



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 465 OF 2015

SOUTH EASTERN KENYA UNIVERSITY.....APPELLANT

VERSES

UKAMBANI AGRICULTURAL INSTITUTE LIMITED.....1ST RESPONDENT

NATIONAL BANK OF KENYA LIMITED.....2ND RESPONDENT

RULING

1. The application dated 13th February 2017 seeks orders that the officials of the 1st Respondent, namely, Stephen Ndambuki Muli (Chairman) and Eric Mutinda Mutisya (Treasurer) be committed to civil jail for a period of six months for disobedience of a court order issued on 29th September 2016, or by any other mode as the court may deem fit.

2. The Application is supported by the grounds on its face together with the supporting affidavit of the Vice Chancellor, Prof Geoffrey M. Muluvi. It is averred that on the 29th September 2016, the Court issued orders as follows:

“1. That pending the hearing and determination of the Appeal herein the 1st Respondent be and is hereby restrained by way of an injunction from in any way parting with possession of, presenting or lodging the title documents in respect of L.R. No. 209/10350 for selling or transferring the said property.

2. That pending the hearing and the Appeal herein the 1st Respondent be and is hereby ordered to forthwith return the title documents to M/s National Bank of Kenya for safe keeping.

3. That costs be paid by the Respondents.”

3. It is averred that following correspondence between the parties, the said orders were extracted and served on the chairman of the 1st Respondent. That in a letter dated 19th December 2016 addressed to the 2nd Respondent’s advocate and copied to the to the 1st Respondent’s advocate, the Applicant sought to know whether the documents had been returned to the bank. That through their letter dated 17th January 2017 and 7th February 2017 the 2nd Respondent’s advocates confirmed that the title documents had not been returned. That subsequently, the Applicant’s independently confirmed that the documents were indeed not returned. It is stated that the 1st Respondent has shown utter contempt of the court process by disobeying the court order. That in order to protect the dignity of the court, the officials of the 1st Respondent ought to be punished for contempt of court as they are the ones who retrieved the title documents from the bank by use of the order of the lower court which order is being challenged in the Appeal herein.

4. The application is opposed through the affidavit of Eric Mutinda Mutisya sworn on 24th March 2017, which reiterates the contents of his affidavit filed on the 15th December, 2015. It is stated that the conditions precedent to the proceedings have not been satisfied and that the application is incompetent, untenable and the orders incapable of compliance and have been overtaken by events.

5. It is stated that in the earlier affidavit sworn on 15th December, 2015, it was stated that the court had directed the original title to the property be availed in court on the 17th December 2015 for inspection. That the Respondent was unable to do so for the reason that it was not in possession of the title. It is averred that the court in 2nd July 2015 upon hearing the application and the suit in question made an order directing the release of the title to the property known as L.R No 209/10350 to the current officers of the Respondent, Eric Mutinda Mutisya, (deponent) and the chairman, Stephen Ndambuki Muli.

6. It is averred that the lower court deemed it fit and in the interest of justice and after the *inter partes* hearing the orders were made in favour of UKAI. That the current directors of the plaintiff are the authorised persons to keep custody of the property of the plaintiff. That the Bank, the 2nd Respondent, rightfully released the original title documents in respect of the land being L.R No209/10350 to UKAI.

7. It is further averred that the title was subject to a sale agreement between Dubai bank and the property was the subject of other various court matters including HCCC No 172 of 2012 where the Appellant is an interested party and has sought similar orders and JR 406 of 2012 where vesting orders and mandatory *mandamus* orders have been made in favour of various parties and the title has been surrendered in compliance with the said orders.

8. I have considered the application, the response to the same and the submissions made by the respective counsels for the parties.

9. The fundamental question before the court is whether the 1st Respondent's officials were aware of the court orders that had been issued and whether they wilfully disobeyed them.

10. Section 5 of the Judicature Act, Chapter 8 Laws of Kenya gives this court the power to punish for contempt of court. The section provided 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.

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”.

11. This is anchored on Order 40 rule 3 of the Civil Procedure Rules which provide as follows:

“3. (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.”

12. Black's Law Dictionary (9th Ed) defines contempt of court as:-

“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

13. That the orders were issued by the court on the 29th September, 2016 is not in dispute. Contempt of court is a serious offence. It is not a matter that is to be taken lightly. For an Applicant to succeed in an application for contempt, one must show that there was either personal service or actual knowledge of the court order, which must be beyond reasonable doubt.

14. In the case of **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others [2015] eKLR** the court observed as follows:

I reiterate that contempt proceedings are of a criminal nature and involve, if proved, loss of liberty, the applicant must therefore endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like in the case of any other ordinary matter like service of summons to enter appearance or hearing notice upon a party, where, even if service was regular, the courts have found that ex parte proceedings or judgment made in default could still be set aside on terms in the discretion of the court

15. In the case of **Basil Criticos v Attorney General & 8 others & 4 others [2012] eKLR** the court stated as follows:

“However the law has changed and as it stands today knowledge supersedes personal service and for good reason. This has recently been held in Kenya Tea Growers Association vs Francis Atwoli & 5 Others, [2012] eKLR where it opined as follows:

“In the case before me, I am more than satisfied that even at the higher level of beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the Court Order had stopped it. He went further to interpret it as made without jurisdiction and that only the “Workers Court”, (the Industrial Court) had jurisdiction to determine the matter. He did not do so once but on a number of occasions as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding.”

16. The thinking was also affirmed by the Court of Appeal in the Case of **Shimmers Plaza Limited V National Bank Of Kenya Limited 2015 eKLR**.

The jurisprudence that emerges from the said cases is that one must prove beyond reasonable doubt the facts upon which they seek to establish that contempt of court has been committed by the accused party. The burden of proof, because of the consequences that would follow, is certainly higher and on a preponderance of probabilities. One has to also show that there was either personal service or actual knowledge of the court order.

17. Counsel for the 1st Respondent argues that the officials were not personally served. An examination of the affidavit of service shows that personal service was indeed effected on the chairman of the 1st Respondent. Whereas the Secretary General of the 1st Respondent contends that he was not personally served, an examination of the replying affidavit to the Application at hand shows that indeed he was aware of the orders issued herein. The counsel for the 1st Respondent was also in court when the court issued the orders.

18. The conduct of the officials of the 1st Respondent in regard to the court processes cannot be regarded as beyond reproach. They got hold of the titles as a result of the lower court orders that they had initially obtained yet when this court ordered them to return the said titles it becomes a difficult task.

19. Indeed an examination of the replying affidavit shows that the same is full of bare assertions and refers to matters that have already been decided herein vide the ruling dated 29th September, 2016. There was no Appeal or any Review proceedings in respect of the said ruling. If the orders herein were ambiguous and incapable of being complied with and the officials of the 1st Respondent were genuine, they could have come back to court for interpretation of the same.

20. With the foregoing, I hold that the Applicant has proved its case beyond any reasonable doubts. Consequently, the mentioned officials of the 1st Respondent are hereby found guilty of contempt of court. Warrants of arrest to issue.

Date, signed and delivered at Nairobi this 17th day of Oct., 2018

B. THURANIRA JADEN

JUDGE