



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 159 OF 2003

OMONDI MBAGOPLAINTIFF/RESPONDENT

VERSUS

NATION MEDIA GROUP LIMITED

[DAILY NATION NEWSPAPERS]..... 1ST DEFENDANT/APPLICANT

STEPHEN MUIRURI..... 2ND DEFENDANT/APPLICANT

RULING

By chamber summons dated 21.06.05 stated to be brought under Order IXB rule 8 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap. 21, the defendants applied for the following orders:-

1. That the ex-parte judgment entered on 06.06.03 against the defendants be set aside and the defendants granted unconditional leave to defend the suit.
2. That the costs of this application be provided for.

The grounds upon which the application is based are that:-

- a) The defendants were filing a Memorandum of Appearance at the time when the plaintiff was requesting for judgment.
- b) The defendants have a defence that raises triable issues.
- c) It is in the interests of justice that the defendants be allowed to defend the suit and that the same be determined on merits.

The application is supported by the affidavit of David Majanja, Advocate for the defendants sworn on 21.06.05.

Hearing started before me on 05.10.05 whereat the defendants/applicants were represented by learned counsel, Mr P. Saende while the plaintiff/respondent was represented by learned counsel, Mr S.K. Ritho.

Defendants'/applicants' case as presented by their counsel was essentially that they attempted to enter

appearance on 06.06.03 but were informed that a default judgment had been applied for and that the case file had been sent to the Deputy Registrar for entry of such judgment. Defendants/applicants maintained that their failure to enter appearance on time was inadvertent and regrettable. Their counsel submitted that the defendants have a good defence of which a draft had been annexed to David Majanja's supporting affidavit sworn on 21.06.05. Defendants'/applicants' counsel cited the following decided cases in support of the application:-

- a) Pithon Waweru Maina -vs- Thuka Mugiria (1982 – 88) 1 KAR 171.
- b) Kenya Ports Authority -vs- Kustron (K) Limited, Court of Appeal Civil Appeal Np.142 of 1995.
- c) Sebei District Administration -vs- Gasyali & others [1968] E.A. 300.
- d) Shabir Din –vs- Ram Parkash Anand (1953) E.A. 48.
- e) Gatley on Libel & Slander, 9th Edition Page 161, Para 7.1.
- f) G.B.M. Kariuki -vs- The Hon. Fred Kwasi Apaloo, H.C.C.C. No. 1376 of 1994.
- g) Onama -vs- Uganda Argus Ltd [1969] E.A. 92.
- h) Giciem Construction Company -vs- Amalgamated Trades & Services [1983] KLR 156.

Defendants'/applicants' counsel submitted that the omission to enter appearance on time in the present case was excusable and asked that the application be allowed.

For his part, plaintiff's/respondent's counsel reported that he had been served at 11.30 a.m. the same day (05.10.05) with the authorities relied on by the defendants/applicants; that he had not had time to study them; and that he could address other issues but defer responding to the authorities until after he had studied them. At that juncture defendants'/applicants' counsel apologized for serving the authorities late. He said he had problems in getting photocopies.

I adjourned the hearing to 17.10.05. For a variety of reasons the case did not come back to me until 04.03.08.

At the resumed hearing before me on 04.03.08, the defendants/applicants were represented by learned counsel Mr. G. Imende while the plaintiff/respondent continued to be represented by learned counsel, Mr S.K. Ritho.

Plaintiff's/respondent's counsel opposed the chamber summons application dated 21.06.05. He relied on the plaintiff's replying affidavit sworn on 29.09.05 which basically chronicled the defendants'/applicants' various omissions and essentially submitted that those omissions disentitled the defendants/applicants to the prayers sought by them.

The essence of the plaintiff's replying affidavit put the blame for the omissions leading to entry of default judgment in this case on the defendants as follows:-

- a) 1st defendant

The plaintiff deponed that the 1st defendant was served with summons to enter appearance on 13.05.03. This is confirmed by the affidavit of John Kilonzo, process server sworn on 30.05.03. The 1st defendant was required to enter appearance within 15 days and thereafter file defence. By 30.05.03 the 1st defendant had not entered appearance and/or filed defence. On the same day the plaintiff filed a request for judgment under Order VIII rule 1 (2), Order IX rule 1 and Order IXA rules 5 and 9. There are various endorsements made on the plaintiff's written request for judgment. The initial one is of 04.06.03

noting that no appearance had been entered or defence filed. The 4th endorsement shows that by 05.06.03 judgment was ready for the Deputy Registrar's signature. Somehow the actual interlocutory judgment does not appear to be in the file. The plaintiff's replying affidavit sworn on 29.09.05 deponed at paragraph 3, *inter alia*, that interlocutory judgment was entered against the 1st defendant on 06.06.03. This has not been controverted and I take it to reflect the correct position.

b) 2nd defendant

An affidavit by John Kilonzo, process server sworn on 21.07.03 deponed that on 24.06.03 he served the plaint and summons to enter appearance upon the 2nd defendant. The summons required the 2nd defendant to enter appearance within 15 days of service. There is a Memorandum of Appearance in the court file by Messrs Mohamed & Muigai Advocates to the effect that they entered it on behalf of the 2nd defendant. The date of the Memorandum appears to have initially been written as 3rd June, 2003 but altered to read like 4th June, 2003. It was, however, filed on 03.07.03. On 21.07.03 plaintiff's counsel drew up a request for judgment against the 2nd defendant similar to the request previously made in respect of the 1st defendant. This latter request was filed on 29.07.03 seeking judgment against the 2nd defendant for having failed to file defence within the stipulated period of time. Under Order VIII rule 1 (2) the 2nd defendant was required to file defence within 15 days after he entered appearance, i.e. 15 days after 03.07.03. The plaintiff deponed vide paragraph 4 of his replying affidavit sworn on 29.09.05 that interlocutory judgment was entered against the 2nd defendant on 31.07.03. This has not been controverted and I take it to reflect the correct position.

The plaintiff proceeded to depone that the suit went before Kihara Kariuki, J for formal proof on 15.12.04; that the applicants' counsel applied to be allowed to file an application to set aside the interlocutory judgments; that the court granted defendants' leave to apply to set aside the interlocutory judgments within 30 days; that by 15.01.05 the defendants had not filed their application to set aside the interlocutory judgments but filed the said application, i.e. the present application, some 6 months later – on 28.06.05.

The plaintiff deponed that he would be prejudiced if the interlocutory judgments are set aside in that the setting aside of the orders would delay the hearing of the suit. Plaintiff added that the draft defence does not contain any arguable material facts to warrant full trial of the issues involved in the suit.

Plaintiff's counsel asked this court to strike out the present application because there was no leave to extend the time to file the same. Plaintiff's counsel also pointed out that on 31.05.05 the case went before Mugo, J for formal proof; that defendants' counsel indicated he wanted to file another application to set aside the interlocutory judgments but that the Judge declined to grant the adjournment. However, the Judge disqualified herself from hearing the formal proof. Plaintiff's/counsel submitted that there is no merit in the defendants' application and urged that it be dismissed with costs.

I have given due consideration to the application and the grounds upon which it is based, the opposition thereto and the grounds upon which the opposition is based and the authorities cited.

Affidavit evidence furnished by David Majanja, Advocate for defendants sworn on 21.06.05 includes Annexure "DM – A", being a photocopy of letter dated '06 August 2002' forwarding to Mr Majanja of Mohamed & Muigai Advocates copies of summonses and plaints with instructions for the said advocates to act for Nation Media Group Ltd. One of the cases alluded to in the letter is the present case. Majanja deponed that the letter was erroneously dated 06.08.02. It was received in the firm of Mohamed & Muigai Advocates on 06.06.03 and so date-stamped. Majanja deponed that he sent his clerk to file Memorandum of Appearance but he was told the court file had been sent to the Deputy Registrar for purposes of entering interlocutory judgment. The judgment was indeed entered against the 1st defendant on 06.06.03 for failing to enter appearance and/or file defence in time. **There is clear evidence that service on the 1st defendant of summons to enter appearance was effected on 13.05.03. The 1st defendant was required to enter appearance within 15 days of service. By the time interlocutory**

judgment was entered against the 1st defendant on 06.06.03, the 15 days had clearly expired. No valid explanation has been given by the 1st defendant for sending the summons to enter appearance to its advocates late.

As for the 2nd defendant, there is clear evidence that he was served with summons to enter appearance on 24.06.03. He was required to enter appearance within 15 days of service and he entered appearance in time, i.e. on 03.07.03. Vide Order VIII rule 1 (2), the 2nd defendant was required to file defence within 15 days of filing appearance. On 21.07.03 plaintiff's counsel drew up a request for interlocutory judgment on account of 2nd defendant's failure to file defence within 15 days of entering appearance. The request was not filed until 29.07.03. Still, the 2nd defendant had not filed defence. Interlocutory judgment was entered against the 2nd defendant on 31.07.03. There is no valid explanation for 2nd defendant's failure to file defence within 15 days of 03.07.03 when he entered appearance.

The court record confirms that on 15.12.04 this case went before Kihara Kariuki, J for formal proof. Plaintiff's counsel was ready to proceed. However, defendants' counsel was not ready to proceed. He said his instructions were that the defendants intended to apply formally for setting aside the interlocutory judgments. Plaintiff's counsel opposed the application for adjournment but the Judge reluctantly granted the adjournment, *inter alia*, on condition that the defendants filed and served their formal application for setting aside the interlocutory judgments within 30 days. No such application was filed or served within the 30 days given, i.e. by 15.01.05.

On 31.05.05, i.e. about 6 months later, the case went before Mugo, J for formal proof. Plaintiff's counsel said he was ready to proceed. Mr Saende held brief for Mr majanja for the defendants. The court record cites Mr Saende as having told the Judge that he (Saende) was not ready to proceed because Mr Majanja had requested an adjournment as he intended to file an application to set aside the interlocutory judgments which he could not do earlier for lack of instructions. The Judge recorded that was not a good reason for asking for an adjournment. However, she was not inclined to hear the matter because it involved the Nation Media Group who were previously her clients. The Judge referred the matter to the Duty Judge for re-allocation, which means it was to go for hearing before another Judge.

Eventually the defendants filed the chamber summons application dated 21.06.05 now under consideration. This was well after the 30 days leave granted by Kihara Kariuki, J on 15.12.04 for filing of such application had long expired without being utilized. No application was made by the defendants for extension of the 30 days leave granted by Kihara Kariuki, J for them to file the present application.

The scenario emerging is that the defendants have, jointly and severally, been casual in treating this matter. One illustration of their casual attitude is found in Annexure "DM – A" to David Majanja's affidavit forwarding, *inter alia*, copies of the plaint herein plus summons to enter appearance. The said Annexure "DM – A" emanating from Nation Media Group Limited, Nation Centre, Kimathi Street, Nairobi purports to be dated '06 August 2002'. It was addressed to Mr David Majanja of Mohamed & Muigai Advocates of Hazina Towers, Monrovia Street, Nairobi. Both buildings are within the city centre. The letter got to Mohamed & Muigai Advocates on 06.06.03. David Majanja deponed that the letter was erroneously dated 6th day August 2002. He did not, however, say what the correct date was. Another illustration of the defendants' casual approach to this matter is found in the remarks made by their counsel before Mugo, J on 31.05.05 i.e. that the defendants were not ready to proceed because Mr Majanja intended to file an application to set aside the interlocutory judgments which he could not file earlier for lack of instructions. Laches like these are in my respectful view inexcusable. The defendants/applicants seem to have taken the court for granted and sneaked in the present application without first seeking permission to extend the 30 days leave granted to them by Kihara Kariuki, J on 15.12.04 to file an application like the present one. The defendants/applicants have shown discourtesy to the court.

Having regard to the circumstance of this case, I am of the respectful view that if the application is allowed, it will more or less provide licence for parties to suits to ignore procedural rules with impunity. It behoves parties to litigation to show some semblance of reverence to rules of procedure. Defendants'/applicants' counsel submitted that in the interests of justice, their application be allowed in order to pave way for their intended defence to be considered on merit. Justice is a double – edged sword. It should cater for both parties. If one party plays by the rules and the opposite party does not, the court should think twice before accommodating the party in default. A party who flouts procedural rules flippantly like the defendants/applicants have done cannot expect to get away with it lightly. It would give justice a bad name. That must be discouraged. I hold that the defendants/applicants do not deserve to have their application considered favourably even if their intended defence has any merits.

The chamber summons application dated 21.06.05 is hereby dismissed with costs.

Orders accordingly.

Delivered at Nairobi this 24th day of April, 2008.

B.P. KUBO

JUDGE