

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 42 OF 2008

REUBEN ODHIAMBO.....PLAINTIFF

VERSUS

DUKE RADING

WANGETHI MWANGI

NATION MEDIA GROUP LIMITED

THE ATTORNEY GENERAL.....DEFENDANTS

RULING

There is a judgment on record in favour of the plaintiff herein delivered on 7th October, 2017 following a formal proof in which the plaintiff and his witness were heard ex parte. The ex parte proceedings followed an interlocutory judgment entered against the 3rd and 4th defendants for failure to enter appearance or file a defence to the suit.

There are now two applications on record to set aside the said judgment. The first application is dated 21st December, 2015 on behalf of the 2nd and 3rd defendants while the second application is dated 6th January, 2016 by the 4th defendant. The application by the 2nd and 3rd defendants seeks orders of stay of execution, the setting aside of the interlocutory judgment and leave to file and serve the defence. The application by the 4th defendant seeks an order of stay of execution and setting aside of the said judgment. I have read the supporting affidavits in respect of the two applications

The 4th defendant supports the application by the 2nd and 3rd defendants. On the other hand the plaintiff opposes both applications and has filed a replying affidavit to that effect. I have related the application and the averments in the affidavits to the provisions of law cited. Counsel for the parties agreed that the ruling herein be based on affidavit evidence on record.

Whereas the 4th defendant had filed a defence to the suit, on the date of hearing counsel did not appear, and has given reasons for that absence in the affidavit in support of the application. On the other hand, the 2nd and 3rd defendants contend that whoever was served with summons to enter appearance had no authority to receive summons and therefore the pleadings were not served upon them.

Annexed to the application of the 2nd and 3rd defendants is a statement of defence running into 19 paragraphs raising several issues which the 2nd and 3rd defendants plead should go for trial. I agree that no party should be condemned unheard but at the same time, consider that this is a very old case in which the plaintiff is anxious to have out of his way. That notwithstanding, I am persuaded by the reasons given, and the issues raised in the draft defences that the defendants should be heard on merit.

That being the case, I allow the application and order that the judgment herein dated 7th October, 2015 be and is hereby set aside entirely. The 2nd and 3rd defendants shall cause their defence to be filed within 7 days from today. The parties shall comply with Order 11 of the Civil Procedure Rules within 30 days thereafter. Upon compliance, the case shall be listed for hearing on priority. The plaintiff shall have the costs occasioned by these applications.

Dated, signed and delivered at Nairobi this 25th day of October, 2018

A. MBOGHOLI MSAGHA

JUDGE