

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 160 of 2009

CHARLES WANJOHI WATHUKU.....PLAINTIFF

VERSUS

SAM KIPLAGAT.....1ST DEFENDANT

NATION MEDIA GROUP LIMITED.....2ND DEFENDANT

RULING

The Defendants took out a notice of motion dated 2nd February 2010 pursuant to the provisions of *Section 1A, 1B* and *3A* Civil Procedure Act and *IXA* rule *10* and *11* of the Civil Procedure Rules in which they sought four *inter alia* prayers 2 and 3(a).

1. That this Honourable Court be pleased to set aside the ex-parte interlocutory judgment entered for the Plaintiff on the 8th December 2009 as the same is irregular.

3A. That the Defendants be allowed to defend the suit

and the Defence annexed hereto and marked "ZJ 6" be deemed as duly filed.

OR

3B. ALTERNATIVELY the Defendants be allowed to file and serve its defence within Fourteen days time from the date of the Order.

The Notice of Motion sets out the grounds it is premised. The same is supported by the affidavit of Zerabanu Jan Mohamed. The plaintiff opposed the motion by relying on the replying affidavit he swore on 9th October 2010.

It is the submission of Mr. Wachira, learned advocate, holding brief for Jan Mohamed, for the Defendants, that the suit was filed on 10th November 2009. Summons to enter appearance were served on the same date, request for judgment in default of appearance were filed on 25th November 2009. That on 27th November 2009 the Defendants were invited to attend the registry to fix a hearing date via a letter dated 27th November 2009 to attend registry on 3rd December 2009 for purposes of fixing a hearing date. A Memorandum of Appearance was filed on 24th November 2009 by the Defendants through the company of Archer & Wilcock Co. Advocates. It is the submission of Mr. Wachira further that the firm of Muthoga & Gaturu & Co. Advocates wrote to Archer & Wilcock & Co. Advocates informing them a request for entry of judgment in default of appearance had been filed but had not been signed at the time of filing the Memorandum of Appearance. On 18th December 2009 a defence was sent by the Defendants' advocates to the firm of G. K. Kibira & Co. Advocates for filing the service. The same was returned on 4th January 2010 on the basis that judgment had been entered and that the matter had been fixed for formal proof on 5th February 2010. It is further the submission of the Defendants' advocate that the firm of Kagundu and Mukunya Advocates enquired on 1st December 2009 from the Deputy Registrar of this court as to why judgment had not been entered. On 8th December 2009 Judgment was entered for the Plaintiff. It is the Defendants' view that the aforesaid judgment was irregular because by then a Memorandum of Appearance had been filed on 1st December 2009. It is also the submission of the def. that they have a defence with triable issues. Mr. Nganga, that is, learned advocate for Plaintiff/Respondent, was of the view that the Defendants did not explain why it took them 14 days to file a Memorandum of Appearance. It is further submitted that there is no evidence whether the aforesaid Memorandum of Appearance was put in the court file. The plaintiff was further of the view that no good reason was given why the Defendant waited for 18 days from 1st December 2009 to file a defence. There is also no explanation as why it took a month for the December to file the current

Notice of Motion. It is the Plaintiff's argument that the defence is a sham and remains a mere denial.

I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavit filed for and against the motion. I have also considered the oral submission of the learned counsels from both sides. The principles to be considered when dealing with such an application are well settled. To begin with the court's discretion is unfettered, it suffices to refer to the case of **MBOGO VS SHAH** reported **IN 1968 E.A Pg. 93** in which it was stated as follows:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accidental inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by eviction or otherwise to obstruct or delay the course of justice.”

In this case there is no doubt that at the time of entering judgment that the Memorandum of Appearance had been filed. Under *Order IXA rule 5* of Civil Procedure Rules, interlocutory judgment can only be entered if it is shown that an appearance has not been entered within the specified time in the summons. It is obvious from this matter that an appearance had been entered at the time interlocutory judgment was entered. That judgment was regular hence the Applicant's entitlement to the order sought. I have also looked at the draft defence attached to the affidavit for Jan Mohamed and convinced the same raises triable issues. Consequently the Notice of Motion dated 2nd February 2010 is allowed in terms of prayers 2 and 3A. Therefore the draft defence is deemed as properly filed and served safe that the Defendant is given 14 days from the date hereof to file the court fees to the same.

Dated and delivered at Nyeri this 16th day of April 2010.

J. K. SERGON

JUDGE