REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 81 OF 2011

MICHAEL JUMA OTIENO.....……PLAINTIFF

VERSUS

MARTIN LURTHER OMONDI OCHOLLA.....DEFENDANT

RULING

The subject of this ruling is the motion dated 19th March 2015 in which the Defendant herein is praying for orders of stay of execution of the judgment dated 26th September 2014 and proceedings pending the hearing and determination of the application, he also prays that the judgment and proceedings issued against the defendant be set aside and costs be borne by the plaintiff. The motion is supported by the affidavits of **Martin Lurther Omondi Ochola** sworn on 19th March 2015. When served with the motion the Plaintiff filed a replying affidavit dated 20th April 2015, he swore to oppose the motion. Learned counsels appearing in this suit recorded a consent order to have the motion disposed of by written submissions.

The gist of the suit is that the defendant maliciously wrote an email to one **Betty Okero** who forwarded it to **Michael Otieno Arum**. The plaintiff claimed the email was defamatory as it was calculated to disparage the plaintiff in his office, profession and calling. The email that was circulated injured the plaintiff's career and reputation.

I have considered the grounds set out on the motion and the facts deponed in the affidavits filed in support and against that application. I have further considered the submissions of learned counsels. It is the submission of the defendant, that though he was served with summons by the plaintiff, the summons indicated the court case number as HCCC 81 of 2008 instead of HCCC 81 of 2011. The defendant alleges that his effort to file a defence did not bore fruits because of the wrong case number since the court file could not be traced. He referred this court to Article 50 of the Constitution that provides for fair hearing and argued that one of the conditions of setting aside judgment is proof by the defendant that the defence raises triable issues, which it does in this case. He averred that he will be pleading the defence of fair comment.

In his response, the plaintiff submitted that the file in this case has always been available in the registry. He argued that the defendant has been served with several hearing notices and judgment notice as portrayed by the several affidavits of service. He contended that a typing error of the case number could not have impeded the defendant from filing a defence and the claims by the defendant that the court relied on the erroneous affidavit to make it's judgment is not proper. He added that the defence is mere denials and does not raise triable issues.

Having considered the material placed before this court and the rival submissions, the following issues arose for the determination of this court***:***

i. ***Whether there was a proper service of summons;***
ii. ***Whether the ex-parte judgment should be set aside.***

I will start with the first issue as to whether or not there was proper service of summons. I have already considered the arguments put forward by both sides. It is argued that the defendant did receive summons which were served on him. Upon receipt of the summons, he instructed the firm of **Otieno, Yogo, Ojuro & Company Advocates** who allege that they were unable to trace the court file for purposes of filing a defence due to the wrong case number that was quoted in the summons. It is for this reason that the defendant never defended the suit resulting in the entry of the interlocutory judgment. The defendant further argued that the court erred in relying on an affidavit of service that had a wrong case number to enter an interlocutory judgment. He was apprehensive that he had been condemned unheard and requested that the exparte judgment be set aside as he has a strong defence and is willing to pay the thrown away costs to the plaintiff.

Looking at the alleged flawed summons, the same are dated 23rd March 2012. They case number therein reads Civil Suit Number 81 of 2011. Practice demands that when summons are served on a defendant, they are normally accompanied by plaint which the defendant does not deny was also served on him. The plaint dated 21st February 2011 also indicates the case number as 81 of 2011. In the record, there is also notice to enter appearance dated 16th March 2011 which also cites the case number of the suit as 81 of 2011. I do not find the summons defective in any manner as at to mislead the defendant.

I will now consider the second issue to wit the interlocutory judgment be set aside. I have perused the court record. This is a case that commenced on 9th March 2011 when the plaintiff filed his plaint. Summons to enter appearance were issued on 23rd March 2011 and the plaintiff sought an extension of the summons and the same was later extended to 23rd March 2012. An affidavit of service was filed on 16th May 2012, to the effect that the summons and the plaint were served on the defendant who it is alleged accepted service but refused to sign the original copy. On 18th May 2012, the plaintiff filed a request for judgment through its advocates Mariaria &Company Advocates, which judgment was entered on 25th May 2012. The matter came up for formal proof and on 26th September 2014, **Ougo J** . entered a judgment for the plaintiff against the defendant for sum of kshs 2,000,000/= together with costs and interest. It is not until the plaintiff attempted to execute the judgment that the defendant, sought to set aside the interlocutory judgment.

I have considered the evidence on record. There is a letter dated 15th October 2010, addressed to the plaintiff's advocate by the defendants advocate which in essence is a response to a demand letter from the plaintiff. This shows that the defendant was aware of an impending suit by the plaintiff. The defendant has referred this court to correspondences between its advocates dated 30th August 2012 and another one from its advocate to the Deputy Registrar dated 6th September 2012 which sought to request the Registrar to trace the missing file. There is no proof that the letter was sent or received by the registrar. Despite the lack of accessing the file, there is no proof that defendant took further measures to obtain the file and file his defence. Moreover, it is evident that this matter has been in court for while. The interlocutory judgment was entered on 25th My 2012 and approximately two years later, the matter was set down for formal proof on 5th February 2014. The matter has been severally in court yet the defendant did not make a point to enter appearance at any stage. The defendant has been indolent. He has not convinced this court that a typographical error of the case number as appearing in the affidavit of service is enough to exonerate him from his indolence. All the other documents and correspondences cited the case number correctly.

Furthermore for an interlocutory judgment to be set aside. The draft statement of defence annexed to the supporting affidavit should raise triable issues. The principles of setting aside interlocutory judgments were laid out in the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** as

per **Duffus P.** who held that:

> ***"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 to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."***

I have perused the defence, even if this court was to grant stay, it would be futile since the defence in my view does not raise triable issues.

Consequently, the application is hereby dismissed with costs to the plaintiff..

Dated, Signed and delivered in open court this 13th day of November, 2015

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant