



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 502 OF 2008**

**JOHN MWAI MATHENGE.....PLAINTIFF/RESPONDENT**

**VERSUS0**

**NATION MEDIA GROUP LIMITED & ANOTHER.....DEFENDANT/APPLICANT**

**R U L I N G**

Before the court for determination is the 1<sup>st</sup> Defendant's application dated the 29<sup>th</sup> November 2017 brought under Article 159 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 7 Rule 7(2) of the Civil Procedure Rules. The applicant has sought orders that he be granted leave to file further documents and/or defendant's witness statements out of time and if this prayer is granted, the documents marked as "WA -1" and annexed to the supporting affidavit be deemed as having been duly filed, upon payment of the requisite fees.

The application is based on the grounds set out on the face of the same and it's supported by the affidavit sworn by Wilberforce Akello Advocate, sworn on the 29<sup>th</sup> November, 2017.

It is deponed that, the suit herein was filed on 7<sup>th</sup> November, 2008. The defendants filed a statement of defence dated the 11<sup>th</sup> January, 2009 and thereafter the suit has been active and has proceeded into an advanced stage of the hearing.

It is averred that the Advocate having the conduct of the matter left the firm of the Defendant's advocate without noting proper instructions on the file and upon perusal of the file, they noted that there was no bundle of documents or Defence witness statements filed on behalf of the 1<sup>st</sup> Defendant/Applicant. This, it is deponed, is prejudicial to the first defendant's case and are thus desirous of having the documents and the witness statements filed out of time.

It is contended that the Applicant has a good and tenable defence and it is in the interest of justice that the application be allowed so that the suit can be heard and determined on merits.

The Respondent filed a replying affidavit on 8<sup>th</sup> March, 2018 sworn by John Mwai Mathenge, the plaintiff herein, wherein it is deponed that after the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed their defence, the Respondent found it necessary to add a 3<sup>rd</sup> Defendant to the suit, one ZEDDY SAMBU who even upon being served with summons to enter appearance and the plaint, failed to enter appearance within the stipulated time which prompted the Respondent to request for interlocutory Judgment which was entered on 19<sup>th</sup> May, 2011.

In the grounds of opposition, it is averred that the application lacks merits and its only calculated at delaying the matter which is already part-heard, that the documents sought to be introduced are not authenticated and that they do not relate to the plaintiff/respondent, that the pre-trial directions under order 11 were concluded and by filing the application, the 1<sup>st</sup> defendant is trying to fill in gaps in their defence using evidence that has already been adduced by the Respondent in Court. It has also been deponed that paragraph 9 of the supporting affidavit should be expunged from the record since the same depones to matters of fact which an Advocate should not swear to and that the witness that the Applicant seeks to introduce as the 3<sup>rd</sup> Defendant, an interlocutory judgment has already been entered against him in which case, it is contended, the Applicant is seeking to have the 3<sup>rd</sup> Defendant defend the suit in disguise of a witness yet the judgment entered against him has not been procedurally set aside.

The application proceeded by way of written submissions which this court has duly considered. In their submissions both parties have agreed on the following as the issues for determination.

- a. Whether the 1<sup>st</sup> defendant/applicant has given justifiable grounds to warrant granting of leave to file documents and introduce witnesses at this stage of the proceedings.**
- b. Whether the plaintiff will suffer any prejudice if the application is granted.**

On the first issue, it is the first defendant's contention that they have demonstrated that the delay was occasioned by administrative changes in their firm of Advocates and they only realized too late that no bundle of documents or Defence witnesses statements were filed on behalf of the 1<sup>st</sup> defendant.

The 1<sup>st</sup> defendant submitted that the mistake of an advocate should not be visited upon a client. It relied on the case of **Edney Adaka Ismail Vs. Equity Bank Limited (2014) eKLR** where the court cited the case of **Lucy Bosire Vs. Kehancha Div. Land Dispute Tribunal & 2 others** in which the court held;

**“It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Chemwolo & Another V. Augustine Kubende (1986) KLR 492; (1982-1988) 1 KAR, 1036 at 1042 (1986-1989) EA 74.**

On his part, the plaintiff/Respondent has argued that the first defendant has not tendered justifiable grounds to warrant granting of the leave sought. It is averred that the reason given by the 1<sup>st</sup> defendant's advocate for the delay caused by administrative changes in their firm occurred last year yet, the same firm has handled the matter on behalf of the 1<sup>st</sup> defendant from the year 2008. That the 1<sup>st</sup> defendant's advocate had been granted time on numerous occasions to file witness statements and the list of documents and that the matter went through the pre-trial and counsel for the 1<sup>st</sup> defendant confirmed to court that they were ready to proceed with the hearing and that they had no witnesses to call. The plaintiff further contends that there is inordinate delay on the part of the 1<sup>st</sup> defendant as it has taken over 9 years to get witnesses and documents. To support this contention the case of **Chennai Metropolitan Water Supply and Sewerage Board and others V. T.T. Murali Babu Supreme Court of India Civil Appeal No. 1941 of 2014** was relied on.

The court has perused the record and as rightly pointed out by the plaintiff, the 1<sup>st</sup> defendant was given several chances by the court to comply with Order 11, to no avail. On the 27<sup>th</sup> February 2013 when the matter came up in court, the first defendant informed the court that they did not intend to call any witnesses and asked the court to set the case down for hearing. The court certified the matter ready for hearing and ordered that a hearing date be taken in the registry. It is true that there has been delay in bringing the Application herein but the delay has been explained. Though the reason given for the delay is not convincing, the court notes that, mistakes do happen in advocates firm as explained by the applicant.

This matter is part-heard but the question that one needs to ask, is whether justice can still be done, the delay notwithstanding. In my view, it can be done as the plaintiff's witnesses can be recalled to clarify any new issues that the first defendant may raise in the documents. That way, justice will be served. On the issue of prejudice, the only concern raised by the plaintiff/applicant is that his witnesses have already testified which can be addressed by re-calling the witness as stated herein above.

The plaintiff in his submissions has raised an issue of whether an advocate ought to swear an affidavit on contentious factual matters of their client's case. He has relied on the case of **Regina Waithira Mwangi Gitau Vs. Boniface Nthenge (2015) eKLR** where the court held that, an advocate should not enter into the arena of the dispute by swearing affidavit on contentious matters of fact. In this regard, a perusal of the court file shows that the 1<sup>st</sup> and the 2<sup>nd</sup> defendants filed a joint statement of defence on the 18<sup>th</sup> day of January 2009 and a list of issues on the 27<sup>th</sup> February 2013. I have looked at paragraph 9 of the affidavit in support which the plaintiff has taken issue with. In that paragraph the Advocate has deponed that the 1<sup>st</sup> defendant has a good and tenable defence. As would be expected, at this stage of the proceedings, the Advocate had already taken instructions and in view of the pleadings on record, a prudent advocate would be expected to form a considered opinion on whether his client's defence is tenable or not. In view of the above observation, my considered view is that an opinion by an advocate on whether his client has a good and tenable defence is a matter that an Advocate can swear an affidavit on and attest to. It is more of a matter of law than the facts and therefore, an Advocate can swear to it.

The blame in this matter lies on the advocate and behind him, is an innocent client who should not be made to suffer. In the circumstances of this case the court will give the first defendant a chance to be heard on merits by allowing the application as prayed. The documents and the witnesses' statements to be filed and served within 14 days from the date of this ruling. Costs of the application in the sum of Kshs.15,000 to be paid by Counsel for the first defendant to the plaintiff, within 7 days from the date hereof. Failure to comply with any of the orders above, the applicant shall lose his right to file the documents sought to be filed.

**Dated, Signed and Delivered at Nairobi this 21<sup>st</sup> day of June, 2018**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of**

..... For the appellant

.....For the Respondent.