



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(NAIROBI LAW COURTS)

Civil Case 2059 of 2000

WILFRED KAMAU GITHUA PLAINTIFF

VERSUS

**NATION MEDIA GROUP LIMITED
DEFENDANT**

RULING

The defendant, the Nation Media Group Limited filed a Notice of Motion on the 2nd February, 2009 under Section 3A of the Civil Procedure Act and Order XVI Rule 5 of the Civil Procedure Rules. The application was supported by the affidavit of *Zehrabanu Jan Mohamed* Advocate, sworn on the 2nd February, 2009.

The application seeks for orders that:

1. The Plaintiff's suit against the Defendant be dismissed with costs for non-compliance with the Court's Order of 11th November, 2008.
2. The costs of the application.

On the 11th November, 2009 pursuant to an application dated 8th November 2006 by the Defendant, seeking for the dismissal of the suit, the court disallowed the said Application on two conditions.

1. That the Plaintiff will take steps to set the suit down for hearing within 30 days of the date of the order.
2. The Plaintiff will pay the Defendant's cost of the application assessed at Kshs.25, 000/= within the next 30 days.

A replying affidavit dated 28th April, 2009 has been filed by one *Peter Muhoro Kimani* an advocate, practicing with the law firm on record for the Plaintiff, opposing the current application.

The response on behalf of the Plaintiff is that the Plaintiff issued a cheque to his advocates on the 24th of November 2008. The cheque was made up of the Kshs.25, 000/= (in compliance with the court order) and part payment of legal fees towards his advocates. In his affidavit Mr. *Peter Muhoro Kimani* states.

“7. That I am informed by my said court clerk, and which I verily believe to be true, that he had duly invited the Defendant’s Advocates to fix a hearing date vide our letter dated 24th November, 2008 and which letter was served on the Defendant’s Advocates on the same day (----)

8. That our file in the matter was however not returned to me thereafter and the matter escaped my attention till the 6th February, 2009 when we were served with the Defendant’s present application.”

From the above averments, it is clear that the Plaintiff complied with the court order within 13 days of the same. The delay as admitted by the Plaintiff’s Advocates was on their part.

The Defendant’s Advocate argues that although the hearing date has been fixed for the 18th of June, 2009 the Plaintiff failed to comply with the court order with regard to the issue of costs.

The advocate for the Plaintiff made indications in court that, if allowed he would pay the costs forthwith.

On arriving at its ruling the court has taken note of the fact that the Plaintiff paid to his advocates the costs payable to the defendant’s advocates in good time. The delay as has been admitted was occasioned by the negligence on the part of his advocates.

Although the Plaintiff’s advocates have not been diligent and efficient in the handling of this matter I do not wish to penalize the Plaintiff for their negligence. To deny a hearing should be the last resort where the Plaintiff has turned to court for justice. Other than the delay caused in the payment of the lawyer’s costs, no prejudice will be suffered by the Defendant. In any event has been set down for hearing in slightly more than a month’s time.

I therefore disallow the application but orderas follows:-

1. That the Plaintiff’s advocates pay the sum of Kshs.25, 000/= being the costs as ordered by the court on 11th November, 2008
2. That the Plaintiff’s advocates do pay a further sum of Kshs.7,500/= being the sum assessed by the court for today’s costs.
3. That the costs be paid within the next seven days, failing which the suit stands dismissed.

DATED and DELIVERED at Nairobi this 18th day of May, 2009

ALI- ARONI

JUDGE