



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 25 OF 2016

SHAINAZ JAMAL.....PLAINTIFF/APPLICANT

VERSUS

MICHAEL ARUNGA.....1ST DEFENDANT/RESPONDENT

THE PEOPLE DAILY.....2ND DEFENDANT/RESPONDENT

MEDIAMAX NETWORK

LIMITED.....3RD DEFENDANT/RESPONDENT

RULING

1) The subject matter of this ruling are three motions. The motion dated 7th April 2016 and that dated 26th April 2016 were taken out by Shainaz Jamal, the Plaintiff/Applicant in which he sought for similar orders as follows:

1. **THAT** the Statement of Defence be and is hereby struck out.
2. **THAT** Judgment be entered against Defendants in favour of the Plaintiff as prayed in the Plaint.
3. **THAT** the Defendants do cater for the costs of this application.

The Applicant swore an affidavit to support each of those Motions. When served, the 1st Respondent filed the replying affidavit he swore to oppose the Motion dated 7.4.2016 while the 2nd and 3rd Defendants filed the replying affidavit sworn by Georgiadis Khaseke to oppose the motion dated 26th April 2016.

2) The third application filed is the motion dated 8th May 2016 and taken out by the 2nd and 3rd Defendants whereof the duo sought for the following orders *inter alia*:

1. ***The Honourable Court be pleased to enlarge the time for filing the Statement of Defence by a period of eighteen (18) days from the date that it became due.***
2. ***The Statement of Defence dated 27th February 2016 and filed on 15th March 2016 be deemed to be properly on record.***
3. ***The Costs of this application be provided for.***

The aforesaid motion is supported by the affidavit sworn by Georgiadis Khaseke. When served, the Plaintiff filed the replying affidavit of Shainaz Jamal to oppose the motion.

3) When the aforesaid motions came up for interpartes hearing, this court gave directions to have the same argued together and to have them disposed of written submissions. I have considered the grounds stated on the face of the motions and the facts deponed in the supporting and opposing affidavits. It is appropriate to start with the motions dated 7.4.2016 and 26.4.2016. It is the submission of the Plaintiff/Applicant that the 2nd and 3rd Defendant entered appearance and filed entered appearance and filed their defences out of time and without leave of court hence they should be struck out and judgment entered in favour of the Plaintiff. It is argued that the aforesaid memorandum of appearance and defence were filed 33 days from the date of service.

4) In response to the application, the 2nd and 3rd Defendants also filed the motion dated 8/5/2016 in which they sought for inter alia leave to enter appearance and to file a defence out of time. The plaintiff urged this court to find that the motion amounts to an abuse of the court process. The Plaintiff further argued that the Defence filed herein is contradictory and at the same time it admits the Plaintiff's claim. The Plaintiff cited paragraph 3 of the Defence where the Defendants deny publishing the alleged defamatory words while in paragraph 5, the Defendants aver that the publication was not defamatory but should instead be regarded as fair comment. The Plaintiff further pointed out that since the 2nd and 3rd Defendants failed to file witness statements, they are not entitled to defend the suit. For the above reasons this court was urged to grant the orders sought in the aforesaid motions.

5) I feel obliged to deal together with the two motions (i.e. the motion dated 26.4.2016 and 8th May 2016). After taking into account material placed before this court I think issues have arisen for the determination by the court.

i. Whether or not the statement of defence was filed out of time and if yes whether or not the time entered appearance and to file a defence should be extended.

ii. Whether or not the defence raises any triable issues.

6) On the first issue as to whether or not the filing of defence and entry of appearance were done out of time.

The other issue is whether this court has the discretion to enlarge time if it is found that the aforesaid pleadings and documents were filed out of time. It is not in dispute that both the memorandum of appearance and the defence were filed out of time. The 2nd and 3rd Defendants have admitted this fact. They were not filed within 15 days as required under order 6 of the Civil Procedure Rules. The 2nd and 3rd Defendants' learned advocate has admitted that the Defendants' defence was not filed within the prescribed time due to inadvertent mistake on their part. The learned advocate also pointed out that the prejudice the Plaintiff will suffer can be compensated by an award of costs.

7) After a careful consideration of the arguments, I am convinced that the 2nd and 3rd Defendants through the inadvertent mistake of their advocates, failed to enter appearance and to file a defence within the time fixed by the rules. There is no doubt that the court has a wide discretion to excuse the defect and to extend the period if good and sufficient reasons are advanced by the offending party. I am convinced that the 2nd and 3rd Defendants have given good and sufficient reason to benefit from this court's discretion.

8) However before exercising the discretion in favour of the Defendants let me examine whether or not the defence filed raises any triable issues to enable the suit go for the trial. I have already stated that the Plaintiff is of the strong view that the defence filed by the 2nd and 3rd Defendants is contradictory and a mere denial. I have critically examined the same. It is apparent that the defendants are denying that the words published were defamatory. They also aver that the words published were fair on a matter of public interest and justified.

9) In my humble view, I find the above defence as raising triable issues which should go for trial. It has also been argued that since the Defendants have not filed their written witness statements, the defence should be struck out. With respect, I agree with the submissions of the defence that such an issue can be taken up during the trial conference of the suit under order 11 of the Civil Procedure Rules.

10) In the end, I am convinced that the Plaintiff's motion should be dismissed and that of the 2nd and 3rd Defendants allowed.

Having come to the above conclusion, let me now turn my attention to the motion dated 7.4.2016.

It is an application seeking to have the 1st Defendant's defence struck out because the same is said to be scandalous, frivolous and vexatious. It is also said that the same is a mere denial and full of admissions. It is further argued that the defence is evasive and does not raise triable issues. I have carefully examined the 1st Defendant's defence. In the defence, the 1st Defendant avers that he will tender evidence at the trial to show that the Plaintiff had been stopped from further construction. It is also stated in the defence that the articles published were matters which were already in public domain. The 1st Defendant is basically raising that the defence of fair comment. Just like in the case of the 2nd and 3rd Defendants, I am convinced that the 1st Defendant's defence raises triable issues which should go for trial.

11) In the end, I find no merit in the Plaintiff's motions dated 7.4.2016 and 26.4.2016. The same are dismissed with costs awaiting the outcome of the suit.

As regards the 2nd and 3rd Defendants' motion dated 8th May 2016, I find merit in the same. The 2nd and 3rd Defendants are given leave to file an appearance and defence out of time. Consequently, the 2nd and 3rd Defendants' defence dated 27.2.2016 and filed in court on 15.3.2016 are deemed to have been filed with leave of court. However, costs of the motion assessed at Ksh.10,000/= is awarded to the Plaintiff payable within 30 days from the date hereof.

Dated, Signed and Delivered in open court this 20th day of December 2016 .

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant