



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 172 OF 2016

FREDRICK ASHIMOSI SHITAMBASI.....PLAINTIFF/RESPONDENT

VERSUS

NATION MEDIA GROUP LTD.....1ST DEFENDANT/APPLICANT

MANAGING EDITOR

NATION MEDIA GROUP.....2ND DEFENDANT/APPLICANT

STELLA CHERONO.....3RD DEFENDANT/APPLICANT

RULING

1. The application dated 17th November, 2017 seeks orders that:

1. That the exparte interlocutory judgment entered on the 23rd day of August, 2016 and all consequential orders arising therefrom be set aside.

2. That the Defendant be granted leave to file and serve defence out of time and within such time as the Honourable court may deem fit.

3. That cost of this application be provided for.

2. It is stated in the grounds and the affidavit in support of the application that interlocutory judgment was entered on 23rd August, 2016. The failure by the Defendant to file a defence within the time lines provided by the law is blamed on the inadvertence of the Defendant's legal office who is said to have filed away the served summons while in the process of changing offices and misplacement of the pleadings. It is contended that the Defendants have a very good defence which raises triable issues. That no prejudice will be suffered by the Plaintiff if the interlocutory judgment is set aside.

3. The application is opposed. It is stated in the replying affidavit and further affidavit that the explanation for the failure to enter appearance and file a defence is not satisfactory. That the Defendant ignored the summons and filed the application at hand to scuttle the scheduled hearing date. The Respondent reiterated his case and stated that the draft defence has no merits. That the defence admits the publication of the article which is the subject of the claim herein. That the defence of justification and fair comment on matters of public interest cannot hold as the truth has not been established by way of documents or witness statements.

4. The Applicants filed a supplementary affidavit in which it is stated that the Respondent appears to be arguing the main case by way of affidavit evidence.

5. I have considered the application, the reply to the same and the submissions made by the learned counsels for the respective parties.

6. The principles applicable in determining whether to set aside an *ex parte* judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983]eKLR** as follows:

“a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c).**

7. In the case at hand, service of summons is not denied. The explanation given is that of a mistake. As stated by the Court of Appeal in the case of **George Mwai Mburu v Mary Wamaitha Kaitany & another [2016] eKLR** while quoting in view of Madan,JA in the case of **Murai v Wainaina(No.4) [1982] KLR:**

“A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made”

8. I have considered the draft defence. It raises triable issues. The same include whether the words complained of bear the meaning and imputation attributed to the same by the Plaintiff; whether the words are fair comments in matters of public concern and whether the publication was made in a privileged occasion.

9. With the foregoing, I allow the application with thrown away costs to be paid to the Plaintiff together with the costs of this application. The Defence to be filed and served 14 days from date hereof.

Date, signed and delivered at Nairobi this 18th day of Oct., 2018

B. THURANIRA JADEN

JUDGE