



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 123 OF 2010**

**MACHARIA WAIGURU.....PLAINTIFF/  
RESPONDENT**

**VERSUS**

**ROYAL MEDIA SERVICES LTD & ANR.....DEFENDANTS/  
APPLICANTS**

**RULING**

**Coram: Mwera J.**

**Gicheru for plaintiff**

**Muchoki for Defendant**

**Court clerk Njoroge**

The defendants filed a notice of motion dated 3/1/11 under sections 1A, 1B, 3A of the Civil Procedure Act and Order 10 Rule 11, Order 51 rule 1 of the Civil Procedure Rules with the main prayers:

- i) that the default judgment herein be set aside; and
- ii) that leave be granted to file defence out of time.

It was contended in the grounds that the judgement in question entered under Order 10 of Civil Procedure Rules was irregular since the plaintiff was not pursuing a liquidated claim at all. The defendants had a good defence hence this application. The defendant/applicants would pay thrown away costs to the plaintiff.

Samuel Macharia, the chairman of the 1<sup>st</sup> Defendant swore an affidavit in support to the effect that such summonses to enter appearance when served are received by one Mutegi Njau, an editor with the 1<sup>st</sup>

defendant who in turn transmits the same to the lawyers. When the summons was received in this cause Mr. Njau passed it to one Zulu Thiongo of Inoro Radio for a briefing about the alleged defamatory broadcast. Thiongo in turn went to consult with the 2<sup>nd</sup> defendant who had originated the questioned story. Thiongo did not return to Mutegi who on his part failed to follow up the matter. It was not said when all this took place but come December 2010, when the plaintiff's current advocates served on the 1<sup>st</sup> defendant a notice of appointment, it dawned on that defendant that this matter was on. It therefore appointed advocates to act on its behalf. In this regard it should be taken that failing to enter appearance and defence constituted an excusable mistake and not a state of affairs to obstruct justice. The 1<sup>st</sup> defendant had a good defence and so the orders sought ought to be granted.

The 2<sup>nd</sup> defendant, an employee of the 1<sup>st</sup> defendant in a separate affidavit deponed that he was based in Muranga town. In September 2010 he received the summons to enter appearance herein but without a copy of the plaint. He got to see one at the 1<sup>st</sup> defendant's office when he was summoned there about the case. One Zulu Thiongo was his senior officer. The 2<sup>nd</sup> defendant briefed this officer at the head office on the alleged defamatory story; he left for Muranga hoping that the 1<sup>st</sup> defendant would follow up the matter. Later, the 2<sup>nd</sup> defendant learnt that no appearance and/or defence had been filed. The 2<sup>nd</sup> defendant then proceeded to the end of his deposition as if it constituted a defence to the claim.

Then the plaintiff filed what was headed "**affidavit**", meant to answer Samuel Macharia's supporting affidavit. It was therein claimed that the defendant's conduct after receiving the summons did not constitute an excusable mistake. Then it delved in some **NYERI HCC No. 171/09**, without apparent connection with the present case.

And the 2<sup>nd</sup> defendant filed a further affidavit stressing that when he took his summons to the 1<sup>st</sup> defendant's offices at Nairobi, he assumed that follow-up in the case would be done there on his behalf.

Asked to submit, the plaintiff maintained that it was not in dispute that both defendants were served with summonses to enter appearance. When they decided to hand them over to one Mutegi Njau and Zulu Thiongo without acting on them, was all at their own risk and nothing to do with an excusable mistake. And that no employee of the 1<sup>st</sup> defendant swore an affidavit to explain the alleged "inadvertent" mistake. Samuel Macharia's supporting affidavit was mere hearsay. This application should be dismissed, because default judgements are not only confined to cases of liquidated claims. On their part the defendants maintained that old Civil Procedure Rules did not avail the plaintiff in anyway because his claim was not for a liquidated sum but for general and exemplary damages plus costs and interest. Order to set aside as sought here is discretionary and in granting it the court should do so to avoid injustice or hardship resulting. That is the case here and all has been set out in the defendants' affidavits.

In this court's opinion this suit falls under Order 10 rule 6 Civil Procedure Rules in that:

**"6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgement against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be."**

Here the plaintiff sued the defendants claiming compensation in damages for what he claimed was a defamatory publication by the latter. It is not in dispute that the defendants were served with summonses to enter appearance but they did not enter such appearance. It is claimed that two officers of the 1<sup>st</sup> defendant – Mutegi Njau and Zulu Thiongo took the summonses to consult before forwarding them to their lawyers to enter appearance but the two forgot to follow up that course and a default judgement was entered against the defendants. But none of these two – Njau and Thiongo, swore affidavits to explain and demonstrate to this court how inadvertence, oversight or other on their part respectively, led to failure to instruct lawyers to enter appearance. Samuel Macharia chairman of the 1<sup>st</sup> defendant, simply set out what

he claimed was the practice in their company when sued in libel cases as this one – the summons being received by Njau who in turn is briefed by an employee in whose portfolio the alleged cause of action arose, before instructing lawyers to act. He is not the one who was going through all that. Njau and Thiongo were. They were the best suited to depone to what went on with a view to convince this court whether to grant the prayers or refuse. They did not do so and the court was left with the impression that no excusable mistake, omission or inadvertence featured, to warrant the orders sought. Accordingly the prayers are refused with costs. The suit to be prepared and set down to assess damages.

This application is dismissed with costs.

Delivered on 23.5.11.

**J. W. MWERA**  
**JUDGE**