Gichuki & another v Attorney General (Civil Appeal E008 of 2023)
[2024] KEHC 7613 (KLR) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7613 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E008 OF 2023

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

JULIUS GICHUKI ..... 1ST APPELLANT

JOSEPH IRUNGU ..... 2ND APPELLANT

AND

THE HONORABLE ATTORNEY GENERAL ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. F. Muguongo (SRM) in Nyeri MCCC No. E324 of 2021, delivered on 16th March, 2022)

JUDGMENT

1. This is an appeal from the ruling and order of the Hon. Muguongo Senior Resident Magistrate, delivered on 16/3/2022 arising out of contempt proceedings in Nyeri E 324 of 2021. The Appellants were not parties to the suit below. The case below was between Samuel Maina Muriuki and 5K Cabs Sacco and Nyekasha Self Help group in the lower court.

2. The appellants filed an appeal on both quantum and liability and set out 8 grounds of appeal as hereunder: -

    a. That the Learned Trial Magistrate erred in fact and in law in passing out a sentence that was illegal, grave and excessive, thereby occasioning a gross miscarriage of justice.

    b. That the Learned Trial Magistrate erred in fact and in law in convicting and sentencing the Appellants whereas the Application for Contempt of Court was premised on the *Contempt of Court Act*, 2016, which has since been declared-invalid and unconstitutional and of no legal effect, thereby occasioning a gross miscarriage of justice.

c. That the Learned Trial Magistrate erred in fact and in law in convicting and sentencing the Appellants whereas the Application for Contempt of Court was premised on section 5 of the *Judicature Act* which is the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned, and not the Magistrates Court, thereby occasioning a gross miscarriage of justice.

d. That the Learned Magistrate erred in law and in fact in convicting and sentencing the Appellants without any mitigation or calling the Appellants to appear personally before the trial court to show cause why they should not be punished for willfully disobeying the orders issued by Hon F. Muguongo SRM on 17th November, 2021, thereby occasioning a gross miscarriage of justice.

e. That the Learned Magistrate erred in law and in fact in failing to find and rule that there was no willful disobedience of the Consent Orders issued by Hon F. Muguongo SRM on 17th November, 2021, thereby occasioning a gross miscarriage of justice.

f. That the learned Trial Magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erroneous findings, thereby occasioning a miscarriage of justice.

g. That the Learned Trial Magistrate erred in fact and in law in reaching an erroneous finding from the evidence presented before her, thereby occasioning a gross miscarriage of justice.

h. That the learned Trial Magistrate failed to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a miscarriage of justice.

Background to the case:-

3. Samuel Maina Muriuki filed a suit against 5K Cabs Sacco. He stated that he is a member of the said Sacco since 2017. He stated that he bought a tax bay from Patrick Muoki Maina to do taxi business. He stated that he operated 2 taxis – KCL 687P and KCF 722F since 2017.

4. On 6.9.2021 the Chairman stopped the two taxis from operating. He suffered loss of Kshs. 3,000/= per day. He prayed for humongous amount of money. In short there was a dispute between a Sacco and its member. The summary for the said case was issued on 4.10.2021 by the Chief Magistrate's Court at Nyeri vide Civil Case No. E324 of 2021.

5. As usual in this kind of matters no evidence of loss was enclosed except some self-serving-fit-for purpose documents. The Only evidence shown is an agreement for purchase of Membership Bay No. 42 between Muchoki and Maina. The said agreement was witnessed by Gerald Wanjohi and Joseph Irungu.

6. An injunction was sought to restrain the Defendant from operating Motor Vehicle Registration KCL 687P and KCF 722X in their bays.

7. The matter was fixed for mention on 25/10/2021. Unfortunately, the court granted leave to amend pleadings though it was not fixed for hearing but for mention on 25.10.2021 before Court 6. Grounds of Opposition were filed stating that the Defendant lacks capacity to be sued.

8. In responding to the grounds of opposition, for the very first time Nyekasha Self Help Group was indicated as the 2nd Respondent. There was also filed on 11.11.2021 an amended Motion seeking the following prayers: -

a. That this Honorable Court may be pleased to issue a temporary injunction restraining the Respondent their agents, proxies and/or legal representatives of any one claiming right from the respondent be restrained by injunction from denying the Plaintiff's cabs registration marks KCL 687P and KCF 722X doing business and operating from their bays and pay the losses incurred pending hearing and determination of this application.

b. That this Honorable Court may be pleased to issue a temporary injunction restraining the Respondent their agents, proxies and/or legal representatives of any one claiming right from the respondent be restrained by injunction from denying the Plaintiff's cabs registration marks KCL 687P and KCF 722X doing business and operating from their bays and pay the losses incurred pending hearing and determination of this suit.

c. That the costs of this application be provided for.

9. On 9.11.2021 a consent was recorded as follows: -

a. That the Plaintiff/Applicant pay a sum of Kshs. 2,000/= for the cab registration number KCL 687P to do business/operate from the taxi business bay operated by the defendants.

b. That the Plaintiff/Applicant deposit a copy of the logbook in respect of the motor vehicle registration number KCF 722X for the same to do business or operate from taxi business bay allocated to or operated by the defendants.

c. That the matter be mentioned on the 15th of December, 2021.

10. On 24.11.2021 an amended Defence was filed but the first defendant stated that the Samuel Maina was a member of Nyakesha Self Help Group. They prayed the Plaint to be struck out for being misconceived.

11. On 11.12.2021 an application was filed seeking the following orders: -

a. Spent

b. Julius Gichuki and Joseph Irungu being proprietors of the fist and second responddents having willfully and without, lawful cause disobeyed the orders issued by this hounourable court on 17/11/2021 be found in contempt of court.

c. Julius Gichuki and Joseph Irungu do appear personally before the court to show cause why they should be punished for willfully disobeying the orders issued by this hounourable court on 17/11/2021.

d. Costs of the Application be borne by the 1st and second respondents

12. They stated that there was a consent to allow vehicles to operate. The Application was filed by the Firm of Gori Ombongi and Company Advocates. The same was based on deposit on 19.11.2021 in the name of Joseph Machira Ndiritu of Kshs. 2,000/= in Nyeri Branch of Family Bank. He was not party to the suit. The log book deposited was in the name of George Ngugi Ng'ang'a, who is not party to the suit. He also had no claim in the suit. The Applicant in the said application did not allege to be an agent for the said person. In short there was no connection to the subject matter.

13. On 24.11.2021 the firm of M/s Magua Mbatha and Company advocates indicated that a log book had not been supplied. The Applicant also disregarded instructions of the stage clerk. A further Supporting Affidavit was filed on 13.1.2022. He stated that he was kicked out of a meeting without any reason. He annexed minutes dated 21.12.2021 at Annabel Hotel, Nyeri.

14. Julius Gichuki replied as the Chairman of the 2nd Defendant. He stated that Motor Vehicle registration number KCF 722X has been returned to the owner and the owner recorded a statement as the owner. In short, the Response was that the Applicant was a fraudster and had no link to the said motor vehicle.

15. In a rather convoluted ruling the court found Julius Gichuki and Joseph Irungu to be in contempt of the court order and gave orders as follows:

    a. That Julius Gichuki and Joseph Irungu are hereby found to be in contempt of the Court's Orders of 17th November, 2021

    b. This court has power to punish for Civil *Contempt of Court Act* No. 46 of 2016.

    c. That Julius Gichuki and Joseph Irungu are hereby directed to pay a fine of Kshs. 100,000/= each, or serve six months in prison each.

    d. The Plaintiff is awarded the costs of this application.

16. This resulted in this appeal which was filed pursuant to Leave granted on 7.2.2023 by this court. They set out 8 grounds of Appeal. The grounds are unseemly contrary to Order 42 Rule 1 of the Civil Procedure Rules provides are hereunder: -

    1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

17. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

18. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR , the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:
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> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

19. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

Analysis

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

21. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

22. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> " .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

23. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

24. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction

to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

25. In this matter however, there were no witnesses hence affidavits were sufficient. The court will have a wider latitude. In the case of *Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018)* [2023] KECA 202 (KLR) (17 February 2023) (Judgment), Kiage JA, stated as follows: -

> " I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the learned magistrate out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge. I think that this further widens our latitude for departure where necessary."

26. The Appeal raises 3 cardinal issues.

    a. Whether the court had jurisdiction to punish for contempt.

    b. Whether there was contempt.

    c. Relief to be granted.

27. The first issue is whether this court has jurisdiction to punish for contempt. I note that the alleged contempt was not contempt on the face of the court. It was also not an injunction. In regard to injunction, the court issued a temporary Injunction has power under order 40 Rule 3 of the *Civil Procedure Act* to punish for disobedience. It is important to note that the same is not contempt. The said rule provides: -

    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.

    2. No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto. (3) An application under this rule shall be made by notice of motion in the same suit.

28. Secondly the court has authority to punish for contempt on the face of the court, and not otherwise.

29. In this matter this was not contempt on the face of the court. The court relied on various sections of *Contempt of Court Act*. This was sad since, before there is no such Act in the republic of Kenya. It was declared unconstitutional by dint of Article Articles 10 and 118(b) of *the Constitution*, the said Act is inapplicable while the declaration has not been set aside. In the case of Kenya Human Rights

Commission v Attorney General & another [2018] eKLR, the court considered the case of The Queen v Big M. Drug mart Ltd, 1986 LRC (Const.) 332, the Supreme Court of Canada which stated that;

> "Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."

30. As a result the court in the said case of Kenya Human Rights Commission v Attorney General & another [supra] the declared as hereunder: -

> "
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> "98. Having considered the petition, the response, submissions, *the constitution* and the law, I am persuaded that sections, 30 and 35 of the *Contempt of court Act* are unconstitutional. I, however, find that the entire fails the constitutional test of validity for lack of public participation and for encroaching on the independence of the judiciary.
>
> Consequently and for the above reasons, this petition succeeds and I make the following orders.
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> A declaration is hereby issued that Sections 30, and 35 of the impugned *contempt of court Act* No 46 of 2010 are inconsistent with *the constitution* and are therefore null void.
>
> A declaration is hereby issued that the entire *contempt of court Act* No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of *the constitution* and encroaches on the independence of the Judiciary
>
> No order as to costs.

31. The power to punish is set out in Section 5 of the *Judicature Act*. It provides as follows: -

> (1) 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 such power shall extend to upholding the authority and dignity of subordinate courts.
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> (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

32. In the case of Henry Musemate Murwa v Francis Owino, Principal Secretary, Ministry of Public Service, Youth And Gender Affairs & another [2021] eKLR, Justice Maureen Onyango stated as hereunder: -

> "I do not agree with the Respondent. Having been declared unconstitutional, all the provisions of the *Contempt of Court Act*, including the repeal of Section 5 of the *Judicature Act*, became a nullity. It is as if the *Contempt of Court Act* was never enacted. This means that Section 5 of the *Judicature Act* was reinstated following the nullification of the *Contempt of Court Act*.

24. This was the positon taken by the Court in Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited which I agree with where the Court stated –

"This section was repealed by section 38 of the Contempt of Act of 2016, and as the said Act has since been declared invalid, the consequential effect in law is that it had no legal effect on, and therefore did not repeal section 5 of the *Judicature Act*, which therefore continues to apply. In addition, the substance of the common law is still applicable under section 3 of the *Judicature Act*. This Court is in this regard guided by the applicable English Law which is Part 81 of the English Civil Procedure Rules of 1998 as variously amended, and the requirement for personal service of court orders in contempt of Court proceedings is found in Rule 81.8 of the English Civil Procedure Rules.

25. Section 5 of the *Judicature Act* is therefore still in force."

33. It is a cardinal principle of law known as Nulla poena sine lege, that there cannot be a punishment without law. The court below does not have powers to punish for contempt under the said act.

34. The Magistrates Courts Act provides as follows: -

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

(2) A person who, in the face of the Court —

(a) assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;

(b) interrupts or obstructs the proceedings of the Court; or

(c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.

35. The court below could not undertake the duties of the High Court. It cannot definitely have the powers of the High Court of Judicature of England. In the circumstances the court exceeded its mandate and fell into deep error in trying the Appellant for contempt. The Magistrate's Court have no power to punish for contempt of court except in two situations: -

i. Contempt on the face of the court.

ii. Disobedience of an order of Temporary Injunction under Order 40.

36. Any other case under Section 5 of the *Judicature Act* must be strictly applied. The practice in England is crucial. This is enough to dispose the Appeal. However, I have noted many errors, most of them fatal to the suit. The court has assumed jurisdiction in cases when it had none. A court cannot by craft or out of feel-good moment create jurisdiction when they have none. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

"This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution*

confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

37. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The court proceeded and wandered from its boundaries and trespassed into the Powers reserved exclusively to the High Court, and to that effect courts of equal status in respect to matters reserved for those courts under Article 165(5) and 162(2) of *the Constitution*. In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

> " With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what
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> I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts.

38. The court should have downed its tools and sent them to the appropriate court.

39. On the other hand, even if we were to assume, and wrongly so that the court was capable of hearing the Application, was there an order capable of being disobeyed?

40. The pleadings speak for themselves. On 25.10.2021 leave to amend pleadings was granted. The same was to be served, at that point only 5K Sacco were parties. I have not seen leave being granted to join the 2nd Defendant - Nyekesha Self Help Group. Even if they were added, there were no summons to enter appearance filed. Therefore, none were served. In short there was no suit against the 2nd Respondent.

41. Order 5 Rule 7 provides as follows: -

> " Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant."

42. Order 5 rule 1(6) provides as follows: -

> (6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate."

43. Without suing the 2nd defendant or getting summons, the suit abated. There was no suit capable of having an order issued.

44. Further, a self help group can only be sued through its officials. The defendants are neither a firm nor a body corporate. The said body was irregularly joined to the proceedings. Given that no summons were issued and served within 30 days, the suit against the Self Help Group was improper.

45. The orders purported to be granted were by consent between an advocate representing 5K Sacco and Samuel Maina Muriuki. The purported second defendant was not party. The nature of the consent was to bind parties not before the court. A consent cannot bind non parties.

46. Lastly, the Applicants had a duty to prove that the order was proved. The decision of Mativo J as he then was in Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR comes to mind and set out hereunder: -

> " It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove
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> (i) the terms of the order,
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> (ii) Knowledge of these terms by the Respondent,
>
> (iii) Failure by the Respondent to comply with the terms of the order.
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> Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book Contempt in Modern New Zealand who succinctly stated:-
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> "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:-
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> (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 notice 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.."

47. A consent is a contract between parties. It cannot bind a third party. It should be remembered that it could have been different if the order was by the court on its own. A court cannot create obligations on non-parties and third parties. In Brooke Bond Liebig Ltd v Mallya [1975] EA 266, It was posited as thus:-

> " A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."

48. In the case of Julius Kigen Kibiego V Angeline Korir & Another[2012]Eklr, Justice Munyao stated as follows: -

> " It is settled law that a consent can only be set aside on the same grounds that a contract may be set aside. In Hirani vs Kassam (1952) 19 EACA 131 the court stated as follows, at page 134:
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> "The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Seton on Judgments and Orders (7th edn.), vol 1, p 124, as follows:
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> "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

49. A consent cannot bind a third party. In *Obala v Okello & 2 others (Civil Appeal E022 of 2022)* [2022] KEHC 15762 (KLR) (22 November 2022) (Judgment), R.E Aburili, J, posited as thus: -

> " In this case however, the consent recorded affected or involved a party that was not party to the case between the 1st respondent and the appellant. From the case of James Muchori Maina supra, a consent is a form of contract. Accordingly, it cannot bind a party that is not privy to it.
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> 36. The Court of Appeal in the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another (2015) eKLR rendered itself as follows:"In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.
>
> 37. For the above reason, I find that in the instant case, the consent order amending the appellant's defence to include the third party was void ab initio as the purported third party was not party to that consent.
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> 38. I find that the appellant was under an obligation, if she felt that someone else was responsible for or contributed to her predicament in the case, to enjoin that someone else as a third party, following the procedure laid out in the law, so that she can claim from him any loss or award that she may suffer, should the case be determined in favour of the respondent. A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear or be made parties to proceedings before it.

50. It is noted M/s. Magua & Mbatha Advocates indicated that they were acting for the 2nd Defendant. However, without summons and without an order for joinder of a party, all proceedings against the

said party are a nullity. In the case of Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others [1998] eKLR, the court stated as follows: -

Mr. Gautama again averred that no one, especially third parties, can be guilty of disobeying an order which is null and void. With this submission I agree. There cannot be as far as third parties are concerned interference with due administration of justice when the ex-parte order made is without any legal basis and is of no legal effect, and; as regards the parties to this suit, it cannot be said that there was disobedience of an order which was in the first place null and void.

51. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

52. The last question is whether the parties cited were in contempt. Even if the order was binding, it did not state that Samuel Maina Muriuki was not subject to the Rules. Members have freedom of association. They have a right to not associate with him. There have been no proceedings against the events from a meeting of 21.12.2021.

53. In any case that was after filing of the impugned application. It was patently clear that Samuel Maina Muriuki had no authority over the suit motor vehicles which had been returned to the owner. The police had been involved when the owner complained. Having not deposited his Log book, the order was incapable of compliance. The said Samuel Maina Muriuki had no vehicle to use and as such there was no contempt. The person who received the order fraudulently concealed facts rendering the entre edifice upon which the order was premised tenuous.

54. Finally, the plaint was based on a lie. By the consent parties were conferring membership to a third party. It means that there was no cause of action at the time of filing. Further the 5K Cabs Sacco was not incorporated. It cannot as well be sued. However, I note that the suit is concluded and there may be a need to restrain myself from doing the needful. It is however important to point out that the suit was a nullity from one go.

55. The Application for contempt was based on falsehood. The orders for contempt are set aside in toto. In lieu thereof, I substitute an order dismissing the Application for contempt with costs to be assessed in the lower court on the basis of a full suit. The Appeal is accordingly allowed. Though the suit was dismissed, contempt was against each of the Appellants. They will each have costs for defending the contempt in the lower court. They shall have costs of Kshs. 75,000/= each for the dismissed contempt application payable by Samuel Maina Muriuki.

56. Secondly, I note that the Attorney General is a nominal Respondent. The true Respondent is Samuel Maina Muriuki. The Appeal is thus allowed with costs of Kshs. 105,000/= to each of the Appellants.

57. For avoidance of doubt it is held that the Appellants did not disobey any order and were not in contempt.

58. In the end I find the whole of the said Ruling erroneous and set it aside entirely. From subsequent proceedings the Appellant have equally been vindicated. Samuel Maina Muriuki appear to have perjured himself. I leave it to the requisite authorities to pursue criminal charges against him.

59. 2N cab Sacco are at liberty to seek requisite orders in view of this ruling regarding costs that were declined in the Judgment in view of the ruling that is set aside.

60. This order be served upon Hon F. Muguongo by the Deputy Registrar of the Court.

Determination

61. In the circumstances I make the following orders: -

a. The Appeal is merited, the same is allowed. Being an appeal on contempt each appellant is granted costs of 105,000/= for the Appeal.

b. The Application for contempt dated 7.2.2023 despite the main suit having been concluded, it is my finding that the suit against the 2nd Defendant was a nullity there having been no summons. Costs ordered herein shall be paid by Samuel Maina Muriuki within 30 days in default execution do issue.

c. The Appellants shall be refunded all the fines paid.

d. The Judgment shall be served upon Hon. F Muguongo by the deputy registrar of the court.

e. The Application for contempt dated 11/12/2021 in Neyri CMCC E324 of 2021 is dismissed with costs of Kshs. 75,000/= to each of the alleged contemnors, the Appellants herein.

f. The fine paid be refunded to the depositors.

g. The Attorney General to bear his costs.

h. Cost be paid by Samuel Maina Muriuki as the substantive Respondent within 30 days in default execution do issue.

i. For avoidance of doubt the consent order recorded on 17.11.2021 is null and void, for all purposes.

j. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant – Jedidah