REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 135 OF 2013

DAVID KISIERO KIBOI.....PLAINTIFF

VERSUS

BOARD OF GOVERNORS SABOTI SECONDARY SCHOOL.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

MINISTRY OF LANDS & SETTLEMENT.....3RD DEFENDANT

R U L I N G

1. The application dated 28/7/2017 seeks an order that the decree/judgment issued on 30/9/2015 together with all other consequential orders be vacated on set aside, that the defendant be granted leave to file and serve their defence out of time and that the suit be set down for hearing on its merits. In addition the application seeks an order that the defence and counter-claim annexed to the supporting affidavit be deemed as properly filed and served.

2. The grounds upon which the application is made are that the interlocutory judgment was entered erroneously on 30/9/2015 since the applicants were not served with the application or interlocutory judgment and/or the hearing notice in respect thereof; that the defendant is a public institution; that no notice of entry of judgment was ever served upon the defendants, and that the plaintiff is guilty of material non-disclosure. The application is supported by the sworn affidavit of one Richard Rono, the Principal of Saboti Secondary School.

3. The application is opposed. The plaintiff filed his sworn affidavit dated 12/9/2017 on 15/9/2017. In that affidavit, his main reply to the application is as follows:- that all the defendants were served with summons to enter appearance, that the Attorney General appeared on behalf of all the defendants; that the defendants failed to file defence within 15 days of service; that the plaintiff successfully requested for judgment against the 1st defendant; that leave was sought to enter judgment against the other defendants vide an application dated 17/4/2014, which was allowed on 17/12/2014; that the matter proceeded to formal proof thereafter after service upon the Attorney General Office; that the fact that parties were negotiating did not bar the defendants from filing their defence or participating in the proceedings, and that the filing of the application after a lengthy period is a pointer to indolence in the part of the Attorney General.

4. The parties filed their respective written submissions on the application. I have considered those submissions. The main issue that arises for determination in this matter is whether the judgment of this court issued on 30/9/2015 should be set aside.

5. The court's discretion in setting aside judgments in default of appearance or defence is unfettered. ***Order 10 Rule 11*** which the applicants have cited states that this court may set aside or vary such judgment and any consequential decree or order upon such terms as are just. The deponent of the applicants' replying affidavit avers that he was posted to the school in the year 2015 and soon thereafter the school was served with a proclamation notice dated 25/7/2017 whereupon he contacted the office of the Attorney General. He learnt that the office of the Attorney General had not filed defence due to limited instructions from his predecessor and that an out of court settlement had been previously pursued by the parties and the parties had reached a point where they believed that the dispute could be sorted out of court. The letter dated 4/12/2014 marked as exhibit "*RR3*", which has not been disputed goes to considerable details as to what transpired regarding this dispute: there are even allegations by the defendants of fraud on the part of the plaintiff in respect of the same parcel of land.

6. On the issue of want of disclosure to the court of the fact that parties were engaged in an out of court negotiations, I find that the supporting affidavit of the plaintiff annexed to the application dated 4/3/2014 did not disclose that those negotiations existed and hence the court may not at the point of granting that application have reflected on the possible cause of failure to file appearance or defence.

7. However as the plaintiff avers that the existence of negotiation did not prevent the defendants from filing a defence, I must examine this assertion. My view is that when parties conduct themselves in a manner that suggests that a suit can be settled out of court, and comprehensive steps are set out as seen in "*Exhibited RR3*" mentioned hereinabove, it would not be proper to revert aggressively to the court process the way the plaintiff did without proper notice to the other party that negotiations were at an end. In the event of such an act of reverting to court process, the opposing party may also decide to regularize their pleadings before judgment is applied for or entered against

them. Now that the plaintiff does appear to acknowledge that there were such negotiations, this court is keen to look out for any mutual indication that the same had fallen through and the parties had to revert to the court process, and this court finds none.

8. As I state this I am aware that ***Article 159 2 (c***) envisage that in exercising judicial authority courts and tribunals shall be guided by the principles stated therein which include:-

> **"(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3"**

9. The issue here does not relate to traditional dispute resolution mechanisms envisaged in Clause 3, and so Clause 3 is irrelevant. However, the fact remains that there was an attempt at alternative dispute resolution, which was not brought to the attention of the court vide the application dated 4/3/2018 which may have guided the court in the exercise of its judicial power in view of the orders sought by the application.

10. I also find that the valuation report produced by the plaintiff demonstrates that he knew where the compensation land was situated and therefore any allegation in the plaintiffs evidence in chief to the effect that he was not given land or, as stated in his statement filed on 10/10/2013, that the land did not exist, could not be considered as correct till the plaintiff was subjected to cross-examination on his evidence.

11. I think I have stated enough that, without more, shows that whatever case the plaintiff has against the defendant, justice in the case will be done and be seen to be done. When the defendants are given an opportunity to present their defence, which to me alleges fraud against the plaintiff and which I believe is not on the fact of it frivolous. A copy of the draft defence is annexed to the supporting affidavit as annexture "*RR6*".

12. I therefore find that the defendant's application has merit. I therefore allow the same in terms of prayers **3, 4** and **5** thereof.

Dated, signed and delivered at Kitale on this **26th** day of **March, 2018.**

MWANGI NJOROGE

JUDGE

26/3/2017

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant – Picoty

N/A for the parties

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

26/3/2018