



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 192 OF 2018**

DANIEL NDAIGA KAMANJA.....1<sup>ST</sup> CLAIMANT

JACKSON KUTSWA SHIRAKU.....2<sup>ND</sup> CLAIMANT

GEOFFREY KIRAGU KARIUKI.....3<sup>RD</sup> CLAIMANT

**VERSUS**

**BOARD OF MANAGEMENT HIGHWAY**

SECONDARY SCHOOL.....RESPONDENT

**RULING**

1. The Applicant in the Notice of Motion application dated 10/11/2020 seeks for an order in the following terms: -

(i) Spent

(ii) THAT the Honourable Court be pleased to issue an order of stay of the orders issued by Hon. Justice Byram Ongaya on 9<sup>th</sup> April, 2020 and all consequential orders flowing therefrom issued on 9<sup>th</sup> April, 2020 pending the hearing and determination of this application interpartes.

(iii) THAT the Honourable Court be pleased to discharge/vary/set aside the orders issued by Hon. Justice Byram Ongaya on 9<sup>th</sup> April, 2020 and all consequential orders flowing therefrom issued on 9<sup>th</sup> April, 2020 pending the hearing and determination of the Application.

(iv) THAT the costs of this application be provided for.

2. The application is premised on grounds set out in the Notice of Motion numbered (a) to (i) the nub of which is that the Court per Byram Ongaya J. ordered the Applicant on 9/4/2020 to pay the claimants amounts stated in the judgment and decree.

3. That the judgment of the Court followed an ex parte hearing and in the absence of the Attorney General.

4. That the respondent was condemned unheard. That schools closed due to COVID – 19 pandemic in March, 2020 and resumed operations on 4<sup>th</sup> September, 2020 and so the school was unable to defend itself.

5. That the Attorney General ought to have been served by virtue of the Government Proceedings Act, Cap. 40, Laws of Kenya.

6. That the respondent shall not suffer any prejudice if the judgment is set aside and the Applicant allowed to defend the suit.

7. The application is buttressed by supporting affidavit of one Irungu Nduati, the Principal of the respondent school who deposes that the respondent and the Attorney General did not participate in the proceedings.

8. That the claim is Res-subjudice under Section 6 of the Civil Procedure Act, since there is another suit on the same subject matter pending determination being DICK KAMECHERWOA & CHARITY WANGUI –V- BOM, HIGHWAY HIGH SCHOOL, Cause No. CMEC 626/2018.

9. That the Applicant's right to be heard under Article 50 of the Constitution has been violated. That the application be granted with costs.
10. The claimant/respondent filed grounds of opposition dated 22/11/2020 in which is stated that the Applicant has not attached to the application a draft defence to enable Court to determine whether the respondent has got a viable defence raising triable issues.
11. That the application lacks in material averments and is a sham, frivolous and an abuse of Court process.
12. That the Applicant simply wishes to delay the cause of justice.
13. That the Applicant has not demonstrated why the judgment should be set aside.
14. The claimants/respondents filed a replying affidavit sworn to by the 1<sup>st</sup> claimant in which is stated that the Applicant has not given valid reasons for the Court to set aside its judgment.
15. That the issue of subjudice does not arise at all as Employment and Labour Relations Court **Cause No. 2036 of 2016, DICK KAMECHERWOA –VS- HIGHWAY SECONDARY SCHOOL and CMEC No. 626/2018 KAMECHERWOA & CHARITY WANGUI –VS- BOM HIGHWAY SECONDARY** have different subject matter as seen in the Statement of Claim attached.
16. That the Applicant was served with the summons to enter appearance and Statement of Claim on 22/2/2018 which process was duly received by the Principal and an affidavit of Service marked 'DNK3' duly filed.
17. That the Applicant was subsequently served with mention notice and a further Affidavit of service filed being "DNK4."
18. That on 7/6/2018, the Applicant did not attend the mention date and a further mention was set for 3/7/2018. The Applicant did not again appear on 3/7/2018 and matter was fixed for Pretrial on 20/12/2018.
19. Again the Applicant was served with a Pre-trial notice marked "DNK6" but it did not appear.
20. That the matter was thereafter fixed for formal proof on 3/12/2019 and the applicant was again served and an affidavit of service marked "DNK7" filed.
21. The matter was rescheduled for hearing again on 2/3/2020 and Applicant was duly served with hearing notice and Affidavit of Service marked "DNK8" duly filed.
22. The matter proceeded ex parte and judgment was delivered on 9/4/2020.
23. That all Court process was served on the Applicant who chose to deliberately ignore the same.
24. That the Applicant has not elected to deny service of process as stated in the replying affidavit nor has it sought to cross-examine the process servers named in the various affidavits of service.
25. Indeed the Applicant did not file any supplementary affidavit to join issue with the claimants on all matters set out in the replying affidavit.
26. The claimants pray that the application be dismissed with costs.

#### Determination

27. Both parties filed written submissions which the Court has duly considered and the issue for determination is whether the Applicant has satisfied the prerequisites for setting aside an ex parte judgment.
28. In **Philip Kiptoo Chemwolo and Mumias Sugar Company Limited –vs- Augustine Kubede (1982) – 1986) eKLR** the Court of Appeal stated: -

**“that the main concern is to do justice to the parties and the Court would not impose conditions in itself to fetter the wide discretion given to it by the rules. On the other hand, where a regular judgment had been entered, the Court would not usually set aside the judgment, unless it was satisfied that there were triable issues which raised a *prima facie* defence which should go for trial.”**

29. The Court of Appeal as per Platt J.A. went on to quote the House of Lords in the case of **Evans –Vs- Barflam, [1937] A.C. 473**, where Lord Atkin observed: -

“The discretion is in terms unconditional. The Courts however, have laid down for themselves rules to guide them in the normal exercise of discretion. One is that where judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a *prima facie* defence.”

30. Therefore, the Court must be satisfied based on an affidavit of merits or draft statement of defence that the Defendant/ Applicant raises triable issues for determination by the Court upon hearing on the merits of the case.

31. The Applicant has only raised the issue of Res-subjudice in the supporting affidavit which matter is easily disposed of on a perusal of the two statements of claim said to raise similar issues in a suit involving same parties. The Applicant failed to establish this fact at all. In any event, the first suit to be determined takes priority even if the two suits were similar in which case, the suit not yet determined would await determination of the other and if common issues in both suits have been resolved, the undetermined suit would have to be withdrawn. This issue is therefore neither here nor there and does not at all advance the Applicant's cause, in this application any further.

32. The Court of Appeal in **Jomo Kenyatta University of Agriculture and Technology –vs- Musa Ezekiel Oebah [2014] eKLR C.A. 217 2009** reiterated the requirements for the Court to exercise its discretion to set aside a regular, ex parte judgment by adding that the object of clothing the Court with discretion to set aside judgment obtained ex parte is to avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice as held in **Shah –vs- Mbogo & Another [1967] E.A. 116.**

33. The Applicant in the present case has not demonstrated that it was not at all material times aware of the proceedings in this matter in that it has not denied service of summons and Statement of Claim and various mention and hearing notices nor has it sought to cross-examine the deponents of the various affidavits of service filed by the claimants.

34. It is apparent that the Applicant's only refuge is an attempt to say that the Attorney General was not enjoined in the suit yet ought to have been served with Court process.

35. This argument about a person who is not a party to the suit does not avail the Applicant nor does it constitute a justifiable reason for the multiple default by the Applicant to attend Court.

36. Accordingly, the application lacks merit and is dismissed with costs.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of May, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with ***Order 21 rule 1 of the Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by ***Article 159(2)(d)*** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under ***Article 48*** of the Constitution and the provisions of ***Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)*** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Ms Chesinya for Respondent/Applicant

Mr. Were for Claimants/Respondents

Ekale – Court Assistant