



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO. 570 OF 2011

(Before D.K.N. Marete)

**KENYA SCIENTIFIC RESEARCH
INTERNATIONAL TECHNICAL &
ALLIED INSTITUTIONS WORKERS UNION.....CLAIMANT**

Versus

**1. AQUA TECHNOLOGIES LTD
2. JOHN CHEGE
3. ESTHER NYAGUTHII NDERITURESPONDENT**

RULING

This is an application by way of Notice of Motion dated the 18th February, 2013 by the Respondent/Applicant for orders;

1. ***THAT*** this Honourable Court be pleased to certify this application as urgent and heard *ex-parte* in the first instance.
2. ***THAT*** this Honourable Court be pleased to issue a temporary order of stay of execution of the decree herein pending the hearing of this Application *inter parties*.
3. ***THAT*** this Honourable Court be pleased to set aside the *ex-parte* judgement delivered on 16th November, 2012 and the decree issued on 19th December, 2012.
4. ***THAT*** this Honourable Court be pleased to order the claimant to serve the Respondents with the statement of claim and the Respondent be allowed to file defence to the claim.
5. ***THAT*** the costs of this application be in the cause.

And is premised on the following grounds;

- a. ***THAT*** the Respondents failed, refused and/or neglected to serve the statement of claim on the Applicants.

- b. ***THAT*** the matter came up for hearing on 24th October 2012 and there was no appearance from the claimant and the Respondent's Advocate requested the court to order that the statement of claim be served on the Respondents which the court did and the matter was marked Stood Over Generally.
- c. ***THAT*** the Respondent without notifying or consulting the Applicants herein procured a hearing date ex-parte and failed to give the Applicants an opportunity to agree on a convenient date for all the parties.
- d. ***THAT*** the hearing Notice that the matter was filed for hearing on 8th November 2012 was served on the Applicants on 5th November 2012 and was received under protest as counsel for the applicants was engaged in Milimani ELC No. 63 of 2011 on the said date.
- e. ***THAT*** the hearing Notice was served on the Applicants too late and counsel for the Applicants inadvertently did not diarize the matter.
- f. ***THAT*** the Applicants/Respondents were not notified that the matter was coming up for hearing on 8th November 2012 hence their failure to make an appearance.
- g. ***THAT*** counsel's inadvertence should not be visited on the Applicants and it is in the interest of justice that the Judgment be set aside and the Applicants be given an opportunity to defend themselves in this matter.

The Claimant/Respondent in their Replying Affidavit sworn on 8th April, 2013 and filed on 11th instant deponed that the 2nd and 3rd Respondents/Applicants had filed a defense in this matter on 26th April, 2013 wholly denying the claim. The advocate for the respondents only made a notice of appearance on the matter and did not raise the issue of lack of service or knowledge of the claim, or at all, as he now alleges. He did not attend hearing on 8th November, 2012 despite service with the hearing date. He did not also raise any defense on the matter all the way up to the date of judgement. The matter was literally abandoned and therefore the respondent cannot be heard to want to benefit from his own negligence and mischief. He therefore prays that the matter be dismissed with costs.

The Respondent/Applicant seeks that this court sets aside the ex-parte judgement made in favour of the Claimant/Respondent on 16th November, 2012 and that he be allowed to file a defense and start the hearing of the matter afresh. The grounds for this application are untruthful, baseless and unsustainable. The application is therefore frivolous and unsustainable and should not see the light of the day. Counsel for the applicant must not be heard to ask the court to reward him of his own mischief. I therefore dismiss the application with costs to the Claimant/Respondent.

Dated, delivered and signed the 20th day of December, 2013.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Kinyanjui instructed by Kinyanjui & Njau for the Respondent/Applicant.
2. Mr. Martin Oduor for the Union/Respondent.