REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 110 OF 2017

ZEPHANIA KHISA SAUL.....PLAINTIFF

VERSUS

THE SCHOOL COMMITTEE

ST. ANNE'S SECONDARY SCHOOL.....DEFENDANT

RULING

1. The application dated **30/8/2019** and filed in court on the same date has been brought by the applicant/defendant. It seeks the following orders:-

(1) …spent

(2) That the *ex-parte* proceedings and all consequential orders be set aside.

(3) …spent

(4) That the applicant be granted leave to be heard in this matter.

(5) That costs be provided for.

2. The applicant has brought the application under ***Section 1A, 1B, 3*** and ***3A*** of the ***Civil Procedure Act, Order 10 Rule 11, Order 51 Rule 1*** of the ***Civil Procedure Rules.***

3. The grounds upon which the application is made are contained at the foot of the application. They are that the applicant herein was never informed of the hearing date by the State Counsel and it became aware of the case after it had proceeded on the **22/8/2019** when the respondent herein served the Principal of the applicant with a copy of the decree; that the applicant has a good defence to the claim and that the applicant shall be prejudiced if the orders sought are not granted.

4. The application is supported by the affidavit of the applicant dated **30/8/2019** which reiterates the above grounds.

5. In reply to the application the plaintiff/respondent filed a replying affidavit sworn on **20/9/2019**. He opposed the application on the grounds that the application is meant to delay his enjoyment of the fruits of judgment; that the applicant has failed to satisfy the court on the conditions of granting stay of execution and has demonstrated no good grounds and that the application will and is intended to re-open the suit.

6. Both parties filed their submissions on **14/10/2019**. I have considered those submissions.

7. The issue arising in the instant application is whether the judgment of this court dated **30/7/2019** ought to be set aside on the grounds advanced by the applicant.

8. It is clear that the discretion of court to set aside judgment is unfettered. See the case of **Patel -vs- East Africa Cargo Handling Services Ltd [1974] EA**.

9. The application has been brought under **Order 10 Rule 11** of the Civil Procedure Rules. The provisions of **Order 10 Rule 11** reads as follows:

> **"Where any judgment has been entered under this order the court may set aside or vary that judgment and any consequential decree or order upon such terms as are just".**

10. The applicant cites the case of **Credit Bank Ltd -vs- Barclays Bank of Kenya Ltd Nairobi CA No. 178 of 1998**. In that case the court stated as follows:

> **"The courts concern in these circumstances would normally be whether any injustices has been caused by the refusal to set aside the judgment. In addition to merit the court takes into account whether the unsuccessful party has been prejudiced as a result of refusal and where none has been shown, whether the default is redeemable by imposing appropriate terms and whether or not the parties or third parties have acted in reliance on the judgment, it is simplistic to assert that if there is no excuse, accident or mistake there should be no relief. The overriding principle must be of necessity for the court to do justice between the litigants."**

11. The defendants aver that failure to attend court on the hearing date was not deliberate and the school being a learning institution and the disputed land being the source of water for the students, it would be in the interest of justice if the judgment were set aside to pave the way for a hearing of the suit on the merits; if that is not done then there would be no water in the school. The applicant also points out that the State Counsel had filed a defence in the matter and denied the existence of the alleged agreement between the defendant and the plaintiff. It is also alleged that there was a breakdown of communication between the defendant and the State Counsel. If the orders are not granted, it is said, the defendant would be prejudiced as it shall be condemned unheard and that the plaintiff would keep both the money paid and the land paid for.

12. I have considered the respondent's assertion that the defendant was represented by counsel who failed to attend court for the hearing. However that statement has been countered by the defendant who avers that there was breakdown of communication between the defendant and the State Counsel.

13. In this case the interest of numerous persons other than the plaintiff and the management of the school is at stake: there are students in school who rely on the water from the disputed land for their hygiene.

14. The court is alive to the fact that water is a necessity in institutional setting where many persons have been accommodated and any crisis arising therefrom may inflict untold hardship on the institution as a whole.

15. In view of the concession that there was breakdown between the defendant and counsel I find that it would be in the interest of justice for the judgment to be set aside and the matter be dealt with on its merits before the final orders are made.

16. The essence of justice lies in granting both sides a hearing before a determination is made. Any decision arrived at on a technicality and which does not address the merits and leave the unheard party dissatisfied.

17. As seen in the case of **Joseph Mweteri Igweta -vs- Mukira M'Ethare & Attorney General 2002 [eKLR]** the court may overlook blunders made by litigants and their counsel from time to time and set aside judgment and proceedings or take any other corrective action, if it appears to it that by that action substantive justice may be done to the parties and avert finalization of a suit on a technicality.

18. In the case of **Kitale Land Case No. 97 Of 2008 Marcellus Lazima Chegge -vs- Mary Mutoro Sirengo and Others** this court stated as follows:-

> **"Nevertheless this court finds that it is better for the plaintiff to suffer a little inconvenience which can be compensated for by way of costs rather than let the 2nd defendant walk away from court with the feeling that he has been denied a hearing on the basis of a mistake on the part of his counsel."1**

19. In this case I do not find any proof from the respondent that the applicant wilfully failed to attend court for the hearing of the suit. The fact that a defence was filed is sufficient to indicate that the defendant was willing to defend the matter. There is no cause for this court to disbelieve the applicant's assertion that breakdown of communication between counsel and client led to the *ex-parte* hearing and judgment.

20. For the above reasons I allow the application dated **30/8/2019** in terms of prayers No. **(2)** and **(4).** The costs of the application shall be in cause

Dated, signed and delivered at Kitale on this 24th day of October, 2019.

MWANGI NJOROGE

JUDGE

24/10/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Munialo and Mr. Kuria for defendant

Plaintiff in person present

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/10/2019