



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 64 OF 2019

HENDERICA NYANGWESO.....APPELLANT

=VERSUS=

REPUBLIC1ST RESPONDENT

MOHAMED SULEIMAN WARSAME.....2ND RESPONDENT

(An Appeal from the ruling and orders of the Chief Magistrate’s Court at Milimani

(Hon. D.O.Mbeja(Mr.)SRM dated 19th August, 2019 in Civil Suit No. 4420 of 2018)

JUDGMENT

Introduction:

The 2nd Respondent filed a suit against the Appellant at the Chief Magistrate’s Court at Milimani Commercial Court on 9th May, 2018 namely, Milimani Commercial Court CMCC No. 4420 of 2018, Mohamed Suleiman Warsame v Henderica Nyangweso (hereinafter referred to as “the lower court suit”). In the lower court, the 2nd Respondent sought judgment against the Appellant for; a permanent injunction restraining the Appellant from entering into, chasing away workers, blocking, or in any other manner interfering with the 2nd Respondent’s rental premises on L.R No. 36/11/261(hereinafter referred to as “the suit property”) and general damages. In his plaint, the 2nd Respondent averred that through a lease dated 28th November, 2016 between the 2nd Respondent and Wilfred Nyangweso, deceased (hereinafter referred to only as the “deceased”) who was at all material times registered as the owner of the suit property, the 2nd Respondent was granted a lease of 7 years and 2 months in respect of the suit property that was still subsisting. The 2nd Respondent averred that on 8th May, 2018, the Appellant for no apparent reason invaded the suit property and attempted to evict the 2nd Respondent therefrom.

Together with the plaint, the 2nd Respondent filed an application in the lower court by way of Notice of Motion dated 9th May, 2018 seeking a temporary injunction restraining the Appellant from entering into, chasing away workers, blocking, or in any other manner interfering with the 2nd Respondent’s rental premises on the suit property pending the hearing and determination of the suit. On 28th May, 2018, the lower court granted the said orders as prayed to last until the hearing and determination of the suit. The orders were extracted and issued on 29th May, 2018.

On 3rd October, 2018, the Appellant filed an application in the lower court by way of Notice of Motion dated 3rd October, 2018 seeking among others, an order for the discharge of the said order that had been issued by the court on 28th October, 2018 and the striking out of the entire suit by the 2nd Respondent in the lower court. The application was brought on among other grounds that the 2nd Respondent had obtained the said order on the basis of a fraudulent lease and that following a report that was made to the police by the Appellant, the 2nd Respondent had been arrested and charged with the offence of forgery at Makadara Law Court in Criminal Case No. 1766 of 2018. The Appellant contended that the 2nd Respondent had misled the court into issuing the said order that he was using to deny the rightful owner of the suit property the right to use the same. The Appellant averred that after the death of the deceased who was her husband who died on 29th January, 2017 at 82 years of old age and Parkinson disease, the Appellant obtained a grant in respect of his estate on 9th August, 2017 and proceeded to sell the suit property to a third party, one, Adan Nura Abass on 31st March, 2018 to whom the property was transferred on 13th November, 2018 after the confirmation of the said grant. The Appellant averred that she needed to grant possession of the suit property to the purchaser thereof. The Appellant’s application was heard by the lower court and dismissed.

In the meantime, on or about 29th January, 2019, the new owner of the suit property, the said Adan Nura Abass sued the 2nd Respondent in the Business Premises Rent Tribunal (the tribunal) and obtained an order for the eviction of the 2nd Respondent from the suit property. The

said order was however stayed by the tribunal on 14th February, 2019. It is not clear from the proceedings as to what became of the said tribunal case or the stay application that was filed by the 2nd Respondent that was to be heard inter-partes on 15th February, 2019. The 2nd Respondent was however evicted from the suit property on 14th February, 2019 the same day that the tribunal stayed its orders. In fact, it appears that when the 2nd Respondent went to the tribunal for a stay, he had already been evicted from the suit property pursuant to the earlier orders by the tribunal. I have noted from his application for stay that was filed at the tribunal that one of the prayers sought was “*That all the Tenants in the residential premises known as L.R No. 36/11/261 located in Section 2 of Eastleigh Area Nairobi County be allowed to return to their premises*”.

Following his eviction from the suit property pursuant to the said orders from the tribunal, the 2nd Respondent went back to the lower court and filed an application by way of Notice of Motion dated 20th February, 2019 seeking an order for the committal of the Appellant herein to civil jail for a period of 6 months for disobeying the orders of injunction that had been made in his favour by the lower court on 28th May, 2018. The 2nd Respondent’s application in the lower court was brought on the grounds that the order of 28th May, 2018 barred the Appellant from evicting the 2nd Respondent from the suit property and that the Appellant was aware of the order and even made an application to set aside the same. The 2nd Respondent averred that despite having knowledge of the said order, the Appellant went ahead and evicted the 2nd Respondent from the suit property on 14th February, 2019. The 2nd Respondent averred that Adan Nura Abass to whom the Appellant sold the suit property and who obtained an eviction order from the tribunal and proceeded to evict the 2nd Respondent from the suit property acted as an agent of the Appellant.

The 2nd Respondent’s application was opposed by the Appellant through a replying affidavit sworn on 19th March, 2019. The Appellant averred that she sold the suit property to Adan Nura Abass on 31st March, 2018 and the same was transferred to him on 30th October, 2018. The Appellant averred that after selling the suit property and transferring the same to Adan Nura Abass (the purchaser), he handed over the property to him together with all the documents relating thereto and left for her rural home in Busia. The Appellant averred that she was aware of the court order of 28th May, 2018 and that the order was issued after she had sold the suit property and handed over the same to the purchaser. The Appellant averred that the suit property no longer belonged to her and that she was not aware that the 2nd Respondent had been evicted. The Appellant averred that she learnt that the purchaser had sought the eviction of the 2nd Respondent from the suit property through a judicial process and that she was not a party to that process. The Appellant denied that the purchaser who was the registered owner of the suit property and who had acquired the same for valuable consideration was acting as her agent. The Appellant denied that she was in contempt of the court order issued on 28th May, 2018. The Appellant averred that she was not the owner of the suit property and was not involved in the eviction of the 2nd Respondent therefrom.

In a ruling delivered on 19th August, 2019, the lower court found the Appellant in contempt of the court orders made on 28th May, 2018. In arriving at that decision, the lower court made a finding that the Appellant had an interest in the suit property as at the time the order of 28th May, 2018 was made because even though she had sold the suit property, she had not transferred the same to the purchaser. The lower court held that since the Appellant had an interest in the suit property, she was bound by the said order. The lower court made a further finding that the 2nd Respondent was not made aware by the Appellant that she had sold the suit property to the purchaser and as such the 2nd Respondent was entitled to consider the purchaser as an agent of the Appellant. On the issue of whether the Appellant had disobeyed the said court order, the lower court held that since the agreement of sale between the Appellant and the purchaser provided that the property was sold in vacant possession, the Appellant could only comply with the terms of the said agreement by defying the court order aforesaid. The lower court also found the Appellant’s failure to notify the purchaser of the said court order an act of contempt as that is what led to the eviction of the 2nd Respondent from the suit property. The lower court held that the purchaser acted as an agent of the Appellant and carried out the eviction of the 2nd Respondent from the suit property on the instructions of the Appellant.

On whether the Appellant was a suitable candidate for committal to civil jail having regard to her advanced age, the lower court while agreeing that where there was another avenue for redress of contempt, the court could decline to impose a jail sentence, the court held that in the circumstances of the case, the appropriate sentence was a jail term. The lower court therefore allowed the 2nd Respondent’s application and ordered that the Appellant be committed to prison for a term of six (6) months. It is that order that prompted the filing of the present appeal.

The Appeal:

In a memorandum of appeal filed on 11th September, 2019, the Appellant challenged the decision of the lower court on the following grounds;

1. The learned Magistrate erred in fact and law by failing to note that he did not have the jurisdiction to allow an application which sought to commit the Appellant to serve a sentence of six months in prison without an option of a fine.
2. The learned Magistrate erred in fact and law by failing to notice that the suit which formed the basis of the order was a nullity since the basis of the suit was an alleged lease agreement between the Appellant’s late husband and the 2nd Respondent and yet she was sued in her personal capacity.
3. That the learned Magistrate erred in fact and law by denying the Appellant an opportunity to be heard having stood her down due to a language barrier and having promised to ensure that an interpreter was available for the contempt of court proceedings but proceeded to hear submissions without hearing the Appellant in her defence against the charge of contempt of court.
4. The learned Magistrate erred in fact and law by failing to notice that the basis of the contempt of court charge was an eviction which was carried out by a third party through an eviction order issued by the Business Premises Rent Tribunal and that the Appellant was not a party to those proceedings.

5. The learned Magistrate erred in fact and law by failing to appreciate the fact that the lease which formed the basis of the suit in which the order was granted was procured through forgery, in respect of which the 2nd Respondent herein (Mohamed Warsame) was facing criminal proceedings at Makadara Law Court in R-vs-Mohamed Warsame, Criminal case No. 1766 of 2018.

6. The learned Magistrate erred in fact and law by misconstruing the Appellant's attempts to set aside the order by highlighting the fact that the order had been illegally procured as the basis of her guilt.

7. The learned Magistrate erred in fact and law by holding that the Appellant had a legal obligation to disclose that the property which formed the basis of the case had been sold by the time the order of the court was issued.

8. The learned Magistrate erred in fact and law by failing to grant the appellant an opportunity to be heard in a charge of contempt of court when she was present in court always despite her advanced age, poor health and travelling from Busia to the court in Nairobi.

9. The learned Magistrate erred in fact and law by failing to carefully examine the evidence tendered by the Appellant on the circumstances surrounding the alleged offence of contempt of court which occurred without her knowledge or involvement.

The appeal was heard by way of written submissions. The Appellant filed her submissions on 7th October, 2020 while the 2nd Respondent filed his submissions on 10th November, 2020. The 1st Respondent was joined in the appeal I believe just as a formality and it did not participate in the proceedings.

Analysis of the issues arising and determination thereof:

I have considered the record of the lower court, the ruling appealed from, the grounds of appeal and the submissions by the parties' respective advocates. Some of the grounds of appeal goes to the merit of the lower court suit. Since this is an interlocutory appeal, the court must stay away from determining issues reserved for the trial court that will hear the pending suit. In my view, the only issues arising in this appeal are;

- a) Whether the lower court erred in its finding that the Appellant was in contempt of the orders made on 28th May, 2018.
- b) Whether the lower court erred in sentencing the Appellant to six (6) months in civil jail without an option of a fine.
- c) Whether the appeal should be allowed.
- d) Who should bear the costs of the Appeal?

In Hardkinson v Hardkinson [1952] ALL ER 567, it was held that:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”

In the case of Mutitika v Baharini Farm Ltd [1985] KLR 227 it was held that:

(i) A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.

(ii) The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.

(iii) The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.

In Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR the court set out the law on contempt as follows:

“It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the Contempt of Court Act and the ruling of the Supreme Court in Republic v. Ahmad Abolfathi Mohammed & Another (supra). Secondly, as this Court emphasized in Jihan Freighters Ltd v. Hardware & General Stores Ltd and in A.B. & Another v. R. B. [2016] eKLR, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See Mutitika v. Baharini Farm (supra) and Republic v. Ahmad Abolfathi Mohammed & Another (supra).”

It is on the foregoing principles that the court will consider whether the lower court correctly convicted and sentenced the Appellant to serve a jail term for contempt. On whether the Appellant was in contempt of the court order made on 28th May, 2018, the following is my view. The order made on 28th May, 2018 by the lower court is self-explanatory. The order did not stop the Appellant from selling or transferring the suit property to a third party. It is common ground that as at the time the said order was made, the Appellant had already sold the suit property to Adan Nura Abass (the purchaser). The agreement for sale was made on 31st March, 2018. The fact that the suit property had been sold was not hidden to the 2nd Respondent or to the court as the lower seems to suggest. In her application dated 3rd October, 2018 seeking to set aside the orders of the court made on 28th May, 2018 aforesaid, the Appellant made it clear that she had already sold the suit property. This is well set out in the Appellant's Further Supporting Affidavit sworn on 8th December, 2018 and filed in court on 11th December, 2018. It is also common ground that the suit property was transferred to the purchaser on 13th November, 2018 through Indenture of Conveyance dated 30th October, 2018.

The act of contempt that was alleged against the Appellant in the lower court was that in breach of the said court order, the Appellant evicted the 2nd Respondent from the suit property on 14th February, 2019. The burden was upon the 2nd Respondent to prove the alleged breach of the said court order. It is common ground that as at the time the 2nd Respondent was evicted from the suit property; the property was not registered in the name of the Appellant. It is also common ground that the 2nd Respondent was evicted from the suit property pursuant to an order that was issued by the tribunal on 14th February, 2019. There is no dispute that the order was obtained by the purchaser and that the Appellant was not a party to the suit in which the order made. I am of the view that no evidence of whatsoever nature was placed by the 2nd Respondent before the lower court in discharge of his burden of proof of the act of contempt that was alleged against the Appellant. I find the lower court's finding that the purchaser acted as an agent of the Appellant farfetched. As at the time of the eviction of the 2nd Respondent, the purchaser was the registered owner of the suit property. The purchaser carried out the eviction following an order that he obtained from the tribunal. The Appellant was not a party to the tribunal case. The fact that under the agreement of sale between the Appellant and the purchaser, the Appellant had a duty to give vacant possession did not in my view make the purchaser an agent of the Appellant in the actions that he took to recover possession of the suit property after the same was transferred to him. There was no evidence that it was the Appellant who granted possession of the suit property to the purchaser. I am in agreement with the Appellant that her attempt to have the orders that she felt had been obtained fraudulently set aside should not have been used as evidence of her involvement in the eviction of the 2nd Respondent. It was within the Appellant's right to move the court to set aside the said orders that had been made against her.

Due to the foregoing, it is my finding that there was no evidence before the lower court on the basis of which it could find the Appellant in contempt of the order made on 28th May, 2018. The evidence that was placed before the lower court did not meet the threshold for proof of a charge of contempt. In the circumstances, the lower court erred in its finding that the Appellant was in contempt of the said orders of 28th May, 2018.

On whether the lower court erred in sentencing the Appellant to serve six months in civil jail without an option of a fine, the following is my view. The power of the lower court to punish for contempt is spelt out in section 10 of the Magistrate's Court Act, 2015(the Act).

Section 10(1) of the Act provides that:

Subject to the provisions of any other law, the Court shall have power to punish for contempt.

Section 10(3) of the Act provides that:

In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.

Section 10 (6) of the Act provides that:

The Court may sentence a person who commits an offence under subsection (1) to imprisonment for a term not exceeding five days, or a fine not exceeding one hundred thousand shillings, or both. (emphasis added)

It is clear from the foregoing that the lower court not only had no basis for sentencing the Appellant since she was not in contempt but also imposed unlawful sentence that was in excess of its jurisdiction. The lower court could only impose a sentence of imprisonment for not more than 5 days or a fine not exceeding Kshs. 100,000/-. The sentence of six months imprisonment that was imposed by the lower court was therefore illegal. I am aware that the 2nd Respondent's application in the lower court was brought under Order 40 rule 3 of the Civil Procedure Rules which gives the court power to impose a sentence of up to six months imprisonment on a contemnor. In my view, Order 40 rule 3 of the Civil Procedure Rules cannot override the provisions of the Magistrate's Court Act, 2015 on the punishment to be imposed by a Magistrate's Court on a contemnor. The basic rule is that, where there is a conflict between a statute and a rule which is a subsidiary legislation, the statute must prevail. In any event, the Civil Procedure Rules were made pursuant to the provisions of the Civil Procedure Act, Chapter 21 Laws of Kenya. Section 1 (2) of the Civil Procedure Act provides as follows:

This Act applies to proceedings in the High Court and, subject to the

Magistrate's Courts Act (Cap. 10), to proceedings in subordinate courts.

This in my view means that the provisions of the Civil Procedure Act and the rules made thereunder are subject to the Magistrate's Court Act, 2015. It follows therefore that where there is a conflict between the Magistrate's Court Act, 2015 and the Civil Procedure Act and the rules made thereunder, the Magistrate's Court Act, 2015 must prevail. Due to the foregoing, section 10(6) of the Magistrate's Court Act, 2015 must prevail over the provisions of Order 40 rule 3 of the Civil Procedure Rules with regard to the sentence that a Magistrate's court

can impose on a contemnor.

On the same issue, I am of the view that going by the authorities that were cited before the lower court, the court did not give any convincing reason for sentencing the Appellant to serve a jail term without an option of a fine having regard to the fact that the Appellant was of advanced age a fact that was appreciated by the lower court. While I appreciate that the court was exercising a discretion, the same ought to have been exercised judicially and not capriciously. From the material before the court, the Appellant is said to have been over 80 years when she was sentenced to serve a prison term. The Appellant appeared in court during the prosecution of the contempt of court application and was seen by the presiding magistrate. A reasonable explanation should have been given why an 80-year-old lady was being sent to prison without an option of a fine when the court had a discretion to impose a fine. It was not enough for the lower court to make a general statement that "it had taken all the circumstances of the case into consideration" and had come to the conclusion that a custodial sentence was appropriate. I am of the view in the circumstances that the court did not exercise its discretion judiciously as a result of which it imposed inappropriate sentence. Due to the foregoing, the lower court erred not only in sentencing the Appellant but also in imposing an illegal and inappropriate sentence.

On the issue of costs, section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya provides that the costs of and incidental to a suit is at the discretion of the court and that as a general rule, costs follow the event. In this case, the Appellant has succeeded in her appeal. No good reason has been given why she should be denied her costs of the appeal and of the application in the lower court. The Appellant shall have the costs of the appeal.

Conclusion:

In conclusion, the Appellant's appeal succeeds wholly. The appeal is allowed on the following terms;

1. The ruling and orders of the lower court made on 19th August, 2019 are hereby set aside and in place thereof there shall be an order dismissing the 2nd Respondent's Notice of Motion application dated 20th February, 2019 in the lower court.
2. For the avoidance of doubt, the Appellant's conviction for contempt and sentence of six (6) months imprisonment are quashed.
3. The Appellant shall have the costs of the appeal and of the application in the lower court to be paid by the 2nd Respondent.

DELIVERED AND DATED AT NAIROBI THIS 22ND DAY OF APRIL 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Wakoko h/b for Mr. Wangira for the Appellant

Mr. Ondabu for the Respondents

Ms. C.Nyokabi-Court Assistant