



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1767 OF 2002

JULIUS MACHARIA NDUGIRE.....1ST PLAINTIFF
GLADYS NYAMBURA MWANGI.....2ND PLAINTIFF
JAMES KARUGA NDUGIRE.....3RD PLAINTIFF
ARTHUR GATUMBI.....4TH PLAINTIFF
EVANSON KARURI ICHENGE.....5TH PLAINTIFF
MUSA MUTHUO.....6TH PLAINTIFF
MOSES WAMBU.....7TH PLAINTIFF
WANJIKU WAMBU.....8TH PLAINTIFF
SAMUEL KARIUKI MUTHUA.....9TH PLAINTIFF
CATHERINE WANGUI NJUGUNA.....10TH PLAINTIFF
NAHASHON WAWERU.....11TH PLAINTIFF
IRUNGU ELISHAPHAN.....12TH PLAINTIFF
NJUGUNA FRANCIS.....13TH PLAINTIFF

V E R S U S

ARCH-BISHOP B. NZIMBI1ST DEFENDANT
RT. REV. J.G. GACHUCHE.....2ND DEFENDANT
REV. JOSEPH M. WANYOIKE.....3RD DEFENDANT
REV. JOHN M. KARIUKI.....4TH DEFENDANT
ARCH-DEACON S.N. MUIRURI.....5TH DEFENDANT
JAMES MWANGI GITAU.....6TH DEFENDANT

RULING

On 19.12.2001 Defendants filed a Notice of Motion under Order 39 Rule 4 and Order 50 Rule 2 of the Civil Procedure Rules praying the discharge of an injunction granted on 29.11.2002 and extended on 11.12.2002 and that the officer commanding Kigumo Police Station so ensure due observance. While the hearing of this application was proceeding, Plaintiffs obtained an order granting leave on 30.1.2003 per Kuloba J., to commit the 3rd and 6th Defendants for contempt of Court in that they disobeyed the Court order of 29.11.2002. On 24.2.2003, the Defendants gave Notice of Preliminary Objection under Order 50 Rule 16 of the Civil Procedure Rules which Mr. Muturi Kigano for the Defendants argued in limine. He said that as a matter of law there was no Court order that could be disobeyed that the order given by Rimita J., had lapsed by effluxion of time. He reasoned that the order was issued on 29.11.2002 but was not served on Defendants within 3 days but was served on 5.12.2002. That there was no order in existence then. That the extension of the order, that the purported extension of the said orders on 11.12.2002 extending those orders for 4 months from that date had no consequence whatsoever since an ex parte order of injunction cannot be extended whether by consent or otherwise.

Thirdly, that only 6th Defendant was already served with the order but no other Defendant, Counsel submitted that, what is needed is personal service which according to Return of Service was only effected on 6th

Defendant, fourthly that the order was ambiguous with regards to prayers 4 and 6 of the application.

Dr. Kuria for Plaintiff objected saying that the facts to sustain preliminary objection were not agreed. He relied on MUKISA BISCUIT MANUFACTURERS LIMITED vs. WESTEND DISTRIBUTORS LIMITED 1969 EA 696. He submitted that notice was properly given to the Attorney General as is required under Order 52 of RSC (1979) but conceded that the order was not personally served on 3rd Respondent. Dr. Kuria asked whether any order made by a Court outside its jurisdiction remains void or voidable and answered saying it remains voidable until discharged.

I have heard the keen arguments by both counsel and particularly the issue of void or voidable orders. I think it is generally now noted that the distinction between void and voidable orders do not relate to circumstances where injunctive order is disobeyed. The Privy Council in the case of GRAFTON ISSACS vs. EMERY ROBERTSON on an appeal from West Indies (1985) 1 AC. 97 has held as much.

The Court there said that in relation to a Court of unlimited jurisdiction, in the contrasting legal concepts of void and voidability form part of English Laws of England, it is misleading to seek to draw distinctions between orders that are “void” and in the sense that they can be ignored by impunity by those persons to whom they are addressed and orders that are “voidable” and may be enforced unless and until they are set aside. The concept of voidness and voidability are inapplicable to orders made by a Court of unlimited jurisdiction in the course of contentious litigation. Such an order is either regular or irregular. If it is irregular, it can be set aside by the Court that made it upon application to that Court, if it is regular it can only be set aside by an appellate Court upon appeal where appeal lies.

The Court composed of the 5 Law Lords, Lord L. Diplock, Lord Kiths Kirkel, Lord Roshll, Lord Bitghtner and Lord Templeman said; It was a sound decision.

“The contrasting legal concept of voidness and voidability form part of English Law of Contract. They are inapplicable to orders.”

In so ruling, the Court rejected the contention that there is a distinction between void and voidable orders in contempt proceedings. However, having heard the forceful argument of Mr. Kigano I agree that the order given was void or voidable but I must see this against the law applicable for better or for worse and the law is as was stated by Romer LJ in HADSO KINSON vs. HADKINSON (1952) P 285 that: -

“It is the plain and unqualified obligation of every person against or in respect of whom a Court order is made by a competent Court of competent jurisdiction to

obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

It is instructive to note absence of distinction of void and voidable orders.

This is the English position the law of contempt applicable is the English Law based on the provisions of Judicature Act Cap 8 of Kenya Law. We apply English Law of Contempt. But even more our Court of Appeal the highest Court has embraced this position when GICHERU J.A. (now Hon. Chief Justice) in C.A. CIVIL APPEAL NO. 59 OF 1993 OMEGA ENTERPRISES (KENYA) LIMITED vs. KENYA TOURIST DEVELOPMENT CORPORATION & 2 OTHERS. Commented on this aspect of Jurisprudence.

But the appeal judge relied more on the second limb of the decision by Lord Diplock in the above quoted case of ISAACS vs. ROBERTSON CASE (1984) 3 ALLER 140 (142) where he said that: -

“There is a category of orders of such a Court which a person affected by the order is entitled to apply to have set aside ex-debito justitiae in the exercise of inherent jurisdiction of the Court without his needing to have recourse to the rules that deal expressly with the proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges that have made distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts EX DEBITO JUSTITIAE the right to have it set aside, SAVE THAT SPECIFICALLY IT INCLUDES ORDERS THAT HAVE BEEN OBTAINED in breach of RULES OF NATURAL JUSTICE.”

In the case before the Court of Appeal, an ex parte order was made in defiance of Order 39 Rule 3(1) then subsequent inter partes hearing the appellant was not considered and the order was illegal because the order affected interest of the Applicant yet it was given without him being given opportunity to be heard. This the Court held to be a breach of Natural Justice and therefore, attracted EX DEBITO JUSTITIAE the right to have it set aside.

The six grounds eloquently argued by Mr. Kigano do not to me disclose any of those categories like breach of natural justice to allow the order to be set aside EX DEBITO JUSTITIAE.

One ground however, is that the summons was not served on the alleged contemnor No. 3. Where disobedience alleged is of injunctive order, the order or its copy, must be served personally on the person required to do or not to do the specific act. It was not argued what happens when a joint contemnor is served and not the other where they are jointly and severally cited for contempt, the one served can be committed on condition that it is shown that the other one was properly served and this draws me to the requirement of preliminary objection. It is now trite from judgement of Sir Charles Newbold J.A. and Law JA in the case of MUKISA BISCUIT MANUFACTURING COMPANY LIMITED vs. WESTEND DISTRIBUTORS COMPANY LIMITED (1969) EA 696 that: -

“So far as I am aware a preliminary point consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

Where evidence is not agreed and facts are still to be established, preliminary point cannot arise. I see this as the position here. The issue of service is a question of fact. So is the objection number four that the 13 Plaintiffs required authority to sue or objection number 6 that the Plaintiffs lack bonafides and are not candid.

However, in the premises, it appears to me that although Mr. Kigano’s reasons can be vindicated, the

law does bar the success of this objection for the reasons I have given above, which I dismiss with costs.

DELIVERED this 20th day of June 2003.

A.I. HAYANGA

JUDGE

Read to -

Mrs Thangeri for Applicant

Mr. Kirauka for Respondent