IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 232 OF 2001

STEPHEN WAWERU……...
…….PLAINTIFF

VERSUS

THE SCHOOL COMMITTEE
NYANDUNDO PRIMARY
SCHOOL……..…1ST DEFENDANT

DIRECTOR OF
SETTLEMENT……...…..2ND DEFENDANT

RULING

Before me is the Chamber Summons dated 3/11/2010, brought under **Order 21 Rule 22(1) Order 9B Rule 8** of the **Civil Procedure Rules** and **Sections 1(a) (b)** and **3B** of the **Civil Procedure Act**. It is filed by the office of the Attorney General seeking an order that the orders made on 13/10/2010 dismissing the 1st defendant's/applicant's application dated 27/8/2010 be set aside and the said application be reinstated and do proceed to full hearing. There is also a prayer of stay of execution and further proceedings pending hearing and determination of this application. The application is based on grounds found in the body of the application and 2 affidavits of Ms Natome Advocate and Ezekiel M. Mwangi, the chairman of Nyandundo Primary School. The application was opposed and the plaintiff/respondent filed a replying affidavit dated 25/11/2010. The plaintiff filed this suit against the defendants on 17/2/2003, judgment was entered for the plaintiff against the defendants on 17/12/03 by J. Muga Apondi. By a chamber Summons dated 27/8/04, the 1st defendant through Rabela Advocate, sought to set aside the ex-part judgment. The said Chamber Summons dated 27/8/04 was dismissed on 12/10/2010 for non attendance on the part of the defendants' advocate. The counsel who has conduct of the matter deponed that the clerk in the Civil Litigation Registry failed to bring the hearing of the application to their attention the hearing date having been taken ex-parte. Counsel deponed that she only learnt of the dismissal of the application dated 27/8/04 on 1/11/2010 when she filed an application seeking stay of execution. She contends that this application was made without delay. It is the applicant's case that the matter involves a public utility i.e. a public school, which is likely to lose its land to the plaintiff who has applied to the Registrar of Lands for consolidation of **L.R. NYA/SABUGO 151** (part of the suit property). The 1st applicant is apprehensive that the plaintiff/respondent may dispose of the land and put it out of reach of the applicants. It is the applicants'/defendants' contention that its application stands overwhelming chances of success. It was urged that the applicant stands to suffer irreparably if the order is not granted yet the failure to attend court was due to inadvertence of counsel which should not be blamed on the applicant and it is in the public interest that the application be reinstated.

Mr. Kimatta appeared for the respondent. It is the respondent's contention that the application lacks merit;

that the judgment that the 1st defendant seeks to be set aside was delivered on 17/12/03, about 7 years ago. The judgment against the 2nd defendant remains unchallenged and that the 1st applicant cannot have any sustainable cause of action without the presence of the 2nd defendant and even if the order is set aside, the hearing of that application will remain an academic exercise. The respondent deponed that the school is on its own independent piece of land i.e. **NYANDARUA/SABUGO/80** while his land is 122 and that the 2 pieces of lands are separated by a road. He exhibited a title deed SW IV, issued to him after the judgment was entered, it is dated 26/7/04. He denied that the property is a public utility and it has never been developed as alleged.

The 1st defendant had instructed the Attorney General's office to act for them and it is counsel's contention that the clerk who received the hearing notice for 13/10/2010 did not bring it to the counsel's attention. The failure to attend the court on 13/10/2010 was due to inadvertence by counsel. Courts are always reluctant to visit the fault of the advocate on the clients. In this case, the 1st applicant assumed that counsel would attend the court on the hearing of the application but failed to do so. It was not the fault of the applicant and this court will not visit the fault of counsel on the client.

The subject matter of this suit is land that is claimed by both the respondent and 1st applicant. The said land is said to have a school built on it. The respondent had exhibited photographs which show that the land is not yet developed. That issue would only be resolved if the matter went to full hearing and the court was given a chance to ascertain what is the position on the ground. At that point the court would also ascertain the plaintiff's contention that his plot is very distinct from that of the school and they are separated by a road. Because of these contentions, it would be unfair to lock out one party by determining the matter ex parte.

Judgment was entered herein ex-parte. Apart from the suit land being a public utility, land is a sensitive issue in Kenya and it would best be resolved by the matter going to full hearing for the court to determine the issue of ownership once and for all.

It is the applicant's case that the application seeking to set aside judgment has overwhelming chances of success. The main ground for seeking to set aside the ex-parte judgment is for failure to serve the applicant. I have seen the hearing notice that was served. It was exhibited to the application dated 2/8/2004 **(JRB2).** It indicates that the case was due for formal proof on 19/3/2003. However, the court record shows that the formal proof proceeded on 17/2/2003. In my view, the conflicting dates do raise an issue of service and it would only be fair that the application seeking to set aside judgment be heard on merit.

It is noteworthy that this suit was filed in 2001 – over 10 years ago. Judgment was entered on 17/12/2003 and the application to set aside was filed on 27/8/2004. When the application came up for hearing it was interrupted by a notice of preliminary objection raised by the 1st applicant and later on 30/7/2010, the court directed that the application do proceed to full hearing. That is when it was fixed for hearing ex-parte and was ultimately dismissed on 13/10/2010. It is true that this case has taken too long to determine, but justice must be seen to be done for all the parties to a dispute and for all the above reasons, and in exercise of this court's discretion, I hereby grant prayer 2 of the Chamber summons dated 3/11/2010. I set aside the order of this court dismissing the applicants' application dated 27/8/2004 and a stay of execution is granted pending hearing of that application.

The 1st applicant will bear the costs of this application.

DATED and DELIVERED this 28th day of March 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Nyakundi for the applicants.
N/A for the respondent.
Kennedy – Court Clerk.