



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1264 OF 2004

DAIRYCOM KENYA LIMITEDPLAINTIFF/APPLICANT

VERSUS

KENYA DAIRY BOARD1ST DEFENDANT/RESPONDENT

BARAZA LIMITED T/A

KENYA TELEVISION NETWORK2ND DEFENDANT/RESPONDENT

RULING

Before the court is an Amended Notice of Motion dated 22nd March, 2011 premised under Sections 27 and 28 of Law of Limitation of Actions Act, Sections 1A, 3A and 95 of the Civil Procedure Act and Order 50 Rule 6 Order 37 Rule (6) (2) of Civil Procedure Rules 2010.

It seeks the prayers at this stage, namely:-

- 1. THAT this Honourable Court be pleased to reinstate this suit.**
- 2. THAT this Honourable Court be pleased to enlarge the time within which the Plaintiff is to file its Verifying Affidavit as per the Ruling of the Honourable Mr. Justice Onyancha dated the 5th day of February, 2010.**
- 3. THAT in the alternative, this Honourable Court be pleased to grant the Applicant DAIRYCOM KENYA LIMITED leave to file suit against KENYA DAIRY BOARD and BARAZA LIMITED T/A KENYA TELEVISION NETWORK after the limitation period.**
- 4. THAT costs of this application be provided for.**

It is supported by the grounds set forth on the application and supporting affidavit sworn on 22nd March, 2011 by Andrew Ombote the Managing Director of the Plaintiff's company.

The facts in brief leading to this application are as under:-

The 2nd Defendant filed an application to strike out the Plaint and Hon. Onyancha J. heard this matter on 8th July, 2009 and fixed the date for delivery of Ruling on 29th September 2009.

Due to his transfer to another station of the High Court, the Hon. Judge could not deliver the Ruling as

scheduled and instead delivered the same on 5th February, 2010.

According to the Applicant, no notice was given of the re-scheduled date of delivery of the said Ruling which was only placed on the daily cause list of the High Court, Nairobi. Thus he was not made aware of the Ruling so delivered.

As per the Ruling, the Plaintiff was given leave to file a fresh verifying affidavit within 7 days from the said date of delivery of the Ruling. Failing which the Plaint was to stand dismissed.

As the Plaintiff was unaware of the said Order, the Plaint stood dismissed.

The Plaintiff thereafter filed an application dated 24th March, 2010 to set aside the Ruling and in the alternative to enlarge the time within which to file the verifying affidavit. The application was premised under Sections 3A, 80 and 100 of Civil Procedure Act and Order 44 Rule 1 (1) of Civil Procedure Rules.

The said application was heard by Hon. Muchelule J and vide his Ruling delivered on 7th October, 2010, he acknowledged that the Applicant was entitled to notice of the dates of delivery of Ruling but found that as there was no prayer for setting aside of the Judgment, (the Plaint being deemed to have been dismissed), the extension of time as prayed could not be granted. Moreover, it was also observed that the Act and Rules relied upon in the application were not appropriate and thus the jurisdiction of the court was not properly invoked. In the premises, the said application was dismissed. Thereafter, an application dated 20th December, 2010 was filed apparently under the old provisions of the Civil Procedure Rules. The Applicant thereafter filed the Amended Notice of Motion as per directions of the court given on 3rd March, 2011.

The application reiterates the grounds and averments made in earlier applications and seeks the prayers as sought in the interest of justice so as to vindicate his justifiable claim against the Defendant.

I have cursorily perused the pleadings. The Plaintiff claims damages in respect of defamatory publication by the Defendant. The defence raises defence of truth and fair comment and justification in public interest.

The 2nd Defendant/Respondent opposes the application and has filed replying affidavit sworn on 23rd May, 2011 by Nelly Matheka, the Assistant Director (Legal) of the 2nd Defendant.

It is opposed on the grounds of delay and *Res Judicata*. It is quite clear from reading the last Ruling of Hon. Muchelulue that he did not grant the Order of extension because Applicant has not asked for the prayer for setting aside the Order and Ruling, though he agreed that the Applicant should be granted the same.

Sec. 7 of Civil Procedure Act clearly stipulates the meaning of *Res Judicata*.

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The issue of setting aside the Ruling of Hon. Onyancha J. was not before Hon. Muchelule while the issue of extension was on the contrary, indirectly given a nod of approval in the Ruling.

In my opinion, the said Ruling really has considered the procedural rather than the substantial issues before the court.

The first ruling of Hon. Onyancha J. was delivered without any notice to the Applicant. Obviously on the

initial scheduled date the Ruling was not delivered. As rightly stated by Hon. Muchelule, the placing of the matter on Cause List without any record or notice was not a sufficient notice.

The time of seven days obviously was short for a party without notice. Subsequently, due to mistake and/or inadvertence by the counsel of the Applicant, he has been in and out of the court.

The Constitution also stipulates that the court should not be considering undue technicalities, though I am not suggesting any, so far as both the Rulings are concerned. The Applicant herein, on the other side may be without any justice if the door of the court is shut on his face.

Taking shelter under the overriding objectives of Sec. 1A of Civil Procedure Act, I do venture to allow the application, review the Ruling dated 5th February, 2010 and extend the time for filing a fresh verifying affidavit within 7 days from the date hereof.

The Applicant shall bear costs of the Defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 27th day of **June, 2011**

K. H. RAWAL
JUDGE
27.06.2011