



**Order of St Augustine Kenya Registered Trustees v Otieno & 5 others
(Being the official of Support African Child Network) (Environment & Land
Case 168 of 2013) [2023] KEELC 18509 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 18509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 168 OF 2013
LC KOMINGOI, J
MARCH 16, 2023**

BETWEEN

ORDER OF ST AUGUSTINE KENYA REGISTERED TRUSTEES PLAINTIFF

AND

**ALFRED OTIENO 1ST DEFENDANT
GEORGE OUMA OCHIENG' 2ND DEFENDANT
RECILA NEKESA PAMBA 3RD DEFENDANT
MARGARET ONGOMA ANDENJE 4TH DEFENDANT
BENSON NYANG'OR JUMA 5TH DEFENDANT
WYCLIFFE OCHIENG' 6TH DEFENDANT
BEING THE OFFICIAL OF SUPPORT AFRICAN CHILD NETWORK**

***(Being the official of Support African Child
Network.....DEFENDANTS/APPLICANTS)***

RULING

1. This is the Notice of Motion dated 28th April 2022 brought under section 1a, 1b, 3, 3A and section 63(e) of the *Civil Procedure Act*, Order 38 Rule 1 and Order 51 of the *Civil Procedure Rules* and all other enabling provisions of the law.
2. It seeks orders:-
 1. Spent.



2. Spent.
 3. That this honourable court be pleased to set aside the ex parte judgment delivered herein on 9th December 2021 and all consequential orders thereto and order the suit to be heard de novo.
 4. That costs of this Application be in the cause.
3. The grounds are on the face of the application and are set out in paragraphs a to d.
 4. The application is supported by the affidavit of Alfred Onyango, the 1st Defendant/Respondent herein, sworn on the 28th April 2022.
 5. The application is opposed. There is a replying affidavit sworn by Salome M. Beacco, Advocate for the Plaintiff/Respondent on the 23rd May 2022.
 6. On the 29th June 2022, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.
 7. It is the Defendants'/Applicants' submissions that they are the registered owners of the school, with students from form I to form IV and that they are threatened with eviction or disruption of the learning programme. That they are being intimidated to hand over the school.
 8. The Plaintiff/Respondent on the other hand submitted that the Defendants/Respondents have not demonstrated sufficient evidence to warrant the judgment to be set aside. Reliance is placed on the cases of *Shah vs Mbogo & Another* [1967] EA116; *Esther Wamaitha Njihia & 2 Others vs Safaricom Limited* [2014] eKLR. It prays that the application be dismissed with costs.
 9. I have considered the notice of motion and the affidavit in support. I have also considered the response thereto, the written submissions and the authorities cited. The issues for determination are:-
 - i. Whether the Defendants'/Applicants' application has given sufficient reasons to warrant the exparte judgement of 9th December 2021 to be set aside.
 - ii. Who should bear costs of this application?
 10. It is well settled that the decision on whether or not to set aside experte judgment is discretionary. In the case of *Esther Wamaitha Njihia & 2 Others vs Safaricom Limited* [2014] eKLR the court citing relevant cases of the issue, held interalia

“...the discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel vs E.A Cargo Handling Services Ltd.* (4) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah vs Mbogo.* (5) The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (see *Sebei District Administration vs Gasyali.* (6) It also goes without saying that the reason for failure to attend should be considered”.
 11. I have gone through the affidavit of Alfred Onyango and paragraph 16 does not reflect what transpired on 23rd June 2021. The court record is very clear. The matter came up for hearing on the 1st December



2021 Mrs. Kerongo who was holding brief for Mr. Nyachoti sought an adjournment on the grounds that Mr. Nyachoti was engaged on another matter in Narok court. Though the application for adjournment was opposed by the Plaintiff's counsel, the court considered that this was the first time the Defendants were seeking an adjournment and granted an adjournment.

12. The matter was then fixed for hearing on 23rd June 2021. On this date there was no appearance for the Defendants. The matter then proceeded *experte*.
13. I have considered the fact that the Defendants in their counterclaim sought to be declared as the owners of the School. It is on this ground that I exercise this court's discretion to accord them an opportunity to ventilate this claim.
14. Consequently, I find merit in this application and I grant the orders sought namely:-
 - a. That the *exparte* judgment dated 9th December 2021 and all consequential orders are hereby set aside on condition that the Defendants do pay the Plaintiff's throw away costs of Kshs.20,000/- within thirty (30) days from the date of this ruling.
 - b. That the suit be set down for hearing at the earliest opportunity.
 - c. That the Plaintiff shall have costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16TH DAY OF MARCH 2023.

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L. KOMINGOI
JUDGE

In the presence of:-

No appearance for the Plaintiffs

No appearance for the Defendants

Mutisya- Court Assistant

