



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 446 OF 2012

HON. BISHOP DR. MARGARET WANJIRU KARIUKI.....PLAINTIFF

V E R S U S

NATION MEDIA GROUP LIMITED.....DEFENDANT

RULING

The Defendant herein seeks by this application (notice of motion dated 9th July 2015) two main orders; one, to set aside interlocutory judgment entered against it on 17th October 2012 and, two, deem the memorandum of appearance duly filed (filed on 17th January 2013).

The application is brought under Section 1A, 1B and 3A of the Civil Procedure Act; Order 10, Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules (the Rules). Under that rule, where judgment has been entered under Order 10, the court may set aside or vary it and any consequential decree or order upon such terms as are just. This is an unfettered discretion. But, like all judicial discretions, it must not be exercised impulsively but upon settled principles. These principles were restated in the Court of Appeal decision of MAINA –vs- MUGIRIA, (1983) KLR 78 -

- a. **there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties;**
- b. **the discretion is intended to be exercised so as to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error; but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice;**
- c. **a discretionary power should not be exercised in a selective, discriminatory, arbitrary or idiosyncratic manner;**
- d. **the power to set aside judgment does not cease to apply because a decree has been extracted;**
- e. **some of the matters to be considered are the facts and circumstances of the case, both prior and subsequent to the entry of judgment, including the respective merits of the positions of the parties, the nature of the action, the defence, if one has been brought to the attention of the court, however irregularly;**

f. the court will consider also if the plaintiff can be reasonably compensated by costs for any delay that would be occasioned by setting aside the judgment; and

g. the court will bear in mind that to deny a litigant a hearing should be its last resort.

The application is brought upon the grounds:-

- i. That judgment in default of appearance herein was entered on 17th October 2012;
- ii. That failure to enter appearance and file defence on time was an inadvertent error which is highly regretted;
- iii. That it is in the interests of justice to have the said judgment set aside and the suit allowed to proceed to full hearing on its merits and not determined on technicalities;
- iv. That no prejudice will be suffered by the Plaintiff should the Court exercise its discretion and set aside the ex parte judgment;
- v. That the Applicant herein is ready and willing to abide by any orders imposed on it by this Court with regard to thrown away costs;
- vi. That the Defendants have a good defence to the claim herein and should be allowed to defend the suit;

There is a supporting affidavit sworn by one SEKOU OWINO, legal officer for the Defendant.

The Plaintiff has opposed the application upon the grounds of opposition filed on 13th October 2015. These grounds can be summarised as follows -

- i. That the application is hopelessly frivolous and vexatious as the defendant is guilty of laches and undue delay which has not been explained in any event;
- ii. That the defendant has lost interest in the case and the application is only meant to deny the plaintiff of the fruits of the judgment;
- iii. That the application is incurably defective and fatally incompetent; lacks merit and is an abuse of the process of the court.
- iv. That the Defendant is not entitled to any of the orders sought and his application should thus be dismissed with costs.
- v.

I have considered the submissions of the learned counsels appearing, including the one case that was cited. As earlier mentioned, there are set down the principles that guide the exercise of the discretion of the court in applications such as the present one.

To begin with, the Plaintiff's claim being pecuniary together with some other claim, interlocutory judgment was available under Rule 9 of Order 10. So, the judgment now sought to be set aside was properly entered.

There is no dispute herein (as there was no replying affidavit filed) that when the Defendant received summons, it inadvertently failed to give instructions to the advocates on record thereby leading to the delay in entering appearance and filing defence. Thus defence was not filed within time.

I have considered all the circumstances of this case including the fact that the claim is large. I have also

considered the defence, though it is not properly on record. It appears to me that the same raises triable issues. In paragraphs 4 and 5 of the defence, the Defendant has relied on various defences like fair comment on matters of public interest and qualified privilege. The defamatory words are denied or that they injured the Plaintiff's character in any way. These are triable issues.

Consequently, it is in the interests of all the parties that this suit go to trial so that the respective rights of each one of them can be established upon evidence. In the circumstances I allow the application. The interlocutory judgment entered on 17th October 2012 is hereby set aside. The Defendant's draft defence shall be filed and served within 15 days from the date of this ruling. The Plaintiff shall have the costs of this application.

Dated and delivered at Nairobi this 27^h day of July, 2016.

A.MBOGHOLI MSAGHA

JUDGE