REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 16 OF 2019

BOB PATRICK MADANJI.....PLAINTIFF/RESPONDENT

VERSUS

THE NAIROBI STAR PUBLICATION LIMITED.....DEFENDANT/APPLICANT

RULING

The application dated 2nd November 2020 was brought by the Defendant for purposes of setting aside the default judgment entered on 28th January 2020.

1. The supporting affidavit was sworn by Advocate **DENNIS C. MUNGAI**, the learned advocate for the Defendant. He deponed that the default judgment was entered due to the inadvertent failure on the part of the Defendant's advocates, which was caused by a mix-up of files at the offices of the said advocates.

2. As a consequence of the mix-up, the Defendant's advocates inadvertently omitted the Defendant's matter from their bring-up system.

3. It was further asserted that the failure to file the defence was further exacerbated by furloughing at the Defendant's advocates' offices, following the outbreak of Covid 19.

4. When canvassing the application, the Defendant conceded that the default judgment herein was regular.

5. However, it pointed out that the delay in realizing that there was a mistake was attributable to the fact that the offices of the advocates for the Defendant had been closed down at the beginning of the year, in order to mitigate the spread of Covid 19.

6. The Defendant described the mistake as innocent, and one which was not intended to delay the determination of the matter.

7. The Defendant called to its aid the following words of Madan J.A. (as he then was) in **BELINDA MURAS & 6**

OTHERS Vs AMOS WAINAINA [1978] K;

> **"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel.**
>
> **Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake which has been made by a lawyer of experience who ought to know better. The court may not condone it, but ought certainly to do whatever is necessary to rectify it if the interest of justice so dictates."**

8. A mistake was definitely made by the Defendant or its Advocates or by both of them.

9. The Plaint was served upon the Defendant. After being served, the Defendant entered appearance on 29th November 2019.

10. The Defence, if any, ought to have been filed on or before 13th December 2019.

11. It was not until 28th January 2020 when the Plaintiff filed a Request for Judgment, following the default by the Defendant to file a Defence.

12. The learned Deputy Registrar entered Judgment in favour of the Plaintiff, and directed that the case should proceed to formal proof.

13. On 10th February 2020, the Plaintiff fixed the case for formal proof on 21st March 2020.

14. However, the matter did not proceed as scheduled.

15. This court takes judicial notice of the matter of common notoriety, that the *"Corona Pandemic"* struck very ruthlessly. Almost the entire world was visited by the great devastation which was brought about by the Covid 19 Virus.

16. Every aspect of life took time-off from normalcy. The Virus imposed upon us a *"New Normal."*

17. In regular times, I would have found that a delay of One Year was inordinate, for filing a Defence. But these have been no regular times. All schools and colleges closed down.

18. The curtains came down on the entertainment places;

19. Even churches and other places of worship closed their doors;

20. The courts scaled down …….

21. These were no ordinary times.

22. Many failures that happened at that span of about one year; before society begun adapting to a *"New Normal"*, are easily forgiven. Yes, even when the failure was not necessarily attributable directly to the Corona Pandemic.

23. Like in this case, the Defendant does not pretend to hide behind the excuse of Corona. While the pandemic might have exacerpated the situation brought about by the mix-up at the offices of the Defendant's advocates, I find that the overal prevailing circumstances make the mistakes more pardonable.

24. Nonetheless, as the judgment herein was not irregular, it could only be set aside if the Defendant were to demonstrate to the court that it had a defence which raised triable issues.

25. As the Plaintiff has pointed out, the Defendant has admitted publication of the impugned article.

26. However, it is equally true that whilst the Plaintiff asserts that the article in question;

> **"…….. referred to him, his profession and character"**,

the Defendant asserted that the words did not refer to the Plaintiff.

27. On the one hand, the Plaintiff deems the draft defence as a mere denial, which did not answer the point of substance; whilst the Defendant, on the other hand submitted that the Plaintiff had the burden of proving that the moniker

> "Photogenic" referred to him.

28. As the Defendant had entered appearance, it will have the opportunity to cross-examine the Defendant. In the circumstances, the Plaintiff submitted that there was no justification in setting aside the regular judgment.

29. I have taken into account the respective prejudices which each of the parties would likely suffer, whether or not the judgment was set aside, and I have come to the conclusion that the interests of justice would be best served if the default judgment was set aside. I so find because it is only when a Defence was on record that both parties would have an equal opportunity to lead evidence to prove their respective cases.

30. When a Defendant does not have a Defence on the record, he cannot call any evidence to support his case. In those circumstances, the Defendant may test the veracity of the Plaintiff's witnesses, but would not be allowed to also provide its own evidence, which could then be placed at the opposite end of the scales of justice, when the trial court would be giving due consideration to the substance of the case.

31. The Plaintiff has suggested that the Defendant was simply being evasive, as the Defendant had failed to disclose the identity of the person who it was referring to in the article. By giving to the Defendant the opportunity to lead evidence, this court is actually advancing the course of substantive justice, as no party could then have any basis for asserting that he was condemned unheard.

32. However, I am not suggesting that it is imperative to literally give a hearing in each and every case: there will be instances when the court may find that a party has already been accorded adequate opportunity to be heard, and that therefore justice demands that the other party ought not to be prejudiced by according further opportunity to the defaulting party.

33. In this case, as already held, justice will be best served by allowing the Defendant the opportunity to file and serve its defence. Therefore, the Defendant is hereby allowed **TEN (10) DAYS** from today, to file and serve its Defence.

34. Finally, the costs of the application dated 2nd November 2020, together with all the thrown away costs shall be paid by the Defendant, to the Plaintiff.

35. The said costs shall be assessed by the Court immediately after delivery of this Ruling, and shall be paid within 10 days of assessment.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 22ND DAY OF APRIL 2021

FRED A. OCHIENG

JUDGE