



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 351 OF 2013

1. SAMUEL KAZUNGU KAMBI
2. RIVA OILS COMPANY LIMITED.....PLAINTIFFS

VERSUS

NATION MEDIA GROUP LIMITED.....DEFENDANT

RULING

The Plaintiff's claim herein is in defamation. Interlocutory judgment in default of defence was entered against the Defendant on 24th September, 2013. It then applied by Notice of Motion dated 21st July 2013 to set aside that judgment. The supporting affidavit is sworn by the Defendant's legal officer who depones, *inter alia* -

- (i) That upon receipt of the summons in this suit on 30th August 2013, investigations into the alleged defamatory article was commenced for proper instructions to be given to the counsel who would defend the suit on its behalf.
- (ii) That due to the nature of the claim, the investigations took long to be completed.
- (iii) That the advocates on record were instructed upon conclusion of the investigations and subsequently filed a memorandum of appearance on 25th September 2013 served on the plaintiff the same day.
- (iv) That upon perusing the file they established that interlocutory judgment had been entered the previous day
- (v) That the Defendant has a triable defence and every desire to defend the claim and no prejudice will be suffered by the plaintiff.

A draft defence was annexed to the application.

The Plaintiff opposed the application through **grounds of opposition filed on 3rd November, 2014**. It was deponed –

- (i) That the application is frivolous, misconceived, misplaced, vexatious and an abuse of the Court process which should be dismissed with costs.

(ii) That the Defendant is guilty of laches as this application was filed nine (9) months after the interlocutory judgment was entered even though the Defendant was all along aware of the suit.

(iii) That there has been no explanation from the Defendant for filing the memorandum of appearance and defence out of time and no leave has been sought for them to be admitted out of time.

(iv) That the interlocutory judgment is regular and should remain in full force and effect hence application should be dismissed

The court has considered the submissions of the learned counsels appearing, including the authorities cited.

Where judgment in default of appearance or defence or for failure to serve has been entered under the various provisions of Order 10 of the Civil Procedure Rules, 2010 (the Rules), rule 11 of that Order gives the court a wide discretion to set aside or vary such judgment and any consequential decree or order “upon such terms as are just”.

The *Court of Appeal* in the case of *Chemolo & Another –vs– Kubende* [1986] KLR 492, pronounced itself thus -

“1...

2. The concern of the Court is to do justice to the parties and the court would not impose conditions on itself to fetter the discretion. However, where a regular judgment has been entered, the court will not usually set it aside unless it is satisfied that there are triable issues which raise a prima facie defence which should go to trial.

3....”

In *Kenya Safari Lodges & Hotels Ltd – vs – Tembo Tours & Safaris Ltd* [1985] KLR 441 the High Court (Harris, J) held, *inter alia* -

“1...

2. In an application for setting aside default judgment, the court will consider whether the defendant has any merits to which it should pay heed and if merits are shown, the court will not, prima facie, allow the default judgment to stand.

3. The court will have regard to the applicant’s explanation for his failure to appear after being sued (or to file defence), though as a rule, his fault, if any, can be sufficiently punished by the terms as to costs or otherwise which the court in its discretion is empowered to impose”.

In the case of *Shah –vs– Mbogo & Another* [1967] EA 116 it was held, *inter alia*, that the Court’s discretion so set aside an *ex parte* judgment

“is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

The Plaintiffs have pleaded in the plaint particulars of falsehood, malice and spite on the part of the Defendant in publishing the words complained of. The Defendant has denied each and every one of them in its statement of defence.

The Plaintiff has also pleaded a wide range of meanings and innuendo that may have been assigned to the

words complained of, from criminality, to lack of ethics, to being fraudulent and corrupt, dishonest, conniving and unprofessional etc. The Defendant has denied each and every one of these meanings and innuendos that the Plaintiff has assigned to the words complained of. The draft defence annexed to the application in my view raises triable issues.

The court is thus satisfied that the various issues raised in the plaint and defence can be satisfactorily determined only in a proper trial of the action and tested oral evidence.

However, the delay in bringing the application by the Defendant displays laxity on its part which has not been satisfactorily and therefore, explained fully. Whereas the court will exercise discretion in its favour, the Defendant ought to be condemned to costs of this application.

Accordingly, this application is allowed. The defence shall be filed within 14 days from the date hereof.

The defendant shall pay the plaintiffs costs occasioned by this application.

Orders accordingly.

Dated and delivered at Nairobi this 6th Day of May, 2015.

A.MBOGHOLI MSAGHA

JUDGE