



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 283 OF 2014**

**JOSEPH KIMARU K. CHUMO.....PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED...DEFENDANT**

**RULING**

On 13<sup>th</sup> June, 2016 this court delivered Judgment in favour of the plaintiff herein following formal proof in the absence of the defendant. There is now before me an application dated 10<sup>th</sup> February, 2017 by way of Notice of Motion under Sections 1A, 1B, 3A and 63 (3) of the Civil Procedure Act; Order 9 Rule 9 and 10, Order 10 Rule 11, Order 12 Rule 12, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules. The application seeks to stay the execution of the decree issued following the said judgment, together with all proceedings in the matter, that the judgment entered against the defendant on 13<sup>th</sup> June, 2016 be set aside and that the defendant be granted leave to defend the suit and the said suit be heard de novo. A draft defence has been annexed to the application.

The reasons upon which the orders are sought have been set out on the face of the application, and there is also an affidavit sworn by Sekou Owino, the Legal Officer of the defendant. The application is opposed and there is a replying affidavit sworn by the plaintiff. Both counsel have filed submissions to address the application. Several authorities have also been cited by both counsel. The orders sought by the defendant are discretionary which discretion should be exercised judicially.

The plaintiff has a judgment in his favour which he desires to execute. As at the time of filing this application, the defendant's goods had been proclaimed in the process of execution of the decree.

I have considered the reasons set out in the judgment of the court in reaching the conclusion that the plaintiff was entitled to judgment in his favour. On the other hand, the main concern of the court is to do justice to the parties before it. – **See Patel vs. EA. Cargo Handling Services Limited (1974) EA 75, Shah vs. Mbogo (1969) EA 116.**

The main reasons advanced by defendant for not filing a defence to the plaintiff's claim is that the Legal Officer, though notified of the pending suit, failed to instruct counsel in good time to defend the claim. That admission is express and candid. In my view, such an admission renders credibility to the defendant's position that it was not deliberate and that an opportunity should be given to be heard. In the case of **Philip Kiptoo Chemwolo & another vs. Augustine Kubende [1986] eKLR** Apaloo J A said as follows,

**“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.”**

I have looked at the draft defence annexed to the application which raises the issue of public duty, fair comment, lack of malice, and privileged communication. A triable issue is not one that should necessarily succeed, but a party should have that issue addressed by evidence and tested under cross examination. I have also considered the issue of prejudice. This case was filed in August, 2014 while the judgement was delivered in June, 2016 just about 2 years thereafter. The ruling herein has been delayed for reasons beyond the control of the court.

I am inclined to give the defendant a chance to defend the suit on the following terms; this application is allowed and the judgment delivered on 13<sup>th</sup> June, 2016 and all orders flowing therefrom set aside. Leave is granted to the defendant to file a defence which must be filed within 15 days from the date of this ruling.

The defendant shall pay the plaintiff all the costs occasioned by the default on its part leading to the judgment now set aside, and the present application.

On filing and serving the defence and subject to any rejoinder by the plaintiff, parties shall comply with the provisions of Order 11 of the Civil Procedure Rules so that this matter is heard and determined expeditiously.

***Dated, signed and delivered at Nairobi this 20<sup>th</sup> of March, 2018.***

**A. MBOGHOLI MSAGHA**

JUDGE