



Cytonn Investments Management PLC v Obongo & another (Civil Appeal E1334 of 2023) [2024] KEHC 15676 (KLR) (Civ) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15676 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1334 OF 2023

RC RUTTO, J

DECEMBER 6, 2024

BETWEEN

CYTONN INVESTMENTS MANAGEMENT PLC APPELLANT

AND

CHRIS ORWA OBONGO 1ST RESPONDENT

MWANGO CAPITAL LIMITED 2ND RESPONDENT

(Being an Appeal from the ruling and order of Hon. B. M. Cheloti, in Milimani Commercial Magistrate's Court Civil Case E3479 of 2023 delivered on 7th November 2023)

JUDGMENT

1. The Appellant is aggrieved by the ruling of the trial court that dismissed the entire suit at preliminary stage has lodged this appeal.
2. The facts of the case leading to this appeal are as follows; the appellant sued the respondents for inter alia a permanent injunction restraining the respondents from publishing defamatory statements against the appellant, general damages for defamation, an apology and retraction as well as costs and interests after the 1st respondent allegedly published alleged defamatory statements against the appellant on his Youtube channel dubbed "Orwa's Digest; Losing Kshs. 1 Million to Cytonn' that discredited its character and exposed its reputation to ridicule.
3. The appellant also filed a Notice of Motion application dated 26/7/2023 seeking a temporary injunction against the respondents from further defaming its reputation pending the hearing and determination of the suit.
4. The notice of motion application was opposed by the 1st respondent who filed a replying affidavit dated 9/8/2023 as well as a preliminary objection of even date.



5. Following the court's direction, both parties filed their respective submissions to the application and preliminary objection. The trial court vide a ruling dated 7/11/2023 found that the notice of preliminary objection as filed did not meet the ingredients of a preliminary objection as laid down in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696* thus the same was dismissed with no costs.
6. The trial court also found that the publications made by the respondents amounted to fair comment as they were not made out of malice to either cause embarrassment or injure the reputation of the appellant. Consequently, the application together with the suit were dismissed with costs. The appellant was dissatisfied with that ruling and preferred the instant appeal on grounds including that the trial court erred and misdirected itself by: -
 - i. Finding that one of the issues for determination was whether the respondents' publications were defamatory,
 - ii. Holding that the publications amounted to fair comment and were not made out of malice to embarrass or injure the appellant's reputation,
 - iii. Dismissing the application without subjecting it to the *Giella vs Cassman Brown* test,
 - iv. Delving into substantive issues at a preliminary stage,
 - v. Discriminating against the appellant by dismissing the application with costs whilst dismissing the respondent's preliminary objection without costs.
7. The appellant filed submissions dated 6th May 2024 in support of the appeal while the respondent's submissions opposing the appeal were dated 5th June 2024.

Appellant's Submissions

8. The appellant submitted on all the seven grounds of appeal as set out in the Memorandum of Appeal. It was his submission that the learned Magistrate misdirected herself when she dealt with the substantive issue of defamation at the preliminary stage when what was before the Court was the Appellant's Notice of Motion dated 26th July 2023 seeking interlocutory orders and the Respondent's Notice of Preliminary Objection.
9. The appellant faulted the trial court for being in breach of Article 50 of *the Constitution* and failing to take into account the principle of *audi alteram partem*. Reference was made to the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)* on the right to fair hearing. Also relied upon were the decision of The Gujarat High Court in *M/S Virani Metal Industries v. State of Gujarat (SCA No. 13233 of 2022 decided on 30.11. 2022* and *Accounting Officer Kenya Ports Authority (Ex Parte) v Public Procurement Administrative Review Board & 3 others (Interested parties) [2019] eKLR*. They urged this court to find that the Ruling is inherently defective and ought to be set aside for violating the principles of natural justice.
10. The appellant relied on the case of *Nation Media Group Limited v George Nthenge Civil Appeal No. 64 OF 2013 [2017] eKLR* to submit that the comments made and published by the Respondents did not qualify as fair comment but were made maliciously with the intention to disgrace, embarrass and injure the Appellant's reputation.
11. They faulted the trial court for dismissing the Appellant's application dated 26th July 2023 with costs without subjecting it to the principles for grant of interlocutory injunctions as espoused in *Giella vs*



Cassman Brown test thus causing great prejudice to the Appellant. Further that the trial court failed to use its discretion judiciously and failed to uphold equality of the parties by granting the Respondents costs and denying the same for the Appellant.

12. The appellant urged this court to allow the appeal in its entirety and set aside the ruling and orders of the trial court delivered on 7th November 2023.

Respondents Submissions

13. The respondents set out one issue for determination namely; whether the trial court was justified in dismissing the plaintiff's claim and granting costs to the Respondents herein. They submitted that, the Plaint as filed was similar to the Application dated 26th July 2023 in relation to the issues raised therein and the prayers sought. The Appellants had sought a mandatory injunction which effectively were final orders at an interlocutory stage. Consequently, it was impossible for the trial court to render or issue the orders sought without delving into the substantive issue.
14. It was their submission that the trial court complied with the provisions of Order 2 rule 15 of the Civil Procedure Rules which permits the court to strike out a suit at any stage of the proceedings. To buttress this argument reference was made to the case of Trust Bank Ltd v. Amin Co. Ltd &anor (2000) KLR.
15. The respondents also submitted that the Ruling of the trial court dated 7th November 2023 met all the elements of a ruling in that it contained a concise statement of the facts of the case; points for determination; the decisions on each of those points; and reasons for each of those decisions. Further that the trial court acted in accordance with the law by giving all parties, a chance to be heard, and determine their rights based on the evidence presented by them, in accordance with the prescribed law. Reference was made to the case of Adeleke V Iyanda (2001) 13 NWLR (Pt 729) page 1 @ 20, UWAIFO JSC to the effect that "A trial judge has the primary duty to receive admissible evidence, access the same, give it probative value and make specific findings of fact thereon.
16. While relying on the case of Nayan Mansukhlal Salva v Hanikssa Nayan Salva [2019] eKLR the respondent submitted that the grounds of appeal as set out had not met the threshold for ordering a retrial since there was no error apparent on the face of the Record. Reference was also made to the case of Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243.
17. They, urged that in the instant appeal, the 'mistake or error apparent on the face of the record' was not a misstate or error in the sense of the law for which a re-trial may be granted. The respondent relied on Omote *& another v Ogutu (Civil Appeal E005 of 2021)* [2022] KEHC 16441 (KLR) (19 December 2022) (Ruling) and Francis Ngira Batware v Ashimosi Shitambasi t/a Ashimosi Shitambasi & Associates Advocates & 2 others [2018] eKLR to expound this position.
18. They thus argued that the Appeal has no merit and urged the Court to strike it out with costs to the Respondents.

Analysis and determination

19. As the first appellate court this court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent decision. (See *Selle & another v Associated Motor Boat Co. Ltd.& others* (1968) EA 123). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* (1958) E.A.
20. In addition, as provided in Section 78 of the *Civil Procedure Act* Cap 21, a court of first appeal can appreciate the entire evidence and come to a different conclusion. Having considered the entire record



of appeal as well as the parties submissions the issue for determination that arises is -Whether the trial court erred in dismissing the appellant's claim at the interlocutory stage

21. It is not in dispute that what was before the trial court for determination was the notice of motion application under certificate of urgency dated 26/7/2023. The main prayer sought was for a temporary order of injunction barring the respondents from publishing any defamatory statements against the appellant. Also set for determination was the preliminary objection dated 9/8/2023 premised on grounds that the 2nd respondent did not have capacity to be sued as it was a social media handle, there was no evidence to support the unliquidated claim, and the suit was seeking to limit the 1st respondent's freedom of speech and intimidate the respondents from making fair comments.
22. The two issues for determination as set out by the trial court were; whether the 2nd respondent had locus standi to be sued, and whether orders restraining the respondents from publishing defamatory statements ought to have been issued.
23. I have carefully considered the ruling delivered on 7/11/2023. At paragraph 6 through to paragraph 10 of the impugned ruling, the magistrate proceeded to determine the issue of defamation. The trial court addressed itself on whether or not the statement made by the 1st respondent was defamatory while this was not one of the prayers sought. In the end, the trial court found that the publication complained of amounted to fair comment and was not made out of malice and held that both the application and the suit lacked merit and dismissed them.
24. It is unclear to this court how the trial court reached such a decision having failed to consider the application at all. There is nowhere in the entire ruling where the trial court gave any attention to the merits of the application. Instead, it proceeded to delve into the issue of defamation which was the subject matter of the entire suit as evidenced by the plaint dated 26/7/2023.
25. Clearly, the trial court delved into the merits of the substantive case without according the parties an opportunity to present their respective cases as to whether the publication amounted to defamatory statements.
26. The parties ought to have been given a chance to proceed to the full hearing and the suit determined on merit after taking evidence from all parties. The case as framed discloses a cause of action against the respondents and did not warrant summary dismissal before hearing the parties.
27. This court has further reviewed the appellant's submissions dated 18/9/2023 filed before the trial court. the said submissions, were limited to the application and preliminary objection, and rightly so. Therefore, as correctly submitted by the appellant, the parties right to be heard was contravened when the trial court determined the merits of the case before the suit could proceed for hearing.
28. In *DT Dobie & Company Kenya Limited vs. Joseph Mbaria Muchina & another* [1982] 1 KLR 1 (Madan, Miller & Potter), the court stated that it is trite that a court must not delve into the merits of the case at a preliminary of interim stage. The Court stated: -

“The court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is the function solely reserved for the judge at the trial as the court itself is not usually informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way... No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond



redemption and incurable by way of amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of a case before it.”

29. Guided by the above authority, in this instance the trial court ought to have determined the application, given pre-trial directions and allowed the suit to proceed for full hearing on merit. The suit was instead prematurely dismissed and this undoubtedly prejudiced the appellant.
30. In the circumstances, it is this Court’s finding that the trial court misdirected itself in determining the merits of the case at a preliminary stage without according the parties a chance to be heard.
31. The upshot of the above is that the memorandum of appeal dated 4/12/2023 is allowed and the following orders hereby issue: -
 - a. The ruling of the trial court dated 7/11/2023 is hereby set aside and Civil Case No. E3479 of 2023 is reinstated.
 - b. The lower court file to be placed before the Chief Magistrate Court for direction on hearing of Civil Case No. E3479 of 2023 before a different Magistrate.
 - c. Each party to bear its own costs of the appeal.

Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 6TH DAY OF DECEMBER 2024.

FOR APPELLANT:

FOR RESPONDENT:

COURT ASSISTANT

