



**REPUBLIC OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 251 OF 2014**

**BENGERIA ARAP KORIR.....PLAINTIFF**

**VERSUS**

**SAINT ELIZABETH ACADEMY KAREN LIMITED.....DEFENDANT**

**RULING**

1. This case appeared before the Deputy Registrar of this court on 8<sup>th</sup> October 2018 when the Deputy Registrar fixed the hearing of the case for 6<sup>th</sup> February 2019. The defendant and his counsel did not appear before the Deputy Registrar when that date was fixed. Only the plaintiff's counsel was present. In view of that the plaintiff's counsel was under an obligation to serve the defendant's counsel with a hearing notice for 6<sup>th</sup> February 2019. The plaintiff's counsel did indeed serve the defendant's advocate with a hearing notice but that hearing notice indicated that the matter was due for mention, and not hearing on 6<sup>th</sup> February 2019.

2. The case proceeded to full hearing on 6<sup>th</sup> February 2019 in the presence of the plaintiff but in the absence of the defendant and his counsel. Judgment was entered in favour of the plaintiff by the court's judgment dated 16<sup>th</sup> May 2019.

3. The defendant by Notice of Motion dated 3<sup>rd</sup> December 2019 has moved this court for setting aside of that judgment. The application is premised on the grounds that the defendant's counsel was serviced with a 'Mention Notice' and not a hearing notice for 6<sup>th</sup> February, 2019 that on that day the defendant's counsel could not attend to this matter because he was engaged in a matter before the Malindi court, and that the hearing proceeded without the defendant being informed because his counsel had been served with a mention notice.

4. The plaintiff has opposed the application on the ground that the defendant had an obligation to attend court even though he was served with a mention that in any case the defendant has no defence to the plaintiff's case.

5. The principles of natural justice require everyone to be afforded a right to fair hearing (*audi alteram partem*). That right to fair hearing which is also captured under 50 of the constitution require that an individual be not penalised by decision affecting their right unless they have been given prior notice of the case, that is a fair opportunity to answer and to present their case.

6. The defendant's counsel having been served with mention notice and not a hearing notice means that the defendant was not afforded a right to be heard when the case proceeded to full hearing. The defendant is entitled to setting aside of the judgment *ex debito justitiae*, that is as of right.

7. Accordingly in respect to the Notice of Motion dated 3<sup>rd</sup> June 2019 I grant the order that the judgment of 16<sup>th</sup> May 2019 be and is hereby set aside. The costs of that Notice of Motion shall be in the cause.

8. At the reading of this Ruling a hearing date of this case shall be fixed.

**DATED, SIGNED and DELIVERED at NAIROBI this 27th day of APRIL, 2020.**

**MARY KASANGO**

**JUDGE**

**ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **27<sup>th</sup>** day of **April, 2020**.

**MARY KASANGO**

**JUDGE**