



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
HCC NO. 140 OF 2009**

MUTEGI KAREGA PLAINTIFF

VERSUS

JOSEPH KINYANJUI & ANOTHER RESPONDENT

RULING

On 21st May 2010 I delivered judgment on this matter without hearing the other party, the Defendant in the suit. The case has a history from being Nairobi HCCC No. 4332 of 1994 to this case.

In the judgment I gave the history of the struggle by the Plaintiff to acquire the right and title to the property, in dispute, the survey carried out to establish the encroachment on and take over by the Defendants of the Plaintiff's land, and being satisfied that the Defendant's Counsel was informed and was aware of the case and refused to attend court.

In the course of hearing the application the subject matter of this Ruling information filtered to me through my Law Clerk that some two representatives of the School were present in court and choose to sit quiet and wait the plaintiff present his evidence as some kind of charade which did

not concern them at all. They have now come to this court by an application dated 18th June 2010 that the judgment be set aside and execution stayed on the sole ground that they were not heard.

I need not cite any authority, but declare it to be self evident to every student of law and men and women of education both lettered and unlettered , that it is in a cardinal principle of natural justice that no man which includes woman, shall be condemned unheard. See the discussion on principle in such leading cases as **Local Government -vs- Arlidge [1915] A.C 120, Ridge -vs- BALDWIN [1964] A.C 40** and referred to in numerous Kenyan cases. The indomitable Romans those progenitors of both the civil law of Europe and the common law of England had a phrase for it, and it consisted of three words "**audi alteram partem**" - "**hear the other side**". What does the court do when the other party just wants to procrastinate and frustrate the rights of the other party usually the claimant?

Our Civil Procedure Rules, Order **1XB rule 3**, permits the court to proceed ex parte if on the date fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends and the court is satisfied that notice of hearing was duly served.

In this case, the court proceeded ex parte and explained so in the judgment. Order **1XB rule 8** gives the court discretion to set aside or vary judgment or order upon such terms as are just.

I can see no grounds for setting aside or varying the orders thereof.

I do not think that the fact the plaintiff's land is occupied by the secondary school which has its own management would change the terms of the judgment herein. At the time when the suit was instituted the applicants were the people on the saddle of the plaintiff's land. The secondary school is their brain - child and baby.

I see no merit in this leg of the application herein to set aside the judgment. I dare say from the antecedents described in the judgment it is brought in bad faith with the sole purpose of frustrating the plaintiff from realizing the fruits of his judgment.

The proper order to make on this leg of the application is to direct, which I hereby do, that the Defendants do negotiate in good faith with the plaintiff on terms of settlement of judgment.

The second leg of the application for a stay of execution is incompetent as no orders of stay can be granted under order **XX1 Rule 22** of the Civil Procedure Rules in the circumstances of, or in relation to the orders therein.

For those reasons, I see no merit on either of the legs of the application herein and the same is dismissed with costs to Plaintiff/Respondent.

There shall be orders accordingly.

Dated, signed and delivered this 22nd day of July 2010

**M. J. ANYARA EMUKULE
JUDGE**