



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 258N of 2009

JAMES KINYUA & 17 OTHERS.....CLAIMANTS

VERSUS

**DR. HASMUK K. RAWAL
DR. VIRENDRA K. RAWAL**

T/A UNIVERSAL GROUP OF COLLEGES.....RESPONDENTS

RULING

Mr. Ngata Kamau for the Claimant

Mr. Kariba Mbaabu for the Respondent

The Application was brought on 4th October, 2010 on a Certificate of Urgency seeking for orders:-

1. That there be a stay of execution of the judgment of the court delivered on 17th September, 2009.
2. That the *ex parte* judgment entered by this court on the 17th September 2009 be varied and/or be set aside.
3. That the Respondents be allowed to file their defences and defend this matter.
4. That the costs of this application be paid by the Claimants.

The grounds for the application are that:-

- (a) The Respondents were not served with the summons and/or any statement of Claim and/or any hearing date and consequently the matter proceeded *ex parte*.
- (b) That at the material time the Respondents were out of the Country.
- (c) The Respondents have good defence against the Claimants' claim.

The Application is supported by the Affidavit of Mr. Hasmukh K. Rawal, the proprietor of the erstwhile employer of the 18 Claimants, the Universal Group of Colleges which closed on 30th November, 2008 leading to the termination of services of the Claimants.

They claimed severance pay, payment in Lieu of Notice and unavailed annual leave.

From the facts outlined in the judgment of the Court dated 17th September, 2009, the matter was listed for mention on 19th June, 2009 and the parties were notified to attend. Mr. Kamau appeared for the Claimants but the Respondents did not attend. The Court directed that the Respondents file their statement of Response on/or before 10th July, 2009 and the dispute was fixed for hearing on 1st September, 2009. Mr. Kamau, Advocate was directed to serve the hearing notice upon the Respondents by himself or through an authorized process server, by registered post and make a return of service. This was done on 25th June, 2009 by Mr. William Kung'u Mundia, an authorized court process server who posted the hearing notices by registered post at last known address of P.O. Box 30240-00100, Nairobi and made a return of service dated 31st August, 2009.

The Respondents did not enter appearance nor file a statement of Response. The matter was therefore, heard *ex parte*.

In the Supporting Affidavit of Mr. Hasmukh K. Rawal dated 4th October, 2010, there is above denial that the Claimants had not served the Respondents with the summons and/or hearing notices. No explanation whatsoever is given as to why the Registered mail could not have reached the Respondents at their last known address. The Respondent is completely silent on whether their address changed or not, and therefore it is not in dispute that the Court Process was served through the correct Post Office Box, namely 30240-00100.

In fact the same address is used in the Supporting Affidavit of the 1st Respondent, Hasmukh K. Rawal.

The Respondents admitted the Claim for severance pay and settled the same on 12th June, 2011.

They have submitted that they have a good defence against the claims for leave pay for periods ranging between 2 to 17 years, arguing that this claim is not only untenable because it is completely unreasonable but the alleged leave claims would be time barred by virtue of the provisions of Section 90(1) of the Employment Act, 2007.

He also contests the Claim for Notice pay on the basis that each of the grievants was paid one month pay in Lieu of Notice.

This is the defence the Respondent had opportunity to prove against the Claims by the grievants were offered opportunity to do so but failed for no good cause shown.

If indeed, the Court award on Leave pay was backdated 17 years, this may have violated the Law on Statutory Limitation and the Respondents would be entitled on a proper application to a review of the judgment to the extent that it is in breach of a written Law. There is no application before the Court for review of the judgment of the court and therefore, cannot dwelve into that issue.

The Application to set aside the judgment of the court dated 17th September, 2009 is dismissed with costs.

Ordered accordingly.

DATED and DELIVERED in Nairobi this 6th day of December, 2012.

Mathews N. Nduma
PRINCIPAL JUDGE