It is apposite to note that the Respondent having been served with summons on 15<sup>th</sup> May 2012 and entered appearance soon thereafter, was subsequently served with mention notices on

30<sup>th</sup> April 2012, 16<sup>th</sup> May 2012, 24<sup>th</sup> October 2012 and hearing notice on 9<sup>th</sup> September 2012 and Affidavits of service were duly filed. The Respondent ignored all those notices and has not explained why it did not appear in Court on any one of those occasions.

7. In the matter of **Shah Vs. Mbogo (1967) EA 116**, the Court held that setting aside a Judgment is a discretion of the court, and this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. It is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

8. Clearly, **Mrs Anne W. Wado**, the Director of the Respondent / Applicant has not come clean as to the reason why, the Respondent failed to attend Court on 16<sup>th</sup> May 2012, 24<sup>th</sup> October 2012 and 4<sup>th</sup> October 2013 only to rush to Court when the Judgment was delivered.

9. There is no documentation annexed to the application to show that the Kenya Revenue Authority was in possession of these material documents. Even if it was in such possession, this does not explain the failure by the Respondent to appear in Court on the various dates stated above.

In the circumstances, the Court declines to exercise its discretion to assist a party who appears to have deliberately avoided to appear in Court.

The application is dismissed with costs.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of July, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**