Mbwika v Kivuva (Environment and Land Appeal 34 of 2019) [2022] KEELC 14597 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14597 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL 34 OF 2019

A NYUKURI, J

OCTOBER 26, 2022

BETWEEN

JOHNSTONE MUTUA MBWIKA .... APPELLANT

AND

COSMAS MUINDE KIVUVA .... RESPONDENT

(Emanating from Kangundo SPMCC No 36 of 2018)

JUDGMENT

Introduction

1. On July 27, 2018, the respondent in this appeal, then the plaintiff in Kangundo SPMCC No 36 of 2018, filed a plaint dated July 26, 2018 against the appellant herein who was the defendant in the lower court; he sought for a permanent injunction against the defendant for interfering with the plaintiff's quiet possession of a parcel of land comprised in a parcel known as Mwala/Kibau/170. The plaintiff alleged that the defendant had sold him 7 terraces of land comprised in property known as Mwala/Kibau/170, land that the defendant had inherited from his deceased father. He sought an alternative prayer for refund of purchase price of Kshs 140,000/- together with interest of 18% per annum from the date of purchase until payment in full.

2. The defendant filed defence and denied the plaintiff's claim. He however stated that the plaintiff was entitled to receive a sum of Kshs 147,000/- from the defendant for a transaction between, them that had aborted.

3. Simultaneous with the filing of the plaint, the plaintiff filed a notice of motion dated July 26, 2018 where he sought for an order of temporary injunction to restrain the defendant from interfering with the plaintiff's quiet possession of the parcel of land comprised in the property known as Mwala/Kibau/170 pending hearing of the suit.

4. On June 30, 2018, the trial court granted an *exparte* temporary injunction in terms of prayers 1 and 2 of the notice of motion dated July 26, 2018. The court also fixed an interparte hearing date of August 15, 2018. Essentially the court gave *exparte* interim orders restraining the defendant from interfering with plaintiff's quiet possession of the suit property.

5. As the notice of motion dated July 26, 2018, was pending interpartes hearing, the plaintiff filed a notice of motion dated November 2, 2018, which sought to cite the defendant, Johnstone Mutua Mbwika, Rose Ndunge, Maundu Mutua, Mutuku Mutisya, Joseph Mbwika, Wambua Mwau and Kasanga, for contempt of the orders of July 30, 2018, for purposes of committing them to civil jail. He also sought to be compensated by the defendants in respect of his trees and crops.

6. In the notice of motion dated November 2, 2018, the plaintiff alleged that the defendant with his relatives and agents had disobeyed the order of July 30, 2018, by digging, cutting trees and burning charcoal on the suit property around the end of September 2018.

7. In response to the application, the defendant filed a replying affidavit on November 28, 2018 dated November 23, 2018.

8. The trial court record shows that the parties filed consolidated submissions in respect of applications dated July 26, 2018 and November 2, 2018. The two applications were for injunction and contempt, respectively.

9. On June 19, 2019, the trial court gave a ruling whereof it found the defendant to be in contempt of the orders of November 2, 2018. The court also found that as regards the application dated November 2, 2018, the plaintiff had proved a *prima facie* case, and granted the orders sought in the application dated November 2, 2018, on the basis that the plaintiff had shown his right over the suit property.

10. Dissatisfied with the ruling of the trial court of June 19, 2019, the appellant herein filed a memorandum of appeal dated July 10, 2019. The appeal is anchored on the following grounds;

    a. The subordinate court erred both in law and fact by granting the application dated November 2, 2018 yet the same had not met the threshold for contempt.

    b. The subordinate court erred both in law and fact by finding the appellant guilty of contempt in relation to an order that does not exist.

    c. The subordinate court erred both in law and fact by basing its findings on hearsay, fabrications and incredible and inadmissible evidence.

    d. The subordinate court erred in law by entertaining a matter which falls under the *law of Succession Act*, cap 160, laws of Kenya.

    e. The trial court erred both in law and fact by mixing up issues and ended up giving a ruling which is not based on any tangible evidence.

11. Subsequently, the appellant sought for setting aside of the trial court's orders made on June 19, 2019 and that the same be substituted with an order dismissing the respondent's applications dated July 26, 2018 and November 2, 2018 respectively. He also sought for costs.

12. The appeal was canvassed by way of written submissions. On record are the appellant's submissions dated January 19, 2022 and the respondent's submissions dated April 1, 2022.

Appellant's Submissions

13. Counsel for the appellant submitted that the trial court erred in law and fact by finding the appellant guilty of contempt in respect of an order that did not exist and that the manner in which the trial court arrived at its ruling flies in the face for procedure for punishing contempt in Kenya.

14. Counsel pointed out that the trial court found the appellant to be in contempt of the order dated November 2, 2018, which order did not exist. Counsel argued that the notice of motion in issue which was dated November 2, 2018, did not make reference to an order dated November 2, 2018. It was further pointed out on behalf of the appellant that there was no order annexed to the affidavit in support of the application. Therefore, counsel argued that the lower court acted in error by pronouncing the appellant guilty of contempt of an order that did not exist. According to counsel, the contempt proceedings were an exercise of futility.

15. It was further submitted for the appellant that the respondent did not demonstrate the existence and service of the order dated November 2, 2018 hence the respondent failed to discharge the burden of establishing disobedience of a court order, as the standard of proof in contempt proceedings is higher than the standard required in ordinary civil cases but slightly below the proof beyond reasonable doubt. For that proportion, counsel relied on the case of *Kipkoech Kirui (deceased)* [2016] eKLR.

16. Counsel argued that the application for contempt dated November 2, 2018 was defective for noncompliance with the provisions of the *Contempt of Court Act* 1981 of England which is the law in force in Kenya as the *Contempt of Court Act* No 46 of 2016 was declared null and void in the case of *Kenya Human Rights Commission vs Attorney General & Another* [2018] eKLR. Reliance was also placed on the case of *Katsuri Limited vs Kapurchand Depar Shah* [2016] eKLR, which the court has considered. Counsel concluded that the contempt proceedings were null and void as they were predicated on nothing.

Respondent's Submissions

17. Counsel for the respondent submitted that the application for contempt dated November 2, 2018 sought for orders that the appellant be punished for contempt of the orders of July 30, 2018. That the same was responded to and the court allowed the application. According to the respondent, there is only one order that was disobeyed and that is the order of July 30, 2018. Counsel was of the view that the appellant was bent on confusing issues for purposes of excusing himself from being punished for contempt when he knew what was being determined.

18. It was contended for the respondent that typographical errors that do not go to the substance of the matter should not be an excuse for the appellant to escape punishment for disobeying court orders. Counsel relied on section 99 of the *Civil Procedure Act* for the proposition that clerical or arithmetical mistakes in orders may be corrected by the court on its own motion or on the application by the parties.

19. Reliance was placed on the case of *Republic vs Attorney General & 15 Others, Exparte Kenya Seed Company Limited & 5 Others* [2010] eKLR for the proposition that the slip rule will be applied to give effect to the actual intention of the judge so that an order does not have a consequence which was not intended by the judge.

20. The respondent's counsel invited this court to exercise its unfettered discretion as well as supervisory powers to correct the minor errors of dates in the lower court. Counsel was of the view that the appellant rushed to file an appeal instead of seeking for orders of review to correct the minor errors in the ruling, hence the appeal on the erroneous date is vexatious.

21. Counsel referred to the case of *Steve Onyango vs Techspa General Supplies Ltd & Others,* High Court Civil Suit No 386 of 2016, where the High Court allowed an application to correct an error in the judgment that erroneously gave interest per a day instead of per annum.

22. On the question as to whether service of the orders in issue was done, counsel submitted that there was proper service and an affidavit of service was filed. Counsel pointed out that page 110 of the record shows that the appellant received the order by writing his name on the face of the order.

23. On whether the procedure for contempt proceedings was followed before the magistrate's court, counsel submitted that the same was not raised before the magistrate's court. Counsel relied on section 10(3) of the Magistrate's Court Act for the proposition that the magistrate's court has power to punish for contempt. Counsel was of the view that the application was properly before court and was properly dealt with by the trial court. In conclusion, counsel urged the court to dismiss the appeal for lack of merit.

Analysis and Determination

24. I have carefully considered the appeal, submissions and the entire record in the lower court. The issues that arise for determination are;

    a. Whether the trial court's finding that the appellant was guilty of contempt of the order dated November 2, 2018 was an error subject to correction under the slip rule.

    b. Whether the question of procedure for contempt proceedings could be raised in this appeal; and if so whether the procedure for contempt proceedings was complied with in the trial court.

    c. Whether the trial court's finding that the appellant was guilty of contempt was justified.

25. With the declaration of the *Contempt of Court Act* of 2016 as unconstitutional, in the case of *Kenya Human Rights Commission vs Attorney General and Another [2018] eKLR*, the law governing contempt of court in the superior courts is governed by section 5 of the *Judicature Act*. The same provides as follows;

    > The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

26. As the *Judicature Act* requires the superior courts to apply both procedural and substantive law for contempt as applied in the High Court of Justice in England, the applicable law therefore is the *Civil Procedure Amendment Rules of 2012* of England and more specifically part 81 (applications and proceedings in relation to contempt of court). The same provides different proceedings for four different forms of violations as follows;

    Rule 81.4 relates to committal for breach of a judgment, order or undertaking to do or to abstain from doing an act.

    Rule 81.11 relates to committal for interference with the due administration of justice (applicable only in criminal proceedings.

    Rule 81.16 refers to committal for contempt in the face of the court; and

    Rule 81.17 refers to committal for making false statement of truth or disclosure statement. (See the case of *Samuel M N Mweru & Others vs National Land Commission & 2 Others* [2020] eKLR.

27. In the instant case, the applicant sought for contempt of a court order, which falls within Rule 81.4 (breach of judgment order or undertaking). In Christine Wangari Chege vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR, the Court of Appeal rightly restated that leave was not required where committal proceedings relate to a breach of a judgment, order or undertaking although leave was required for the other applications cited above. As the alleged contempt herein is in regard to disobedience of a court order, leave was not required before a contempt application is filed.

28. Moreover, in the instant case, the order which is alleged to have been disobeyed was an interim injunction sought and granted under order 40 of the *Civil Procedure Rules*. order 40 rule 3 of the *Civil Procedure Rules* empowers the court that issues a temporary injunction to punish for breach of such order. In this case as the trial court made the order of injunction in issue, it had the power to punish for breach of the said injunction. As the subordinate court is not a superior court envisaged under section 5 of the *Judicature Act*, it is not bound by the procedure in the High Court of Justice of England.

29. It is therefore my finding that there was no requirement for the respondent to seek leave of court and follow the procedure in the High Court of justice in England as at the time of application, the order which was said to have been breached was not only an order under rule 81.4 of part 81 of the *Civil Procedure Amendment No 2 rules* 2012 of England, but also an injunction issued by the trial court exercising its jurisdiction under order 40 rule 1 of the *Civil Procedure Rules* and whose powers to punish for contempt was specifically provided for therein. Besides, the appellant did not object to procedure before the lower court and therefore he cannot contest the same on appeal.

30. On whether the ruling dated June 19, 2019 was subject to correction under the slip rule, the appellant argued that the trial court found that the appellant was in contempt of the orders of November 2, 2018, which orders did not exist. On the other hand, the respondent has argued that both parties were aware that the orders being litigated upon were dated July 30, 2018 and therefore the error of the date by the court was an error that could be corrected under the slip rule by the court *suo motto* or on application of either party and could not be a ground of appeal.

31. Section 99 of the *Civil Procedure Act* provides for the amendment of judgments, decrees or orders as follows;

    Clerical or arithmetic mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

32. Essentially as judgments, decrees or orders are done by human beings, there are instances where the same may have errors that may be arithmetic, clerical or accidental slip or omissions. In such instances, a party may apply to have the same rectified or if it comes to the attention of the court without any prompting of the parties, the court has power to correct such errors on its own motion. What is important is the intention of the court to be made clear and maintained.

33. In the case of *Sanitam Services (E.A) Limited vs Rentokil (K) Limited & Another* [2019] eKLR, the Court of Appeal held as follows;

    The slip rule does not allow or permit a court to give an order which alters the judgment or orders made earlier. It is for purposes of correcting clerical errors and giving effect to the judgment of the court.

34. Similarly, in the case of *Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others* [2017] eKLR, the Supreme Court held that the slip rule does not confer upon a court any jurisdiction to sit on appeal over its own judgment or to extensively review its decision to the extent of substantially altering it.

35. Clearly, the slip rule is applied to correct errors in the court's decision without altering the initial intention of the court.

36. I have considered the decision of the lower court made on June 19, 2019. The ruling refers to the applications dated July 26, 2018 and November 2, 2018. I note that both applications were on record and both parties filed respective consolidated submissions for the two applications. The application dated July 26, 2018, sought for temporary injunction against the appellant while the application dated November 2, 2018 sought to cite the appellant for contempt of the orders issued on July 30, 2018.

37. In the ruling of June 19, 2019, the learned trial magistrate properly referred to the prayers sought in the contempt application and made a reference to the date of the affidavit in support of the application as having been sworn on November 2, 2018. However, he referred to that application as having been dated July 26, 2018. The court then found as follows;

    The records clearly shows that the order was issued on the July 30, 2019 restraining the respondent, his servants, agents, relatives or any other person claiming to act under his instructions or through him from taking over possession, occupying, alternating, trespassing, interfering, selling or disposing of or dealing in any way whatsoever with the plaintiff's quiet and peaceful possession of the parcel of land comprised in the property known as Mwala/Kibau/170 pending the hearing and determination of this application.

38. The subordinate court, went further to make the following findings;

    Having looked at the facts that emerged in this case, the evidence adduced, I find that the Plaintiff has proved that the defendant was in contempt of the order dated November 2, 2018 and will punish him for that. In regard to the application dated November 2, 2018, and filed on November 8, 2018, I also find that the plaintiff has proved a *prima facie* case of success against the defendant.

    In vies of the above, I find that the plaintiff has shown his right over the suit property. I will proceed to grant the orders sought in the application dated November 2, 2018 with costs to the applicant.

39. It is therefore clear that the trial court was clear in its mind that it was dealing with an application for contempt of court order and an application for interlocutory injunction. That is why the court referred to the elements to be proved for contempt of court and for temporary injunction. The court referred to the application for contempt as that dated July 26, 2018 while the application for interlocutory injunction as that dated November 2, 2018. Did the two applications exist? Yes, they did and they are the ones that were being considered in the court's ruling of June 19, 2019. The only issue is that the trial court instead of referring to the application dated July 26, 2018, as being the application or interlocutory injunction and the application dated November 2, 2018, as being the application for contempt, the court switched the dates. Can this error be corrected under the slip rule? My view is that it is an error of omission which falls under section 99 of the *Civil Procedure Act* and the same can be corrected without altering the intention of the trial court.

40. It is clear from the ruling that the trial court was satisfied that the appellant was in contempt of the orders of that court made on July 30, 2018 and the respondent had demonstrated an enforceable right over the suit property and shown a prima facie case with chances of success.

41. Therefore, the question of the date of the violated order was a matter that could be corrected under section 99 by application for such correction in that court and not by way of appeal.

42. I therefore find that the contention that the orders which were said to have been disobeyed did indeed exist on record, as frivolous as the error on the dates by the trial court was a matter that could be corrected under the slip rule.

43. On the question as to whether the respondent met the threshold for contempt, the appellant submitted that the orders in issue were not served, while the respondent maintains that service of the orders was done.

44. The *Blacks Law Dictionary*, 11th Edition defines contempt as follows;

The act or state of despising, the quality, state or condition of being despised. Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.

45. The power of the court to punish for contempt is geared towards upholding the authority and dignity of the court for purposes of promoting respect for the rule of law.

46. In the case of *Econet Wireless Kenya Limited vs Minister of Information & Communication of Kenya & Another* [2005] KLR, the court emphasized the importance of obeying court orders in the following words;

> "It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the persons affected by the order believes it to be irregular or void."

47. Obedience of court orders is a critical component of the rule of law and the basis of a democratic society. In the case of *T N Gadavarman Thiru Mulpad vs. Ashok Khot & Another* [2006] 5 SCC, the Supreme Court of India succinctly put forward that position as follows;

Disobedience of this court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic state. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that court's orders are to be followed and complied with.

48. Contempt of court has a criminal element and anyone found to be in contempt of court may lose their liberty by an order of imprisonment. Hence the standard of proof for contempt is higher than that of a balance of probabilities and just a little lower than beyond reasonable doubt.

49. In the case of *Gatharia K Mutikika vs Baharini Farm Limited* [1985] KLR, the court held as follows;

A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved satisfactorily. ......It must be higher than proof on a balance of probabilities, almost but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

50. To prove contempt of court order the applicant must demonstrate that the terms of the order are clear, that the respondent had knowledge of the said order and that failure to comply with the terms of the

order was wilful or deliberate. In the issue paper, "*Contempt in Modern New Zealand", (New Zealand Law Commission IP36*, May 2014), the element of contempt were stated by the learned authors as follows;

There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases that;

a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;

b. The defendant had knowledge of or proper notices of the terms of the order;

c. The defendant has acted in breach of the terms of the order; and

d. The defendant's conduct was deliberate.

51. In determining whether the respondent had proved contempt against the appellant, the trial court directed itself as follows;

This being the application for contempt, the court has to establish whether the defendant/respondent was duly served.

52. The trial court went on to make the following findings;

The record clearly shows that the order was issued on the July 30, 2019 restraining the respondent, his servants, agents, relatives or any other person claiming to act under his instructions or through him from taking possession, occupying, alienating, trespassing, interfering, selling or disposing of or dealing in any way whatsoever with the plaintiff's quiet possession and peaceful possession of the parcel of land comprised in the property known as Mwala/Kibau/170 pending hearing and determination of this application.

The order was served and affidavit of service filed herein. It is upon which the defendant filed his reply. This confirms that he received the order of the court. The defendant in his reply has not denied the existence of the order dated November 2, 2018. He actually acknowledged receipt of the same. Having received the order, the defendant therefore simply chose to ignore the order and proceeded to deal in the land though restrained. The dignity of the court must always be protected and whoever disobeys should be punished.

53. As can be seen from the record, the trial court guided itself that all that needs to be proved for contempt was service of the order. Did the lower court sufficiently direct itself on the elements of proof of contempt? I do not think so. The elements of contempt as earlier stated are that there must exist an order with clear terms, it has to be shown that there was breach of the terms of the order, that the respondent breached those terms and that the breach was wilful or deliberate. By merely citing service of the order as the only element to be proved in a contempt application, I find that the trial court misdirected itself on that core question, as it left out other key elements for proof of contempt.

54. In addition, the court made findings that there was an affidavit of service to prove service of the order and that in his reply the appellant acknowledged service of the order. The appellant has challenged service. Were the trial court's findings above justified? The record at pages 57 to 64 show the application for contempt dated November 2, 2018. In the supporting affidavit in paragraph 4 thereof, the respondent alleged as follows;

That in pursuit thereof, I am aware that the defendant was served as I accompanied the process server – one Don Carlos Muthoka to point out the defendant to him.

55. Clearly, there is no affidavit of service attached to the supporting affidavit sworn by the respondent on November 2, 2018. Therefore, the lower court's finding that there was an affidavit of service is not supported by any evidence.

56. Besides, in the affidavit in reply by the appellant and sworn on November 23, 2018, there was no acknowledgment whatsoever of service of the order of July 30, 2018. Hence the lower court's finding that the appellant "actually acknowledged receipt" of the order is not supported by any evidence, and therefore lacked factual basis.

57. The requirement that there must be an order in clear, unambiguous terms and which order ought to be served and the applicant ought to show wilful breach, must be demonstrated by the applicant. Were these proved? My answer is in the negative. To begin with, the record shows that prayer 1 and 2 of the application dated July 26, 2018 were granted in the interim on July 30, 2018 pending interpartes hearing. While the order was made on the court record, the Respondent did not bother to extract or cause to be extracted the orders of July 30, 2018 and therefore those orders were not attached to the application dated November 2, 2018.

58. Contempt proceedings are quasi-criminal proceedings and must be strictly proved. The orders made on July 30, 2018 were made *exparte* only in the presence of the respondents counsel. The said orders were not extracted and therefore the requirements that the applicant must demonstrate clear terms of the order was not met. Were the clear terms of the order wilfully breached? In the absence of proof of existence of clear terms of the order, proof of wilful violation of the same may not be possible, and in this case there was no such proof.

59. In the premises, it is my finding that the respondent did not strictly prove contempt as against the Appellant and therefore the lower court's finding in that regard was erroneous both on facts and the law.

60. Although the ruling of June 19, 2019, was in regard to the application for injunction dated July 26, 2018, and the application for contempt dated November 2, 2018, the appellant's grounds of appeal and submissions only challenged the lower court's findings on the application for contempt.

61. In that regard therefore, it is my finding that the appeal is merited, the same is allowed and the ruling of the lower court of June 19, 2019 set aside only to the extent that the lower court's finding in respect of the application dated November 2, 2018, is set aside and substituted with an order dismissing that application with costs. The costs of the appeal shall be borne by the respondent.

62. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Ngolya for Appellant.

Ms. Musau holding brief for Ms. Mugo for the Respondent.

Court Assistant - Josephine