



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 182 of 2008

JOHN GAKUO.....PLAINTIFF

VERSUS

ALWAKA TOM OSCAR T/A HEADLINK PUBLISHERS.....DEFENDANT

R U L I N G

1. The Defendant herein has brought the chamber summons dated 12th November, 2009 under **Section 3A and 63 (e) of the Civil Procedure Act and Order IX A Rules 10 & 11 of the Civil Procedure Rules** seeking:

(a) That there be a stay of proceedings herein pending the hearing and final determination of this application.

(b) That the interlocutory judgement entered herein and all the consequential *ex parte* proceedings and order be set aside and the applicant be granted leave to file his defence herein.

Prayer (a) is spent.

2. The application is supported by the affidavit of the Defendant and on the grounds on the face of the application.

In his supporting affidavit, the Defendant avers that he was neither the publisher of the 'weekly citizen' nor was he trading as 'Headlink Publishers'. He contends that the claim in the affidavit of service that he was served near summit house was false.

3. It is deposed further, that the Defendant learnt of the suit herein on 11th November, 2009 through his advocate B.M. Eboso who he thereafter instructed to take legal steps occasioning the application herein.

He continues that he has a good defence which raises triable issues and should therefore be given an opportunity to defend the suit.

4. The gist of the application is that the Defendant was not served with summons to enter appearance and the plaint on 27th June, 2008; and that the affidavit of service by S. Njoroge (annexure "TOA 3") on whose basis the interlocutory judgement was obtained contained falsehood.

This application is unopposed.

5. At the hearing of the application, the Defendant's counsel, Mr. Eboso submitted that the Defendant's

contention was that he was never served with the plaint and summons to enter appearance, that the time of the alleged service was outside the hours prescribed for service and further that affidavit of service does not indicate the place of service or the actual manner of service.

6. The discretion to set aside a default judgment is unfettered, and the primary concern of the Court is to do justice to the parties. The said discretion is intended to be exercised in order to avoid injustice or hardship resulting from accident or inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice as was held in **Shah Vs. Mbogo [1967] E.A. 116**.

7. In exercising the said discretion, the Court usually considers the reason, if any, given for the default and the merits or otherwise of the case of the party against whom the judgment was entered. It was stated in **Express (K) Ltd Vs. Patel (2001) 1 EA 54**:

“...The Applicant has to explain plausibly the cause of delay and must show that the proposed defence has merits...”

8. There seems to be a conflicting affidavit evidence as to whether or not the Defendant was served with the summons and the plaint, which conflict can only be resolved by the cross – examination of the process server. Unfortunately, the Defendant has not requested to examine the process server, the Plaintiff on the other hand did not offer the process server for examination or in any manner rebut the Defendant’s contentions.

I am satisfied therefore, that the Defendant has a good and sufficient explanation for his failure to enter appearance and file defence.

9. On the merit of the defence, without going into the details, the defence raises issues; he was not carrying business under the name and style of Headlink Publishers, that he was not the proprietor of the newspaper known as ‘weekly Citizen’, that he was not the publisher of the article complained of, that no notice to sue was given. He also denies any loss or damage to the Defendant.

10. From the circumstances herein, the Defendant does not appear to have sought to delay or obstruct the course of justice.

For those reasons, I allow the application. The defendant to file defence within 14 days of delivery of this ruling.

DATED AT NAIROBI THIS 1ST DAY OF OCTOBER 2012

**H.P.G. WAWERU
JUDGE**

DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2012