



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 4 OF 2019

1. MAZERA BOMA alias KANYBWE
2. MWACHUPA TSUMA MADZO
3. CHARLES TSUMA MULANGO
4. BOMA NDURYA TSUMA MADZO.....APPELLANTS

VERSUS

1. NYAE MRISA TSUMA
2. ALINGOMBEKO CHAKA.....RESPONDENT

(Being an appeal from the entire Ruling/Order of the Senior Resident Magistrate

(Hon. D.M. Ndungi) delivered on 13th March, 2019 by Hon. S.K. Ngii (SRM)

at Mariakani, in the Magistrates Court, Land and Environment Suit No. 21 of 2018)

JUDGMENT

This appeal arises from the lower court's ruling dated 13th March 2019 delivered at Mariakani SPM's Court in *MCL & E Case No 21 of 2018*. The appellant herein being aggrieved by the said ruling lodged this appeal vide a memorandum of appeal filed on 2nd April 2019 listing 11 grounds that:

- 1) *That the learned trial magistrate erred in law and in fact in finding in favour of the Respondents;*
- 2) *That the learned trial magistrate erred in law and in fact in failing to dismiss the application by the Respondent for being fatally defective;*
- 3) *That the learned trial magistrate erred in law and in fact in failing to hold the burden of proof at beyond reasonable doubt given that the liberty of the Appellants was at stake;*
- 4) *That the learned trial magistrate erred in law and in fact in failing to consider the submissions by the Appellants;*
- 5) *That the learned trial magistrate erred in law and in fact in failing to find that personal service had not been effected on the Appellants;*
- 6) *That the learned trial magistrate erred in law and in fact in failing to regard prevalent precedent authorities set in contempt proceedings;*
- 7) *That the learned trial magistrate erred in law and in fact in considering and/or finding as sufficient evidence minimal and/or negligible proof of alleged contempt;*
- 8) *That the learned trial magistrate erred in law and in fact in failing to find that the order that allegedly bore fruit to the*

contempt proceedings had expired as at the time of the alleged contempt;

9) That the learned trial magistrate erred in law and in fact in failing to appreciate that the size of the suit property was such that proof of contempt could be proved by a site visit and not photos of an "unknown location" that could not be confirmed as, the suit property;

10) That the learned trial magistrate erred in law and in fact in finding that the Respondents had proved beyond reasonable doubt that the Appellants were guilty of contempt of court; and

11) That the ruling of the learned trial magistrate was against the law and weight of evidence on record.

Counsel agreed to canvas the appeal vide written submissions which were duly filed.

APPELLANT'S SUBMISSIONS

Counsel gave a brief background to the appeal and stated that the Respondents filed a suit at Mariakani SPM's Court, against the appellants vide a plaint dated 27th November 2018 seeking orders *inter alia* that a permanent injunction be issued restraining the appellants from trespassing on land parcel known as Chigutu, Samburu within Kwale County and measuring approximately 35 acres. The respondent filed the plaint contemporaneously with a notice of motion seeking for a temporary injunction against the appellants from interfering with the suit land until the determination of the notice of motion and the main suit which was heard *ex parte* and granted as the defendants had not filed a response.

It was counsel's submission that on 14th December 2018, the appellants moved the trial court to set aside the orders issued on 11th December 2018, whereby the court directed that the application be served and the same was scheduled for hearing on 16th January 2019. That before the hearing of the application the respondents filed an application dated 18th December 2018 seeking that the appellants be held in contempt of court for disobeying the trial court's orders issued on 28th November 2018 and confirmed on 11th December 2018.

Counsel submitted that the appellants filed a preliminary objection and a replying affidavit but the trial court dismissed the application for stay of the orders as it would prejudice the respondent's contempt application already slated for ruling on 30th January 2019. The ruling is the subject of this appeal.

Counsel condensed the 11 grounds into two issues and submitted that the issues for determination are whether the application dated 18th December, 2018 was fatally defective and whether the application dated 18th December 2018 had met the threshold for contempt of court orders to issue.

On the first issue as to whether the application dated 18th December 2018 was fatally defective, counsel relied on Order 51 Rule 4 of the Civil Procedure Rules, 2010 which provides thus;

"Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."

It was counsel's submission that Order 51. Rule 4 is couched in mandatory terms and makes it compulsory for all applications in the form of a notice of motion to be accompanied by legal grounds. That the impugned application did not meet this condition hence the court should have dismissed it as the defect was raised in a preliminary objection which the court ignored.

On the second issue as to whether the application dated 18th December 2018 had met the threshold for contempt of court orders to issue, counsel relied on the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** which he submitted that nullified the Contempt of Court Act No. 46 of 2016 which was governing law in contempt cases.

Counsel cited the case of **Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR** where the court observed 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."

It was counsel's further submission that the orders granted on 28th November, 2018 were interim orders which were to restrain the defendants from interfering and trespassing on the plaintiffs un-demarcated portion of land measuring approximately 35 acres located in Chigutu, Samburu pending the hearing and determination of the application. Counsel therefore submitted that the interim orders issued on 28th November 2018 lapsed upon the delivery of the ruling on 11th December 2018 hence the only order which was capable of being disobeyed was the ruling of 11th December 2018.

Counsel also submitted that the orders were ambiguous as they restrained the Defendants from trespassing on a parcel of land measuring 35 acres whose boundaries were unknown.

On the issue of service counsel submitted that the affidavit of service allegedly showing that the orders of 28th November 2018 had been served upon the appellants, did not disclose who amongst the appellants was served; and that the date of service indicated thereon was 29th

November 2018 before the ruling dated 11th December 2018 and the one capable of being extracted, was delivered.

Counsel further submitted that there was no evidence implicating the appellants as the persons who had cultivated or destroyed bushes on the suit land and urged the court to set aside the ruling delivered on 11th December 2018 and dismiss the application dated 18th December 2018 with costs.

RESPONDENT'S SUBMISSIONS

Counsel cited the Supreme Court of Kenya case of **Republic v Ahmad Abolfathi Mohammed & another [2018] eKLR** stated;

"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In HADKINSON v. HADKINSON (1952) 2 All E.R. 567, it was held that: It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a 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 void."

Counsel submitted that the Appellants lodged this appeal on 2nd April 2019 and made no steps to prosecute the appeal. That the respondents moved court vide the Notice of Motion filed on the 11th March 2021 seeking to dismiss this appeal for want of prosecution, but the court gave directions that the application be compromised and the appeal be set down for hearing.

Counsel for the respondent submitted that the appellants were aware of the existence of the orders of 28th November 2018 and even sought to set them aside vide their application dated 13th December 2018. That the appellants willfully disobeyed the court orders and cited the Court Appeal case of **Kirn Tea Factory Company Ltd v Stephen Maina Githiga & 14 others [2019] Eklr**.

Counsel further submitted that although the standard of proof in contempt of court cases is higher than the required standard in civil cases, it is certainly not beyond reasonable doubt and relied on the case of **Mutitika v. Baharini Farm Limited [1985] KLR 229, 234** where the Court of Appeal held that:

"In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."

Counsel also relied on the case of **North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR** where Mativo J. stated that:

'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 -

- 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.*

Counsel therefore urged the court to dismiss the appeal with costs.

ANALYSIS AND DETERMINATION

The appellant filed this appeal and listed 11 grounds of appeal which counsel later condensed to 2 issues. The issues that arise are as to whether the respondent's application dated 18th December 2018 met the requirements of Order 51 Rule 4 of the Civil Procedure Rules, whether the impugned application which the court relied on for the contempt proceedings had expired and whether the court erred in the procedure of finding the appellant in contempt of court.

In the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** the Court of Appeal stated as follows regarding the duty of first appellant Court: -

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that: -

"On a first appeal from the High Court, the Court of Appeal should consider

the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

The court is cognizant of its role as a first appellate court in this matter which is to consider the evidence, reevaluate and draw its own conclusions depending on the evidence presented before it from the record.

On the first issue as to whether the respondent’s notice of motion dated 18th December 2018 met the requirements under order 51 Rule 4 of the Civil Procedure Rules.

Order 51 rule 4 reads as follows:

Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.

Counsel for the Appellant had argued that the Respondents’ notice of motion dated 18th December 2018 was fatally defective as it did not state the grounds and the person to swear the supporting affidavit, but from the record it is evident and that page 2 of the notice reads as follows:

“WHICH APPLICATION is grounded on the annexed Affidavit of NYAE MRISA TSUMA the 1st Plaintiff herein sworn and filed herewith and more particularly on the following grounds...”

This makes the appellants argument not tenable as the grounds were listed in the application.

On the issue whether the order upon which the contempt proceedings were anchored had expired, it was counsel’s submission that the appellants were held in contempt for disobeying the trial court’s temporary orders delivered on 28th November 2018 yet the confirmed order was issued on 11th December 2018 of which the appellant was not served with.

The record shows that when the parties appeared before the Learned Magistrate Hon.

Ndungu on 14th December 2018, 3 days after the ruling of 11th December 2018 was delivered, the appellants’ counsel Ms Mokuu sought to set aside the orders delivered on 11th December 2018 and subsequently filed an application dated 13th December 2018. This is a testament that the appellant and his counsel were aware of the order that is why they made the application to set it aside.

With due respect to counsel for the appellant, his argument that the applicant could not obey a temporary orders of injunction because they had not been confirmed is flawed. An order of the court must be obeyed whether it is on a temporary basis or confirmed. There is no evidence that the orders had either expired or varied the parties or the court.

Further on the issue of service counsel for the appellant argued that the appellant was not personally served. The court must determine whether there was proof of service. In the **Court of Appeal case of Dickson Daniel Karaba –vs- John Ngata Kariuki & 2 Others, Nairobi Civil Appeal No. 125 of 2008 (unreported)**, the court stated that: -

“There is a presumption that the court process was properly served unless such presumption is rebutted and that the burden lies on the party questioning the affidavit of service to show that the same is incorrect.”

In the same case the court stated further that: -

“Where service is denied it is normally desirable that the process server be put in the witness box and the opportunity given to those who deny service to cross-examine him.”

The issue of lack of or proper service never arose in the lower court and it was incumbent upon the person alleging so to rebut such presumption. In the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** tracing the procedural rules for punishing contempt of court back to Part 81 of Civil Procedure (Amendment No. 2) Rules, 2012 of England, stated that;

“The dispensation of service under rule 81.8

(1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in court by counsel.”

In this case the court held that in contempt of court proceedings, personal service of an order is not necessary where it is made in the presence of the respondent’s advocate.

On the jurisdiction of the court to hear contempt cases, Section 10 of the Magistrates Act No. 26 of 2016 gives the lower court jurisdiction to conduct contempt of court proceeding. Section 10 thereon reads:

10. Contempt of Court

(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.

(3) 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.

(4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which —

a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;

b) prejudices, or interferes or tends to interfere with, the due course of any judicial proceedings; or

c) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court.

(5) A police officer, with or without the assistance of any other person, may, by order of a judge of the Court, take into custody and detain a person who commits an offence under subsection (2) until the rising of the Court.

(6) 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.

(7) A person may appeal against an order of the Court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the Court.

(8) The Chief Justice may make Rules to regulate procedures relating to contempt of court.

Further in the case of **Jihan Freighters Limited v Hardware & General Stores Limited [2015] eKLR** citing the Mutitika case (supra) explained as follows:

“We must start by disposing of the disagreement between the parties on whether contempt of court is required to be proved beyond reasonable doubt. That issue was settled by this Court in Mutitika v Baharini Farm (1982-88) 1 KAR, 863 where the Court rejected the view expressed by Lord Denning in in re Bramblevale Ltd (1970) Ch 128, at 137, that contempt of court must be proved beyond reasonable doubt. The Court stated:

“With the greatest possible respect to that eminent English judge, that proof is much too high for an offence ‘of a criminal character’ and ipso facto, not a criminal offence properly so defined...In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt.”

The appellants admitted that they have been cultivating or clearing bushes within the suit land as per the replying affidavit sworn by Charles Tsuma Mulango and filed on 21st December 2018 which states that the appellants have lived on the suit land since 1890. The Learned Trial Magistrate relied on the affidavits sworn together with photographic

evidence to come up with the ruling that the appellants had disobeyed the court order. The order was to preserve the substratum of the case pending the hearing and determination of the suit, but the appellant did not see the need to obey court orders which had to be punished by contempt of court to uphold the dignity of the court.

I find that the learned Magistrate neither erred in law or fact in arriving at the decision and therefore the appeal is dismissed with costs to the respondent as it has no merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF OCTOBER, 2021.

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.