



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 169 OF 2012

HENSON NIGEL GRAHAM PLAINTIFF/RESPONDENT

V E R S U S

THE STANDARD GROUP LIMITED DEFENDANT/APPLICANT

RULING

1. What the Defendant's Notice of Motion dated 20th May 2013 shows is that the Defendant's learned Counsel blundered in this matter.
2. The Defendant was served with summons and plaint and in response they filed a Memorandum of Appearance on 10th October 2012 through their Counsel. The Defendants also filed a Notice of Preliminary Objection dated 9th October 2012 directed towards the Plaintiffs suit. In support of the Preliminary Objection their learned Counsel filed written submissions on 10th October 2012. In response the Plaintiffs learned counsel filed their written submissions in opposition to the Preliminary Objection.
3. In all that flurry of activity the Defendant failed to file a Defence within the prescribed period. Order 7 Rule 1 of the Civil Procedure Rules, 2010 provides as follows-

“Where a Defendant has been served with a summons to appear he shall, unless some other or further order be made by the Court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the Plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

4. Because the Defendant failed to file its Defence as required by that Rule the Plaintiff quite rightly on 30th October 2012 requested for judgment in default for a Defence.
5. It is in that request for judgment that the Plaintiff erred. The Plaintiff erred because he did not follow the rules correctly. The Plaintiff's claim in the plaint is for a declaration that the Defendant's publication of a news item on 14th June 2012 was false and malicious. The Plaintiff prayed for general damages, defamation and libel. The Plaintiff also made a claim seeking for the Defendant to be ordered to publish an apology in words and photograph which would be acceptable to the Plaintiff. Looking at those prayers it is clear that the Plaintiff's claim in the plaint is not for a liquidated amount. That being so the Plaintiff ought to have sought for an interlocutory judgment in default of a Defence as provided under Order 10 Rule 4. In other words the Plaintiff's request for judgment ought to have specifically sought for the entry of interlocutory

judgment so that the Plaintiff could subsequently set the suit down for hearing when he would formally prove his claim. Instead the Plaintiff requested for a final judgment. Following that request the Deputy Registrar of this Court entered judgment for the Plaintiff on 5th November 2012 being the final judgment. That judgment in view of Order 10 Rule 4 and bearing in mind the prayers of the Plaintiff in the plaint cannot stand.

6. The Court has wide discretion to set aside *ex parte* judgment. That discretion was discussed in the following cases-

“Patel -Vs -EA Cargo Handling Services [1974] EA 75. The Court stated in that case as follows-

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just. 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 it by the rules.”

The Court's discretion was also considered in the case of **Shah -Vs- Mbogo [1967] EA 116.** In that case the court had this to say-

“This discretion is intended so as 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 course of justice.”

Similarly, in the **CMC Holdings Ltd -Vs- Nzioki [2004] I KLR** the Court expressed itself thus-

“We are fully aware that in an application before a Court to set aside *ex parte* judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts. This is trite law and there are many decided cases in support of the proposition.”

7. It should be noted that after the entry of that judgment the Defendant did file a Defence under protest. The Defendant by that Defence raises the question of this Court's jurisdiction to entertain this suit. It is imperative that the Defendant be allowed to ventilate that Defence. Consider what was stated in the case **BARAKA APPAREL EPZ (K) LTD -Vs- ROSE MBULA OJWANG T/A FAIDA 2002 CATERER (2007)eKLR-**

“It is our humble view that where there is a Defence which raises bona fide triable issues, or even a solitary bonafide issue, the same ought to be allowed to proceed to hearing and final determination on merit.”

8. It is for the reasons stated above that I grant the following orders-
- a. **The *ex parte* judgment entered herein is set aside and the Defendant is granted unconditional leave to defend this suit.**
 - b. **The Defendant's Defence filed on 25th February 2013 is hereby deemed as though filed with the leave of the Court.**
 - c. **There shall be no order as to costs in respect to the Notice of Motion dated 20th May, 2013.**

Dated and delivered at Mombasa this 20th day of September, 2013.

MARY KASANGO

JUDGE