

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 244 OF 2015

FRANCIS MUTHAURAPLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED.....1 ST DEFENDANT

MAINA KIAL.....2ND DEFENDANT

RULING

The plaintiff filed a case against the defendants for damages among other prayers, arising from a publication in the 1st defendant's newspaper said to have been authored by the 2nd defendant. It was the plaintiff's case that the said publication was defamatory and caused him pain and anguish.

The defendants were served with Summons to enter appearance but the 1st defendant did not comply hence at the request of the plaintiff, interlocutory judgment was entered against it on 10th September, 2015. It is that judgment that has led to the filing of this application dated 7th March, 2017 seeking to set aside the said interlocutory judgment and all consequential orders thereto. It also seeks to have the annexed defence deemed as properly filed and served upon payment of requisite fees. The application is brought under Order 51 Rule 1, Order 10 Rule 11 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act.

The grounds upon which these orders are sought appear on the face of the application and there is a supporting affidavit sworn by Sekuo Owino, the Legal Officer of the 1st defendant. The application is opposed and there is on record grounds of opposition filed by counsel for the plaintiff alongside a replying affidavit sworn by the plaintiff.

The 1st defendant's Legal Officer admits that summons to enter appearance were served on 20th July, 2015 but that he inadvertently failed to forward the pleadings to their advocates in good time and regretted the omission. He discovered the mistake on 3rd December, 2015 but by then an interlocutory judgment had already been entered against the 1st defendant.

It is also averred by the same officer that communication followed between the advocates for the plaintiff and the 1st defendant to have the said judgment set aside, and consent be recorded to that effect. There is also on record an averment that indeed some consent may have been reached and a cheque for Kshs. 10,000/= addressed to the advocates for the plaintiff dispatched to meet the costs incurred. However, the advocates for the plaintiff declined to sign the consent notwithstanding receipt of the cheque mentioned above.

Subsequent thereto, the advocates for the plaintiff wrote to the advocates for the 1st defendant forwarding a cheque for Kshs. 10,000/= said to have been a refund of the earlier cheque received and banked. On the other hand the replying affidavit alludes to the cheque being banked in error hence the refund. That cheque was forwarded to the 1st defendant's advocate on 24th February, 2017. Twelve days thereafter this application was filed.

The orders sought may be granted at the discretion of the court which should however be exercised judicially. It is instructive that the Legal Officer of the 1st defendant has expressly conceded his mistake and in my view that alone enhances the credibility of the averment that it was a genuine mistake and discounts any notion of a deliberate action on his part.

I have also noted the intention of the parties to have the matter adjudicated by way of a full trial when a cheque was transmitted to the advocates for the plaintiff. It would be noted that after the advocates for the plaintiff returned the cheque, twelve days thereafter the advocates for the 1st defendant filed this application. That is also a demonstration that the 1st defendant wished to be heard on merit. I have also looked at the draft defence and believe that there are triable issues which should go for full trial. Several issues stand out which the trial court should be given an opportunity to test through evidence.

I am persuaded that discretion should be exercised in favour of the 1st defendant by setting aside the interlocutory judgment entered on 10th September, 2015 which I hereby do. The 1st defendant shall file its statement of defence within seven days from the date of this ruling and serve the advocates for the plaintiff and the 2nd defendant. Thereafter the parties shall comply with Order 11 of the Civil Procedure Rules to facilitate expeditious determination of this matter.

The costs of this application shall be paid to the plaintiff by the 1st defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 22nd day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE