



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 182 OF 2017**

**(FORMERLY NAKURU ELC NO 328 OF 2014)**

**MARION NJERI MACHARIA (Suing as legal representative**

**of the estate of JOHN MACHARIA MWANGI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SILIBWET PRIMARY SCHOOL BOARD**

**OF MANAGEMENT.....1<sup>st</sup> DEFENDANT/APPLICANT**

**THE COUNTY DIRECTOR OF EDUCATION**

**(NYANDARUA COUNTY).....2<sup>nd</sup> DEFENDANT/APPLICANT**

**MINISTRY OF EDUCATION.....3<sup>rd</sup> DEFENDANT/APPLICANT**

**HON. ATTORNEY GENERAL.....4<sup>th</sup> DEFENDANT/APPLICANT**

**RULING**

1. Following a judgment that was delivered in this matter on the 4<sup>th</sup> October 2018 in favour of the Plaintiff, the Hon Attorney General on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant/Respondents herein filed an application under Certificate of urgency dated the 19<sup>th</sup> November 2018 seeking to set aside the said judgment.
2. The court directed that the said Application be served upon the Plaintiff/Respondent for hearing inter parties which was done and the matter set for hearing inter-parties wherein the Applicant's Counsel submitted that they sought to set aside the judgment of 4<sup>th</sup> October 2018 so that the matter could be reinstated for hearing. That the main ground of their application being that the subject suit was land belonging to a public school.
3. That from the court's judgment, there was an error at paragraph 3 and 4 which error they sought to bring to the attention of the court, being that wherein the Hon. Attorney General had filed their defence and counter claim dated 26<sup>th</sup> February 2016, on the 3<sup>rd</sup> March 2016, the court might have overlooked or missed to consider the said defence and counter claim filed on behalf of the school which was fatal and compromised the outcome of the case.
4. Counsel further submitted that on the issue of failure to file an appearance, the Hon Attorney General had filed a memorandum of appearance on 2<sup>nd</sup> February 2015 and a list of documents dated on the 11<sup>th</sup> March 2016, and therefore it was not true that the Hon Attorney General did not defend the suit or file documents in rejoinder to the pleadings by the defendants.(sick)
5. The State counsel then submitted that he would leave the documents to speak for themselves but that on the strength of omission to consider their defence and documents, that it was in the best of justice that the judgment be set aside and the Hon Attorney General be given a chance to defend the suit for the wheels of justice not just to move, but to move in the right directions.
6. In response to the State Counsel's submission and in opposition of the Application, Counsel for the Respondent submitted that they would rely on both their replying affidavit filed on the 4<sup>th</sup> January 2019 and a list of authorities filed on the 19<sup>th</sup> February 2019.

7. That the application before court was an application for setting aside the judgment of 4<sup>th</sup> December 2018 and not seeking to review the judgment. That to that extent the submission that there was an error on the face of the judgment was neither here nor there, there being no application for review.

8. That the Hon Attorney General was duly served with the suit papers, and a hearing notice on the 19<sup>th</sup> March 2018 among many other occasions where no explanation was given as to why there was no appearance on the many occasions when the matter came for mention or for hearing respectively.

9. That the orders sought by the Applicant were purely discretionary, the elephant in the room being whether they had any defence or trial defence in that matter. One of the documents annexed to the application was an agreement dated 26<sup>th</sup> April 2001 between the Plaintiff and the Defendants where the Plaintiff transferred 11.1 acres of his land to the Defendant with a promise of compensation. The application was silent as to the import of that agreement and reasons why the agreement had not been honored to date.

10. The application was also silent as to the import of their correspondence dated 23<sup>rd</sup> April 2004 where the Defendants promised to compensate the Plaintiff, as well as on a document dated 31<sup>st</sup> May 2001 where the Plaintiff had transferred the land to the Defendant with a promise of compensation.

11. The Respondent submitted that a defence is not arguable unless supported by evidence and the Hon Attorney General cannot seek to defend a case before court for the sake of defending it. That they needed to demonstrate the fact that if the court was to set aside its judgment, what kind of defence they would be advancing.

12. It should not be lost to the court that the Plaintiff had been pursuing this compensation since the year 2001. The Defendants were seeking that they delay the said compensation even further. That this is was a court of justice and by allowing the said delay, it would be wholly unjust.

13. Counsel sought that the court do consider the decisions in their list of authorities filed on the 19<sup>th</sup> February 2019 and further submitted that they did not dispute that there was a defence on record filed by the Hon. Attorney General but asked themselves the kind of material the Hon Attorney General was seeking to advance.

14. That the Hon Attorney General neither made any response to the documents filed by the Plaintiffs nor did they dispute the Plaintiffs allegations. Further, the Hon Attorney General had not filed any supplementary affidavit in response to their replying affidavit which meant that the same was not contested at all.

15. To sum up their submissions, the Respondent's sought that the court uses its discretion not to allow the Government to take the Plaintiff in circles and to abuse the court process. That this would only be achieved by dismissing the present application.

16. In rejoinder, the State Counsel's submitted that the Plaintiff had admitted that there had been a defence and counter claim served on him, which documents were not considered by the court. That whether their defence was arguable or not, the documents filed were sufficient and it was not a mere defence based on mere denials. There was a counter claim that was missed by the court in the judgment.

17. That whether the Hon Attorney General was served, did not affect the present application. That there might have been service but the court did not consider documents filed by the Hon Attorney General.

18. That if the court were to consider the contents of the agreement, the Plaintiff had consented that this was a public utility which he had admitted to surrender. There was no promise by the school that an alternative land was to be provided. He thus sought for a chance to defend their case for the interest of justice as per the court's wide powers under Article 159 of the Constitution.

#### **Determination.**

19. I have considered the submissions herewith as well as the law and the authorities annexed. I find that the Applicant's main issue and/or grievance was the fact that the court did not consider their filed defence and counter claim while delivering its judgment and therefore they seek that the judgment delivered on the 4<sup>th</sup> October 2018 be set aside.

20. The provisions of Order 12 Rule 7 of the Civil Procedure Rules are clear to the effect that:

*Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.*

21. Setting aside an *ex parte* judgment is a matter of the discretion of the court, as was held in the case of **Esther Wamaita Njihia & 2 others vs. Safaricom Ltd [2014] eKLR** where the court citing relevant cases on the issue held *inter alia*:-

*“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.**) 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**). 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**. It also goes without saying that the reason for failure to attend should be considered.”*

22. The Court of Appeal for Eastern Africa in the case of **Mbogo v Shah [1968] EA 93**, held that for the court to set aside an *ex parte* judgment, the court must be satisfied about one of the two things namely:-

a. either that the defendant was not properly served with summons; or

b. that the defendant failed to appear in court at the hearing due to **sufficient cause**.

23. As to what constitutes sufficient cause, to warrant the exercise of the court's discretion, the Supreme Court of India in case of **Parimal vs Veena 2011 3 SCC 545** attempted to describe what **sufficient cause** was when it observed that:-

*"Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

24. In the present case, it is clear that the main ground upon which the applicant seeks to set aside the judgment of this court is not for sufficient cause but for reasons that there is an error apparent on the face of the record to the effect that the court in its judgment had stated that the Applicant had neither entered its appearance nor filed its defence and hence failed to consider the said filed documents while delivering its judgment.

25. In **Patel vs East Africa Cargo Handling Service Ltd (1974) EA Duffus, V.P.** stated;

*"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"*

26. From the court record, it is clear that this case was filed on the 27<sup>th</sup> November 2014. On the 3<sup>rd</sup> March 2016, only the Plaintiff/Respondent appeared before court wherein the court had noted that there **had been no defence filed** and the matter was fixed for hearing for the 11<sup>th</sup> July 2016, wherein parties had appeared before the Deputy Registrar and were directed to fix the matter for hearing that was the first and last time the Defendant/Applicants appeared in court up until after the judgment was delivered.

27. It is against this back ground that the court looked at the affidavits of service filed in court seeking the attendance of the Applicant/Defendants to no avail.

28. The test to be applied is whether the Applicant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the Applicant/Defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. The Applicant did not demonstrate sufficient cause why they never appeared in court on the several occasions the matter was coming up for either mention or hearing.

29. From the record, only the Plaintiff/Respondent had complied with the provisions of Order 11 of the Civil Procedure Rules, by filing witness statements and documents to be relied on as exhibits at the hearing. The record has only one Applicant/Defendants' witness statement and no document to be relied upon as exhibits at the hearing. The question therefore is whether the kind of defence or counterclaim, the Applicant/Defendant is claiming in this application, was triable or whether it raised triable issues.

30. In the present case, I have gone through the filed documents with a tooth comb and I still do not find the Applicants' alleged filed Memorandum of Appearance, the defence and Counter claim or documents that were to be relied upon. It also comes as a surprise that on the 3<sup>rd</sup> March 2016 when the court noted that there was no defence filed, the Applicant did not deem it fit to regularize the said anomaly.

31. Now they have filed the present application where they have submitted that the court in its judgment did not consider the defence, counter claim as well as the list of documents filed therein. For the sake of argument, let us for one second admit that the said documents were filed, what would have been their effect in a case where the Applicant/Defendant in this matter failed to appear in court to defend the case despite several hearing notices?

32. **In the case of Kenneth Nyaga Mwise v Austin Kiguta & 2 others (2015) eKLR, the court held as follows:**

*The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a*

document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.....

*Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.*

33. In **Des Raj Sharma –vs- Reginam (1953) 19 EACA 310**, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence.

34. In the Nigerian case of **Michael Hausa –vs- The state (1994) 7-8 SCNJ 144**, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

35. Guided by the decisions cited herein above, it is clear that a document becomes part of the evidence on record only when it has been formally produced as an exhibit by a witness and therefore the Applicant's submission to the effect that the court did not consider the alleged filed documents is of no consequence in the circumstance as the court could not rely on the same in making its decision.

36. The court while deciding whether there is a sufficient cause or not, must bear in mind the object of doing substantial justice to all the parties concerned. In this case, when the date set for hearing was served upon the Applicant/Defendants, only the Respondent/Plaintiff attended court for the hearing, the Applicant/Defendant was absent hence the court ordered its case closed and parties were directed to file written submissions. The mere filing of the defence without any evidence to support the positions taken by the Applicant/defendants is nothing. A party must tender evidence in support of the allegations.

37. In this application, the Applicant/Defendant has carefully crafted the reasons for seeking that the court sets aside its judgment, leaving out the issue of its failure to attend court during the hearing of the suit, and the subsequent failure to file submissions which would still have amounted to nothing as no evidence was adduced to prove or disapprove facts that were alleged.

38. The Court of Appeal decision in the case of **Richard Nchapai Leiyangu vs. IEBC & 2 Others**, where the Court expressed itself as follows:-

*“we agree with the noble principles which goes further to establish that the court’s discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”*

39. In the present suit, I find that the Applicant deliberately failed to attend the hearing and prosecute their case and thereby refusing to avail itself of the court process. Further that no evidence was placed on the record even by way of witness statements or documents.

40. I find that the Application is an afterthought, a waste of judicial time and an abuse of the court process to vex the Respondent/Plaintiff and put him to expense. The Respondent/Plaintiff is being gravely prejudiced by the Applicant/Defendant and therefore there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice. That the court is not powerless to grant relief, when the ends of justice and equity so demand, to this effect, I find that the Application dated 19<sup>th</sup> November 2018 has no merit and proceed to dismiss it with costs to the Plaintiff/Respondent.

**Dated and delivered at Nyahururu this 2<sup>nd</sup> day of July 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**