



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CIVIL APPEAL NO E026 OF 2021

WINSTAR SECURITY GUARDS LIMITED.....APPELLANT

VERSUS

EDWIN NYANYUKI ARICHA.....1ST RESPONDENT

HESTON OBEDI DAVASI.....2ND RESPONDENT

GEOFFREY ASEKA.....3RD RESPONDENT

(Appeal from the ruling/order of Hon. A.N. Makau, SPM delivered on 26th

February 2021 in Milimani CMEL NO. 1204 of 2019)

JUDGMENT

Introduction

1. On 8th May 2020, the trial Magistrate delivered an *ex parte* judgment in favour of the Respondents.
2. The present appeal arises from a subsequent Notice of Motion dated 17th October 2020, by which the Appellant sought orders restraining the Respondents, their agents, servants and/or employees from attaching, proclaiming, collecting and possessing the property of the Appellant. By a ruling dated 26th February 2021, the Appellant's plea was disallowed. It is this ruling that forms the subject of the present appeal.

The Appeal

3. In its Memorandum of Appeal dated 9th March 2021, the Appellant raises the following grounds of appeal:
 - a) That the learned Magistrate erred in law and in fact by upholding the *ex parte* judgment delivered on 8th May 2020 and condemning the Appellant unheard;
 - b) That the learned Magistrate erred in law and in fact in giving undue regard to procedural technicalities instead of considering the substantive justice to parties in the dispute between them;
 - c) That the learned Magistrate erred in law and fact by condemning the Appellant unheard thereby failing to consider the technical hitches affecting the filing system, which affected the Appellant's filing its documents in time, which reasons were beyond the Appellant's control;
 - d) That the learned Magistrate erred in law and in fact by failing to consider the defence, witness statement and supporting documents on record filed by the Appellant;
 - e) That the learned Magistrate erred in law and in fact by declining to set aside the *ex parte* proceedings, judgment and decree and denying the Appellant the right to be heard thereby condemning the Appellant unheard;

f) That the learned Magistrate erred in law and fact by failing to consider that there was no service of summons and pleadings on the Appellant hence the judgment was irregular and ought to have been set aside *ex-debito justitiae*;

g) That the learned Magistrate exercised her discretion wrongly thereby arriving at a wrong and erroneous decision;

h) That the learned Magistrate's decision was wholly erroneous in law, contrary to judicial precedent on the matter and a miscarriage of justice.

4. Prior to the Notice of Motion of 17th October 2020, which is the subject of this appeal, the Appellant had filed another Notice of Motion dated 2nd June 2020, seeking orders to stay execution and to set aside the *ex parte* proceedings and judgment. The Motion dated 2nd June 2020 was compromised by the parties, the *ex parte* judgment was set aside and the Appellant was granted 14 days to file its Response. From the record, the Appellant sought and was granted a further 7 days to file its Response.

5. By 4th August 2020, when the matter came up for further mention, the Appellant had not filed its Response. At this mention, which the Appellant did not attend, the Respondents were allowed to proceed with execution.

6. In its grounds of appeal and written submissions, the Appellant appears to fault the trial Magistrate for failure to set aside the *ex parte* judgment. With tremendous respect, this is an erroneous and misleading presentation of the proceedings before the trial court. The *ex parte* judgment was in fact set aside by consent of the parties, upon which the Appellant was given time to file its Response. For some reason, the Appellant did not keep the set timelines and the consent order lapsed.

7. The Appellant's appeal is therefore premised on non-existent facts and there cannot be any merit in such an appeal.

8. Consequently, the appeal fails and is dismissed with costs to the Respondents in this Court and the court below.

DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022

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JUDGE

Appearance:

Mr. Litoro for the Appellant

Mr. Wetaba for the Respondents