



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 215 OF 2014

PROF. JOSEPH MUNGAI KERIKO.....CLAIMANT

VS

KIRINYAGA UNIVERSITY COLLEGE.....RESPONDENT

RULING

1. The Respondent's application brought by way of Notice of Motion dated 1st July 2014 seeks the following orders:

- a. That the Court be pleased to extend time to the Respondent to file its Reply and Counterclaim and deem the Reply and Counterclaim dated 20th May 2014 duly filed;
- b. That the Court be pleased to grant leave to the Respondent to file its documents in support of the Reply and Counterclaim within 7 days from the date the leave is granted;
- c. That the costs of the application be provided for.

2. The Respondent's application is based on the following grounds:

- a. That the delay in filing the Reply and Counterclaim was inadvertent;
- b. That the key personnel of the Respondent which is a public university was involved in meetings towards management of a nationwide universities strike and were therefore not in a position to issue instructions in time;
- c. That most of the operations of the Respondent were affected by the universities strike and access to crucial documents relevant to the claim was not possible;
- d. That the application has been filed without undue delay and it would be in the interest of justice that the Respondent be allowed to respond to the claim and raise a counterclaim for the protection of public funds;
- e. That no prejudice will be caused to the Claimant;
- f. That it would further the interests of justice for the Court to consider all the documents that the Respondent seeks to rely on to enable a determination of the issues in dispute on merit.

3. In a supporting affidavit sworn by the Respondent's Principal, Prof. Mary Ndungu it is

deponed that it took time to convene a meeting of the University Council which was required to make input into the Respondent's Reply and to authorise release of critical documents relevant to the claim.

4. Prof. Ndungu further depones that she was involved in numerous meetings with officials of staff unions, Ministry of Education officials and other stakeholders who were negotiating to end the universities strike.

5. The Claimant filed grounds of opposition and a replying affidavit on 15th July 2014 raising the following:

a) That the Respondent is not entitled to the discretion of the Court as its application is not made in good faith since it has, in the supporting affidavit, attempted to mislead the Court;

b) That the Respondent's Counsel filed a Memorandum of Appearance on 10th March 2014 but did not file a Reply until 22nd May 2014, nearly two months late;

c) That the explanation given by the Respondent is not credible because the universities strike lasted only about two weeks and ended on 19th March 2014 when the return to work formula was signed whereas the Reply and Counterclaim was not filed until 22nd May 2014, two months after the end of the strike;

d) That there is no proof that Prof. Mary Ndungu is a member of the Inter Public Universities Councils Consultative Forum, the body which negotiated with the staff unions;

e) That while knowing that the Reply and Counterclaim was filed late, the Respondent waited until the Claimant raised the issue of delay before belatedly filing the application over a month after filing its Reply and over three months out of time. The failure to seek leave to file the Reply and Counterclaim earlier is neither explained nor justified;

f) That having entered appearance in time, the Respondent will have an opportunity to participate in the proceedings by cross examining the Claimant and the Counterclaim against the Claimant can be pursued as a separate suit.

6. Rule 13(1) of the Industrial Court (Procedure) Rules, 2010 requires a party served with a statement of claim to respond within fourteen days from the date of service and Rule 13(4) gives the Court power to extend this time. The Respondent states that it was unable to file its Reply in time owing to operational difficulties. The Claimant on the other hand maintains that the reasons advanced by the Respondent for the delay in filing its Reply and Counterclaim are not plausible.

7. In determining whether to extend time for filing of a pleading, the Court is expected to consider the nature of the action, the defence however irregularly brought before the Court and whether the claimant can reasonably be compensated by costs for any delay caused. To deny a party a hearing should always be the last resort. (see **Mukunya J in *Jeremiah's Creek Limited Vs Charles Kamau [2013] eKLR***)

8. In the instant case, the Claimant having been served with the Respondent's Reply and Counterclaim filed a detailed response on 12th June 2014 and the Court finds that in spite of the delay by the Respondent, the Claimant will not suffer any prejudice if the Reply and Counterclaim is admitted.

9. The Court therefore makes the following orders:

a) Time is extended in favour of the Respondent and the Reply and Counterclaim dated

20th May 2014 is deemed duly filed and served;

b) The Respondent is granted leave to file supporting documents within 7 days from the date of this ruling;

c) The Claimant may file any further response within 14 days from the date of service of the Respondent's supporting documents;

d) The costs of this application will be in the cause.

Orders accordingly.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Kiura for the Claimant

Mr. Njomo for the Respondent