

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 859 OF 2001

REGISTRAR OF CO-OPERATIVES SOCIETIES. PLAINTIFF

VERSUS

MUKUUNI SECONDARY SCHOOL. DEFENDANT

R U L I N G

The Application before the court is the Chamber Summons dated 16th November, 2009. It sought mainly that the ex parte Judgment in favour of the plaintiff against the defendant dated 3rd September, 2001 and all consequential orders, be set aside on the grounds that the judgment was entered against a non-legal entity who is the Defendant and has no legal capacity to sue or be sued. The other ground is that the sum claimed had already been fully settled.

The application is strenuously opposed by the Defendant. The Plaintiff argues that the amount due under the stated judgment has not been fully settled and therefore the judgment should remain standing to enable the plaintiff to recover the balance by execution. The Plaintiff argues also that setting aside of the judgment will cause injustice to it. And finally, the Plaintiff argues that the delay between the date of judgment and the date of filing this application, a period of about 8 years is too long and inordinate for setting aside a judgment.

I have carefully considered the above facts and arguments. The defendant admits that it owed the Plaintiff the sum of Ksh.824,154.25 as at the time of the entry of the judgment. There is no doubt also that since then, in the period of 8 years, the amount was accruing court interest which by now could be quite substantive. In that respect and with the admission by the Defendant of the said amount, it clearly appears to the court that the applicant herein has no reasonable defence and prima facie, no reasonable grounds for the prayers of setting aside the ex parte judgment aforesaid.

Furthermore, the Defendant clearly would appear to have slept on its rights for too long as stated by the Respondent. It was aware the judgment had been entered against the school but did nothing towards setting the judgment aside. Instead, it went ahead to settle the same by various instalments spread between 2001 and 2002 and the balance of Ksh.44,733/5, which apparently or allegedly was recovered by a kind of execution on 1st December, 2006 when Ksh.68,000/- was recovered from the Defendant's bank account with the help of the Commissioner of Co-operatives.

I am however, not oblivious of the fact that the parties herein do not agree on the total amount paid to the Plaintiff by the Defendant towards the settlement of the debt. In such circumstances, the Defendant could be given an opportunity by this court to render proper accounts during the process of execution, without necessarily having to set aside an otherwise regularly entered ex parte judgment. In the court's mind is the process of execution by Notice to Show Cause why attachment should not be ordered which challenges both parties to justify the decretal sums.

However, in this case the case is different. The Defendant asserted that the pleadings and the judgment in this case are not only irregular but are illegal because the Defendant is not an entity that has legal capacity to sue or be sued. The Defendant asserted also that Mukuuni Secondary School is run by a Board of Governors and cannot of its own sue or be sued and that accordingly, the pleadings and

judgment herein, respectively, were not only filed and entered in error, but should not be allowed to remain standing, let alone the being allowed to be executed.

The Plaintiff if the court understands it properly, admits that the Defendant has indeed, no capacity to sue or be sued. It however, argued that that notwithstanding the judgment should not be disturbed after such a long and inordinate delay.

I have considered the Plaintiff's argument carefully. I am however of the view that the judgment cannot be left to stand. The Defendant is a legally non-existence entity in the Republic of Kenya. A judgment entered against a legally non-existent person is not only null but void. It does not exist and cannot, therefore, be executed, more so against an entity that does not legally exist. The fact that legally non-entity of Mukuuni Secondary School delayed to challenge the judgment through it s Board of Governors did not alter the invalidity of the judgment.

In the above circumstances, it is the view of this court that the only correct thing to do and hereby does, is to set aside the ex parte judgment entered in this case on 3rd September, 2001. Costs are to the Defendant. Orders accordingly.

Dated and delivered at Nairobi this 18th day of February 2014.

.....

D A ONYANCHA

JUDGE