



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 819 OF 2007

JOSEPH KIGUNDA.....PLAINTIFF

VERSUS

KENYA BROADCASTING CORPORATION.....DEFENDANT

R U L I N G

1. The Notice of Motion was taken out by the Plaintiff herein is dated 8th December, 2017 in which the Plaintiff sought for the following orders *inter alia*:

i. This Honourable Court do re-open the proceedings herein to enable the Plaintiff produce a demand notice dated 6th November, 2017 which the Plaintiff failed to produce at the hearing due to inadvertence on the part of his advocate.

ii. The Plaintiff be allowed to file a supplementary list and bundles of documents to include the said notice.

iii. The costs of this application be provided for.

2. The Motion is supported by the Affidavit of John Mbau Mburu sworn on 8th December, 2017 but filed on 11th December, 2017 where he averred that prior to filing the suit, he had sent a demand notice to the Defendant by post on 6th November, 2007.

3. He further stated that at the time of filing of this suit, he was relocating his law firm from Mombasa to Nairobi and that he had delegated the file to his associate who subsequently left the employment of his firm within a short notice before the suit came for hearing on 20th March, 2017.

4. He also averred that during the transition and departure of his former associate, he failed to confirm that a copy of the demand notice alongside the list of documents had been included in the record and evidence.

5. He stated that the demand notice had been served and that service of the same had been pleaded under paragraph 7 of the plaint and that failure to include a copy in the bundle of documents of the plaintiff was occasioned by inadvertence on his part and should not be visited upon the plaintiff.

6. The Motion was opposed by the Defendant who filed the replying affidavit of Paul Jilani, the Acting Managing Director sworn on 14th March, 2018. The deponent of replying denied the averments under paragraph 3 and put the deponent of the supporting affidavit to strict proof as the exhibit adduced by the Plaintiff's advocate marked JMM-1 was not dated, signed, acknowledged nor was it on a letterhead.

7. He averred that the alleged demand notice did not comprise part of the Plaintiff's list of pleadings and documents filed in court on 11th February, 2014.

8. He averred that the Plaintiff had not adduced evidence to demonstrate service of the demand and notice of intention to sue and stated that parties ought to exchange and share their evidence before the commencement of a trial as stipulated under Orders 3, 7, and 11 of the Civil Procedure Rules of 2010.

9. He averred that the only court that can grant leave for documents to be filed out of time under the Civil Procedure Rules at least fifteen days before the pre-trial conference and urged this court to dismiss the application with costs and have the matter proceed to closing submissions.

10. The Motion was further supported by the Supplementary Affidavit of Joseph Nchebere Kigunda sworn on 29th May, 2018 in which he averred that he had been informed by his advocate via telephone that his advocate had served a letter of demand on the defendant by ordinary

post and sent him a copy of the same.

11. He averred that his advocate had informed him that his office did not keep a record of letters sent via ordinary mail and only maintains a record of incoming letters delivered either by hand or registered post. He averred that in the interest of justice, mistake of his advocate ought not to be visited upon him.

12. I have considered the grounds stated on the face of the Motion and the facts deponed in the affidavits filed in support of and against the Motion. Courts must ensure that due process is observed during the court process with the aim of averting miscarriages of justice taking place.

13. The Plaintiff through his advocate admit that indeed a demand notice had been served and that service of the same had been pleaded under paragraph 7 of the plaint. However, he admitted that through his mistake, he failed to ensure that a copy of the demand notice alongside the list of documents had been shared with the Defendant and were subsequently omitted from the court record and evidence.

14. It is trite law that as provided under Order 3 Rule 2 of the Civil Procedure Rules that all suits filed including suits against the government, except small claims, shall be accompanied by inter alia, a list of witnesses and copies of documents to be relied on at the trial including a demand letter before action.

15. The Defendant has argued that the Plaintiff failed to file the demand notice as required by law under Section 46 of the Kenya Broadcasting Corporation Act which provides:

Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

(a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim and of the intention to commence the action or legal proceedings, has been served upon the Managing Director by the plaintiff or his agent.

16. The Defendant has not challenged the fact that the demand notice had been alluded to under paragraph 7 of the plaint.

17. Failure or neglect the Plaintiff's counsel to ensure that the demand notice and list of documents were given to the Defendant before commencement of this suit is regrettable as it places the daunting task upon the court to determine conformity with procedure vis-a-vis the fair administration of justice.

18. From the foregoing and in the interest of justice, a demand notice seems to have been sent given that the same is alluded to in the plaint. It would be a miscarriage of justice to dismiss this application owing to explanation given by the Plaintiff's counsel.

19. The motion is found to have merits. It is allowed, Consequently, the following orders are given.

i. This Court issues an order to re-open the proceedings herein to enable the production of a demand notice dated 6th November, 2017 by the Plaintiff

ii. The Plaintiff is allowed to file a supplementary list and bundles of documents to include the aforesaid notice within 15 days..

iii. Each party to meet its own costs in respect of the application.

Dated, Signed and Delivered in Nairobi this 28th day of September, 2018.

J.K. SERGON

JUDGE

In the presence of:

.....***For the Plaintiff***

.....***For the Defendant***