



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 198 OF 2017

HON JOHN NJOROGE.....PLAINTIFF

VERSUS

NATION MEDIA GROUP LIMITED.....1ST DEFENDANT

KIPCHUMBA SOME.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Defendants Notice of Motion application dated 13th April 2018 and filed on 17th April 2018 was brought pursuant to the provisions of Order 51 Rule 1, Order 10 Rule 11 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the Law. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.

2. THAT the interlocutory judgment entered herein on the 23rd day of November 2017 and all other consequential orders thereto be set aside.

3. THAT the Defence annexed hereto be deemed as properly filed and served upon payment of the requisite court fees.

4. THAT the costs of this application be provided for.

2. The Defendants' Written Submissions were dated 28th October 2018 and filed on 1st October 2018 while those of the Plaintiff were dated and filed on 27th July 2018.

3. When the matter came up on 4th October 2018, the parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE DEFENDANTS' CASE

4. The Defendants' application was supported by the Affidavit and Supplementary Affidavits that were sworn by their counsel, Vera Kemunto Nteng'a that were sworn on 13th April 2018 and 27th July 2018 respectively.

5. The Defendants contended that they failed to enter appearance and/or file a defence because their advocates had misplaced their file as a result of which interlocutory judgment was entered against them on 23rd January 2017.

6. They asked this court not to punish them for the mistake of their advocate which mistake was inadvertent.

7. They stated that they had a good defence that raised triable issues and that it was in the interest of justice that they be accorded an opportunity to defend themselves.

8. It was their contention that the Plaintiff would not suffer any prejudice if this court exercised its discretion to set aside the interlocutory

judgment that had been entered against them because he could be compensated by way of costs.

THE PLAINTIFF'S CASE

9. In response to the said application, the Plaintiff's counsel, John Muriithi Waiganjo, swore a Replying Affidavit on 22nd May 2018. The same was filed on even date.

10. He contended that the Defendants application was frivolous, vexatious, unmeritorious and was an abuse of the court process. He stated that the advocates' explanation that they had misfiled their file could not be verified by this court if it was true and that in any event, the advocates failed to take measures to safeguard their clients' interest.

11. He further averred that five (5) months from the time interlocutory judgment was entered had passed and hence the date the present application was filed was inexcusable and inordinate.

12. He stated that the interlocutory judgment that had been entered against the Defendants was regular and thus urged this court to dismiss their application with costs to them.

LEGAL ANALYSIS

13. Order 10 Rule 11 of the Civil Procedure Rules, 2010 provides as follows:-

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just”.

14. Notably, the Defendants and the Plaintiff were agreed that the court could exercise its discretion in setting aside interlocutory judgment. This was in line with the holding in the case of **Patel vs E.A Cargo Handling Services Ltd [1974]** at page 76 that was relied upon by the Defendants herein where it was held that:-

“There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules”.

15. They were also all agreed that interlocutory judgment could only be set aside if a defence raised triable issues. In this regard, the Defendants relied on the case of **Patel vs E.A Cargo Handling Services Ltd** (Supra) and **Sameer Africa Ltd vs Aggarwal & Sons Ltd [2013] eKLR**, the latter which was also relied upon by the Plaintiff herein. What they were not agreed upon on was whether or not the Defendants' draft defence had raised triable issues warranting the setting aside on the interlocutory judgment so that they could file their defence thereto.

16. A perusal of the draft defence showed that the Defendants had endeavored to justify that the words they were accused of publishing by the Plaintiff were not defamatory and that they were in their honest belief, true. They denied that the words caused him to lose his re-election bid as a member of Kasarani Constituency.

17. Whereas the Plaintiff had contended that the draft defence had not raised any triable issues, it was the considered view of this court that the issues raised above were indeed triable. Indeed, no party should be shut out from presenting its case no matter how hopeless its opponent deems its case to be. Article 50 of the Constitution of Kenya, 2010 is clear that every person has a right to access the court to have his dispute resolved.

18. The next issue this court had to interrogate was whether or not there was delay in the Defendants bringing the application herein and/or whether the failure by the Defendants' advocates was excusable.

19. The Plaintiff contended that the Defendants' advocates' explanation was inexcusable because they owed the Defendants professional duty to defend the suit timely and that they could pursue their advocates for professional negligence. He relied on the case of **Sameer Africa Ltd vs Aggarwal & Sons Ltd** (Supra) in this regard.

20. This court, however, agreed with the Defendants that the mistake of their advocate ought not to be visited upon them. In this regard, it fully associated itself with the holding in the case of **Pithon Waweru Maina vs Thika Mugiria [1983] KLR** that they relied upon where it was held that a party ought not to be punished for the mistake of his advocate even if the same amounted to negligence.

21. Their advocates' explanation that their file was misplaced painted a picture of some sort of disorganisation in their offices. Files do not just disappear or become misplaced if there is proper filing. There was therefore negligence on their part.

22. Having said so, this court took the view that it would be greatly prejudicial to the Defendants if they were not allowed to defend the Plaintiff's suit because of their advocates' omissions when clearly, their draft defence had raised triable issues. The above notwithstanding, the Defendants could not be allowed to go scot free. They had set back the Plaintiff's in the duration that he would have probably concluded prosecution of his matter. He therefore had to be compensated by way of costs.

23. Accordingly, having considered the parties' Written Submissions and the case law they each relied upon, this court came to the firm conclusion that it ought to exercise its discretion in favour of the Defendants herein. Whether the issues they raised in their draft defence

were meritorious or not was not a concern of this court at this juncture. That was an issue to be determined at trial.

DISPOSITION

24. For the foregoing reasons, the upshot of this court's decision was that the Defendants' Notice of Motion application dated 13th April 2018 and filed on 17th April 2018 was allowed in the following terms:-

- 1. THAT interlocutory judgment entered herein on 23rd November 2017 and all other consequential orders be and are hereby set aside.**
- 2. THAT the court hereby grants leave to the Defendants to file and serve their Statement of Defence within fourteen (14) days from the date of this ruling.**
- 3. THAT the court hereby grants leave to the Plaintiff to file and serve its Reply to Defence to the Defendant's Defence within fourteen (14) days from the date of service.**
- 4. THAT the Defendant shall pay to the Plaintiff thrown away costs in the sum of Kshs 50,000/= within fourteen (14) days from today.**
- 5. In the event the Defendant shall fail to comply with Paragraph 25 (2) and (4) hereinabove, the Plaintiff will be at liberty to move the court for appropriate orders.**

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 13th day of December 2018

J. KAMAU

JUDGE