



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL CASE NO. 533 OF 2011

JOHN NJOROGE GICHORA.....APPELLANT

VERSUS

GIDEON NUMA.....RESPONDENT

JUDGMENT

This appeal arises from the ruling and order of D. Mulekyo Principal Magistrate delivered on 22nd July 2011 in the Principal Magistrate's Court at Kikuyu in Civil Case no. 110 of 2009.

The appellant herein John Njoroge Gichora was the plaintiff suing Gedion Numa the Defendant Respondent.

Brief facts are that the two parties are neighbours, with the plaintiff residing and owning Plot No. Sigona/ 99 whereas the defendant owned and resided on plot No's Sigona (100 and 101). The plots are adjacent to one another.

In 2008, while the defendant was allegedly constructing a link road from his plots to the Nairobi- Nakuru Highway, he dumped soil outside the plaintiff's premises consisting of several housing units. The alleged dumping of soil at the plaintiff's premises blocked the normal flow of storm water and any other water from the plaintiff's premises and interfered with access to the said premises by tenants and quiet possession. Some tenants had to vacate which occasioned him loss and damages. He therefore sought orders of injunction and restoration of the natural flow of storm water by removing the dumped soil together with stones constructed along the said premises.

He also sought for lost rental income as a result of tenants vacating the premises for lack of access together with costs and interest.

Simultaneous, with the filing of suit on 15/4/2009 the plaintiff/appellant herein filed a Chamber Summon under Order XXXIX Rules 1 & 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking an order restraining the defendants from dumping or continuing to dump soil next to the plaintiff's premises and or constructing of any stone barriers next to the said premises pending hearing and determination of the suit.

2. A mandatory injunction to compel the Defendants/ Respondent to remove the soil dumped next to the appellants premises with stone barriers constructed to the said premises pending hearing and determination of the suit.

3. A mandatory injunction compelling the Defendant to restore the natural flow of storm water or any other water that flows therein. The appellant swore an affidavit on 15th April 2009 outlining the facts of the case as summarized above, attaching title documents and of the material subject premises showing the soil dumped complained of.

The defendant entered appearance and filed defence on 21/5/2009 denying all the plaintiff's claim and putting him to strict proof thereof and contending that it is the plaintiff who encroached on access road and erected structures on the road reserve and thereby altering the original size of the access road to the detriment of other plot owners adjacent to his plot. He also denied the existence of the access road on the survey map.

In response to the Chamber Summons, the Defendant swore and filed a replying affidavit denying the averments and contended that he only constructed a culvert to enable him access his plots from the Highway as there was an open sewer line which existed just before getting to the Highway.

In addition, that the defendant, in the process on constructing on his plot, created a road linking his plots and the main Nakuru- Nairobi Highway to facilitate the entry and exit of the construction vehicles transporting materials on site. Further, that the soil deposited was not meant to interfere with the plaintiff's premises but for linking the road and for construction of culvert to link the Highway with both plots for the vehicles transporting materials.

He urged the court to visit the scene to verify his deposition.

The application for injunction was argued interparties on 18/9/2009 and a ruling delivered on 23/11/2009 allowing the applicants prayer 2 requiring that the Respondent remove the soil next to the appellant's premises on plot Sigona/99 together with the stone barriers constructed next to the said premises pending the hearing and determination of the suit.

The Respondent being dissatisfied with the Order made on 23/11/2009 filed a notice of motion dated 10th November 2010 seeking among other orders, stay of the orders made on 23/11/2009 and discharge the said orders and order the suit to be heard on priority basis. It was contended that it was necessary to discharge the said injunction as the circumstances did not exist for performance of enforcement of the said order and that the execution of the said order would cause more harm than good, and that the access road was better for use than it was before the road was made.

He also stated that he had essentially complied with the order barring him from dumping any more soil next to plot no.99.

However, when the said application to discharge the injunction came up for hearing on 24/6/2011 the appellant raised a preliminary objection stating that the Respondent did not have or deserve audience with the court because he had failed to comply with the orders of 23/11/2009 and that as he was in contempt of court, he could only be heard on his application after purging his contempt otherwise to allow him proceed with the application would be belittling the court. Since he had not appealed against the ruling, citing the case of **Hadkinson Vs Hadkinson and Ramesh Popatlal Shah & Another T/a Lents Agencies Vs National Industrial Credit Bank Ltd (2005)eKLR**.

He contended that he had commenced contempt proceedings in the High Court against the Respondent.

The Respondent contended that the preliminary objection was not sustainable as the injunction granted had lapsed and overtaken by events. Further, that relying on the **Mukisa Biscuit** case, the preliminary objection did not lie as it was not based on a pure point of law. He also averred that there was no formal application seeking to be a bar a party to be heard, citing the cases of **Rv S Judicial Service Commission et al and Reef Building Systems Ltd Vs NCC NRB HCC 1357/ 2001 (2001) LLR**.

In her ruling dated 22nd July 2011, the Principal Magistrate dismissed the appellant's preliminary objection.

It is worth noting that before hearing that preliminary objection, the court did on 14/1/2011 make a site visit to the premises in question to ascertain for itself whether it would be possible to implement the order granted. It observed that it would be impossible to implement the injunction for reasons given and further that there had been fundamental changes on the ground since the institution of suit.

The trial magistrate expressed that she had sought the help of experts to resolve the dispute but they were unable and concluded that allowing the preliminary objection was tantamount to issuing orders in vain. She therefore allowed the Respondents application to discharge the injunction issued on 23/11/2009 and dismissed the preliminary objection. The trial magistrate also struck out the plaintiff's application filed in the High Court to cite the defendant for contempt. The said application is dated 17th March 2010 which had been annexed to the appellant's replying affidavit sworn on 22nd November 2010 in opposition to the Respondent's application dated 10th November 2010 seeking to discharge the injunction granted on 23/11/2009.

It is that ruling by the Principal Magistrate that provoked this appeal. The Memorandum of Appeal dated 16th February 2010 filed on 17/2/2010 sets out 4 grounds of appeal namely:-

1. That the learned trial magistrate erred in Law and fact when she failed to find that the Appellant was entitled to the access to his property which is adjacent to the Respondents.
2. The learned Magistrate erred in law and fact in failing to direct her mind towards the legal principles applicable in cases of the nature of the one before her and therefore arrived at a wrong decision.
3. The totality of the learned Magistrate's decision indicates that she had directed her mind to a position favourable to the Respondent and prejudicial to the appellant.

The appellant sought that the appeal be allowed and the ruling of the Principal Magistrate be reviewed, varied, set aside wholly and the matter be referred back to the subordinate court for trial before any other magistrate other than Hon. D.N. Mulekyo, any other orders and relief be issued as appropriate and costs.

The appellant obtained leave on 14/10/2011 to appeal against the ruling.

When this appeal came up for hearing, the Respondents were represented in court by Miss Muhoro holding brief for Mr. Gacheru, who left the courtroom after the court directed the matter to proceed at noon by way of oral submissions, the court was in session until 5 pm but no appearance was made by the Respondent.

At 4.30 pm, the appeal proceeded with only the appellant's advocate, Mr. Kiplagat submitting in support of the grounds of appeal. I have nonetheless examined the entire record and applied the law as set out in Section 78 of the Civil Procedure Act.

Mr. Kiplagat submitted that the Respondent had appealed against the ruling granting an injunction and that after the High Court **R N Sitati J** dismissed his application for stay of execution of the ruling pending appeal is when he came back to the lower court seeking to discharge the injunction. This is as per the Ruling contained on pages 103-113 of the record of Appeal dated 1st November, 2010.

Further, that the appellant's application in the High Court vide HCC Misc 105/2010 contained on pages 114-128 was seeking leave to cite the Respondent for contempt which application was pending. The same is dated 17th March 2010 and that it was erroneous for the Principal Magistrate to purport to strike out a matter pending before the High Court.

That the trial magistrate further proceeded to determine the application by the Respondent which application was never argued by the parties as what was before her was a preliminary objection and not the main application.

The trial magistrate was also accused of disregarding the authorities cited, the submissions made before her and therefore committing an error of law and acted in excess of jurisdiction in striking out the matter pending before the High Court.

I have carefully considered the appeal herein, the record and proceedings of the lower court, the submissions of parties in the lower court giving rise to the ruling subject matter of this appeal and the submission made by the appellant's advocate in support of this appeal. I have also considered the authorities cited in the lower court and in support of this appeal.

In my view, there are only three issues arising from the record as analysed, in accordance with section 78 of the Civil Procedure Act. This being the first appellate court, I have had to analyse, evaluate and examine the entire record and evidence in the lower court to enable me arrive at my own decision. I am also conscious of the fact that this court should sparingly interfere with the discretion exercised by the lower court in dismissing the preliminary objection raised, and in allowing the Respondent's application discharging the injunction unless I am satisfied that such discretion was exercised in error of principle.

Issue no. 1:

Whether a party who has disobeyed a court order has a right to be heard before purging the contempt.

In this case, it was on record that the trial court granted an injunction against the Respondent compelling him to remove the soil dumped at the appellant's plot (premises). The Respondent was dissatisfied with the said order of injunction and appealed to the High Court. He also sought an order of stay of execution of the said injunction which application was dismissed by Sitati J on 1st November 2010 in HCCA No. 42 'A' of 2010.

As stated above, it was upon that dismissal that the Respondent returned to the lower court to seek to discharge the injunction. Before the court heard the parties' interpartes on the said application, it visited the scene and after satisfying itself that it was impossible to enforce the order of injunction granted, it proceeded to hear the parties on a preliminary objection as raised.

The power to punish for contempt is an important and necessary power for protecting the cause of justice, the rule of law and for upholding the authority of the court and the supremacy of the law. In the Scottish case of **STEWART Robertson Vs HER MAJESTY'S ADVOCATE, 2007 HC JAC 63**, cited with approval in the court of Appeal at Nairobi, **Civil Appeal No 267 of 2004**. Nambuye, **Musinga, M'inot, JJA**.

Lord Justice Clerk states as follows on contempt of court:

“Contempt of court is constituted by conduct that denotes willful defiance of or disrespect towards the court or that willfully challenges or affronts the authority of the court or the Supremacy of the law, whether in Civil or Criminal proceedings.”

His Lordship further stated that the power of the court to punish contempt is inherent in a system of administration of justice and that power is held by every Judge.

In the Supreme court of Kenya petition Nos 6 & 7 of 2013. **THE BOG MOI HIGH SCHOOL Kabarak Vs Malcom BELL & Another**, the Supreme court described the power to punish for contempt as a power of the court ***“to safeguard itself against contemptuous or disruptive intrusion from elsewhere”*** and identified it as one of the indisputable attributes of the court's inherent power. Without that power, protection of Citizens rights and freedoms would be virtually impossible. Court of law would be reduced to futile institutions spewing forth orders in vain. **Bowen, Lord Justice in Hellmore Vs Smith, (2) (1886), L.R. 35 C.D 455** pertinently stated the rationale for punishing for contempt in the following terms:-

“The object of the discipline enforced by the court in use of contempt of court is not to vindicate the dignity of the court or the person of the Judge, but to prevent undue interference with the administration of Justice.”

The same principle was upheld in **Johnson Vs Grant 1923 SC 789 P 790** by Lord President Clyde that:-

“The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”

The court of Appeal in **Akben Abdullah Kassam Esmail Vs Equip Agencies Ltd & 4 Others (Supra)** stated, however, that

“The power to punish for contempt is a drastic power that sometimes borders on the arbitrary. As the saying goes, just like fire, the contempt power can be a good servant, but a bad master. If it is not exercised cautiously and responsibly, it may undermine the very cause of Justice and the Rule of law that it is intended to safeguard. Arbitrary resort to the contempt power imperils the liberty and property of citizens as badly as deliberate disobedience of a court order.”

The court of appeal further cited with approval the speech of **Lord Jessel, M.R in RE-CLEMENTS, CLEMENTS Vs ERLANGER (1877) 46. L.J.C 383** as best exemplifying the misgivings about invocation of the contempt power to the effect that:-

“It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject”.

In this case, although the application before the trial court was not for contempt proceedings, as the said contempt proceedings were pending in the High Court, and based on the above principles, and even assuming that there was no such application pending in the High Court, the court of Appeal has held severally that order 39 of the Civil Procedure Rules is a self sufficient provision and the appellant could still have filed an application before the court that issued the injunction, to punish the Respondent for contempt of court, which procedure did not require leave to be obtained before the application is filed.

In **Joseph Schilling Biyo (K) Ltd Vs Stardust Investment Ltd CA No. 134/97** the court of Appeal stated:-

“The procedure where there is disobedience of any terms of an injunction order under order XXXIX rules 1 and 2 is by Chamber Summons as set out under rule 9. That rule does not require that leave of court be first obtained before taking out such summons”.

The same principle was applied in **CA 233/2007 in Christine Wangai Gachege Vs Elizabeth Wanjiru Evans and 11 Others** that in an application for breach of an order of the court, no prior leave is required.

It is therefore clear that the trial court had the power to hear and determine whether the Respondent had breached or disobeyed the injunction granted against him and similarly she had the power, therefore, to decide whether the Respondent could be heard or not, in the event that he was found to have disobeyed the said court order.

In my view, the Respondent had a right to be heard, whether or not he had complied with the order

of injunction. Such right was unlimited as he had brought himself before the court by way of an application seeking not only to have the injunction discharged, but to explain himself to the court why it was impossible to comply with the orders of the court. They would be put to task to show cause why the court should not hold them in contempt.

And albeit I am aware that the application before the trial court was not for Notice to show cause why the Respondent could not be committed for contempt, it is clear that the preliminary objection as raised by the appellant was, in clear terms, a show cause why the Respondent could not be heard before purging their contempt.

Regrettably, the appellant had not cited the Respondent for contempt. He had filed an application in the High Court to cite the Respondent for contempt, which application was pending hearing.

Having chosen not to use the provisions of Order 39 that require no leave to punish for contempt, he came in a little too late. I say late because the Respondent had already moved the court to the site, and the court had already formed an opinion that indeed, it was impossible for the Respondent to comply with the Order as granted earlier and that there was nothing to enforce. In **Hadkinson Vs Hadkinson (Supra) Lord Denning** stated that it was unusual for a court to refuse to hear a party to a suit and that such case should only be taken when justified by grave considerations of public policy. Further, that the fact that a party to a suit has disobeyed an order of the court is not itself a bar to his being heard; and that a court could exercise its discretion to refuse to hear him if the disobedience continued to impede the cause of justice.

In other words, albeit some authorities as cited by the appellant show that a party who is in contempt of court ought not to be allowed to be heard unless and until it has purged the contempt, in **Rose Detho Vs Rahlal Automobiles & 6 Others** NRB Court of Appeal CA 304/2006, the court of Appeal per Githinji JA, speaking for the majority stated as follows on the right of a contemnor to be heard:-

“---the general rule that a party in contempt could not be heard or take part in the proceedings in the same case until he has purged his contempt applies to proceedings voluntarily instituted by himself in which he has made some claim and not a case where all he seeks it to be heard in respect of some matter of defence or where he has appealed against an order which he alleges to be illegal having been made without jurisdiction....”

The Court of Appeal further stated that:-

“...the court’s power when deciding whether to hear a contemnor or not is discretionary, the general rule has been not to hear a contemnor until he purges the contemptMuch as I have the discretion to hear or not to hear the applicant, that discretion, like any other judicial discretion, must be exercised upon reasons and not on the whims of the court or on sympathy or sentimental aspects such as the court must show that it has teeth when faced with a case such as before us. Ofcourse, courts have teeth but must only bite in appropriate circumstances. Courts act on reason and not on emotions.”

In Wangondu Vs Nairobi City Commission, CA 9J/88 the court of Appeal held that a person cannot be denied an opportunity to be heard in contempt proceedings unless and until it was established that he had indeed committed the contempt of court. The court stated:-

“even assuming for the purposes of argument only that there was a competent application [for committal for contempt] before the judge, he was in error in our view perfectly justified (sic) in holding that the respondent could not be driven from the seat of judgment on the bare allegations of the appellant unless and until it had been established by credible evidence that the respondent had indeed committed a contempt

of court”.

Like in the above Wangondu case, there was no determination that the Respondent was in breach of the injunction issued, when his application came up for hearing. The contempt proceedings were still pending in the High Court. What the appellant court have done, in the circumstances of this case, was to apply to stay the proceedings in the Magistrate’s court until the contempt proceedings he had commenced had been disposed of. In the absence of a finding of contempt, the appellant could not be heard to say from the bar through his advocate, that the Respondent was in breach of the court order and could not therefore, be heard in the proceedings, and more so, on his application to discharge the injunction. I say so, with conviction, noting that breaches of court orders have to be precisely defined and proved to a standard consistent with the gravity of the alleged contempt, which proof is higher than proof on a balance of probabilities, but not as high as proof beyond Reasonable doubt. To refuse to hear the Respondent on his application would have been tantamount to denying him a fair trial and condemning him before according him such fair hearing contrary to Article 50 (1) of the Constitution of Kenya, 2010.

I hasten to add that where the liberty of the subject is involved, the courts have asserted that the procedural rules applicable (in this case, rules regarding finding one guilty of contempt) must be strictly complied with (see *Chil tern District Council Vs Keane* (1985) 2 All ER 118.

The above issue which I determine that the person in contempt has a right to be heard therefore settles the appellants grounds Nos 1 and 2 of the Memorandum of Appeal, which grounds are dismissed, and although the trial magistrate did not consider the authorities cited, and or find that the Respondent could not be heard for the reason that he had not purged his contempt, I have in my analysis considered the decision in **Hadkinson Vs Hadkinson** and found it in favour of the Respondent. It cited with approval the case **CA 134/97. Joseph Schilling and 2 Others Vs Stardust Investment & 6 Others**.

The **Leah Agao Onguto Vs COTU HCC 1846/2001** is persuasive, compared to the authorities I have relied on herein heavily which emanate from the court of Appeal. the same applies to the HCC 515/2003 **Ramesh Papatlal Shah & Others Vs NIC Bank Ltd** and **R.Vs Judicial Commission** of inquiry into the Goldenberg Affair et al (2003) KLR.

Furthermore, none of the above cited decisions are current and neither have their holdings been upheld after they were made.

For avoidance of doubt, I hold that a person who is in contempt of or alleged to be in contempt is entitled to be heard in the proceedings as the right to be heard is a Constitutional right which should not be limited and as it is only by hearing that person that the court can determine whether he/she deserves the prayers or orders being sought in his/her application to discharge the injunction.

2. ISSUE NO 2: WHETHER THE Trial magistrate erred in allowing the Respondent’s Notice of Motion dated 10th November 2010 without hearing the parties substantively on the same.

The record of appeal at page 188- clearly show that on 10/6/2011, the court gave directions to the effect that the preliminary objection would be heard on 24/6/2011. And on 24/6/2011 when both advocates for the parties appeared, the court did indeed, hear the preliminary objection raised by Mr. Kiplagat advocate for the appellant herein, with Mr. Gacheru advocate for the Respondent herein replying to the preliminary objection as raised. The court then reserved the ruling for 15/7/2011 at 12.00 noon. In the submissions by both advocates and as can be discerned from the authorities cited, including **Mukisa Biscuit Manufacturing Ltd Vs West End Distribution Ltd (Supra)**, the parties advocates concentrated on whether the preliminary objection was sustainable, with the appellant’s advocate clearly demonstrating that a party in contempt could not be heard in his application before the court, unless he purged his alleged contempt.

No arguments were advanced to dispose of the main substantive application seeking to discharge the injunction granted, on its merits. The appellant, besides raising the preliminary objection, dated 22nd November 2010 had sworn a detailed replying affidavit consisting of 17 paragraphs, on 22nd November 2010, opposing the Respondent's application dated 10th November 2010, on merit and attaching several annexures contending, among others, that the Respondent had filed an appeal which was pending and the ruling in the Appeal HCCA 42A/2010 dismissing his application for stay of the enforcement of the injunction granted by the lower court.

He also contended that the application was subjudice as the appellant had filed an application before the superior court vide HC NRB MISC. APPL. NO 105 /2010 seeking to cite the Respondent for contempt of court following leave granted on 16th March 2010 by **Hon Rawal J** (as she then was).

Certainly, the trial magistrate by proceeding to determine the Respondent's application dated 10th November 2010 on merits acted in error as she was not seized of that application. She could only have determined the merits of the preliminary objection and if she found in favour of the Respondent, then she could direct that the application by the Respondent be heard on merits. On the other hand, if she had found the preliminary objection well founded, such finding would no doubt determine the Respondent's application and there would be nothing to be heard.

In my view, the learned Magistrate did not have the jurisdiction to determine the application by the Respondent on merit as she was not seized of it and I accordingly set aside the order allowing that application.

I will revert later to determine a supplementary question whether in setting aside that order, the application is reinstated as if it was not heard or at all after determining the third and last issue below.

3. ISSUE NO. 3: WHETHER THE SUBORDINATE COURT HAD THE Jurisdiction or power to dismiss an application dated 17/3/2010 pending before the High Court in HCC MISC. Appl 105/2010 seeking to cite the Respondent for contempt of court.

The learned magistrate stated as follows in her ruling discussing the preliminary objection.

“The net effect of this ruling is that the plaintiff's application to cite the defendant for contempt dated 17th March, 2010 is similarly struck out with the same blow...”

The only application dated 17th March 2010 was an application annexed to the appellant's Replying affidavit sworn on 22/11/2010 to show that the appellant had obtained leave of the High Court to cite the Respondent for contempt of court and had filed the application by way of Notice of Motion vide HC Misc. Application 105/2010 citing the Respondent for contempt which application was pending hearing and determination. The appellant had deposed in paragraph 11 of his replying affidavit sworn on 22/11/2010 that “THAT I am further advised by my advocates on record and which advice I really believe to be true, that the questions as to non-compliance of the order or any explanation in terms of its impropriety are subjudice in view of the appeal lodged against these orders and the contempt application filed before the Superior court. (Attached hereto and marked “JNG 3” is a copy of the application for contempt).

Therefore, did the Magistrate have any jurisdiction to strike out a matter pending in the High Court?

Assumption of Jurisdiction by courts in Kenya is a subject regulated by the Constitution which is the Supreme Law of the land and by statute, primarily and secondarily, by the principles laid out in judicial precedent. The classic decision in this regard is the court of Appeal decision in Owners of Motor Vessel 'Lillian S' Vs Caltex Oil (K) Ltd (1989) KLR 1, with the following holding by

Nyarangi, JA as he then was:- ***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step”.***

The ‘Lillian S’ case establishes that the jurisdiction of courts and tribunals flow from the law, and the recipient court is to apply the same with any limitation embodied therein. Such a court may not arrogate itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. The jurisdiction of the High Court is donated or conferred by the Constitution under Article 165 (3) (6) (7) of the Constitution of Kenya 2010 which provides

“165 (3) Subject to clause (5), the High Court shall have

(a) Unlimited original jurisdiction in Criminal and Civil matters;

(e) Any other jurisdiction, original or appellate conferred on it by legislation.

(b) The High Court has Supervisory jurisdiction over the Subordinate courts and over any person, body, or authority exercising a judicial or quasi-judicial function, but not over a Superior court.

(7) For purposes of clause (6) the High Court may call for the record of any proceedings before any Subordinate court, persons, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

Article 162 of the Constitution also establishes a system of courts consisting of Superior Courts, courts contemplated in clause (2) and Subordinate Courts as established in Article 169.

The High Court is a superior court established under Article 165 of the Constitution. On the other hand, a Magistrates court is Subordinate court established under Article 169 of the Constitution and the jurisdiction is conferred by an Act of Parliament in this case, the Judicature Act and Magistrate’s Court Act. Under Section 3 (1) of the Judicature Act, the jurisdiction of the High Court, the court of Appeal and all Magistrates courts shall be exercised in conformity with the Constitution. From the above Constitutional provisions and enactments and authorities cited it is clear that the High Court is a Superior court which has supervisory jurisdiction over Subordinate (Magistrate’s) courts.

Furthermore, Section 5 of the Judicature Act confers jurisdiction on the High Court to punish for contempt.

With the above in mind, what effect does the trial Magistrate’s order striking out the appellant’s application dated 17/3/2014 pending in the High Court have? In my view it is a nullity and an absurdity of all sorts. By so ordering, the Magistrate was doing nothing but arrogating herself the power to supervise the High Court and declaring what had been filed before the High Court incompetent. This act offends the clear provisions of the law and more so, the Constitution of Kenya, the Supreme Law of the land. Under Article 2, the Constitution binds all persons and all state organs and nobody may claim to exercise state authority except as authorized under the Constitution, whose validity or legality is not subject to challenge by or before any court or other state organ.

Furthermore, any law which is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid.

Article 3 obliges every person to respect, uphold and defend the Constitution.

By striking out the proceedings pending in the High Court which is Constitutionally mandated to supervise Subordinate courts, the trial magistrate was reversing the roles of the courts as established and mandated by Article 165 (6) and (7) of the Constitution which act, in exercise of the authority conferred on the High Court under Articles (3) and 165 (3) of the Constitution I hereby declare invalid and vacate the order of the Magistrate striking out the HCC Misc. 105/2010 application dated 17/3/2010. My above holding therefore settles the appellant's grounds Nos 4,5 and 6 of the Memorandum of Appeal.

I now revert as promised, to Issue No. 2. Having found that the trial Magistrate erred in determining the application dated 10th November 2010 by her ruling of 22/7/2011 as she was not seized of the same, for reasons already provided, I now proceed to determine an ancillary question whether this court can order that the said application be heard on merits.

Before I do so, I have no doubt in my mind that the preliminary objection had no merit. The questions raised, that the Respondent could not be heard on his application as he had not purged his contempt have been answered in Issue No. 1 herein

The appellant in his prayer No (d) asked this court to make such further orders as it may deem fit and just in the interest of justice.

Under Article 165 (7) of the Constitution, this court in the exercise of its Supervisory jurisdiction over the Subordinate courts may call for the record of any proceedings before any Subordinate court...and may make any order or give any direction it considers appropriate the fair administration of justice.

In this case, the trial magistrate was clearly in error when she determined the Respondent's application dated 10/11/2010 which was seriously opposed, on merit without hearing from both parties. And in allowing the said application she held thus:-

“Before hearing the application the court ordered a visit of the scene and ascertained for itself that it would not be possible to implement the order for the reason given and further thatthere have been fundamental changes on the ground since the institution of this suit, with the involvement of the parties, the court sought to find an alternative solution which would have seen the involvement of experts with a hope of finding a lasting solution to the problem but this too came to a naught prompting the parties to decide to press forth with their litigation. Having said so legal arguments not withstanding; would it be prudent for this court to uphold the plaintiff preliminary objection that until the defendant purges his contempt by implementing the orders of this court of 23rd November 2009 he should not be heard on his application to discharge the same on the grounds of futility? I think not, it is a legal maxim that courts will not issue orders in vain and I humbly submit that to allow the preliminary objection would be tantamount to just that and proceed to reject the said preliminary objection....and that the defendant's application dated 10th November 2010 to have my earlier orders issued on 23rd November 2009 is allowed paving way for the full hearing of this suit. Costs in the cause. As the parties have appeared before me in their numerous applications, to avoid any prejudice I direct the hearing to take place before another court competent to hear the matter”.

What I gather from the last part of the ruling is that the learned magistrate was frustrated that parties had failed to reach a compromise to resolve the dispute amicably, even after involving experts.

Assuming that was the case, it is unfortunate that the trial magistrate allowed herself after visiting the disputed site to descend into the arena of the disputants and as a result, she was clouded by the

dust therein hence, she was unable to reach a decision based on the facts and the law. She was overwhelmed after seeing the scene and notwithstanding the law or legal arguments, she could not decide the case based on the facts she had discovered on the ground.

That should not have been the case, in my view, the facts on the ground should have formed the basis upon which to decide the dispute with the application of the law. Even assuming that indeed she had found that it would be impossible to implement the injunction as earlier granted, there was no material before her to demonstrate that upon visiting the said site, she made an earlier finding that could have informed her decision.

The record of appeal at page 184 shows that on 26/11/2010 when the Respondent's application came up, Mr. Gacheche requested the court to visit the scene before hearing the application and Mr. Kiplagat advocate responded that ***"my instructions are that the Plaintiff/applicant not having complied with the orders is in contempt of court"***.

The court then recorded ***"We can spend the whole day arguing that the soil is in place or it is not, but the argument will only be put to rest by a visit to the scene, - scene visit on 14/1/2011 at 2.30 pm"***.

On 14/1/2011, the record shows the court visiting the scene at 2.50 pm and making the following order.

"after visiting the scene, I am of the view that we would require the technical expertise of the town engineer on the(Sic) (enforceability) of the order sought to be enforced i.e the impact of removing the soil and gravel complained of. For this reason, summons are issued to the town engineer to attend court so that the terms of reference can be spelt out. Mention on 25/1/2011 at 2.30 pm"

On 1/2/2011 is when the town engineer for Kikuyu Mr. Kenneth Kemumbo appeared, and the advocates for the parties laid down/ recorded the agreed 7 terms of reference for the expert's work. The said advocates disagreed over some issues including the involvement of parties not before the court and whether or not the soil was still there.

The court then recorded as follows:-

"We are going around in circles the genesis of this matter is very clear. The defendant/ applicant came to court seeking review orders the grounds being that the plaintiff/ Respondent order was no longer enforceable, we visited the site, it is evident that the original landscape has changed hence the view of the court that we seek an expert opinion on remedial measures which could be undertaken to facilitate the free flow of storm drain and prevent a back flow of storm drain and prevent a back flow into Sigona/ 99. These could take any form, removal or addition of soil, retention, removal or expansion of the culvert amongst a host of many others and these are captured in No. 3 of the agreed upon referees (sic) and it is these agreed upon referees (sic) and it is these agreed upon referees (sic) plus the plaintiff/ Respondent's order of 23/11/2009 that will form the basis of the town engineers report. The reasonable costs of the engineer will be shared by the parties. The engineer will visit the site on a date to be agreed upon by the parties and in the presence of the parties. Mention on 23/3/2011 at 2.30 pm for further orders".

It is worth noting that on 8/4/2011 when the parties appeared before the trial magistrate, it was recorded that parties were agreeable to the implementation of the report, the only pending issue being who should bear the costs.

They also sought to get the opinion of a civil Engineer within the next fortnight and make submissions on costs.

However, there is no evidence that the reports of the town Engineer or the Civil Engineer were even filed in court. On 29/4/2011 it was reported that the parties were yet to obtain the Civil Engineer's report as he was out of the country and they asked for a further mention date on 20/5/2011 at noon.

On 10/6/2011, the Defendant's advocate reported that the surveyor (not Civil Engineer) had done his report and it disputes the report of the town Engineer. He proposed that a date be taken to set aside the orders and the court recorded:-

“Court- Hearing of preliminary objection on 24/6/2011”.

I have provided the above history of events as they unfolded in the court below to demonstrate that from the record, the court had not determined whether or not the injunction given could be implemented owing to various conflicting situations and the court itself after visiting the scene was unable to make that finding conclusively as alleged. The matter therefore required a hearing to determine the issues. But as I have stated above, the trial magistrate appeared fatigued by lack of consensus. Yet she had the opportunity to hear the parties and make her determination either way. The defendant had merely made an allegation that the orders sought could not be implemented and gave reasons which the appellant had countered by way of a replying affidavit.

Consequently, there was absolutely no basis for the trial magistrate to make a conclusive determination on the application, that after visiting the scene she had made a determination that the injunction was incapable of implementation which determination, in my view was a biased one. She did not accord the plaintiff appellant an opportunity to be heard on that critical issue before making such a conclusive order at an interlocutory stage which in essence determined the suit.

This conclusion by the trial magistrate at an interlocutory stage contravened the rules of natural justice as established. It also denied the appellant the right to fair hearing and access to justice as espoused in Articles 50 (1) and 48 of the Constitution respectively which rights cannot be limited. Article 50 (1) is clear that (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

In addition, to the right to a fair hearing not being limited under Article 25 of the Constitution, this right and the right of access to justice are fundamental human rights guaranteed under the Constitution as well as National values and principles of governance which bind all persons whenever any of them applies or interpretes the Constitution or enacts, applies or interprets any law.

Having said so much of the record and the ruling, it is my view therefore, that the trial magistrate having erred in law in determining the Respondent's application without hearing the appellant on the same, and having found that indeed there was a pending application for contempt in the High Court, the trial magistrate should have either heard the parties on the application before her after disposing of the preliminary objection raised or stayed the said application as it was preceded by the contempt proceedings pending in the High Court. Moreover, there was a pending appeal upon which the Respondent had challenged the grant of the said injunction and the High Court **R.N. Sitati J** had dismissed the Respondent's application for stay pending appeal.

It was expected that the Respondent should have either pursued his appeal or withdrawn it first before coming back to the trial court seeking to discharge the orders. Failure to do so was fatal to his application as the court which had granted the injunction, which order was appealed against, became functus officio. The Magistrate could not purport to discharge her orders which had been appealed against as that was tantamount to sitting on her own appeal, and judgment by allowing the Respondent have a second bite at the cherry through the back door, which is an unacceptable practice.

Therefore, having called those proceedings into this court, I proceed to strike out the Respondent's application to discharge the injunction.

This court commits itself to order and efficiency in the administration of justice and therefore requires that an appeal process commenced must be exhausted using the laid down appellate procedures.

To allow the Respondent look back like lots wife is setting a dangerous precedent that would lead to two jurisdiction come into conflict and circles that abuse the process of the court.

In so striking out that application, I am conscious of the principles of judicial authority espoused in Article 159 of the Constitution that justice shall not be delayed and the overriding objectives of the law in section 1A and 1B of the Civil Procedure Act.

For me to order that the said application be heard interpartes when the trial magistrate already made a finding on merit which finding I have found to be erroneous and in gross violation of the established law, would be to sanction an illegality and delay dispensation of justice.

On the whole, consequently, I allow this appeal to the extent stated above and direct that the proceedings before the lower court in Kikuyu PM CC 110/2009 shall be stayed until the contempt proceedings pending in HCC 105/2010 are heard and determined, upon which the main suit may be set down for hearing Interpartes.

I award costs of this appeal and of the application in the lower court dated 10/11/2010 to the appellant.

Dated, Signed and Delivered at Nairobi this 17th Day of March, 2015.

R.E.ABURILI

JUDGE

17/3/2015

17/3/2015

Coram: Aburili J

CC: Kavata

Mr. Kiplagat for the appellant

Miss Njeri holding brief for Gacheru for Respondent.

Court- Judgment read and pronounced in open court at 2.35 pm as scheduled.

R.E. ABURILI

JUDGE

17/3/2015