



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 3 OF 2021

(Formerly HC Civil Appeal No. 4 of 2020)

ARPHAXAD MUTISO MUTISYA.....APPELLANT

VERSUS

ROSE KATUNGWA *alias*

ROSE KYALO MWANZIA.....RESPONDENT

(Being an Appeal from the Ruling and decision in Kangundo Senior Principal Magistrate's Court (Hon. D. Orimba-SPM) Civil Suit No. 168

of 2017 delivered on 8th January, 2020)

JUDGMENT

1. Vide an Application dated 20th November, 2017 accompanied by a Plaintiff of the same date filed before the trial Magistrate at Kangundo Law Courts, the Appellant sought for injunctive orders restraining the 1st Defendant from harvesting white sand on the suit property, namely L.R. No. Kangundo/Matetani/620.
2. The 1st Defendant failed to file appearance hence the court entered an Interlocutory Judgment against the 1st Defendant on 23rd January, 2018. Further, the court vide a Decree issued on 27th February, 2018 granted a perpetual order of injunction restraining the 1st Defendant, her agents and/or servants from harvesting white sand on the suit property.
3. By an Application dated 26th March, 2019, premised on Order 40 Rule 3 of the Civil Procedure Rules 2010, the Appellant sought orders to commit the Respondent to civil jail for a term of six (6) months for contempt in disobedience of the court orders of 27th February, 2018. The Application was supported by the Affidavit of the Appellant herein. The 2nd Respondent filed a Replying Affidavit sworn by the Respondent on 28th May, 2019 in response to the contempt Application.
4. On 8th January, 2020, the trial Magistrate dismissed the Application seeking for contempt orders against the Respondent for lack of particulars in the Affidavit of Service. The Appellant, dissatisfied with the trial Magistrate's Ruling, filed the current Appeal. The Appellant and Respondent's filed written submissions.
5. The Appellant submitted that the trial Magistrate erred by relying entirely on the Affidavit of Service of Joseph Mutinda Munyasia sworn on 5th April, 2019 to dismiss the Application for contempt orders against the Respondent when the Affidavit had nothing to do with the service of the notice of the existence of the court order.
6. It was submitted that paragraphs 2, 3 and 4 of the Affidavit of Service was not in respect of service of the court order but the Notice of Motion dated 26th March, 2019 and that the trial Magistrate failed to see, mention, notice and/or detect the glaring Affidavit of Service of Joseph Mutinda Munyasia sworn on 9th April, 2018 despite it being properly on record confirming that the court order was served upon the Respondent.
7. The Appellant submitted that the trial Magistrate's finding that the process-server in the Affidavit of Service dated 5th April, 2019 did not say who told him that the person being served was the intended person is erroneous and unfounded since in paragraph 5 of the Affidavit of Service, the process-server has deponed that the Respondent was pointed out by the Appellant.
8. The Appellant submitted that based on the Affidavit of Service sworn on 9th April, 2019, the 2nd Respondent had knowledge of the court

order. Reliance was placed on the decisions in *Kiru Tea Factory Co. Ltd vs. Stephen Maina Githiga & 14 Others (2019) eKLR* where court cited the case of *General of Fair Trading vs. Smith Concrete: Re: Supply of Ready Mixed Concrete (1991) QB 212, Jihan Freighters Ltd vs. Hardware & General Stores Ltd (2015) eKLR* and *AB & Anor. vs. R.B (2016) eKLR*.

9. It was submitted that the trial Magistrate erred for not finding that the contents of the Affidavit of Service were never challenged/controverted nor was the cross-examination of the process-server sought hence a qualified presumption of service in favour of the process-server. Reliance was placed on the cases of *Shadrack Arap Boiywo vs. Bodi Bach (1987) eKLR* where court cited *MB Automobile vs. Kampala Bus Service (1966) EA* and in *Chitale & Annaji Rao, the Code of Civil Procedure Volume 11 page 1670* on presumption as to service.

10. It was submitted that the Respondent did not deny, rebut, challenge and/or controvert the photographs and OB No.8 of 9/12/2018 in support of the Application for contempt but the trial Magistrate ignored and/or failed to consider the evidence; that the 2nd Respondent did not deny that a lorry had collected and harvested sand on the suit property and that the 2nd Respondent had knowledge of the court order but did nothing to stop the harvesting of the sand on his husband's land.

11. According to the Appellant, the contemptuous acts complained of were committed under the express authority and instructions of the 2nd Respondent and that the 2nd Respondent claim that she was not a party to the original suit where an injunction was granted is not a license or excuse to disobey the court order that had been served on her while at her matrimonial home. Reliance has been placed on the cases of *Republic vs. Council of Legal Education & Anor Ex-parte Uganda Pentecostal University (2015) eKLR* where Odunga J. cited *Gathara K. Mutitika & 2 Others vs. Baharini Farm Ltd (1985) KLR 227, Mutitika vs. Baharini Farm (1982-88) 1 KAR 863, Hadkinson vs. Hadkinson (1952) ALL ER, Johnson vs. Grant (1923) SC 7890* and *Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others, Civil Application No. 33 of 2013*.

12. The Respondent's counsel submitted that the Appellant acting in person filed the pleadings in the Appeal without the leave of court; that the entire Appeal should be struck out; that all parties in a suit must be named and served with pleadings in the Appeal and that there is no valid Appeal before the court.

13. The Respondent's counsel submitted that the Appellant did not seek the leave of the court to Appeal against the interlocutory Ruling of the court issued on 8th January, 2020 dismissing his Application to have the Respondent committed to civil jail and that an Appeal against a Ruling and order of this nature does not lie as a matter of right.

14. It was submitted that Order 43 of the Civil Procedure Rules outlines matters where leave of the court has to be sought before any Appeal is preferred and that it was a prerequisite that the lower court gives leave before this Appeal could be filed.

15. I have read and considered the Memorandum of Appeal, the Record of Appeal as well as the written submissions filed by the respective parties. I consider the issues necessary for determination as follows:

a) *Whether the appeal is competent.*

b) *Whether the Respondent was served with the court decree issued on 27th February, 2018.*

c) *Whether the Respondent disobeyed the court orders.*

16. On the first issue, the Respondent submitted that no leave was sought to file the Appeal hence the Appeal should be struck. Further, that the Appeal is irregular since the Appellant filed it in person instead of his advocate who was still on record. The Appellant asserts that the Respondent's assertions on lack of leave to file the Appeal are mere technicalities meant to defeat substantive justice and that since the Respondent has not filed an Application to strike out the Appeal, the objection is not merited.

17. On the issue of leave, the Court of Appeal in *Lucy Wanjiku Nyaga vs. James Mwaniki Munyi & another [2018] eKLR* while dealing with Article 159(2) (d) of the Constitution, cited the case of *Peter Nyaga Murake vs. Joseph Mutunga (2015) eKLR* where the Court of Appeal stated:

“Without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. The procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”

18. Again, in *Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others [2013] eKLR*, the Court of Appeal observed:

“The right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the Constitution. We do not consider Article 159 (2) (d) of the Constitution to be a panacea, nay, a general white wash, that cures and mends all ills, misdeeds and defaults of litigation.

19. The same position was taken in *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR* where the Court stated thus:

“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle of Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of cases.”

20. In **Nyutu Agrovet Ltd vs. Airtel Networks Ltd [2015] eKLR**, the Court of Appeal held that where there was no automatic right of Appeal stipulated under Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, then the Appellate Court has no jurisdiction to hear and determine an Appeal unless leave of the court from which the order was made is sought and obtained.

21. It follows therefore that the right of Appeal goes to the jurisdiction of this court, and lack of the leave to Appeal, where one is required by law, renders the entire Appeal *void ab initio*.

22. The Application that sought orders to commit the Respondent to civil jail was premised on Order 40 Rule 3 of the Civil Procedure Rules. The Order provides *inter alia* (Consequences of breach):

“(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”

23. Section 75 of Civil Procedure Act and Order 43 Rule 1 of the Civil Procedure Rules, 2010 sets out the law on Civil Appeals. Order 43 Rule (1) provides that:

“An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act-

(a)...

(u) Order 40, Rules 1, 2, 3, 7 and 11 (temporary injunctions).”

24. A reading of sub-rule 1(u) (*supra*) shows that an Appeal lies as of right in respect of Applications for contempt of injunctive orders. Hence, the Appellant did not require leave to file the current Appeal.

25. Further, the Respondent contends that the Appeal be struck out in its entirety for being filed by the Appellant in person and not by his advocate who was still on record as no notice to act in person has been filed and served by the Appellant upon the Respondent.

26. The Notice of Appointment dated 9th October, 2019 shows that the Appellant had engaged the firm of Nyende & Company Advocates. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides that:

“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

27. In the case of **Mukunya Mugo ‘A’ & another vs. Elizabeth Mugure Mukunya [2021] eKLR**, the court stated as follows:

*“...it is clear that Order 9 Rule 9 of the Civil Procedure Rules applies where the parties were represented by advocates and would wish to change the advocates and act in person after the Judgment. The essence of Order 9 Rule 9 of Civil Procedure Rules is to protect advocates from mischievous clients who wait until a judgment had been delivered and then sack the Advocates. See the case of **S.K. Tarwadi vs Veronica Muehlemann [2019] eKLR.**”*

28. Further, in the case of **Kenya Pipeline Company Limited vs. Lucy Njoki Njuru [2014] eKLR** the Court observed:

“The confusion in the differing positions in my view, brought about by what interpretation to be accorded firstly, to Order 9, Rule 5 and secondly to Order 9 Rule 9 of the Civil Procedure Rules. I shall begin with the provisions of order 9 rule 9 CPR which provides:

“After judgment has been passed, no notice of change of Advocates shall be effected without an “order of court upon application with notice to all parties or upon consent filed between the outgoing advocate and the proposed incoming advocate or party contending to act in person as the case may be.

Clearly this rule applies to change of advocates where judgment has been passed. It is intended to protect the advocates from “hopping” parties and cause them to lose their hard earned fees.”

29. The Appellant’s submissions that the court should be guided by Article 159(2)(d) of the Constitution was met with displeasure by the

court in **Lalji Bhimji Shangani Builders & Contractors vs. City Council of Nairobi [2012] eKLR** where Odunga J. held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

30. And in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** Kiage, JA held as follows:

“I am not in the least persuaded that Article 159 of the Constitution and the Oxygen Principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost effective manner...were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice..it is in the even-handed and dispassionate application of rules that Courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.”

31. However, I note in **Tobias M. Wafubwa vs. Ben Butali [2017] eKLR**, the court was of this view:

“We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice to Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.

We would go further to add that, provided that where the failure to comply with the Rule 9 did not undermine the jurisdiction of the court or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the Constitution and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings.”

32. The Appeal herein has been filed in person by the Appellant. This Appeal is not a continuation of the proceedings of the lower court, but rather a commencement of new proceedings in this court by way of Appeal. The Appellant had the right to choose whether to remain with the same counsel or to engage another counsel or to act in person on Appeal, without being required to file a Notice of Change of Advocates; or a Notice to Act in person; or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.

33. It is noted that the Respondent has not submitted on the second and third issue in respect of contempt proceedings but chose to concentrate on the incompetency of the Appeal. However, the courts role at this stage is to reconsider the evidence, evaluate itself and draw its own conclusions.

34. In the Ruling of the trial court, the Magistrate held at page 8 of the Ruling as follows:

“In this case it has been submitted that the alleged contemnor was served. The counsel for the applicant has relied on the affidavit of Joseph Mutinda Munyasia sworn on 5th April 2019. In that affidavit, the process server deposed that he received a copy of order and served upon the 2nd Defendant who received, but declined to sign. The said process served did not say who told him that person he was serving was the intended person. The counsel for the 2nd Defendant submitted that the 2nd Defendant was not aware nor party to the proceedings in court. The affidavit by the process server lacks particulars. Furthermore, the 2nd Defendant alleges that she is not the one mentioned in the pleadings....”

35. The Appellant contends that the trial Magistrate failed to note and/or detect the Affidavit of Service sworn on 9th April, 2019 and relied on the Affidavit of Service sworn on 5th April, 2019 that had nothing to do with service of the court order.

36. I have perused the Affidavit of Service sworn on 5th April, 2019 which I note was in respect of the Notice of Motion dated 26th March, 2019 and not the court order issued on 27th February, 2018. The law on Affidavit of Service is set out under Order 5 Rule 15(1) of the Civil Procedure Rules, 2010 which provides that:

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery of tender of summons. The affidavit of service shall be in form No. 4 of Appendix A with such variations as circumstances may require.”

37. The Affidavit of Service sworn on 9th April, 2018 indicate that the Respondent was served on 6th April, 2018 with a demand letter dated 6th April, 2018 and the court Decree issued on 27th February, 2018 at around 10:30am while at her matrimonial home in Matetani Sub-Location, Mbondoni village. The said Affidavit further states that the Respondent was pointed out by the 2nd Respondent in the presence of an elder, Amos Mwanzia.

36. In my view, the contents of the Affidavit of Service dated 9th April, 2018 and filed on 28th March, 2019 remain unchallenged hence a plausible conclusion that the Respondent was served with the court orders.

39. In *Peter K. Yego & Others vs. Pauline Nekesa Kode Nakuru HCCC No. 194 of 2004* the court recognizing that since contempt of court is a quasi-criminal transgression, it must be proved that one has actually disobeyed the court order. An Applicant in an Application for contempt must prove to the required standard that the Respondent is guilty of contempt.

40. It is noted at paragraph 9 of the Supporting Affidavit, the Appellant has deposed to have been woken up at 4:00am from sleep; that while in the company of his wife, they saw a lorry being driven out of the suit property and that he was not able to identify the motor vehicle's registration number.

41. Further, at paragraph 11 of the Supporting Affidavit, the Appellant states that on 9th December, 2018 at 7:30am, he saw white sand being harvested on the suit property at night and that the white sand was being harvested by the Respondent's agents.

42. In my view, it was incumbent upon the Appellant to establish through documentation that the Respondent was the registered owner of the motor vehicle that is alleged to have been loaded with the white sand. Section 107(1) of the Evidence Act requires that *'whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.'*

43. On the evidence that was placed before the trial court, I am satisfied that no evidence was adduced to show that the Respondent disobeyed the orders of the court. Consequently, the trial Magistrate's order dismissing the contempt Application dated 26th March, 2019 is upheld.

44. The general rule is that costs of the suit follows the event, and unless there are good grounds why a losing party should not pay costs, the losing party will most certainly pay the costs. The Appellant's Appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 28TH DAY OF MAY, 2021.

O. A. ANGOTE

JUDGE