



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 215 OF 2012

JOSEPH GREGORY NYAMU.....PLAINTIFF

V E R S U S

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

JOHN ALLAN NAMU.....2ND DEFENDANT

KEZIA GATHONI SUPEYO.....3RD DEFENDANT

LINDA OGUTU.....4TH DEFENDANT

RULING

1) Nation Media Group Ltd and John Allan Namu, the 1st and 2nd defendants herein, took out the motion dated 10th October 2017 in which they sought for:

i. THAT this court be pleased to strike out the suit against the first and second defendants for having abated.

ALTERNATIVELY

ii. THAT the plaintiff's suit against the first and second defendants be dismissed for want of prosecution.

iii. THAT the costs of this application and suit herein be awarded to the first and second defendants.

2) The motion is supported by the affidavit of Zehrabanu Janmohamed. When served with the motion, Joseph Gregory Nyamu filed a replying affidavit to oppose the motion.

3) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have further considered the oral submissions of learned counsels. It is the submission the the applicants that they were never served with the summons to enter appearance since the institution of the suit nearly 5 years ago contrary to the provisions of Order 5 rule 1 of the Civil Procedure Rules, 2010 therefore the suit as against the 1st and 2nd defendants has abated for want of service of summons to enter appearance. On the above singular basis, this court was urged to dismiss the suit.

4) In response to the motion, the plaintiff beseeched this court not to dismiss the suit arguing that it will not be to the best interest of justice to shut him out on a technicality. The plaintiff cited the provisions of Articles 10, 22, 50(1), 159 and 258 of the Constitution of Kenya, 2010, which he argued enjoins this court to broaden the scope of the law to accommodate the emerging challenges.

5) The plaintiff also relied on Sections 1A and 1B of the Civil Procedure Rules to urge this court to adjudicate substantive justice. The plaintiff stated that it was an oversight on the part of his counsel to fail to effect service therefore he should not be punished for the mistakes of his counsel. The plaintiff further urged this court to instead extend time for taking out summons.

6) Having considered the material placed before this court and the rival submissions, it is clear that the plaintiff filed the plaint contemporaneously with an application in which the plaintiff sought for an interlocutory order of injunction against the defendants. It would appear the plaint and the motion were served. It is also apparent that the plaintiff's counsel did not take out summons to enter appearance.

7) The plaintiff has now admitted that summons to enter appearance were not obtained hence the absence of service. The plaintiff squarely blamed his advocate for the mistake and has urged this court not to punish him for the mistake of counsel.

8) It is clear from the record that the plaintiff instructed the firm of Ondieki and Ondieki Advocates to institute this suit on his behalf. The aforesaid firm of advocates have not come forward to explain why it committed such a mistake but has instead gone round citing legislative and constitutional provisions to beseech this court to excuse the firm's mistake. The provision of Order 5 rule 1(5) of the Civil Procedure Rules is specific that the summons to enter appearance is to be prepared by the party or advocate and file with the plaintiff.

9) Pursuant to the provisions of Order 5 rule 1(6) the summons should be collected for service within 30 days from the date of issuance or notification in default the suit shall automatically lapse.

10) This court has been urged to find that the suit has abated. In my humble understanding, the suit will automatically abate if summons to enter appearance have been issued but not collected for service after the lapse of 30 days. The scenario here is quite different. The summons to enter appearance have not been prepared by the plaintiff and his counsel. The mistake is purely that of the plaintiff's advocate. I agree with the plaintiff that there is no way the plaintiff could have known that his advocate had failed to prepare such a critical document. I am persuaded to indulge the plaintiff but the plaintiff and his counsel cannot escape from paying costs of the application.

11) In the end, I dismiss the 1st and 2nd defendant's application dated 10th October 2017. However the plaintiff is condemned to pay costs of the motion assessed at sh.15000/= within 15 days from the date of this ruling. The plaintiff to make the necessary application to have the summons issued and served within 60 days from the date hereof in default the suit shall stand automatically dismissed.

Dated, Signed and Delivered in open court this 19th day of October, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant