



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 5 of 2013

**KENYA UNION OF DOMESTIC, HOTELS,
EDUCATIONAL
INSTITUTIONS, HOSPITALS AND ALLIED WORKERS
(KUDHEIHA
WORKERS).....CLAIMANT**

V

B.O.G GILGIL DAY SECONDARY SCHOOL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th May, 2013)

RULING

The court delivered the judgment in this case on 12.02.2013. The respondent filed the notice of motion on 23.04.2013 under certificate of urgency seeking the setting aside of the judgment on the ground that the respondent had not been served and the respondent should be given an opportunity to be heard in view of its intended defence that raises serious triable issues. The application was supported by the affidavit of the respondent's secretary **Peter Mbugua Kibury** sworn on 22.04.2013. The claimant opposed the application through the replying affidavit of **Hezron Onwong'a** sworn on 6.05.2013 and filed on 07.05.2013.

The application was heard on 10.05.2013. The respondent's secretary and the process server **Peter Mwangi Njoroge** were examined on the issue of service and the following facts emerged.

a)The hearing of the case proceeded on 29.01.2013. The process server admitted that he served the hearing notice for that date upon the Gilgil Girls Secondary School and not the respondent being Gilgil Day Secondary School. The court record shows that the claimant erroneously interchanged the two schools as the respondent in this cause with the consequence that the judgment has in fact been erroneously entered against the Gilgil Girls Secondary School.

b) On 23.11.2011 the Deputy Principal of the respondent was served the hearing notice for the hearing scheduled on 12.07.2012 but the respondent did not take any steps to attend court or to enter appearance.

c)The respondent's secretary denied service of the memorandum of claim and the summons to enter appearance but admitted that Mercy as mentioned in the affidavit of service to have received the documents on 7.10.2011 was his personal secretary. On a balance of probability and taking into account the affidavit of service sworn on 10.10.2011, the court finds that the memorandum of claim and the

summons to enter appearance were served.

The court has considered the draft statement of response on record and finds that it raises triable issues. The court has also considered that the respondent failed to take due steps to comply with the rules of the court to defend the case. However, the hearing proceeded on a date when the respondent had not been served by the claimant to attend as ordered by the court on 29.01.2013. In the circumstances of this case, the court makes orders as follows:

1. The judgment delivered in this case on 12.02.2013 and all the processes flowing from the judgment are set aside.
2. The respondent shall pay in any event, the claimant's costs of the case up to the date of this ruling.
3. The respondent shall file and serve the memorandum of response and copies of all relevant documents by close of 24.05.2013.
4. The claimant is at liberty to file and serve a reply to the memorandum of response by close of 31.05.2013.
5. Parties to agree upon a convenient mention date for directions on the hearing of the case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 17th May, 2013**.

BYRAM ONGAYA
JUDGE