REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 3 OF 2020

ST MARY ACADEMY LIMITED.....1ST APPELLANT

MICHAEL MBURIA NAMISU.....2ND APPELLANT

VERSUS

GRACE NJERI MUKORA.....1ST RESPONDENT

CYRUS MWENDIA.....2ND RESPONDENT

-AND-

YVONNE JERUTO.....1ST CONTEMNOR

CHARLES KAMANDE.....2ND CONTEMNOR

RULING

1. The ruling relates to the application dated 10.2.2020 that was filed in court vide certificate of urgency as well as a notice of motion that was brought pursuant to sections 4(1)(b); 5(1)(b) and (c); Section 27(b) and section 28(c) of the Contempt of Court Act No 46 of 2016.

2. The Applicant sought the following orders:-

> ***a) Spent***.
>
> ***b) THAT*** *the 1st and 2nd contemnors have disobeyed this Honorable court (sic).*
>
> ***c) THAT*** *the Honorable court be pleased to issue an order of citation to the 1st and 2nd contemnors to appear in person before this honorable court at a specific date and time for a hearing to show cause why they have disobeyed with (sic) the order of this court.*
>
> ***d) THAT*** *the Honorable court be pleased to find that the conduct of the 1st and 2nd contemnors to be offensive to the authority and dignity of the court and to vindicate the dignity of this court to impose a fine or fixed sentence of imprisonment or both.*
>
> ***e) THAT*** *the costs herein be provided for.*

3. The grounds of the application were set forth on the face of the notice of motion as well as the affidavit in support that was deponed by Ephantus Mugo Mburia who is stated to be the director of the 1st applicant.

4. It was averred by Ephantus Mugo Mburia that on 22.1.2020, the 2nd contemnor a licensed Auctioneer trading in the name and style of Chaka Auctioneers and acting under the instructions of the 1st contemnor, an advocate of the High Court practising in the style of Y. Jeruto & Co Advocates proclaimed her company's goods as evidenced by the proclamation notice marked A dated 20.1.2020. It was averred that the 1st applicant instructed their advocates to apply for stay of execution of the decree which was successful after this court issued an order dated 24.1.2020 (marked B) that was served on the 1st contemnor on 24.1.2020. It was averred that the interim order was extended but however on 3.2.2020 the 2nd contemnor acting on the instruction of the 1st contemnor attached the 1st applicant's goods on the grounds that

the interim order was not extended. It was averred that the contemnors are in contempt of the orders of this court and the deponent urged the court to declare the attachment of the 1st applicant's goods as illegal and that the goods be restored to the 1st applicant.

5. In reply to the application was grounds of opposition dated 19.5.2020. Learned counsel stated that the application is bad in law, incompetent and an abuse of the court process. The court was urged to dismiss the application with costs.

6. Vide affidavit deponed on 19.5.2020, the 1st contemnor admitted instructing Chaka Auctioneers on 20.1.2020 to execute the judgement that was delivered on 20.2.2019 in favour of the 1st and 2nd respondents in **Mavoko SPMCC 1133 of 2013**. It was admitted that the goods of the 1st appellant were proclaimed on 20.1.2020 and on 24.1.2020 the deponent was served with orders of temporary stay dated 24.1.2020. The deponent assailed the 1st appellant for failing to serve the auctioneers and yet the terms of the order were that all the parties were to be served. It was further averred that the appellants were obliged to serve the auctioneers who had already proclaimed the goods. It was averred that the deponent was served with the instant application on 12.2.2020 whereupon she wrote to the auctioneers to release the goods in question (YJ1) but however they delayed to collect the same. The deponent averred that she was not privy to what the auctioneers did and that the appellants ought to blame the auctioneers and not her. It was pointed out that the contempt was purged as the motor vehicle had been released to the appellants hence the instant application is overtaken by events and ought to be dismissed with costs.

7. On record are submissions filed on 16.12.2020 by counsel P. Sang & Co Advocates for the 1st contemnor. There are also submissions by counsel for the Appellant/applicants dated 9.12.2020. I have given due consideration to the said submissions. The two issues for determination are whether the contemnors are in contempt of court and secondly whether the court should punish the contemnors where the contempt has been purged. In respect of the 1st issue, it was submitted that by the time the stay order was issued, the 1st contemnor had already instructed the auctioneers hence they cannot be said to have disobeyed the order. It was submitted that contempt was not proven against the 1st contemnor. Reliance was placed on the case of **Kasturi Ltd v Kapurchand Depar Shah (2016) eKLR**. In respect of the 2nd issue, it was submitted that the contempt had been purged and there is no evidence of continuance of the original act of contempt. Reliance was placed on the case of **Directline Assurance Co Ltd v Jamii Bora Bank Ltd & 5 Others (2015) eKLR** where it was stated that;

> "*13. Now, to the second issue, what is the role of contempt proceedings in civil litigation? To my mind contempt proceedings are quasi – criminal in nature, and is a tool employed by a civil court to ensure obedience to the civil court's orders and directions. A civil court has no interest in punishing a litigant, unless a litigant leaves the court with no option but to resort to quasi- criminal proceedings to punish a litigant. When a court orders are being disobeyed, or are about to be disobeyed, and the contemnor comes down and purges the contempt, either out of his own freewill or at the prompt of the court, the court will accept the purge of the contempt unless circumstances exist to suggest that the coming down, or the alleged purging of the contempt, is not genuine, or is done in bad faith, or is in itself a continuation of the original contempt. In accepting the coming down of the contemnor, the court will assess the reasons given for the disobedience, the time taken to come down, and the cost incurred in the process"*.

8. Contempt of court consists of *conduct which interferes with the administration of justice or impedes or perverts the course of justice.…… Civil contempt consists of a failure to comply with a judgment or order of a court or breach of an undertaking of court. –See* **Osborne's Concise Law Dictionary, P. 102**.

9. In the case of **Sam Nyamweya & Others v Kenya Premier League Ltd and Others [2015] eKLR** Justice Aburili stated that:-

> "*contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings*."

10. **Halsbury's Law of England,Vol.9(1) 4th Edition** states as follows;

> '**Contempt of Court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which creates substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to Judgment, Orders or other process of Court and involving in private injury'**

11. From the above definition of contempt of Court, the issues for determination are;

> ***a) Whether the suit is properly instituted against the contemnors in the correct names.***
>
> ***b) What is the law applicable in respect of contempt of court?***
>
> ***c) Who are the contemnors?***
>
> ***d) Were the orders served upon contemnors and were they aware of the said orders?***
>
> ***e) Is the contemnor guilty of contempt of the above stated orders a priori, has the contemnor purged the contempt?***
>
> ***f) What orders may court grant?***

12. In respect of the 1st issue, the question of whether a suit can be commenced by or against a business name was considered by the Supreme Court (High Court) of Kenya in Nairobi in the case of **Lakhman Ramji v Shivji Jessa and Sons [1965} EA 125** by Rudd J.

13. Order 30 rule 9 of the Civil Procedure Rules permits a Plaintiff to sue the person or persons trading under a business name or style to sue them in that business name or style. 30 rules 9 of the Civil Procedure Rules provides as follows:

> ***''Any person carrying on business in a name or style other than his own name may be sued in such name and style as if it were a firm name: and, so far as the nature of the case will permit, all rules under this order shall apply''***

14. Rule 9 permits a Plaintiff to sue a Defendant in a business name of the Defendant which name is not the Defendant's own name. The Learned Authors of Halsbury's Laws of England (4th Edition; Volume 37; paragraph 268) in referring to Order 81 Rule 9 Civil Procedure Rules of England which is in *pari materia* with Kenya's own Order 30 Rule 9 of the Civil Procedure Rules 2010; and states

> ***''An individual carrying on business within the Jurisdiction in a name or style other than his own name may be sued in that name as if it were the name of the firm"***

The text then under footnote 3 goes on to state that;

> "***if he sues, however, he should do so in his own name, describing himself as 'trading as***'

15. I note that though the 1st contemnor was stated to be trading in the name of her firm, she was sued in individual capacity hence creating confusion as to wherein liability lies. This is also the case of the 2nd contemnor who is sued in his personal capacity and yet he was trading in the names of Chaka Auctioneers. There is a need to amend and substitute the names of the contemnors if there would be no prejudice occasioned to the parties as held in the case of **Lakhman Ramji v. Shivji Jessa and Sons [1965} EA 125** by Rudd J thus;

> "***The legal position is quite clear, a sole proprietor of a business cannot sue in the name of that business if that name is not his own. He should not even sue in his own name trading in the business name. He should sue in his own name simpliciter and then in the body of the plaint he can say he carries on business in the name of whatever his business name happens to be and is the sole proprietor of that business.***"

16. In the book **Odgers on Pleadings and Practise" 20th Ed. By Giles Francis Harwood pg 174-175**, the learned authors state:

> "***If any party to the action is improperly or imperfectly named on the writ and no change of identity is involved, the misnomer may be corrected in the statement of claim by inserting the right name with a statement that the party misnamed had sued or been sued by the name on the writ e.g. 'John William Smythe' sued as J.M Smith). The defendant cannot take advantage of such alteration (pleas in abatement of misnomer were abolished as long as 1834); but difficulty may arise in executing a judgment unless the plaintiff amends the writ. The author also notes that where a defendant has executed a deed by a wrong name, it is right to sue him by the name in which he executed it".***

17. A misnomer is defined in **Black's Law Dictionary 7th Ed, by Bryan A Garner** at pg 1015 as:

> "***A mistake in naming a person, place or thing especially in a legal instrument. In Federal pleading-as well as in most states-misnomer of the party can be corrected by an amendment, which will relate back to the date of the original pleading. Fed R. Civ. P15 (c) (3)"***

18. As indicated earlier the misnaming of the contemnors relating to their identity and touch on liability however the same are curable during proceedings under order 1 rule 10 (2)of civil procedure rules 2010 which states;

> ***"(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."***

19. Another point to note is that the affidavit in support and the affidavit in reply to the application proves the fact that the 2nd contemnor was acting under the authority of the 1st contemnor hence there was an agent-principal relationship. **Bowstead and Raynolds on Agency Seventeen Edition, Sweet and Maxwell, at page 1-001** defines an agent-principal relationship as "*a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relationship with third parties, and the other of whom similarly consents so to act or so acts*."

20. In the case of **City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another [2016] eKLR**, the court of appeal rendered itself as follows;

> **Victor Mabachi & Anor V Nurtun Bates Ltd, [2013] Eklr** stated:
>
> ***"37. It remains now to consider the second issue whether the enjoinment of the appellants in the suit in the High Court breached the principle of law that an agent cannot be sued where there is disclosed principal."***
>
> ***38. In Anthony Francis Wareheim T/A Wareheim & 2 Others V Kenya Post Office Savings Bank, Civil Appln Nos. NAI 5 &***

48 OF 2002, at page 10, this Court unanimously held as follows:

> ***"It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal."***

> ***39. In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal [the appellant]. There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued. In the circumstances of this case, the principal (the appellant) is disclosed and the agent (the 2nd respondent) cannot therefore be sued. There are no factors vitiating the liability of the disclosed principal. Accordingly, the enjoinment of the 2nd respondent in this case is unwarranted.***

21. I therefore find that though the suit was brought against contemnors who were not properly named in line with Order 30 Rule 9 of the Civil Procedure Rules, the same is a defect that is curable. I also find that it was not necessary to include the 2nd contemnor as he was acting under the authority of the 1st contemnor.

22. From the Court record, the application is brought under section 4, 5, 27 and 28 of the Contempt of Court Act 46 of 2016.

23. In the case of **Kenya Human Rights Commission v Attorney General & another [2018] eKLR,** Justice E.C. Mwita held that :

> ***"1. 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.***
>
> ***2. 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."***

24. In respect of the declaration of unconstitutionality of the Contempt of Court Act, in the South African case of ***Sias Moise v Transitional Local Council of Greater Germiston, Case CCT 54/00***, *Justice Kriegler (for the majority)* ***held:***

> ***"If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution."***

25. Therefore, as it is there is no law that governs contempt of court and hence the application was brought under incorrect provisions of the law. Recourse would have to be had to the provisions of Section 3 of the Judicature Act that provides that;

> ***"The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with—***
>
> ***a) The Constitution***
>
> ***b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule***
>
> ***c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date***
>
> ***Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."***

26. In this regard the statutes of general application **in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date** in respect of contempt of court indicate that *the only other law relating to contempt of court in England was contained in sections the Supreme Court of Judicature Act 1873 and 1875 and the procedure is* provided for under *Order* **52** *Rules* **1** *to* **4** *of the Rules of the Supreme Court.*

27. The procedure in that regard is Order **52** RSC, that may be summarized as follows, in so far as it relates to the High Court of Justice:-

> ***i. An application to the High Court of England for committal for contempt of court will not be granted unless leave to make such an application has been granted.***

ii. An application for leave must be made ex parte to a judge in chambers and supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit verifying the facts relied on.

iii. The applicant must give notice of the application for leave not later than the preceding day to the Crown Office.

iv. Where an application for leave is refused by a Judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the Judge.

v. When leave has been granted, the substantive application by a motion would be made to a divisional court.

vi. The motion must be entered within 14 days after the granting of leave; if not, leave shall lapse.

vii. The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.

28. In the case of **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR** Justice Mativo observed that leave is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. Despite having brought the application under the incorrect provisions of the law, the root of the application is a disobedience of a court order and therefore the court ought to satisfy itself of the elements of civil contempt as were laid out in *Contempt in Modern New Zealand* that was cited in **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR.**

29. This application is based on allegations of disobedience of court orders and the 1st contemnor stated that the acts complained of occurred before the order was issued.

30. In the instant application, the court ought to satisfy itself of the elements of civil contempt as were laid out in *Contempt in Modern New Zealand that was cited in* **North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi [2016] eKLR** as follows:-

"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:-

(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.

31. It is undisputed that the court granted orders on 24.1.2020 as confirmed by the court record. There is an affidavit of service indicating service on 24.1.2020 of the application that was the subject of the said orders, however there was no indication that the order was served on the 1st contemnor.

32. With regard to the 1st issue, the contemnors are on the face of the application stated to be the 1st and 2nd contemnors. The affidavit on record speaks to the fact that the applicant's goods were proclaimed. The 1st contemnor defended her actions by saying that the order was issued after she had issued instructions to proclaim hence the orders she was said to have disobeyed arrived a little too late.

33. It was the argument of counsel for the 1st contemnor that the complained acts were those of the 2nd contemnor and she imputes that she could not be cited for contempt for his acts. I had indicated earlier that she was the disclosed principal and as such the actions of the 2nd contemnor bound her as well.

34. With regard to the 2nd issue, there is no affidavit on record that is indicative that the order was served on the contemnors or their advocates. I am not convinced that the impugned order was served on the contemnor.

35. The 3rd issue relates to disobedience of the court orders *a priori is the defendant* guilty of contempt of the above stated orders? In the case of **A-G v The Times Newspapers (1974) AC 273**, Lord Diplock said, at pages 311H-312A-B that:-

"---*The remedy for contempt of court after it has been committed is punitive; it may involve imprisonment, yet it is summary; it is generally obtained on affidavit evidence and is not accompanied by the special safeguards in favour of the accused that are a feature of the trial of an ordinary criminal offence. Furthermore, it is a procedure which if instituted by one of the parties to litigation is open to abuse, .. the courts have therefore been vigilant to see that the procedure for committal is not lightly invoked in cases where, although a contempt has been committed, there is no serious likelihood that it has caused any harm to the interests of any of the parties to the litigation or to the public interest-*

36. The burden of proof is that the Contempt of Court is proved beyond reasonable doubt that the contemnors wilfully disobeyed court order cited above and instead proceeded with ***the execution of the decree in Mavoko SPMCC 1133 of 2013 pending the hearing and***

***determination of the appeal No 3 of 2020*.**

37. I have considered the 1st contemnor's argument that the proclaimed goods were released to the applicant hence the alleged acts of contempt have since been purged and in addition the act that were said to have constituted contempt happened way before the court order was issued. I see no reason to disbelieve the averment by the 1st contemnor. I therefore associate myself with the dictum by Justice Ogolla in the case **Directline Assurance Co Ltd v Jamii Bora Bank Ltd & 5 Others (2015) eKLR** where he stated that;

> ***"13. Now, to the second issue, what is the role of contempt proceedings in civil litigation? To my mind contempt proceedings are quasi – criminal in nature, and is a tool employed by a civil court to ensure obedience to the civil court's orders and directions. A civil court has no interest in punishing a litigant, unless a litigant leaves the court with no option but to resort to quasi- criminal proceedings to punish a litigant. When a court orders are being disobeyed, or are about to be disobeyed, and the contemnor comes down and purges the contempt, either out of his own freewill or at the prompt of the court, the court will accept the purge of the contempt unless circumstances exist to suggest that the coming down, or the alleged purging of the contempt, is not genuine, or is done in bad faith, or is in itself a continuation of the original contempt. In accepting the coming down of the contemnor, the court will assess the reasons given for the disobedience, the time taken to come down, and the cost incurred in the process".***

38. This court finds that the orders of court issued on 24.1.2020 have been implemented and therefore there is nothing to punish the contemnors for and it would not even be in order to refer to them as contemnors. I am not persuaded by the assertions of the applicants that the contemnors are guilty of contempt. It seems that the applicants are out to have them punished even after the orders had been complied with and the attached goods released to the applicants. That smacks of malice yet the contemnors have already purged the contempt.

39. In the result, it is my finding that the appellants' application dated 10.2.2020 lacks merit. The same is dismissed with costs.

It is so ordered.

Dated and delivered at Machakos this 4th day of February, 2021.

D. K. Kemei

Judge