



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 251 OF 2014

MAJOR (RTD) ANDRE NKIIRI..... 1ST APPELLANT

NEWTON KAMAU 2ND APPELLANT

KAMAU MUCUHA 3RD APPELLANT

- V E R S U S -

STANLEY NJENGA1ST RESPONDENT

RADIO AFRICA LIMITED 2ND RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court Nairobi (Milimani Commercial Courts) in civil case no. 5146 of 2012 dated 30th May 2014)

JUDGEMENT

1) The appellants herein filed an action claiming damages against the respondents for defamation before the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi. Accompanying the plaint were the witness statements plus a list of documents. The defendants (respondent) filed their statement of defence together with copies of the witness statements and the documents to be relied upon. Eventually the suit was certified as ready for hearing. The case proceeded for hearing on 17.03.2014. The 2nd appellant tried to introduce new evidence in form of a recent publication. The 2nd respondent took an objection forcing the hearing of the case to be adjourned. While the case was pending for hearing, the appellants filed a supplementary list of documents which the respondents raised an objection claiming the same were filed after pre-trial conference had been done and concluded. The objection was upheld. Being dissatisfied by that order, the appellants preferred this appeal.

2) On appeal, the appellants put forward the following grounds:

1. THAT the learned Principal Magistrate grossly erred in law and fact in striking out all documents which the appellants intend to use to prove their case.

2. THAT the learned Principal Magistrate grossly erred in failing to appreciate that the provisions of article 159 of the Constitution, sections 1A, 1B, 3 and 3A of the Civil Procedure Act, the provisions of the Evidence Act (Cap. 80), and Order 5 of the Civil Procedure Rules direct courts to admit all relevant documents in evidence so as to do justice as between the parties.

3. THAT the learned Principal Magistrate grossly erred in failing to appreciate that some of expunged documents had been published after the 27th May, 2013 and were crucial documents which would enable the appellants to prove malice on the part of the respondents.

3) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. Learned counsels were also permitted to make oral highlights of their written submissions.

4) This appeal is on a singular point that is to say whether or not a party can be allowed to introduce or rely on new evidence after a pre-trial conference has been done under Order 11 of the Civil Procedure Rules, 2010. In this case, the pre-trial conference was done and concluded. In the middle of the trial the appellants attempted to produce and rely on a document which had not been served and exchanged before the pre-trial conference. The hearing of the case had to be adjourned to enable the respondents' advocate to consult his client. It is when the suit was pending hearing that the appellant filed a supplementary list of documents. When an objection was taken up, Hon. Ole Keiwa, learned Principal Magistrate upheld the objection and ordered for the documents to be struck out. It is the submission of the appellants that the provision of Order 11 Civil Procedure Rules did not provide that after the pre-trial conference has been concluded a party cannot introduce new documents which he was not aware of or which is relevant to the case. The respondents did not deem it fit to answer this point but they instead concentrated on the argument that the appellants did not seek prior leave from the court before filing the supplementary list of documents. The respondents accused the appellants for attempting to ambush the respondents with new evidence.

5) I have carefully considered the rival submissions. I have also critically examined the manner in which the learned Principal Magistrate dealt with the issue of late filing of documents. The learned Principal Magistrate concluded that any document filed after the pre-trial conference was irregularly on record and proceeded to strike it out. It is not in dispute that the appellant filed the supplementary list of documents without leave of court. It is also not in dispute that the provision of Order 11 of the Civil Procedure Rules does not expressly bar a party from introducing new evidence after the conclusion of a pre-trial conference. The learned Principal Magistrate was therefore right to conclude that the appellant's new documents were irregularly on record. After a pre-trial conference has been concluded, a party who wishes to file a fresh list of documents has to apply for leave of court to bring on board such documents. In so doing, the party seeking to introduce such new evidence will be able to explain to the trial court the reasons why it could not do so earlier. However, the provision of Order 11 Civil Procedure Rules was not meant to lock out the introduction of new evidence which were not accessible to the parties at the time of conducting the pre-trial conference. The order was basically meant to assist in case management to avoid unnecessary delays in concluding the hearing of cases. Therefore, it is not fatal to introduce new evidence.

6. In this appeal, I think the learned Principal Magistrate did not properly apply the overriding objective stated in Sections 1A and 1B of the Civil Procedure Act. The learned Principal Magistrate should not have struck out the documents but should instead have admitted the same and granted the respondents time to file further documents if any.

7. In the end this appeal is found to be meritorious. It is allowed. Consequently the order striking out of the record, the documents filed after the pre-trial conference is set aside and is substituted with an order allowing the same to remain on record. The trial court to determine the admissibility of the same in evidence as exhibits according to law.

Dated, Signed and Delivered in open court this 10th day of February, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent