



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 260 OF 2016**

**1. AUGUSTUS MBALA KIMATHI**

**2. KIPROTICH M. MUTAI**

**3. JULIUA MUNYOKI MWAMBU (Suing as the trustees of)**

**KENYA CHURCH OF CHRIST.....PLAINTIFF**

**VERSUS**

**ALFRED MAKHULU t/a**

**MAGONGO NEW LIGHT ACADEMY.....DEFENDANT**

**RULING**

1. The defendant/applicant in the Notice of Motion dated 20<sup>th</sup> July 2018 seeks the following substantive orders:

**1. Spent**

**2. That this Honourable Court be pleased to stay the proceedings herein and re-open both the plaintiff and the Defendant's case so that the defendant can get an opportunity to cross-examine the plaintiff's witnesses and to be heard as well in his defence to the suit.**

**3. That the defendant be granted unconditional leave to comply and defend this suit on its proper merits.**

**4. That the costs of this application be provided for.**

2. The Application is based on the ground that the defendant's failure to attend court on 24<sup>th</sup> May 2018 was purely inadvertent and excusable and as such both the plaintiff and the defendant's cases ought to be re-opened for the purposes of having the matter determined on its full merit. The application is supported by the affidavit of Alfred Makhuyu Isaya sworn on 20<sup>th</sup> July, 2018 in which he depones that although the defendant's advocates on record had ceased acting, the deponent did not understand the full consequences of the said orders and thus when he was served with a Hearing Notice he forwarded it to the same advocates hoping that they would regularize their position and attend court on 24<sup>th</sup> May 2018 to defend the suit. That it was not until the defendant was served with the Plaintiff's written submissions that he realized that the plaintiff had proceeded to be heard in the defendant's absence and closed both the plaintiff's and the defendant's cases. He depones further that failure on his part to attend court on 24<sup>th</sup> May 2018 was unintended oversight on his part as he was overwhelmed preparing students for examinations. He avers that there is a statement of defence filed that raises triable issues and that the school has over 700 pupils some of them candidates and if the defendant is condemned unheard, there shall be occasioned irreparable harm and grave inconvenience to the pupils which cannot be possibly compensated by award of any damages. It is the defendant's case that the plaintiff will not be occasioned any injustice if the matter is re-opened and any incidental loss suffered by the plaintiff can be compensated by way of costs.

3. In reply to the defendant's notice of motion, the plaintiffs filed a replying affidavit sworn by Julius Munyoki Mwambu on 21<sup>st</sup> September, 2018. The plaintiffs aver inter alia that the defendant was duly served but deliberately absconded court without any justifiable cause. That the explanation for failure to attend court are preposterous and baseless and that the statement of defence does not raise any triable issues.

4. After going through the pleadings, affidavits filed and the parties submissions, the court finds that the issue for determination is whether the court should re-open both the plaintiff's and the defendant's case.

5. It is not denied that the defendant was served with a hearing Notice to attend court on 24<sup>th</sup> May 2018. The record shows that the firm of Sherman Nyongesa & Mutubia Advocates were granted leave to cease acting for the defendant on 24<sup>th</sup> January, 2018. The defendant has explained that upon being served with the Hearing Notice, they forwarded the same to their then erstwhile Advocates. The same firm of advocates are now back on record for the defendant.

6. In the case of Patel –v- E. A. Cargo Handling Services Ltd (1974)EA 75 at page 76 C and E, the court held as follows:

***“There are no limits or restrictions on the judge’s discretion to set aside or vary an ex-parte judgment except that if it does vary the judgment, he does so on such terms as may be just. 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 it by the rules.”***

The court further held as follows:

***“That where there 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 merits. In this respect, defence on merits does not mean a defence that must succeed. It means a ‘triable issue’ that is an issue which raises a prima facie defence which should go to trial for adjudication.”***

7. In Shah –v- Mbogo (11967)EA 166 the court stated as follows:

***“The discretion to set aside an ex-parte judgment 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”***

8. From the foregoing, the principles and tests for setting aside an ex-parte judgment or orders or proceedings can be summarized as follows: that the court has unfettered, unlimited and unrestricted jurisdiction to set aside ex-parte orders or proceedings; whether there is a defence on merits; whether there would be any prejudice to the plaintiff, and the explanation given.

9. In the instant case, the defendant had filed a statement of defence dated 18<sup>th</sup> October 2016. I have looked at the said statement of defence. In my considered view, the same raises triable issues.

10. The plaintiffs will not suffer any prejudice if the case is re-opened as the case will be heard and decided on merit. Further, the defendant has explained the reason for their failure to attend court on 24<sup>th</sup> May 2018. It is the view of the court that the explanation given is reasonable and excusable.

11. The court notes that the judgment herein has not been delivered. The court will therefore exercise its discretion in favour of the defendant and set aside the ex-parte proceedings herein. The case is re-opened for hearing of both parties on merits.

12. The upshot is that the notice of motion dated 20<sup>th</sup> July 2018 is allowed as prayed in terms of prayers 2 and 3 thereof. Costs of the application are awarded to the plaintiff

**DATED, SIGNED and DELIVERED at MOMBASA this 5<sup>th</sup> day of February 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Nzamsa for defendants/Applicants

Odhiambo holding brief for Adhoch for plaintiff

Yumna Court Assistant

**C.K. YANO**

**JUDGE**