



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 164 OF 2016

JIMMY MUTUKU KIAMBAPLAINTIFF

- V E R S U S -

NATION MEDIA GROUP.....1ST DEFENDANT

TOM MSHINDI 2ND DEFENDANT

JOHN NGIRACHU3RD DEFENDANT

RULING

1) Jimmy Mutuku Kiamba the plaintiff herein filed a suit by way of plaint dated 23rd June 2016 for defamation against the Nation Media Group Limited, Tom Mshindi and John Ngirachu as the 1st, 2nd and 3rd defendants respectively. The 1st defendant is a media house, the 2nd defendant is the editor in chief of the 1st defendant and the 3rd defendant is a senior reporter of the 1st defendant and the author of the alleged defamatory article that was published on 2nd April 2016 in the 1st defendant's newspaper of the Saturday Nation.

2) The defendants failed to enter appearance and file a defence within the requisite time, despite having been served with summons to enter appearance. Interlocutory judgment was entered in favour of the plaintiff and against the defendants on 25th August 2016.

3) The defendants have now taken out the notice of motion dated 31st October 2016 in which it sought for inter alia:

1. That this honourable court be pleased to set aside the judgment entered in default of appearance on 1st September 2016.

2. That the draft defence annexed hereto be deemed as duly filed upon payment of the requisite court fees.

3. That costs of this application be provided for.

4) The applicants motion is supported by the affidavit of Sekou Owino. When served, the plaintiff/respondent filed its grounds of opposition to oppose the motion. When the motion came up for inter partes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support of the motion and the grounds of opposition as well as the rival submissions.

5) The applicants aver that the summons to enter appearance were served upon the Defendants on 29th June 2016. That upon receipt of the said summons, the applicant sought out the reporter who wrote the alleged defamatory story (the 3rd defendant herein) for purposes of knowing the source of his story as well as getting his written statement. The information that was being sought by the 1st defendant was to be found in the Hansard Report and the same was only received in the month of September, 2016 and was forwarded to the defendants' advocates on record via email on 20th September 2016. By this date, time had already lapsed for the defendants to file their defence. The defendants aver that they have a good defence which raises triable issues, and it would be in the interest of justice to allow the application to set aside the default judgement, and allow the suit to be heard on its merits. The defendants aver that if the plaintiff is allowed to proceed with the formal proof hearing, then the defendants stand to suffer great loss as it will have lost a chance to defend themselves.

6) The applicants avers that they are willing to abide by any conditions that this court deems fit to impose with regard to filing of defence, complying with Order 11 as well as meeting the thrown-away costs for this application. The applicants contend that this application has been made without undue delay, in good faith and with full disclosure of the circumstances that led to filing of the application.

7) The respondent on the other hand states that the defendants application is frivolous, misconceived, misplaced, vexatious and an abuse of the court process and should be dismissed with costs. Further that the respondent is of the view that the defendants are guilty of laches in view of the fact that the current application was filed over two (2) months after the interlocutory judgment was entered, which fact the applicants were fully aware. That the applicants have not raised any plausible explanation for the inordinate delay and as such they do not deserve the exercise of the discretion of this court in their favour.

8) The respondent avers that the interlocutory judgment is regular since service of summons to enter appearance was duly effected upon the applicants, who in turn failed or neglected to enter appearance and or file their statement of defence within the time stipulated by law and as such the same should not be disturbed. The plaintiff further argues that the applicants intended defence does not raise any triable issues, hence the motion should be dismissed.

9) The principles to be considered in setting aside an ex-parte judgment are well settled. In **Patel -vs- E.A. Carge Handling Services Ltd [1974] EA 75**, the court inter alia:

'That where there is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a 'triable issue' that is on issue which raises a prima facie defence which should go to trial for adjudication.'

In **Shah -vs- Mbogo [1967] EA 166** the court stated in part as follows:-

'this discretion to set aside an ex-parte judgement is intended 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 cause of justice.'

In **Mohamed & Anor -vs- Shoka [1990] KLR 463**, the Court of Appeal held inter alia :-

'The test for the correct approach in an application to set aside a default judgement are; firstly whether there was a defence on merit; secondly whether there would be any prejudice and thirdly what is the explanation for any delay.'

It is apparent from the above cited decisions that the following principles should be applied in determining such applications:

i. That the court has unfettered, unlimited and unrestricted jurisdiction under Order 9B Rule 10 of

the Civil Procedure rules to set aside an ex-parte judgement.

ii. That the tests for setting aside an ex-parte judgement are:-

- a) Whether there is a defence on the merits.
- b) Whether there would be any prejudice to the plaintiff.
- c) Whether there is explanation for the delay.

It is the submission of the applicants that their draft defence does raise triable issues and cited the case of **Muthaia Road trust Company Ltd –vs- Five Continents Stationers Ltd (2003) KLR 714**, where the Court of Appeal held inter alia that the court will not usually set aside a judgment unless it is satisfied that there is a defence on the merits or a bonafide defence. Looking at the draft defence annexed to the notice of motion the defendant/applicant in its defence at paragraph 3, admits publishing the alleged defamatory words as stated in the respondent's plaint at paragraph 5 and 6, but denies that the same were defamatory of the plaintiff/respondent. The defendants/applicants in their defence deny that the plaintiff's reputation was damaged. The applicants avers that the plaintiff/respondent is not entitled to a grant of injunctive orders and damages as per the plaint. The defence in my view raises triable issues. I am convinced that the applicants have shown this court that its defence raises triable issues.

On the question as to whether or not there would be any prejudice to the plaintiff, the applicants submits that if the prayers sought are not granted then it will suffer prejudice as against the respondent because it will not be allowed to defend the suit before this court and relied on the case of **Shah-vs- Mbogo (1967)EA 116** that sated inter alia that;

“.. the main concern of the court is to do justice to the parties ..”

The respondent on the other hand submits that the interlocutory judgment entered herein was regular and the applicants ignored and or refused to enter appearance within the time required by law. As such they had a chance to defend the suit but slept on their right, therefore their application should not be entertained.

I am convinced by applicants argument that they are likely to be prejudiced if the orders sought are not granted.

The applicants have explained the cause for the delay and cited the case of **Patel –vs- Ert Cargo Handling Services (1974) Ex 75** that stated inter alia that: **“there are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on terms that are just.”**

10) The respondent submits that the courts discretion to set aside an interlocutory judgment should not be used to assist a litigant who has deliberately sought to obstruct or delay the course of justice like the applicants herein and the courts will only set aside such an application if satisfied that the defendant has a defence. The defendants/applicants explanation for the delay was due to the fact that they spent time sourcing from the Hansard Report of parliament for 31st March 2016, which they only received in the month of September 2016. In the end, I find merit in this application and allow it in terms of prayer 1 and 2. Costs of the motion to abide the outcome of the suit.

Dated, Signed and Delivered in open court this 8th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant