REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 990 OF 2012

JONAH KARIUKI MURAGA.....**CLAIMANT/RESPONDENT**

VERSUS

BROOKSHINE SCHOOL……..... **RESPONDENT/APPLICANT**

RULING

1. The application before me is the Respondent's Notice of Motion application dated 11th July 2015 and filed on 13th July 2015. The Respondent seeks through the motion expressed to be brought under Rule 25(2) and 32(2) of the Industrial Court (Procedure) Rules 2010, for the court to set aside the order of 9th July 2015 and all consequential orders made thereon. The application is supported by the affidavit of Regina Murugi Kimani. She deponed that she was the new proprietor of the Respondent and was keen to be heard on the dispute. She blamed the previous advocate on record for the Respondent for failure to attend to the matter with the care and attention it deserved. She deponed that counsel had been instructed to initiate negotiations and had failed to do so.

2. The Claimant was opposed and filed an affidavit in reply on 22nd July 2015. In it, he deposed that the application by the Respondent was calculated to delay the matter and that there had been no negotiations initiated. He urged the Court to disallow the application.

3. The application was urged by Mr. Ruiru on 10th May 2016. He submitted that the application was meritorious and deserving of grant as the mistakes of the former counsel for the Respondent should not be visited on the Respondent. He urged the Court to find in favour of the Respondent and recall the orders granted on 9th July 2015 and allow the Respondent leave to defend.

4. Mr. Gachomo opposed the application and submitted that from the onset the Respondent has not been candid and that no negotiations were initiated and that a defence had indeed been filed by the Respondent. The Claimant submitted that the Respondent was underserving of the discretion of the Court as the Respondent had disobeyed Court orders. He thus urged the dismissal of the application with costs.

5. In his brief reprise Mr. Ruiru submitted that the instructions to negotiate were given and the failure to undertake negotiations is indicative of the failure by the former counsel to execute the Respondent's instructions.

6. The Court of Appeal had occasion to pronounce itself on the factors to consider in setting aside in the oft cited case of **CMC Holdings v Nzioki [2004] 1 KLR 173**. The Court learned judges of

appeal Tunoi, O'kubasu JJA, Onyango Otieno Ag. JA (as they then all were) held as follows:

> 1. In an application before a court to set aside an ex parte judgment, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and judiciously.
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> 2. On appeal from the decision, the appellate court would not interfere with the exercise of the discretion unless such discretion was exercised wrongly in principle or the Court acted perversely on the facts.
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> 3. In law, the discretion on whether or not to set aside an ex parte order 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.
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> 4. It would not be 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. Such an exercise of discretion would be wrong in principle.
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> 5. In the instant case, the trial magistrate did not exercise her discretion properly when she failed to address herself to a matter which might have very well amounted to an excusable mistake visited upon the appellant by its advocate.
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> 6. In an application for setting aside ex parte judgment, the Court must consider not only the reason why the defence was not filed or why the appellant failed to turn up for the hearing, but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed raised triable issues.

7. Clearly, the Respondent herein has not had the best of legal service from the bar. Its previous counsel failed to execute instructions as requested and the present counsel had deliberately failed to attend Court on one occasion leading to the orders being sought. The failure by counsel to attend Court after time was set was due to his being at Muranga as was indicated in the brief on 9th July 2015. It would seem counsel had assumed, rather mistakenly that the Court would grant the application for adjournment as a matter of right. Did the failure amount to a mistake that I can overlook? In the general view of the Court, such does not amount to excusable mistake or error visited on the party by counsel but in the interests of justice as the Respondent's new proprietor has been proactive so far in trying to take steps to resolve the dispute, I will exercise my discretion and reopen the case to the extent that the Respondent will have an opportunity to cross examine the Claimant on a date to be set after this Ruling sometime June 2016 and proffer any witnesses it may have. The application is allowed only to that extent and each party to bear their costs

Orders accordingly.

Dated and delivered at Nairobi this 17th day of May 2016

Nzioki wa Makau

JUDGE