



**Rono v Nairobi Club & 2 others (Civil Case E148 of 2020)
[2022] KEHC 16819 (KLR) (Commercial and Tax) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
CIVIL CASE E148 OF 2020
JK SERGON, J
DECEMBER 20, 2022**

BETWEEN

EDWIN KIPNGENO RONO PLAINTIFF

AND

NAIROBI CLUB 1ST DEFENDANT

JANE THIRIKALI 2ND DEFENDANT

LUKE MUSAU 3RD DEFENDANT

RULING

1. The subject matter of this ruling is the motion dated December 2, 2021 taken out by the plaintiff whereof he sought for the following orders:
 - i. That judgment on admission be entered against the 1st, 2nd and 3rd defendants in favour of the plaintiff as prayed in the plaint in respect of:
 - a. The 2nd and 3rd defendants wrote and the 1st defendant published physically by posting on its notice boards located prominently all around the 1st defendant's premises a letter dated January 5, 2019 on and concerning the plaintiff boldly entitled 'Suspension of members'.
 - b. The 2nd and 3rd defendants wrote and the 1st defendant published virtually by emailing its members through its email addresses known as ceo@nairobiclub.com and infor@nairobiclub.com an email dated January 5, 2020 on and concerning the plaintiff boldly entitled 'suspension of members'.



- c. That the plaintiff was suspended from the membership of the 1st defendant as a result of the publications by the 1st, 2nd and 3rd defendants titled ‘suspension of members’.
 - d. The plaintiff and his nominees were precluded from accessing their privileges as a member of the 1st defendant and it is amenities as an outcome of the defendant’s letters of suspension dated January 5, 2019 and January 5, 2020.
 - e. An effect of the suspension of the plaintiff by the defendants is that it caused the agents/contractees/ partners/cohorts/service providers of the defendants to republish and redistribute the publication by advancing the belief that it was a routine disciplinary procedure.
 - f. The 1st, 2nd and 3rd defendants owed the plaintiff a fiduciary duty to act in the plaintiff’s best interests.
 - g. The suspension has been lifted.
 - h. The suspension of the plaintiff by the 1st, 2nd and 3rd defendants had not been communicated to the plaintiff by the defendants prior to the publishing of the letters dated January 5, 2019 and January 5, 2020.
- ii. That the 1st defendant’s statement of defence dated January 7, 2021 be struck out on the grounds that it discloses no reasonable defence in law and that the same is scandalous, frivolous and vexatious and is otherwise intended to prejudice, embarrass or delay the fair trial of this suit, besides being an abuse of the process of the court.
 - iii. That the 2nd defendant’s statement of defence dated October 14, 2021 be struck out on the grounds that it discloses no reasonable defence in law and that the same is scandalous, frivolous and vexatious and is otherwise intended to prejudice, embarrass or delay the fair trial of this suit, besides being an abuse of the process of the court.
 - iv. That the 3rd defendant’s statement of defence dated October 14, 2021 be struck out on the grounds that it discloses no reasonable defence in law and that the same is scandalous, frivolous and vexatious and is otherwise intended to prejudice, embarrass or delay the fair trial of this suit, besides being an abuse of the process of the court.
 - v. That the 1st defendant’s memorandum of appearance dated November 10, 2021 be struck out on the grounds that it is filed beyond the requisite time as set out in the [Civil Procedure Rules, 2010](#) and no leave has been granted permitting the same.
 - vi. That the 2nd defendant’s memorandum of appearance dated September 30, 2021 be struck out on the grounds that it is filed beyond the requisite time as set out in the [Civil Procedure Rules, 2010](#) and no leave has been granted permitting the same.



- vii. That the 3rd defendant's memorandum of appearance dated September 30, 2021 be struck out on the grounds that it is filed beyond the requisite time as set out in the [Civil Procedure Rules 2010](#) and no leave has been granted permitting the same.
 - viii. That the 1st, 2nd and 3rd defendants memorandum of appearance dated statements of defence be struck out on the grounds that they are served beyond the requisite time as set out in the [Civil Procedure Rules, 2010](#) and no leave has been granted permitting the same.
 - ix. That the 1st, 2nd and 3rd defendants' statements of defence be struck out on the grounds that they were not properly served on the plaintiff.
 - x. That the 1st, 2nd and 3rd defendants' statement of defence be struck out for failing to comply with mandatory provisions of the [Civil Procedure Rules, 2010](#).
 - xi. That this Hon court be pleased to issue a ruling against the defendants as prayed in the plaintiff's application for default judgment dated December 3, 2020.
 - xii. That judgment be entered against the 1st, 2nd and 3rd defendants as prayed in the suit.
 - xiii. That the costs of this application be provided for.
2. The plaintiff filed an affidavit he swore in support of the motion. The defendants each filed a replying affidavit to oppose the motion. The court gave directions to have the application disposed of by written submissions.
 3. I have considered the grounds stated on the face of the motion dated December 2, 2021 plus the facts deponed in the rival affidavits. I have further considered the rival written submissions. In the aforesaid motion, the plaintiff is seeking or inter alia that the 2nd defendant's memorandum of appearance dated September 30, 2021 and the statement of defence dated October 14, 2021 struck out and for judgment to be entered in favour of the plaintiff as prayed in the plaint.
 4. The plaintiff has averred that the memorandum of appearance and the defence were filed out of time without leave of court hence they should be struck out.
 5. It is also argued that the defence raises no reasonable defence in law and that the same is scandalous, frivolous and vexatious. The plaintiff further averred that the filing of the defence will prejudice, embarrass and delay the trial of the suit besides being an abuse of the court process.
 6. In response to the plaintiff's submissions, it is the submission of the 2nd defendant that she has raised triable issues and that thir defence discloses a reasonable defence in law. It is also the submission of the plaintiff that the 2nd defendant admitted the material facts pleaded in the plaint hence this court should enter judgment on admission.
 7. In response, the 2nd defendant is categorical that she denied the plaintiff's claim and that the only admission she made in the letter dated January 5, 2019 is on the suspension of the plaintiff but denied the allegation that the contents therein were false and malicious.



8. The 2nd defendant pointed out that the plaintiff did not adhere to the 1st defendant's rules and by-laws in his conduct as a member of the 1st defendant and that is why he was precluded from accessing his privileges as a member in the best interested of the entire membership of the 1st defendant.
9. The 2nd defendant is also of the submission that the issues raised in her defence can only be resolved in a full hearing. The 1st and 3rd defendants made submissions similar to those of the 2nd defendant.
10. Having considered the rival submissions, it is clear that the defendants entered appearance and filed a defence outside the time fixed by the rules. It is also apparent that the entry of appearance and the filing of a defence were done before the plaintiff applied for entry of a default judgment.
11. The rules give a plaintiff the right to apply for entry of judgment in default of appearance and defence after the expiry of the period fixed by the rules. It is apparent that the law did not envisage a situation where a party can apply for the striking out of a defence and memorandum of appearance which were filed out of time.
12. I decline to exercise my discretion in favour of the plaintiff because the memorandum of appearance and the defence were filed before the plaintiff sought for entry of a default judgment, being the only available sanction the law prescribes. In any case the plaintiff has not demonstrated the prejudice he would suffer if the defence and appearance filed out of time are not struck out.
13. I have also perused the defence and it is apparent that the defendants did not expressly admit the claim as alleged by the plaintiff. One of the grounds put forward in the defence is that the defendants deny that the contents of the letters referred to in the plaint were false and malicious. Therefore the questions as to whether there was malice or not is a question which cannot be summarily determined but it is a matter which can only be determined in a trial.
14. I am therefore satisfied that the defendants' defence raise triable issues.
15. In the end, I find no merit in the plaintiff's motion dated December 2, 2021. The same is dismissed with costs abiding the outcome of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 20TH DAY OF DECEMBER, 2022.

JK SERGON

JUDGE

In the presence of:

.....for the plaintiff.

.....for the 1st defendant.

.....for the 2nd defendant.

.....for the 3rd defendant.

