



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 21 OF 2020

NATION MEDIA GROUP.....APPELLANT

VERSUS

GEOFFREY MUGENDI MUCEE.....RESPONDENT

JUDGMENT

1. This appeal impugns the ruling delivered on 12th March 2020 by the trial court (*Hon. S. Ouko, RM*) in Runyenjes SPMCC No. 8 of 2019.
2. In the ruling, the learned trial magistrate dismissed with costs the appellant's Notice of Motion dated 23rd January 2020 in which the appellant principally implored the trial court to review or set aside the proceedings of 23rd January 2020 in which the respondent's suit proceeded for hearing *ex parte* and any consequential orders. The appellant also sought leave to cross examine the respondent's witnesses.
3. Following dismissal of the application, the appellant proffered this appeal. In its memorandum of appeal, the appellant relied on the following four grounds of appeal:
 - i. That the learned trial magistrate erred in law and in fact in finding that an interlocutory judgment in the matter was entered on 27th June 2018, whereas the matter was filed on 19th February 2019.*
 - ii. That the learned magistrate erred in law and fact by failing to appreciate the merited statement of defence on record, filed in respect of SPMCC No. 8 of 2019, Geoffrey Mugendi Mucee V Nation Media Group dated 16th July 2019.*
 - iii. That the learned magistrate having found that there was no defence on record, erred in law by fixing the matter for mention on 26th March 2020, to confirm filing of respective submissions by parties.*
 - iv. That the learned trial magistrate erred in law and fact by failing to accord the defendant an opportunity to cross examine the plaintiff.*
4. By consent of the parties, the appeal was prosecuted by way of written submissions.
5. This being a first appeal to this court, I am duty bound to thoroughly examine and consider afresh the material that was on the trial court's record at the time the aforesaid application was heard and determined and draw my own independent conclusions.
6. I have carefully considered the grounds of appeal, the record of the trial court as compiled in the record of appeal and as it appears in the original record of the trial court. I have also given due consideration to the parties' rival written submissions and the ruling subject matter of the appeal.
7. To start with, I wish to point out that as correctly observed by the respondent, the record of appeal as filed is incomplete since the appellant whether deliberately or otherwise, omitted to include the entire proceedings of the trial court including the proceedings that the trial court was being asked to review or set aside in the application that gave rise to the impugned ruling.
8. This omission apparently escaped the eye of the Hon. Deputy Registrar when she certified the appeal ready for hearing. The court record shows that the respondent's counsel was present in court when this certification was done but he did not bring this fact to the attention of the Hon. Deputy Registrar. It is however my view that though the omission is serious and undesirable, it does not deal a fatal blow to the appeal since the court has recourse to the original record of the trial court.
9. Having considered the grounds of appeal and the parties' rival submissions, I find that the only issue which crystallizes for my determination is whether the learned trial magistrate erred in dismissing the appellant's application.

10. My perusal of the trial court's record shows that upon a request for entry of interlocutory judgment dated 24th June 2019 which was filed on 27th June 2019 by *Khan & Associates* who were the advocates on record for the respondent, interlocutory judgment was entered in favour of the respondent against the appellant on the same date the request was filed, that is, on 27th June 2019. The date of 27th June 2018 referred to by the learned trial magistrate in her ruling which forms the substance of the appellant's first ground of appeal was clearly an inadvertent or typographical error since the trial court's record clearly shows that the default judgment was entered on 27th June 2019.

11. I have thoroughly combed through the entire record of the trial court and I have not come across any indication that the appellants prior to filing the Notice of Motion dated 23rd January 2020 applied to have the default judgment set aside and for leave to file a defence.

12. My reading of the trial court's record confirms that the default judgment was entered after the appellant failed to enter appearance or to file a defence within the stipulated time. Having failed to challenge the existence of the interlocutory judgment and having not sought or obtained leave to file a defence out of time, the appellants were not entitled to defend the suit and did not have a right to be heard in the trial court.

13. In view of the foregoing, I have no basis to fault the findings of the learned trial magistrate in the ruling dated 12th March 2020. She comprehensively dealt with all the issues raised in the application and came to the correct conclusion that since there was interlocutory judgment in force against the appellant and no application had been filed to set it aside, the application lacked merit and was a good candidate for dismissal.

14. Before I conclude, I wish to observe that the memorandum of appearance and statement of defence contained in pages 17-19 of the record of appeal are for undisclosed reasons not part of the original record of the trial court. The memorandum of appearance and statement of defence contained in the trial court's record are those that were referred to by the trial court and were filed in respect of Runyenjes SPMCC No. 73 of 2018 which is different from the suit in which the ruling challenged in this appeal was delivered and it involves completely different parties.

15. I believe I have said enough to demonstrate that this appeal lacks merit and cannot be sustained. Consequently, the appeal is hereby dismissed with costs to the respondent. I also hereby direct that the original record of the lower court shall now be remitted to the trial court for disposal of the suit or further orders.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH 2021.

C. W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT EMBU THIS 18TH DAY OF MARCH 2021.

L. NJUGUNA

JUDGE

In the presence of:

Mr. Chasie holding brief for Mr. Ochieng Opiyo for the appellant

Mr. Ogweno for the respondent

Esterina: Court Assistant