



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 172 OF 2016**

**FREDRICK ASHIMOSI SHITAMBASI ..... PLAINTIFF**

**VERSUS**

**NATION MEDIA GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MANAGING EDITOR NATION MEDIA GROUP ..... 2<sup>ND</sup> DEFENDANT**

**STELLA CHERONO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Interlocutory judgment was entered in this matter on 19<sup>th</sup> August, 2016. The matter was then set for formal proof on 21<sup>st</sup> March, 2017. On that day Miss Jan Mohammed learned counsel for the defendant made an oral application for leave to file an application to set aside the interlocutory judgment. The application was opposed by Mr Gichohi learned counsel for the plaintiff. He contended that the defendant's counsel had no right of audience because she had not filed a notice of appointment. The defendant's counsel was given time and filed a memorandum of appearance which was contested by Mr Gichohi who argued that the filed memorandum of appearance did not give the defendant's counsel right of audience since it had not been filed in line with ***order 6 rule 1 of the Civil Procedure Rules***.

2. It was stated that summons were served on 13<sup>th</sup> July, 2016 and the memorandum of appearance ought to have been served 15 days after the said service. He argued that counsel for the defendant has not sought leave to extend time. That the interlocutory judgment has not been set aside and if the defendant's counsel is allowed to participate in this suit in view of the memorandum of appearance, he seeks that the memorandum be struck out since it was filed out of time.

3. In rebuttal the defendant's counsel argued that a defence will not automatically be filed within 15 days. That leave can be made orally as she did. That there is no provision for notice of appointment in the Civil Procedure Act. She submitted that ***sections 1A, 1B and 3A and Article 159 (2) (d)*** are clear on the discretion of the court. She prayed for time to file an application to set aside the interlocutory judgment. She stated that the situation can be compensated by costs and that there is no prejudice that will be suffered by the plaintiff.

4. Mr Gichohi submitted that the matter he has raised is a point of law that the defendant's counsel should have filed a notice of appointment under ***order 9 rule 7 of the Civil Procedure Rules***. He contended that there is no reason given for the late filing of the memorandum of appearance. ***Order 10 rule 3 of the Civil Procedure Rules*** provides that:

***“Where a defendant fails to serve either the memorandum or appearance or defence within the prescribed time, the court may on its own motion or on the application by the plaintiff, strike out the memorandum of appearance or defence as the case may be and make such order as it deems fit in the circumstances.”***

5. A memorandum of appearance ought to be filed within 15 days. Service was made on 13<sup>th</sup> July, 2016 and the memorandum of appearance filed on 21<sup>st</sup> March, 2017. There was a delay of close to a year in filing a memorandum of appearance. Without filing a memorandum of appearance as prescribed, there is

an automatic danger of interlocutory judgment being entered. In this case, such has been entered and though the court has discretion to grant leave, this discretion has, however, to be exercised judiciously. The defendant's advocate has not given any reason for the delay in filing the memorandum of appearance, defence and the application to set aside the interlocutory judgment. Prudence requires her to have done that.

6. Counsel for the defendants submitted that **Article 159 (2) (d) of the Constitution** requires this court to administer justice without undue regard to procedural technicalities and **Section 1A** provides that overriding objective of the Act and the rules are made to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act. This matter has not been heard on formal proof and the plaintiff can therefore be compensated by way of costs.

7. The court has considered the submissions made by the learned counsels. The record shows that interlocutory judgment was entered on 23<sup>rd</sup> August, 2016 against all the defendants for failure to file appearance and defence. I concur with the counsel for the plaintiff that the counsel for the defendants ought to have filed a notice of appointment of advocates first, pursuant to the provisions of **order 9 rule 7 of the CPA** before filing the memorandum of appearance, which in any event was filed out of time in view of the provisions of **order 6 rule 1 of the CPA**.

8. However, in the interest of justice, the court shall not strike out the memorandum of appearance but counsel for the defendants is hereby given time to regularize the position. In view of the fact that the matter was coming up for formal proof on 21<sup>st</sup> March, 2017 when the objection was raised and thus denying the plaintiff an opportunity to proceed with the same, the defendants are hereby condemned to pay costs to the plaintiff assessed at KShs.10,000/-. The same to be paid within 7 days from the date of this ruling.

**Dated, signed and delivered at Nairobi this 20<sup>th</sup> day of April, 2017.**

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**L. NJUGUNA**

**JUDGE**