



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 168 OF 2018**

**THE BOARD OF TRUSTEES OF KIAMBU**

**INSTITUTE OF SCIENCE & TECHNOLOGY...1<sup>ST</sup> PLAINTIFF**

**ALLAN NGUGI.....2<sup>ND</sup> PLAINTIFF**

**JAMES RAYMOND NJENGA.....3<sup>RD</sup> PLAINTIFF**

**GEORGE K. WARUHIU.....4<sup>TH</sup> PLAINTIFF**

**JOSEPH NJUGUNA THAIRU.....5<sup>TH</sup> PLAINTIFF**

**KIMANI MATHU.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

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

**TOM MSHINDI.....2<sup>ND</sup> DEFENDANT**

**MUTUMA MATHIU.....3<sup>RD</sup> DEFENDANT**

**JOHN KAMAU.....4<sup>TH</sup> DEFENDANT**

**RULING**

**1.** This ruling is in respect of the defendants' Notice of Motion dated 21<sup>st</sup> September 2018 and filed on 25<sup>th</sup> September 2018 in which they sought the following orders:

*i. That this matter is certified as urgent and be heard ex parte in the first instance.*

*ii. That pending the inter partes hearing and determination of this application, this Honourable court be pleased to stay further proceedings in this matter including any formal proof hearings.*

*iii. That this Honourable court be pleased to set aside the interlocutory judgment entered by this Honourable court on 7<sup>th</sup> September 2018 and all other consequential orders and proceedings thereof and in the result the defendants/applicants herein be granted leave to file their defence in this matter.*

*iv. That this Honourable court be pleased to issue any other orders as it may deem just and expedient to grant in the circumstances.*

*v. That the costs of this application be provided for.*

Prayers (i) and (ii) are now spent and what is pending my determination are prayers (iii), (iv) and (v).

**2.** The application is expressed to be brought under *Articles 50 and 159 (2) (d) of the Constitution; Sections 1A, 1B and 3A of the Civil Procedure Act and Order 10 Rules 11 and 51 of the Civil Procedure Rules* and all other enabling provisions of the law. It is supported by the grounds stated on its face which are largely reproduced in the depositions made by *Mr. Chrysostom Akhaabi*, the applicants' learned counsel

in the supporting affidavit sworn on 21<sup>st</sup> September 2018.

3. In the supporting affidavit, *Mr. Akhaabi* deponed that upon receiving instructions from the applicants on 10<sup>th</sup> August 2018, he filed a memorandum of appearance on 13<sup>th</sup> August 2018 which was duly served upon the respondents; that he was subsequently served with a hearing notice for the respondents' application dated 20<sup>th</sup> July 2018 which was slated for hearing on 9<sup>th</sup> October 2018; that inadvertently, his office file was filed alongside others and was to be brought up in time for the preparation of the hearing of the respondents' application; that on 19<sup>th</sup> September 2018, the file was brought up for the aforesaid purpose and this is when he realized that he had not filed a reply to the respondents' motion nor had he filed a defence to the respondents' suit.

4. Counsel further averred that he only became aware of the existence of the interlocutory judgment entered against the defendants on 20<sup>th</sup> September 2018 when his clerk presented the defence and replying affidavit to the registry for filing. He admitted that the mistake of failing to file the applicants defence within the prescribed time was due to his inadvertence and cannot be attributed to indolence on the part of his clients who in his view had always been willing and desirous of defending the suit; that the mistakes of counsel should not be visited on innocent litigants; that the applicants have a reasonable defence to the suit which raises triable issues and they should be given an opportunity to defend the suit.

5. The application is opposed. The 2<sup>nd</sup> plaintiff, *Mr. Allan Ngugi* filed a replying affidavit on his behalf and on behalf of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> respondents. The respondents also filed grounds of opposition dated 12<sup>th</sup> October 2018. In a nutshell, the respondents' opposition to the motion as can be ascertained from the grounds of opposition as filed and the replying affidavit is based on the claim that the application is frivolous and amounts to an abuse of the court process; that the proposed defence is a sham and does not raise triable issues; that no reasonable excuse has been given for not filing the statement in defence within the prescribed time; that a mistake committed by an advocate cannot justify the setting aside of an interlocutory judgment; that in the interest of justice the application should be dismissed to allow the suit to proceed for formal proof.

6. I have carefully considered the application, the affidavits filed by the parties and the grounds of opposition filed by the respondents. I have also considered the written rival submissions filed on behalf of the parties as well as the authorities cited. The submissions basically reiterated and buttressed the different positions taken by the parties in support and in opposition to the application as summarized earlier.

7. Having analysed the material presented before me, I find that the issue that arises for my determination in this application is whether the applicants have established sufficient cause to justify the exercise of the court's discretion in their favour by setting aside the default judgment entered against them on 13<sup>th</sup> September 2018. The other secondary issue which the court needs to determine is what orders should be made on costs.

8. The starting point is an examination of the law that governs the setting aside of interlocutory judgments. Under *Order 10 Rule 11* of the *Civil Procedure Rules (the Rules)*, the court is clothed with wide and unfettered discretion to set aside or vary interlocutory judgment and any consequential decree or order on terms it considers just. That discretion however being a judicial one must be exercised in accordance with established legal principles after taking into account the facts and circumstances of each particular case.

9. The Court of Appeal in *Patel V EA Cargo Handling Services Limited, [1974] EA 75* and *Mbogo & Another V Shah, [1968] EA 93* gave guidelines on the factors a court should consider when deciding on how it should exercise its discretion under *Order 10 Rule 11* of the *Rules*. Those factors which I will indicate shortly have no application where there is evidence to prove that the defendants were not served with summons to enter appearance because in such a case, the default judgment would be liable to be set aside *ex debito justitiae*. The Court of Appeal guidelines only apply where service of summons was properly effected. These include *inter alia*, the explanation given for failure to enter appearance or to file a defence within the stipulated time; the length of time that has passed since the interlocutory judgment was entered; whether the intended defence raises triable issues and lastly, the prejudice that either of the parties was likely to suffer if the application was allowed or dismissed.

10. The court emphasized that the court's discretion to set aside default judgment is intended to be exercised to avoid injustice or hardship resulting from accidental inadvertence or excusable mistake or error but was not meant to assist a party who was deliberately seeking to obstruct the course of justice.

11. In this case, it is not disputed that summons to enter appearance was served on the applicants and that is why they filed a memorandum of appearance 13<sup>th</sup> August 2018 through their advocates on record. The applicants' learned counsel *Mr. Akhaabi* has candidly conceded that despite having been given instructions by his clients to defend the suit in good time, he inadvertently failed to file their statement of defence within the prescribed time as his office file was filed away together with others and was not brought up to him till 19<sup>th</sup> September 2018 and as he was to realize later, default judgment had by that time already been entered. It is important to note that the default judgment was entered on 13<sup>th</sup> September 2018 and the instant application was filed a few days later on 21<sup>st</sup> September 2018. In my view, the timeous filing of the application goes to demonstrate that the applicants are diligent litigants who are not interested in delaying the course of justice.

12. I have given some consideration to the reason advanced for failure to file the applicants' statement in defence within time. Learned counsel *Mr. Akhaabi* has owned up to his mistake or omission and since the applicants were not in any way to blame for the failure to file their intended defence on time, I find that it is only fair and just that they be given an opportunity to defend the suit so that the same can be determined on merit. The court as a custodian of justice is duty bound to ensure that justice is done to all the parties before it and in my opinion, it would not serve the ends of justice to shut out the applicants from ventilating their defence to the plaintiffs' claim because of an inadvertent mistake made by their counsel on record.

13. If the court were to dismiss the application, the applicants will definitely suffer grave injustice since they will be ousted from the seat of justice. Conversely, if the application was allowed, the respondents will only suffer the inconvenience of some delay in the hearing of the suit which can be compensated by an award of costs.

14. In addition, I have perused the draft defence annexed to the supporting affidavit and in my view, it raises several triable issues key among them being whether or not the statements published by the applicants in reference to the respondents were defamatory or whether they were true in substance and amounted to fair comment on a matter of public interest.

15. Having taken all the relevant factors into account, I am satisfied that the applicants have demonstrated sufficient cause to justify the exercise of the court's discretion in their favour. The application is therefore merited and it is hereby allowed. Consequently, the interlocutory judgment entered on 13<sup>th</sup> September 2018 is hereby set aside. The defendants/applicants are hereby granted leave to file and serve their statement of defence within the next 21 days.

16. In order to compensate the respondents for the drawback of having their regularly obtained interlocutory judgment set aside, I award them the costs of this application.

17. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> day of July, 2019.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Mr. Githua for the defendants

Mr. Chege for the plaintiffs

Mr. Salach: Court Assistant