

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1038 OF 2012

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS & HOSPITAL WORKERSCLAIMANT

VERSUS

BOARD OF GOVERNORS LUGULU GIRLS.....RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated 23rd November 2020 seeking to be heard for orders that pending the *inter partes* hearing of this Application, there be a stay of the judgement entered on the 23rd October 2012 and the decree extracted therefrom together with all the consequential orders and that the same be further set aside and or vacated forthwith. It also seeks to be granted leave to file and serve its Defence and this matter be set down for hearing and further, that this matter be transferred to Webuye Law Courts for hearing. The Application is based on the grounds that the Respondent/Applicant was never served with Summons to enter appearance and the matter proceeded *ex parte* to the detriment of the Applicant, a public institution based in Bungoma County. That the Respondent/Applicant was never notified of entry of Judgment herein and that the Claimant has not complied with Section 21 of the Government Proceedings Act in the process of execution. That the Applicant only realized there was a case and judgment against them when they were served with a proclamation notice by Pave Auctioneers and that it is only fair and just that the said judgment, decree and all consequential orders be set aside and the case be heard on merits.

2. The Application is supported by an affidavit sworn by the Principal of the Respondent/Applicant High School, Mrs. Dinah Cheruiyot, who avers that she is not aware of any case between the Claimant and the school as the same was not amongst the documents handed over to her when she took over as Principal. She annexes in her affidavit the said proclamation notice dated 11th November 2020 together with the auctioneer's bill of costs which were served on them and avers that the institution risks losing its property and public funds if the orders sought herein are not granted. She avers that the nearest Law Courts to the Applicant are Webuye and Bungoma and having the case proceed for hearing in Nairobi would be punitive to the Applicant. Further, that it is contrary to the rules of natural justice for a party to be condemned unheard and that the Claimant/Respondent will suffer no prejudice if the Application is allowed.

3. The Claimant/Respondent filed a Replying Affidavit sworn on 19th January 2021 by Ressa Nekesa Wanyonyi, the Grievant who had instituted the suit through the Claimant Union. She avers that the Court issued parties with a mention for directions and later issued a hearing notice but the Respondent/Applicant was absent on the set date. That the Court then directed for the hearing to continue *ex-parte* after being satisfied that proper service had been made and judgment was later entered in her favour in the sum of Kshs. 182,108/-. That the said judgment was communicated to the Claimant/Respondent while requesting for payment of the same the recent communication being in October 2020 which the Claimant/Respondent declined to acknowledge receipt of. That she thus instructed her lawyers to commence execution as she urgently needed funds for medical treatment of a family member. She further avers that the application to stay the execution of the judgement has been filed inordinately late being more than eight years since the judgement was entered. That the Respondent/Applicant has also not offered any explanation for the inordinate delay to date and neither has it availed any evidence of any loss it will suffer should the Claimant proceed with the said execution process. She avers that the instant application is a deliberate ploy by the Respondent to delay her from enjoying the fruits of her judgement and that the Respondent/Applicant has further not furnished the court with security for costs against the decretal sum herein. She prays that the Application be dismissed with costs.

4. The Respondent/Applicant did not file submissions and relies on its Notice of Motion. The Claimant/Respondent submits that it duly served the Applicant in accordance to Order 5 of the Civil Procedure Rules 2010 but the Applicant failed to enter appearance and file a defence in the matter or even appear when the matter proceeded to formal proof on 18th September 2012. It cites the case of **William Mossi Moi v The Chairman Board of Governors, Highway Secondary School [2008] eKLR, Civil Case 1737 of 2001** where the court found evidence on the court record of service of summons to enter appearance and plaintiff's pleadings but the defendant had not entered appearance and file defence, and the court held that the plaintiff was entitled to prosecute their case *ex parte*. The Claimant/Respondent cited the case of **Wachira Karani v Bildad Karani [2016] eKLR, Civil Suit No. 101 of 2011** where the Court held that setting aside an *ex parte* judgement is a discretion of the court and that the main concern of the courts is to do justice to the parties before it. The court went on to find that 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. That the court considers the nature of the action, the defence if any and 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. That the Court in its discussion held that the rationale for this rule lies largely on the premise that an *ex parte* judgement is not a judgement on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard, then that party should indeed be given a hearing.

5. The Claimant/Respondent submits that in determining whether the Applicant in this matter has given sufficient cause why the judgment and the decree should be set aside or vacated, this Honourable Court may be persuaded and guided by the test applied in the case of **Wachira Karani v Bildad Karani (supra)** where the Court held:

"... The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the 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. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

6. The Respondent/Applicant is seeking to set aside a judgment entered in 2012. That is too far in the past for the Respondent/Applicant to assert that justice will be done to any party. I think it is not in doubt that the discretion that a court of law has, in deciding whether or not to set aside *ex-parte* order such as herein was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. There is no demonstration before me any excusable mistake, inadvertence, accident or error. The Respondent thus must meet the demands of the Claimant in the proclamation issued by paying the decretal sum as this motion is devoid of merit and is dismissed with costs to the Claimant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2021

Nzioki wa Makau

JUDGE