



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 76 OF 2016

HON. JUSTUS KARIUKI MATE..... PLAINTIFF

- V E R S U S -

DAVID ODONGO1ST DEFENDANT

CYRUS OMBATI 2ND DEFENDANT

THE STANDARD GROUP LIMITED..... 3RD DEFENDANT

RULING

1. The plaintiff/respondent, filed an action before this court against the defendant vide the plaint dated 16th March 2016 whereof he sought for general damages for defamation plus costs and interest. Summons to enter appearance were effected upon the 3rd defendant/applicant on 20th March 2016 and the defendants entered appearance on 6th April 2016. The plaintiff/respondent successfully obtained judgment in default of a defence on 23rd May 2016 against the defendants. The defendants aver that they came to learn on 3rd November 2016 that the plaintiff had obtained a default judgment against them. This discovery prompted the defendants to file the motion dated 17th November 2016, the subject matter of this ruling. In the aforesaid motion, the defendants simply sought to have the default judgment to be set aside and for the defendants to be given unconditional leave to defend the suit. The plaintiff opposed the motion by filing the replying affidavit sworn by the plaintiff. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

2. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting and opposing affidavits. I have further taken into account the rival written submissions and the authorities cited by learned counsels. The main reason advanced by the defendants in seeking to set aside the default judgment is that it was due to the mistake of the clerk of the defendants' advocate who failed to file and serve the defence in time. It is said that the aforesaid staff left the employment of the defendants advocates offices before filing the defence in his possession. It is submitted that due to his exit, the defendants' advocates bring up and filing systems were severely interrupted creating great confusion thus the time provided by statute to file a defence lapsed without the knowledge of the defendants and their advocates.

3. The defendants beseeched this court to exercise its discretion in favour of them by setting aside the default judgment because the delay to file the defence was not deliberate but was due to inadvertent mistake which occurred in the defendants' advocate's office.

4. The plaintiff vehemently opposed the application arguing that the same lacks merit. It is submitted that

the defendants failed to give justifiable reasons for their failure to file their defence within the time fixed by law.

5. The plaintiff accused the defendants for being indolent hence they should not benefit from equity. It is argued that the defendants were awakened up from their slumber by the formal proof hearing notice served upon them.

6. The plaintiff further argued that the draft defence put forward by the defendants raises no triable issues therefore there are no good grounds warranting the setting aside of the regular judgment.

7. Having considered the rival submissions, it is clear to me that the default judgment obtained by the plaintiff is a regular judgment. The defendants have admitted so. They however,, have beseeched this court to exercise its wide discretion in their favour to set aside the same. They argue that the delay to file the defence within the stipulated time was due to inadvertent mistake committed in the offices of their advocates.

8. The plaintiff has challenged the assertion that a clerk had left the employment of the firm of Mckay & Co. Advocates. The plaintiff has averred that the aforesaid firm should have obtained an affidavit from the clerk who exited that firm to buttress the application.

9. On my part, I have carefully considered the averments of Paul Momanyi Nyaosi sworn and filed in support of the motion. The learned advocate has specifically deponed that he personally prepared a substantive defence which he handed over to his clerk to file and serve.

10. The learned advocate further avers that the aforesaid clerk left the employment of Mckay & Co. Advocates a week after being assigned the duty to file and serve the defence. He further deponed that he honestly believed that his clerk had filed the defence before disengaging his services from the firm.

11. I have no reason to doubt the veracity of the averments made by Mr. Nyaosi. I am satisfied that the delay to file and serve the defence was occasioned by the defendants' advocates administrative inadvertent mistake. There is no evidence that the clients were in any way the cause for the delay.

12. In the circumstances of this case, justice demands that the client should not suffer for the accidental and genuine mistakes of their advocates.

13. The second ground ably argued by the plaintiff against the motion is that the draft defence does not raise triable issues. It is argued that the defence put forward admits the impugned publication. The defendants have stated that their defence raises the defence of fair comment and public interest to answer the allegation of defamation. The plaintiff argued that the publication was a mere assertion of facts and not a comment as pleaded by the defendants and therefore the defence raises not triable issues.

14. It is not in dispute that in an action for defamation, the defences of fair comment and public interest are available to any defendant to raise which in this case the defendants have pleaded in their draft defence. In order to determine whether the aforesaid defences are valid or not, substantive arguments must be received either via a trial or through a substantive application where evidence may be adduced.

15. In the matter before this court, the aforesaid defences have been put forward in a draft defence which if allowed to be filed, the plaintiff will still have a chance to controvert by filing a reply to the defence. The plaintiff will still retain the right to challenge the defence by filing a substantive application to have the defence struck out if he thinks the defences raised are a sham and meant to delay the just determination of the suit.

16. In the end and on the basis of the above reasons, I find the motion to be well founded. In the circumstances of this case, since the default judgment was regularly obtained, the plaintiff will be compensated by an award of costs. Consequently the motion dated 17.11.2016 is allowed as prayed with costs assessed at ksh.10,000/= being awarded to the plaintiff.

Dated, Signed and Delivered in open court this 2nd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant