Muganda & 16 others v Nyabuti & 2 others (Civil Appeal 115 of 2019) [2023] KECA 808 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 808 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 115 OF 2019

MSA MAKHANDIA, F SICHALE & HA OMONDI, JJA

JULY 7, 2023

BETWEEN

JOE MUGANDA ..... 1ST APPELLANT

TOM MSHINDI ..... 2ND APPELLANT

STEPHEN GITAGAMA ..... 3RD APPELLANT

GIDEON ASWANI ..... 4TH APPELLANT

GABRIEL CHEGE ..... 5TH APPELLANT

JAMES KINYUA ..... 6TH APPELLANT

ELIZABETH KYENGO ..... 7TH APPELLANT

JAPHET MUCHEKE ..... 8TH APPELLANT

MICHAEL WALEKWA ..... 9TH APPELLANT

MICHAEL NGUGI ..... 10TH APPELLANT

PHILIP VELESE ..... 11TH APPELLANT

AGNES ASIIMWE-KONDE ..... 12TH APPELLANT

ANTHONY CRAIG GLENCROSS ..... 13TH APPELLANT

DAVID KIAMBI ..... 14TH APPELLANT

FRANCIS MAJIGE NANAI ..... 15TH APPELLANT

LINUS KAIKAI ..... 16TH APPELLANT

ROSE LUTTA ..... 17TH APPELLANT

AND

PETER NYABUTI ..... 1ST RESPONDENT

NATION MEDIA GROUP LIMITED ..... 2ND RESPONDENT

DAVID HERBLING ..... 3RD RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Njuguna, J) dated 25th October, 2018 IN HCCC NO. 431 OF 2015)

JUDGMENT

1. The 17 appellants herein namely; Joe Muganda, Tom Mshindi, Stephen Gitagama, Gideon Aswani, Gabriel Chege, James Kinyua, Elizabeth Kyengo, Japhet Mucheke, Michale Walekwa, Michael Ngugi, Philip Velese, Agnes Asiimwe-Konde, Anthony Craig Glenccross, David Kiambi, Francis Majige Nanai, Linus Kaikai & Rose Lutta filed this appeal against the ruling of Njuguna, J delivered on October 25, 2018. The prayers sought are that:

> "1. Thatthe Appeal herein be allowed and the Orders of Review issued on the October 25, 2018 be set aside and the Respondent's Application dated October 2, June, (sic)2017 in the superior Court be dismissed with costs."
>
> 2. That the sum of Kshs 3,400,000 paid by the Appellants herein to the Court as a fine for contempt of Court on the 7th day of November, 2018 be refunded to the Appellants herein.
>
> 3. Thatin any event the costs of this Appeal be awarded to the Appellants."

2. The background facts giving rise to the ruling of October 25, 2018 are that on October 2, 2017, the 1st respondent herein filed a Notice of Motion which inter alia sought to review/vary the ruling of Njuguna, J delivered on September 22, 2017, in which Nation Media Group and David Herbling were found guilty of contempt. In the motion, the 1st respondent sought to have the orders of September 22, 2017 apply to the seventeen (17) appellants herein. The motion was opposed by the then two defendants namely, Nation Media Group and David Herbling (now the 2nd and 3rd respondents respectively). In the impugned ruling, the judge reviewed her earlier ruling and found the seventeen (17) appellants being directors of Nation Media Group guilty of contempt and fined each one of them Kshs 200,000.00 in default to serve 3 months in prison.

3. The appellants were aggrieved by the said outcome and hence, the instant appeal. In the Memorandum of Appeal dated March 29, 2019, the appellants listed 19 grounds of appeal which we shall advert to in our determination herein.

4. The background facts to the impugned motion is that the 1st respondent herein filed a suit alleging defamation by the 2nd and 3rd respondents. During the pendency of the suit, the 1st respondent sought an injunctive relief barring the 2nd and 3rd respondents from "further publishing" the alleged defamatory words. On September 8, 2016, Njuguna, J determined the said motion and ordered as follows:

> "In the premises aforesaid, the application dated December 14, 2015 is hereby allowed in terms of prayer 3. Costs shall be in the cause."

5. The Notice of Motion of December 14, 2015 had sought the following orders:

1) Spent

2) That, pending the hearing and determination of this application inter parties, there be an order of temporary injunction, restraining the Defendants, their agents, employees, servants or any other person claiming through them from further publishing any article, words, material or remarks against, of and concerning the Plaintiff in relation to the alleged "Tanzanian Big Loan Scandal."

3) That pending the hearing and determination of this suit, there be an order of temporary injunction, restraining the Defendants, their agents, employees, servants or any other person claiming through them from further republishing any article, words, material or remarks against, of and concerning the Plaintiff in relation to the alleged "Tanzanian Big Loan Scandal."

4) The costs of this application be provided for."

6. Subsequent to the above, the 1st respondent filed a Notice of motion dated June 21, 2016 seeking for an order inter alia, that:

> " That Joe Muganda, Tom Mshindi, Stephen Gitagama, Gideon Aswani, Gabriel Chege, James Kinyua, Elizabeth Kyengo, Japhet Mucheke, Michael Walekwa, Michael Ngugi, Philip Velese, Agnes Asiimwe-konde, Anthony Craig Glencross, David Kiambi, Francis Majige Nanai, Linus Kaikai, Rose Lutta And David Herbling, the Directors of the 1st Respondent and the 2nd Respondent respectively be committed to a civil jail for a term of six months or for such period of time that this Honourable Court may deem fit for contempt of court having deliberately disobeyed orders of this court issued on December 23, 2015."

7. In a ruling of September 22, 2017, the Court rendered itself thus: "Having found the defendants guilty of contempt, I hereby fine each of them Kshs 200,000.00 for the contempt and in default to serve three months in jail. The fine to be paid a (sic) within 14 days failing which a warrant of arrest to be issued. It is so ordered.

8. It would appear that the ruling of September 22, 2017 having found the "defendants" guilty of contempt, it became necessary to file the motion of October 2, 2017 for "review and /or variation" of the ruling of September 22, 2017 to the extent that the ruling of September 22, 2017 applied to the appellants herein.

9. On July 5, 2022, the appeal came up before us for plenary hearing.

   Miss Janmohamed, learned senior counsel appeared for the appellants whilst learned counsel, Mr. Waudo appeared for the 1st respondent. In arguing the appeal, the appellants' counsel highlighted the submissions dated January 20, 2020.

10. On grounds 1 & 4, the judge was faulted for finding that the orders of September 22, 2017 were broadly worded to cover the appellants who were not parties to the suit. Further, that there was no service of the Court order of September 22, 2017 upon the appellants.

11. On grounds 2 and 3, it was contended that there was no error on the face of the record to warrant a review of the orders made on September 22, 2017.

12. On grounds 5, 6, 7, 8, 9, 10 & 11, the judge was faulted for finding that the appellants had knowledge of the order which in any event was a non-existent. It was argued that the order of February 23, 2015 was an injunctive order restraining further publication of the offending article of which the 2nd and 3rd

respondents duly complied with as there was no further publication contrary to the 1st respondent's assertion.

13. In the 1st respondent's written submissions dated October 12, 2020 in opposition to the appeal, it was contended that since a company was a juristic person, it can only act through its directors; that the court orders of December 23, 2015 restrained the "defendants, their agents," and the appellants herein being directors of the 2nd respondent are also its agents.

14. In opposition to ground 4, it was argued that "the directors represent the directing mind and will of a company and control what it does. The state of the mind of the directors is the state of mind of the company and is treated by the law as such"

15. In respect of grounds 2 and 3, the 1st respondent maintained that there was an error on the face of the record and more specifically, the way the ruling of September 22, 2017 was fashioned as it left out the appellants herein.

16. In opposition to grounds 5, 6, 7, 8, 9, 10 and 11, it was argued that courts have moved away from the necessity of personal service of an order and of primary consideration is whether there was knowledge of the existence of the order; that knowledge of the order by the appellants can be imputed by the fact that the Legal Officer of the 2nd respondent was served with the order. Further, that on October 25, 2016, the appellants' counsel in their grounds of objection in respect of the motion of June 21, 2016 stated as follows:

    (i) The Plaintiff has failed to show this Honorable Court the alleged contempt by the Defendants herein.

    (ii) That the Defendants herein are not in blatant contempt of the order of this Honorable Court, as the orders that were issued on December 23, 2016 did not include pulling down of the online publications concerning the Plaintiff /Applicant.

    (iii) That the Defendants have duly complied with the order issued on December 23, 2016 and have ceased from further publication of any article, words, material or remarks against, of concerning the Plaintiff in relation to the alleged "Tanzanian Big Loan Scandal"

    (iv) That the Defendants cannot be cited for contempt for an order that is non-existent.

    (v) The application herein has no merit.

    In these premises the Plaintiff's Application be dismissed with costs"

17. It was argued that the fact that the appellants contended that they had complied with the court order of December 23, 2015 as stated in paragraph 3 of their objection of October 25, 2016, meant that they were aware of the order. Finally, we were urged to find that that failure to pull down the offensive article was tantamount to continued publication.

18. We have considered the record, the rival submissions, the authorities cited and the law. The appeal before us is a first appeal. The position as regards a first appeal is as was stated in *Selle v Associated Motor Boat Co of Kenya & others* [1968] EA 123 wherein it was held.

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

> In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

19. Firstly, the appellants were brought into the suit, the subject of this appeal following the 1st respondent's application for review. The appellants were not defendants in the suit filed by the 1st respondent. Suffice to state that they were enjoined after the court heard and determined the application for review.

20. Secondly, a review application is hinged on order 45 of the *Civil Procedure Rules*. It provides:

> " 45(1) Any person considering himself aggrieved –
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> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) By a decree or order from which no appeal is hereby allowed,
>
> And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desire to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review... "

21. In the decision of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, this Court in defining the parameters of what constitutes an error apparent on the face of the record stated:

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omissions on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

22. The crux of this appeal is whether the non-inclusion of the appellants in the suit filed by the 1st respondent as against the 2nd and 3rd respondents was an error apparent on the face of the record? It is noteworthy to point out that in the motion of June 21, 2016 seeking orders of contempt of court, the appellants herein were named in the motion. However, in her ruling of September 22, 2017, the learned judge found the "defendants" guilty of contempt. The appellants herein were not defendants in the suit filed by the 1st respondent and as stated above, this necessitated the filing of the application of October 2, 2017 to have the orders of September 22, 2017 apply to the appellants herein. It is also important to point out that in the motion of October 2, 2017, the 1st respondent sought to have a "review and/or a variation" of the ruling of September 22, 2017. On our part, we are not aware of a situation in law when "review" can be equated to "variation". The 1st respondent appeared to have used the words interchangeably. An order for review is meant amongst other grounds to correct an

error apparent on the face of the record but it is never meant for purposes of variation of an order. Admittedly, all the 17 appellants herein were directors of the 2nd respondent but, would it matter if any one of them was on leave during the publication of the said offending article? In our view, it was imperative that the appellants be named as defendants in the suit filed by the 1st respondent; further, that they be served with summons to Enter Appearance and they be given an opportunity to defend themselves. We are not aware of any provisions in law where one is brought into a suit by way of joinder in a review application on the basis that there was an error in not naming him/her in the suit filed by a claimant.

23. In our respective view, a party cannot be brought into a suit following a review application as joinder or non-joinder of a party cannot be cured by a review application as this was not an error apparent on the face of the record. The fact of the matter is that the appellants were not parties in the suit filed by the 1st respondent and it matters not that they filed objection proceedings to the 1st respondent's application dated June 21, 2016. We wish to associate ourselves with the sentiments expressed in *Pancras T Swai v Kenya Breweries Limited* Civil Appeal No 275 of 2010 as follows:

> "If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction".

24. As regards the 1st respondent's contention that the appellants had knowledge of the order issued on December 23, 2015, it is not in dispute that the said order was served upon the 2nd respondent's legal officer. The respondent contended that there is a wealth of authorities that demonstrate that knowledge of the order as opposed to service was sufficient. Reliance was placed on the decision of *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2014] eKLR where this Court held:

> "(31). As set out in the affidavit of Service, the service of the order was not made personally on the appellants as required under Rule 18.6 of the Civil Procedure (Amendment No 2) Rules 2012. What are the consequences thereof? Rule 18.8 (1) of the Civil Procedure (Amendment No 2) Rules provides for circumstances when the court can dispense with personal service of an order as follows.
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> "1. In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules
>
> 81. 5 to 81.7 if it is satisfied that the person has had notice of it-
>
> a. By being present when the judgment or order was given or made; or
>
> b. By being notified of its terms by telephone, email or otherwise".

25. Similarly, in *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR, this Court stated:

> "As per rule 81.8, dispensation of service on the basis of notice or knowledge of the terms of an order will only apply to a court judgment or order requiring a person not to do an act, that is, a prohibitory order.

The dispensation of service under rule 81.8

(1) Is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his

agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come intro (sic) knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel. Once the applicant has proved notice, the respondent bears an evidential burden in relation to willfulness and mala fides disobedience.

26. The question as to whether the appellants had actual knowledge of the order, whether they had received information about it or whether they had reason to know about the issuance of the order cannot be said to be full proof of knowledge of the same, moreso, given the fact that the appellants herein were not parties to the suit.

27. As to whether the 2nd respondent's legal officer brought it to the attention of all the appellants, or only to those named as defendants in the 1st respondent's suit is a matter that was not conclusive. In our view, we find that whereas there have been recent attempts to water down the requirements of personal service, we think that given the gravity of the consequences, we think the position as stated in *Ochino and Another v Okombo & 4 others* [1989] eKLR holds sway. It was stated:

> " As a general rule, no order or court requiring a person to do or to abstain from doing any act may be enforced (by committing him for contempt) unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question.
>
> The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it.

28. It is in view of the above that we have come to the conclusion that the appeal herein is meritorious. It is hereby allowed in terms of prayers 1, 2 and 3 of the Memorandum of Appeal dated March 29, 2019.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR