



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT GARISSA
ELC APPEAL NO. E002 OF 2021
(CONSOLIDATED WITH ELC APPEAL NO. E003 OF 2021)

ADHAR KHALIL.....1ST APPELLANT

MUHAYID KALI.....2ND APPELLANT

VERSUS

FATUMA HUSSEIN HASSAN....RESPONDENT

(Being an appeal from the decision of Hon T. Ole Tanchu SRM dated 20TH January 2021 in Garissa ELC Case No. 13 of 2020)

JUDGEMENT

1. The 1st Appellant herein was the 2nd Defendant in the trial Court while the 2nd Appellant was the 3rd Defendant. The Respondent was the plaintiff. The trial Court on 15th October 2020 issued Injunctive Orders restraining the Defendants by themselves, their servants, agents, employees or anyone acting on their instructions from any form of trespassing, occupying, interference in any way of the plaintiff's quiet possession and exclusive rights to all the property known as GSA/2425 pending the hearing and the determination of the application dated 15/10/2020 filed by the Respondent herein.
2. The Court further directed the Officer Commanding Police Station, Garissa Police Station to effect the orders of the court.
3. Subsequently thereafter the Respondent filed application dated 25th November 2020 seeking an Order that the appellants be detained for a term not exceeding six months for disobedience and/or breach of the courts interim injunction granted on 15th October 2020.
4. On 20/1/2021 the trial Court committed the Appellants to One Month (1) imprisonment.
5. Aggrieved by the trial Court Ruling on committal the appellants filed their respective memorandum of appeal ostensibly seeking their release from civil jail and vacation of the committal Orders.
6. Together with the Memorandum of Claim the Appellants filed application dated 22nd January 2021 seeking stay Orders pending interparty hearing of the application. Interim stay Orders were issued on 26th January 2021. The appellants were released from custody on 28th January 2021
7. This court after inter-parties hearing and vide Ruling dated 28th May 2021 stayed the trial Courts Orders and directed the parties to compile the record within 90 days.
8. On 22nd November 2022 the Court directed the parties to canvass the appeal through written submissions. The appellants submitted that they were condemned unheard and urged the court to therefore vacate the Orders made.
9. The Respondent submitted that the appeal herein is spent owing to the Court's Ruling dated 28th May 2021 that released the appellants.

Analysis and Determination

10. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own

conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123**.

11. The appellants herein were committed to one (1) month Imprisonment. By the time the interim stay order was issued and their subsequent release from custody they had spent eight (8) days imprisoned.

12. I have looked at the court proceedings. the appellants were first represented by the firm of Bare and Balqesa Advocates. The firm ceased to represent the appellants. It was the first instance the appellants were unrepresented in court. They were equally present in Court. The trial court never gave them leave to provide reasons why they ought not to be committed to civil jail. The committal proceedings therefore proceeded unheard.

13. In my ruling dated 28th May 2021 I made reference to the same when I opined;

The Orders which were the subject of the committal were issued ex parte without giving a hearing to the applicants

14. Before a person can be committed to civil jail there must be strict adherence to the procedures laid down in the Civil Procedure Act and Rules, which provide the due process safeguards essential to making limitation of the right to liberty acceptable in a free and democratic society. See **Jayne Wangui Gachoka v Kenya Commercial Bank Limited [2013] eKLR**.

15. Fundamental to this, is the right to be heard. This is usually done by issuance of Notices to the contemtor to show cause why he/she ought not to be committed to civil jail. At the hearing of the show cause the court interrogates the contemtor and it is upon it being satisfied that there are valid reasons provided that the committal Order is issued. Again, committal orders are orders issued as a last resort. If there are alternative mechanisms, the same ought to be adopted first before resulting to civil jail. In this case, due regard to procedure was not adhered to. The court was quick to issue the aforesaid Orders.

16. I therefore find merit in the appeal herein. Consequently, the Orders issued by the trial Court on 20/1/2021 are hereby set aside. Each party to bear their own costs.

17. It is so Ordered.

READ, DELIVERED AND SIGNED VIRTUALLY AT GARISSA THIS 25TH FEBRUARY, 2022

.....

HON. E.C. CHERONO

ELC JUDGE

In the presence of :-

1. 1st Appellant: present

2. 2nd Appellant: present

3. Respondent/Advocate: absent

4. Ijabo: Court Assistant