



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 45 OF 2016**

**ALBERT SIMIYU KULOBA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**NATION MEDIA GROUP.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**ERIC OBINO (sued in his capacity as**

**The managing Editor of the Sunday Nation.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**ANDREW TEYIE.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

1. The application dated 2<sup>nd</sup> May, 2018 principally seeks orders that this Honourable Court is pleased to set aside the default judgment entered by this Honourable Court on 26<sup>th</sup> April, 2017 and all other consequential orders and proceedings thereof and in the result the Defendants/Applicants be granted leave to defend the suit.
2. The application is predicated on the grounds stated therein and the supporting affidavit sworn by Chrysostom Akhaab. The failure to file a defence within time is blamed on an inadvertent mistake on the part of the 1<sup>st</sup> Applicant's Head of legal Training who, it is averred, misplaced the proceedings and summons and therefore the same were not forwarded to their advocate. That immediately the summons and pleadings were traced on 3<sup>rd</sup> October, 2017 they were forwarded to the advocates. That on 4<sup>th</sup> October, 2017 the Advocate filed a Notice of Appearance but it turned out that judgment had already been entered on 26<sup>th</sup> April, 2016. That due to pressure of work, the matter fell off the Advocate's radar who inadvertently misplaced the office file and delayed in filing the present application and the formal proof also slipped off his mind. It is further averred that the present application was prepared but the office file went missing but was later located on 30<sup>th</sup> April, 2018 having been mistakenly archived.
3. It is contended that the Applicants are desirous of defending the suit herein and that there is a valid defence to the Plaintiff's suit. That the draft defence raises triable issues which ought to be ventilated in a full trial.
4. The application is opposed. It is stated in the replying affidavit that the Applicants are guilty of laches and underserving of the exercise of the courts discretion in their favour. That the reasons given for the delay are casual and lack seriousness and that the draft defence raises no triable issues.
5. The application was canvassed by way of written submissions. I have considered the said submissions.
6. The principles upon which a judgment can be set aside were considered by the Court of Appeal in **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** where it was held as follows:

**“a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c). Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has****

**arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.** *Mbogo v Shah [1968]EA 93.*

7. In the case at hand, service of summons and pleadings is not denied. The judgment was regularly entered.

8. I agree with the Plaintiff's counsel that the explanation for the failure to enter appearance and file a defence lacks seriousness. There is first the misplacement of summons and pleadings by the Plaintiff followed by misplacement of the Advocate's file and pressure of work. The delay from the time of service of summons and pleadings to the date of filing the intended application comes to about two years. This is inordinate delay. There were mistakes both on the Defendant's side and it's advocate.

9. This case was fixed for formal proof on 19<sup>th</sup> July, 2017. The present application was however filed before the case could proceed to formal proof. This court's view is that the defence can be accommodated without great prejudice to the Plaintiff that cannot be compensated by way of costs. As stated in the Court of Appeal further quoted the case of **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103** at 1040 where Apalo, J.A. (as he then was), posited as follows:

**“Blunders will continue to be made from time to time and it does not follow that because a mistake had been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”**

10. I have looked at the draft defence. The same raises triable issues which include but is not limited to the following:

- Whether the publication in question has any nexus with the Plaintiff.
- Whether there was malice.
- Whether the article is defamatory.

11. With the foregoing, to serve the wider interests of justice, I allow the application and set aside the default judgment herein. Costs to the Plaintiff. The Applicant to pay the Respondent Ksh.50,000/= thrown away costs. The Defence to be filed and served within 7 days from the date hereof.

**Date, signed and delivered at Nairobi this 26<sup>th</sup> day of June, 2019**

**B. THURANIRA JADEN**

**JUDGE**