



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(CORAM: WAWERU, NYAMWEYA & KIMONDO, JJ)

CIVIL DIVISION
CIVIL APPEAL NO 27 OF 2012

BETWEEN

PETER NG'ANG'A MUIRURI.....APPELLANT

AND

- 1. F.M. GIKANGA (T/A EXPEDITIOUS GENERAL MERCHANTS)**
- 2. CHIERA WAITHAKA.....RESPONDENTS**

AND

COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 235 OF 2009

BETWEEN

CHIERA WAITHAKA.....PLAINTIFF

AND

PETER NGANGA MUIRURI.....DEFENDANT

R U L I N G

1. There are three applications before us. The first is **notice of motion dated 12th July, 2012** by the Appellant. It seeks to commit **Chiera Waithaka**, the 2nd Respondent, and his lawyer, **Kamau Karori**, to civil jail for contempt of orders of the Court issued on 27th February, 2012. Leave to bring the proceedings was granted on 11th July, 2012.

2. The second application is **also a notice of motion dated 12th July, 2012**. It is brought by Chiera Waithaka in High Court Commercial Case 235 of 2009. He seeks an order to transfer the proceedings in Civil Appeal 27 of 2012 to the Commercial Division of the High Court at Nairobi; and also an order to set aside the order of 11th July, 2012 for leave to institute the contempt proceedings. He also seeks a number of declarations, including that his or his counsel's constitutional right to a fair administrative action has

been violated; and that the proceedings of 11th July, 2012 were illegal and void. Chiera Waithaka also prays for a permanent injunction to restrain Peter Ng'ang'a Muiruri from instituting any other suit over the property known as LR Number 7752/225, situated in Loresho, Nairobi.

3. The third application is the **notice of motion is dated 16th July, 2012**. It is made by Chiera Waithaka's lawyer, Kamau Karori. It is a mirror image of the second motion, save that it is taken out in the appeal. It seeks conservatory orders to stay the contempt proceedings; to set aside the order of Court (Ang'awa J) made on 11th July, 2012; and constitutional declarations and reliefs as in the earlier motion. As a result, Peter Ng'ang'a Muiruri has attacked the latter motion as an abuse of court process.

4. The history of the ligation is material. The Appellant, Peter Ng'ang'a Muiruri, was the registered proprietor of LR. Number 7752/225. He borrowed monies from **Housing Finance Company of Kenya Limited** on the security of the property. He defaulted. The bank exercised its statutory right of sale. The Respondent, Chiera Waithaka, bought the property for KShs 18,000,000/00. It was registered in his name on 20th March, 2008 and charged to **Barclays Bank of Kenya Limited**. Barclays is not a party to these proceedings.

5. The Appellant was aggrieved by the sale of the suit property. He first challenged the sale in **HCCC 287 of 2008**. The suit was struck down on 13th October, 2008 by Khaminwa J. The Appellant lodged a second suit in **HCCC 1928 of 2000**. It was also struck out.

6. The Plaintiff (the 2nd Respondent) then filed **HCCC 235 of 2009** praying for vacant possession of the suit property. A ruling was made on 16th February, 2011 (Khaminwa, J) in which the learned Judge found that the Appellant's proprietary rights were extinguished. Despite that finding, the learned Judge dismissed the Plaintiff's motion. The Plaintiff lodged an application dated 27th May 2011 to review the latter order. The application was heard by Mutava, J. On 13th December, 2011 the learned judge held as follows-

“The application by the applicant dated 6th April, 2009 sought orders for grant of vacant possession. The court having made the above unequivocal findings in favour of the plaintiff, and the court having made no mention of the defendant in the whole ruling (let alone any orders as would be construed to be in the defendant's advantage), I am left with no doubt in my mind that the court erred in making the order that the plaintiff's application be dismissed. The error, in my intuition, was inadvertent, as the court may have mistaken the party who had taken out the notice of motion. With due respect to that Court, this error must now be rectified. Consequently, and in exercise of the powers bestowed upon this Court under Order 45 Rule 2, I hereby grant the application for review order as follows:-

- i. **That the orders of the court issued on 16th February, 2011 be rectified to read that “the plaintiff is a bona fide purchaser and I hereby allow this application with costs”.**
- ii. **That the order of the court given on 16th February, 2011 is hereby set aside.**
- iii. **That, for the avoidance of doubt, the plaintiff's notice of motion dated 4th March, 2011 and filed on 27th May, 2011, is hereby allowed with costs.”**

7. In the meantime, the Plaintiff appointed the 1st Respondent in the appeal, F M Gikanga, an auctioneer (and now deceased) to evict the Appellant from the suit premises. The auctioneer presented before the Deputy Registrar an application dated 25th January, 2012. It was premised upon section 3A of the Civil Procedure Act and sought one key relief: that the Officer Commanding Spring Valley Police Station do supervise the eviction of the Appellant *“for purposes of maintaining law and order.”* The application was placed before L.M. Njora, DR who ordered, *ex parte*, that *“the Officer Commanding Spring Valley Police Station do accord the auctioneer all the necessary assistance to carry out his duties.”*

8. That is the order that precipitated the appeal. The key grounds in the appeal are that the Deputy Registrar lacked jurisdiction; that she had no power to waive service of the application; that the motion could not be founded on section 3A of the Civil Procedure Act; and, that the auctioneer had no valid license. Contemporaneously with the appeal, the Appellant took out a chamber summons to stay execution of the orders of the Deputy Registrar. The matter came up before Ang'awa, J who found the appeal was arguable. The learned judge granted a temporary stay of execution pending hearing and determination of the appeal. It is that order that the 2nd Respondent and his lawyer are alleged to have breached by evicting the Appellant.

9. The Respondent and his advocate argue that they are not liable for contempt and that leave to cite them for contempt should never have been granted. First, they say the auctioneer died in February, 2012 before he could execute the order. The appeal against the auctioneer was withdrawn by a notice of the Appellant dated 9th July, 2012.

10. The 2nd Respondent states that he filed a notice of motion dated 9th March, 2012 in HCCC 235 of 2009. The application sought orders that the Provincial Police Officer, Nairobi do enforce the order of the High Court (Mutava, J) issued on 13th December, 2011. On 22nd May, 2012, the Court (Mutava, J) allowed the Plaintiff's motion and at the same time dismissed the Defendant's (Appellant's) application for stay of the Court's orders of 13th December, 2011. On 13th December, 2011, Mutava J had issued mandatory orders compelling the Defendant (Appellant) to vacate the suit premises and further restraining him from interfering with the Plaintiff's quiet possession of the suit premises. Acting on this order, the Plaintiff evicted the Defendant from the suit premises on 29th June 2012. In a synopsis, the Respondents argue that they cannot be liable for contempt by executing a lawful order of the Court.

11. Those matters are buttressed by the replying affidavit sworn on 29th May, 2014 in which it is averred that the Appellant refused to vacate the suit premises despite the mandatory order of court of 13th December 2011. It is stated that to that extent, the Appellant was himself guilty of contempt. That is why the 2nd Respondent moved the court for police assistance to enforce the order for mandatory injunction. The deponent states that the orders issued by Mutava, J on 13th December 2011 and 22nd May 2012 respectively have never been set aside. He says the eviction proceeded on the basis of the latter order. The deponent averred that the order issued by Ang'awa, J on 27th February 2012 could not stop the eviction. In his view, the terms of that order were live issues before Mutava, J who clarified that the order by Ang'awa, J was limited to the appeal against the order of the Deputy Registrar issued on 31st January 2012.

12. In response to the motion for contempt, Kamau Karori has filed a replying affidavit sworn on 30th May 2014. The affidavit was filed and served late and only upon directions and leave of the Court on 13th May 2014. The deponent avers that he has been wrongly enjoined into the proceedings. He deposed that he has not done anything in the appeal or in HCCC 235 of 2009 in his personal capacity. He states that his role has been limited to that of counsel for Chiera Waithaka. He acknowledged writing a letter to the auctioneer to carry out the orders issued by Mutava, J on 13th December 2011 and 22nd May 2012. In his view, authoring the letter does not amount to contempt of court.

13. On 13th May, 2014, we directed that all the rival motions be heard together. All the parties have filed detailed written submissions and lists of authorities. The Appellant's submissions are dated 21st May, 2014 as well as a list of authorities filed on 7th May, 2014. There is also an earlier list of authorities by the Appellant filed on 13th February, 2013 in support of the motion for committal. The Plaintiff filed submissions with an annexed list of authorities on 3rd March, 2013 and a supplementary list of authorities on 29th May, 2014. On 5th June, 2014, we heard all the learned counsels briefly on those submissions. We are grateful to all the learned counsels. We have reviewed majority of those authorities in the course of our decision. We have carefully considered the three applications, the grounds of opposition dated 26th October, 2012 and the affidavits filed by the respective parties. We are of the following considered opinion.

14. In a nutshell, the Respondents' case is that the eviction on 29th June, 2012 proceeded on the basis of the order of Mutava, J; that since the deceased auctioneer never executed the impugned order of the Deputy Registrar, the appeal has no merit. Consequently, the Respondents assert that they cannot be cited for contempt of court. They argue that there were two conflicting orders of two judges of concurrent jurisdiction; and that by following one, they cannot be said to be in contempt. The Appellant's answer is that a party cannot conveniently choose the orders to follow. To the Appellant, the orders of the Deputy Registrar were a logical extension of the reliefs sought in the High Court suit.

15. The main appeal in Civil Appeal 27 of 2012 is pending for determination by the High Court. We cannot comment on its merits to avoid prejudicing the trial court. But it is not lost on us that the appeal relates to the decision of the Deputy Registrar of 31st January, 2012. That decision allowed the police to assist F. M. Gikang'a, the deceased auctioneer, to evict the Appellant. The auctioneer is dead. The order was never executed. The appeal against him has been withdrawn. The primary ground in the appeal is whether the learned Deputy Registrar was seized of jurisdiction to grant the order or at any rate to grant it *ex parte*. As the Appellant insists on proceeding with the appeal, the less we say about it, the better.

16. What is material is that on 27th February, 2012 the High Court (Ang'awa, J) granted a stay of execution pending determination of the appeal. Was the eviction of the Appellant from the suit premises on 29th June 2012 in breach of the order? Can the Respondents take refuge in the orders of Mutava, J of 22nd May, 2012? That is the elephant in the room! To answer those questions, we must examine the conduct of the parties in light of the various orders of Court of 13th December 2011, 31st January 2012, 11th February 2012, 27th February 2012 and 22nd May 2012.

17. It is common ground that the Appellant was evicted from the suit premises on 29th June 2012. Mr. Kamau Karori readily admits instructing the auctioneer to carry out the eviction. He says he was acting purely as a legal advisor to the 2nd Respondent. The 2nd Respondent admits to knowledge of the order of Ang'awa, J of 27th February 2012 but asserts that he carried out the eviction on the basis of the orders of Mutava, J of 22nd May 2012. It is important to note that although Mutava, J dismissed the Appellant's motion for stay of execution, he nevertheless granted the Appellant leave to appeal and issued a temporary stay of execution for 7 days. Mr. Wamalwa, learned counsel for the Appellant, conceded that the intended appeal to the ***Court of Appeal*** is pending; and that no further stay has been granted.

18. Mr. Wamalwa argued that due to the intervening High Court Christmas vacation or the provisions of Order 50, time stopped to run from 20th December of that year until the 13th of January in the following year. He thus submitted that the application by the 2nd Respondent dated 23rd December, 2011 seeking mandatory orders to evict the Appellant was irregular for being filed during the stay and without leave. We disagree. If a temporary stay was granted for seven days, the computation of time was not affected by the court vacation or Order 50, rule 4. That rule provides as follows -

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December, in any year and the thirteenth day of January in the year next following,, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleadings or the doing of any other act.

Provided that this rule shall not apply to any application in respect of a temporary injunction.”

19. The rule freezes time for amending, delivering or filing of pleadings. It does not apply to temporary injunctions for example. It focuses more on the party served and the time within which to respond. We are not persuaded that the stay granted on 13th December, 2011 was in force at the time the application for eviction dated 23rd December, 2011 was presented. In any event, that application was not determined *inter parties* until 22nd May, 2012. In the meantime the Plaintiff had instructed F. M. Gikanga to seek police assistance to evict the Appellant. As stated, the learned Deputy Registrar had granted an order for

police assistance on 31st January 2012 which precipitated the appeal. That order was stayed by Ang'awa, J.

20. To our mind, what was being stayed was the order of the Deputy Registrar of 31st January 2012. Assuming that the appeal here as framed by the Appellant succeeds, the order that would be set aside or reversed is that of the Deputy Registrar. We earlier on set out the impugned order in full. It was simply an order directed to the police to assist the auctioneer and to keep the peace. True, it was an order in furtherance of execution of the Judge's order. Learned counsel for the Appellant submitted that it was ancillary to, or flowed from decisions in HCCC 235 of 2009. But it is plain to us that Ang'awa, J did not stay execution of the order of Mutava, J in the suit made on 13th December, 2011.

21. **Section 5 of the Judicature Act** grants this Court jurisdiction to punish for contempt. The procedure is set out in **Order 52, Rule 5 of the Rules of the Supreme Court of England** as amended from time to time. The latest amendments dispense with application for leave to bring proceedings for contempt of court orders or abuse of court process. The power is exercised to protect the dignity of the court. It is to ensure the streams of justice are kept pure. A party aggrieved by an order of the court should move to review, set aside or appeal the decision; not to disregard or disobey it. In *Hadkinson Vs. Hadkinson* [1952] 2 All ER 567 at 569 it was stated as follows-

“A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it...it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed”.

22. There is a long line of local decisions upholding that position. See for example *Mutika vs. Baharini Farm Ltd* [1985] KLR 227, *Benard Kongo Njau –vs- City Council Of Nairobi & Another*, Nairobi High Court ELC Case No. 495 of 2009 (unreported), and *Shah & Another t/a Lento Agencies –vs- National Industrial Credit Bank Ltd*, [2005] 1 KLR 300. In certain instances, a contemnor will not even be heard on review until he purges the contempt. See *Mawani v Mawani* [1977] KLR 159.

23. in the present case, two Judges of the High Court have made conflicting orders in favour of either party. Mr. Wamalwa, learned counsel for the Appellant, submitted that Mutava, J being junior to Ang'awa, J should never have attempted to review or clarify her order or issue subsequent orders in HCCC 235 of 2009 that rendered Ang'awa, J's orders of stay fractious. First, it matters little that Mutava, J was junior to Ang'awa, J. Under our Constitution, there are no such distinctions. We are reminded of the dictum of Madan, JA (as he then was) in *Butt –v- Rent Tribunal* [1982] KLR 417 that-

“A judge is a judge whether he is newly appointed or an old fogy. The former has the benefit of his latest learning, the latter the advantage of experience. Both are men of honour and scholarly gentlemen...both are 24-carat gold. Both act free from doubt, bias and prejudice. Both carry the conviction of correctness of their decision....”

24. The filing of separate actions by the parties may have led to the conflicting decisions. The reliefs by Mutava, J were granted in the commercial suit; those by Ang'awa, J in the civil appeal. The two orders were at cross-purposes. They allowed parties to cherry pick. There was clear and present danger in the multiplicity of actions. It led to failure of justice. In *Nairobi City Council –vs- Thabiti Enterprises Limited*, Civil Appeal No. 264 of 1996 (unreported), Akiwumi, JA observed-

“...one thing is clear to my mind, that where as in this appeal, a judgment has been given which makes nonsense of a previous judgment in the same suit, then there has been a failure of justice...”

25. Contempt of court is a criminal offence. The standard of proof is quite high. The punishment can lead to loss of liberty. As a result, it must be proved that the contemnors were served with the court order and they disobeyed it. It must be clear from their overt acts that they intended to breach the order of

court. It would have amounted to contempt of court if Mr Gikanga (the deceased auctioneer) or Chiera Waithaka or Mr Karori had executed or participated in execution of the order of the Deputy Registrar in the face of the order of stay by Ang'awa, J. The evidence before us is that Mr Gikanga died in February, 2012 and the eventual eviction of the Appellant was based on the orders of Mutava, J made on both the 13th December, 2011 and 22nd May, 2012. There is no evidence that the eviction took place during the further stay of 7 days granted by Mutava, J on 22nd May, 2012. We are unable to then say that by writing to the auctioneer, Mr. Karori *ipso facto* committed acts of contempt of the order of Ang'awa, J. There is equally no such evidence to cite the Plaintiff for contempt. In a word, the Appellant has been unable to prove the contempt to the required standard.

26. We are also restrained a little by the words of the Master of the Rolls in ***Re Clement*** cited with approval in ***Re Maria Anne Davies [1988] 21 QBD 236*** on the jurisdiction to punish for contempt.

“I have always thought that necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men’s rights, that is, if no other pertinent remedy can be found. Probably, that will be discovered after consideration to be the true measure of the exercise of the jurisdiction”.

27. We shall turn briefly to the *ex parte* order of 11th July 2012 granting leave to cite the Respondents for contempt. The Respondents have urged us to set aside that order. The principal grounds are that the Respondents were not heard thereby violating their constitutional rights to a fair hearing. Sections 3 and 5 of the Judicature Act as read together with Order 52 the Supreme Court of England Practice and Procedure Rules required the Appellant to seek leave *ex parte*. Order 52 of the Supreme Court Rules, as we stated, has since been amended and in matters of this nature, the application for leave is no longer necessary. While the Appellant was entitled to seek leave *ex parte* it was perfectly open to Ang'awa, J to direct him to serve it for hearing *inter partes*. The latter course would have been suitable in a contentious matter of this nature. The discretion however was entirely that of the trial judge.

28. We agree with counsel for the Plaintiff that a court has power to set aside an *ex parte* order. ***Shah – v- Mbogo & Another [1967] EA 116, Mbogo and another Vs Shah [1968] EA 93, Kimani Vs Mc Connell [1966] E A 547***. This is particularly so where there has been material nondisclosure. From the pleadings and depositions placed before Ang'awa, J on 9th February 2012, the Appellant did not make a full disclosure of the ruling and order of Mutava, J made on 13th December 2011. Such disclosure would have assisted the court in determining whether or not to grant leave *ex parte*. See ***Wea Records –v- Visions Channel 4 Ltd [1983] All ER 589, Republic –v- The Capital Markets Authorities Ex-Parte Peter Muthoka & Joseph Mumo Kivai Nairobi High Court JR 355 & 356 of 2012 of 2012*** (unreported), ***Kenya Planters' Co-operative Union –v- Kenya Commercial Bank & Others, Nairobi High Court Petition No. 8 of 2014*** (unreported), In ***Kenya Planters Co-operative Union Limited vs The Attorney General & Others Nairobi, High Court Petition No. 700 of 2009*** (unreported), the Court stated-

“Ex parte orders are essentially provisional in nature. They are made by the judge on the basis of the evidence and submissions emanating from one side only. Despite that fact the applicant is under a duty to make full disclosure of all relevant information in his possession....”

29. The Appellant's application dated 9th July, 2012 for leave to bring the committal proceedings and the subsequent leave granted on 11th July, 2012 are so much water under the bridge. The Appellant was entitled to present that application which was granted by a competent court. The Respondents may have strong reservations but it would be to turn logic on its head to state that their freedoms of expression or due process were violated merely by the grant of the leave. After allegations of contempt of court were made, it was critical to find out whether the Respondents have polluted the streams of justice. The true province for that inquiry is in the substantive motion for committal before us now. We have observed that the recent amendments to Order 52 of the Supreme Court of England Rules have done away with the requirement for leave to bring proceedings for contempt of an order of Court. It all goes to emphasize the formality of granting an order for leave *ex parte* to bring contempt proceedings. For all the above

reasons, we decline in the circumstances to set aside the leave.

30. From what we stated earlier, we are not also persuaded that the Respondents acted in contempt of the order of Ang'awa, J made on 27th February, 2012. The notice of motion by the Appellant dated 12th July, 2012 is thus without merit and is dismissed.

31. Having reached that conclusion, the prayers for conservatory orders in the two motions by the 2nd Respondent and Mr. Kamau Karori dated 12th July, 2012 and 16th July, 2012 respectively are now superfluous. But we wish to add the following. The two motions are identical in all respects save that they are presented by different parties and in separate suits. Mr. Macharia, learned counsel for the 2nd Respondent, admitted that he filed the subsequent motion out of abundant caution and in view of the different suits. It remains irregular and an abuse of court process to bring similar proceedings over the same subject-matter in different suits. It is a fetter on justice; it increases costs and squanders valuable judicial time. In *Attorney General –v- Baker*, *The Times March 2000*, Lord Bingham, CJ held-

“It is an abuse to bring vexatious proceedings in two or more sets of proceedings in respect of the same subject matter which amounts to harassment of the defendant in order to make him fight the same battle more than case with attendant multiplication of costs, time and stress”.

32. The abuse is not confined to the Respondents' side alone. There are multiple actions by the Appellant at the High Court and the Court of Appeal. He first challenged the sale in HCCC 287 of 2008. The suit was struck down on 13th October, 2008 by Khaminwa, J. The Appellant lodged a second suit in HCCC 1928 of 2000. It was also struck out. The Plaintiff then sued the Defendant (Appellant) in HCCC 235 of 2009. The Appellant has lodged Civil Appeal 27 of 2012 at the High Court challenging the orders of the Deputy Registrar of 31st January 2012. The *Court of Appeal* in *Peter Ng'ang'a Muiruri –v- Chiera Waitthaka Civil Application 155 of 2012* (unreported), arising out of this suit did not hide its disdain for the multiplicity of actions by the Appellant. Koome, JA held -

“These multiple appeals arising from the same subject matter should be handled in a systematic way. The applicant's failure to disclose all the material information must be construed as intended to either mislead the court or take undue advantage of the multiplicity of cases. Dealing with these piecemeal applications will not promote the interests of justice as there is likelihood of the court making conflicting decisions”

33. The Respondents have urged us to transfer the proceedings in the appeal to HCCC 235 of 2009 at the *Commercial and Admiralty Division*. We note that Civil Appeal 27 of 2012 was filed after the commercial suit. It is undesirable to have parallel proceedings at the High Court over the same subject-matter because of the attendant risk of conflicting decisions. See *Muturi Investments Limited –vs- National Bank of Kenya Ltd*, Nairobi, High Court Case No. 199 of 2005 [2006] eKLR.

34. We however agree with Mr. Wamalwa, learned counsel for the Appellant, that an order for transfer and consolidation of the appeal and the suit will not serve any practical purpose. For one, the appeal, as we stated, is on the narrow issue of the validity of the orders of the Deputy Registrar made on 31st January, 2012. On the other hand, HCCC 235 of 2009 is to all intents and purposes finalized at the High Court save for an appeal that is pending at the Court of Appeal. Never mind that the Appellant protests that the issues in the suit have been hurriedly or irregularly determined summarily before issuance and service of summons to enter appearance. The true province to determine such issues will be the Court of Appeal. In our considered opinion, it will not be suitable to transfer Civil Appeal 27 of 2012 now in Civil Division to the Commercial Division in the High Court, or to consolidate it with a finalized suit. In the interests of justice and good order, the order that commends itself to us is to direct that at the hearing of Civil Appeal 27 of 2012, the records and proceedings in HCCC 235 of 2009 be placed before the trial judge.

35. The prayer to transfer the appeal to the Commercial Division of the High Court and consolidate it with HCCC NO. 235 of 2009 is accordingly rejected. For the reasons we advanced earlier, we decline to

grant the declarations and reliefs sought by the 2nd Respondent and Mr Kamau Karori in their applications dated 12th July, 2012 and 16th July, 2012.

36. That leaves only the matter of costs. As each party has succeeded in part, and considering the history of this litigation, and in the interests of justice, each party shall bear its own costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY 2014

H P G WAWERU

JUDGE

P NYAMWEYA

JUDGE

G K KIMONDO

JUDGE

DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2014