



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

Civil Suit 17 of 2005

OPUNDO JAMES OMONDI

t/a O.J. OMONDI & CO. ADVOCATES PLAINTIFF

VERSUS

1. THE EDITOR EAST AFRICAN STANDARD

2. THE STANDARD LIMITED DEFENDANTS

RULING:

The Plaintiff/Applicant seeks court to expunge the defendants' statement of defence and enter judgment for the plaintiff and set down the suit for formal proof. He also prays for costs.

It was deponed by the applicant and submitted by Mr. Minda that on 9th May 2005 parties entered a consent whereby the respondent was to file his defence within 7 days and do discoveries within 30 days. This order was not complied with.

Further it was deponed that the defence on record does not disclose any triable issues and should therefore be struck out. The words complained of as being defamatory were not fair or accurate report. What was reported was inaccurate.

The Respondent did not appear on the hearing date though served. Application proceeded ex parte. There is however a replying affidavit on record.

I have considered the application, affidavits both in support and reply and the submissions. Indeed the parties appeared in court on 9th May 2005 when an application dated 15th April 2005 by the defendant was set for hearing.

Interlocutory judgment had been entered on 16th March 2005 after the defendant failed to enter appearance or file defence. That application sought to have the interlocutory judgment set aside and the memorandum of appearance and defence filed by then to be deemed filed within time. Mr. Nyamurongi held brief for a Mr. Githaiga for defendant/applicant and Mr. Nyakundi held brief for Mr. Minda for plaintiff. They asked court to record a consent as follows:

“By consent c/s dated 15/4/05 be and is hereby allowed as follows:

(a) Interlocutory judgment entered hereby set aside.

(b) Leave is granted to the defendant to file and serve defence within 7

days hereon.

(c) discoveries be effected within 30 days.”

It seems that after that the defendant did not file nor serve any defence. Whereas his application sought to have the defence which had already been filed to be deemed filed within time, the court order was very different. It clearly stated that defence has to be filed within 7 days and served. The order did not state that the defence already filed has been deemed to have been filed. The defendant therefore did not comply with the court order and on that ground this application will succeed. The defence which is on record was filed out of time and without leave of the court. It will therefore be expunged from record.

Even if that defence was to be found to be properly in court. I concur with the applicants counsel that it do not disclose any triable issues. The respondent/defendant had pointed in the standard newspaper that a Homa-bay court had ordered the applicant,. Who is a lawyer to refund 18 head of cattle and two goats after it had found that he had forged auction documents in attaching the animals. It was said the court had said that the attachment was illegal as the applicant is not an auctioneer.

Copies of the proceedings in Homa-Bay Senior Resident Magistrate Land Case No.15 of 2003 have been exhibited and annexed to this application. Nowhere in those proceedings did the court order the applicant to return the said animals or say that the applicant attached any property. Though the magistrate found the attachment in that case were done by an unlicensed auctioneer he did not say it was the applicant who attached. Equally the court did not state that the applicant forged any documents. The respondent cannot therefore claim that the report was fair and accurate. What they reported does not exist in the pleadings. Though I am alive that courts should be slow to dispose off cases in a summary judgment in this case there are absolutely no triable issues which should go for trial. The defendant have no defence and going for full trial would be futile. This I feel is a fit case to be dealt with summarily.

In the circumstances I allow the application by the applicant and expunge and strike out the defence by the defendant and enter interlocutory judgment for the plaintiff as prayed. Costs to the applicant.

Dated 15th May 2005

KABURU BAUNI

JUDGE

Cc – Mobisa

Mr. Minda for Applicant

KABURU BAUNI

JUDGE