IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox, Nyarangi JJA & Gachuhi Ag JA)

CIVIL APPLICATION NO. NAI 24 OF 1985

Between

MUTITIKA..APPLICANT

AND

BAHARINI FARM LTD...................................RESPONDENT

(Application from the High Court at Nairobi, Todd J)

JUDGMENT

On April 1, 1977 the respondent company filed a suit number 2343 of 1976 in the High Court Nairobi against the three applicants and one other and averred that the applicants had illegally entered into the respondent's land, damaged some property, occupied two houses and brought illegal squatters into the land, thus making it unsafe for the agents and employees of the respondents to enter the land. On October 28, 1976 the first and second applicants were restrained from trespassing upon or damaging any part of the land and on April 4, 1977 the third applicant was similarly restrained.

As a result of continued trespass and damage the respondent took out a chamber summons under Order XXXIX rule 2(3) and (5) for an order that the first and second applicants be detained in civil jail. The two applicants were subsequently arrested and committed to civil jail but on January 29, 1979 they were ordered by consent to vacate the land LR 462/R and restore vacant possession to the respondent on or before April 30, 1979. Simultaneously the committal order was discharged and the two applicants were released. On March 29, 1984, the respondent applied for fresh warrants to issue against the three applicants. Undeterred, the applicants on June 14, 1984 brought a notice of motion under Order XLIV rules 1 and 2 of the Civil Procedure Rules for an order that the consent order recorded by the High Court on January 29, 1977 be reviewed and that the execution of warrants of arrest of the first and second applicants be stayed until after the hearing thereof. Platt, J (as he then was) could not hear the application for review and adjourned it until Todd, J became available but granted an interim injunction against the third applicant as well.

On August 23, 1984, Todd, J dismissed the application to review the consent order and refused to grant a stay of the execution. The applicants have not appealed to this court against the decision of Todd, J. They also successfully applied to this court for stay of execution. The order of December 20, 1984, reads as follows:

> "This is an application for stay of execution which was refused by the High Court (Todd, J) to execute a consent order. We are told no decree has been extracted pursuant to the

> consent order. The validity of the consent order is sought to be challenged. The subject matter of the suit in the High Court is land and if execution is allowed to proceed about 200 people may be faced with eviction. These people are said not have any alternative area to take themselves to. Mr. Khaminwa assures us the appeal could be ripe for hearing during February, 1985. In view of the large number of people who are likely to be adversely affected and as the decree is not available for execution immediately, we consider it appropriate to grant a stay until the hearing and result of the appeal. We feel assured Mr. Khaminwa will use his best endeavours to expedite. We also consider it appropriate that the applicants should deposit the sum of Kshs 40,000 in court within 21 days to meet any legitimate items that arise to become their obligation. We order accordingly".

On April 3, 1985, Mr. Khaminwa for the applicants filed a notice of motion for an order that councillor Alice Rono, Messrs Richard Chirop Rotich, Charaite and Sura be cited for contempt of this court on the grounds that the said three persons have defied this court's order stated to be made on August 28, 1984, but which is clearly the order of December 20, 1984, by entering upon the land in dispute, planting thereon and taking possession thereof, unlawfully. The application is supported by the affidavit of the second applicant. The parties called witnesses who testified in support of their respective cases. The jurisdiction of this court is found in section 5(1) of the Judicature Act cap 8 which provides:

> "The High Court and the Court of Appeal shall have same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, ..."

The first witness of the applicants, Gathumbi, a professional valuer, recently carried out an inspection of the land and compiled a report (Ex 1), which shows that out of the total of about 244 acres, 200 acres are covered by a crop of maize (which will be ripe in October), beans (which is about to ripen) and millet con approximately 25 acres, a homestead sited on some 2 acres and 6 acres of unutilized land. He was, unfortunately, not asked if he observed any damage on the land, for example, to fencing or water pipes. The evidence of Joshua the third applicant was, in brief, that he stays on the land where there are seven houses) with his family, that he and the other applicants cultivated 30 acres but that in March, 1985 the Naka group cultivated all the land including the 30 acres and planted beans, maize and potatoes. Joshua identified Councillor Rono, Michael Rotich, Sura and Chairet as the persons who led a group of persons on to the land. Joshua said he witnessed Rono and Rotich bring tractors which ploughed some 206 acres of land, and that the crops thereon belong to the people who were brought there by Rono. The witness said before he moved out there were 200 people staying on the land, that he had 57 cattle and 60 sheep on the land for which he leased land elsewhere after the tractors cut the water pipes and destroyed fencing poles. Crossexamined, Joshua said the land is the property of Baharini Farm Ltd and that he moved to the land in 1976.

A farm contractor and his tractor driver supported the evidence of Joshua, that he had cultivated 30 acres but that before the 'shamba' was harrowed, an angry group of people stopped the tractor driver from completing the harrowing. The first applicant said he is living on the land still, that Njai and Joshua were chased when some people carrying sticks and pangas came to the land, cutting fencing wire, pulled down huts and then cultivated the land using four tractors. Some time later, people came in a pick-up and carried away the fencing wire, poles, etc. Another witness, Kiratu, who had ploughed 3 acres but not planted identified Rono and Rotich as some of the people who came to the land and planted maize and beans. The evidence of Hoperaft had no bearing on the application.

The senior chief of the Nakuru Municipality said he is familiar with the area, that one part of the original farm was sold to the National Parks, leaving about 200 acres. That there are 40 squatters and three houses on the farm. The senior chief said that on March 26, 1985, Rono and her Naka group reported to him that the applicants had occupied the three houses. The next day he directed an assistant chief to visit the land and find out what was happening and wrote to the applicants telling them to appear before the DO the next day. The senior chief attended the meeting held on March 27, 1985 whose minutes were taken by the assistant chief. According to the senior chief there were 40 squatters on the land who would not be evicted before alternative land is found for them. There were not 200 people on the land.

Councillor Rono said she found Gatharia and Joshua but, not Njai, living on the land in April, 1984 after her group had bought all the shares in the Baharini Farm Company, that on March 26, 1985, it was reported to her that the land was being cultivated and she went to the land. She found a tractor ploughing, did not interfere but went straight to the DO's office, was then referred to the senior chief who instructed the assistant chief and two administration policemen to proceed to the site and stop the ploughing. Rotich accompanied her and the assistant chief to the land. A meeting was convened the next day and the four matters stated in the minutes were agreed upon and her group continued to develop the land by reploughing the already ploughed area and extending by ploughing more land. Rono denied they tried to evict Joshua or Gatharia who is still occupying one of the houses on the farm; she denied that there were 200 people on the land but agreed the two families of Joshua and Gatharia plus the squatters. This witness claimed that Joshua left on his own accord on April 6, 1985.

The common ground which emerges from the evidence adduced by the witnesses is that the land is the property of the respondents and that the order of stay made by this court was understood to mean that the applicants would not be evicted pending the hearing and result of the appeal. On the evidence of Joshua and Gatharia and that of Councillor Rono whose evidence was, in many respects, consistent with that of the senior chief and who was an impressive straightforward and truthful witness, it is common ground also that after the applicants had ploughed 30 acres, members of the respondent's company occupied the land ploughed almost all of it, including the 30 acres, and planted the cultivated acreage with maize, beans, peas, potatoes and millet. Joshua moved out. Gatharia soldiers on. The remaining evidence discloses a conflict as between the version of Joshua and Gatharia on the one hand and Councillor Rono on the other. It is debatable if the respondents were told at the meeting held on March 25, 1985, to plough the land, as they did while Joshua and his group continued to live there.

It is obvious from the evidence that after this court's order of stay the applicant's started ploughing, that the shareholders of the respondent were immediately astounded and, fearing that the applicants' activities on the land might result in the occupation of the whole land for some time yet, took a pre-emptive step to move in, stop the applicants from ploughing and so as to be absolutely certain that the applicants would not in the near future cultivate on the land, the respondents then ploughed the whole of the cultivatable part including the 30 acres. It was a drastic and, to a certain extent, punitive measure. The question however is, has it been shown that the respondents intended that the applicants should vacate or to drive away? To decide this question, we have to examine the whole order of the stay made on the 20th day of December 1984, and not on August 28, 1984 as the notice of motion states. In addition, the findings on the evidence have to be considered and tested, having regard to the degree of proof necessary in contempt proceedings. The order of stay did not state in precise terms the rights and privileges of the applicants. The court, of which one of us was a member, ruled that we considered:

> "it appropriate to grant a stay until the hearing and result of the appeal".

The order does not say the applicants, will or will not, continue to plough or use the land. Merely that they will not vacate. Of course a party can engage in acts directed at the other, which acts to embarrass the party in whose favour an order of stay is made that the entire basis of the order of stay is effectively eroded and nullified, as a result of which the party who had applied for stay vacates. That would amount to harassment and to constructive eviction. It is perfectly clear on the authorities that any one who, knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt. See *Acrow v Rex Chainbelt Inc* [1971] 3 All ER 1175 at page 1180. The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught.

In *Kasturilal Laroya v Mityana Staple Cotton Ltd & Anor* [1958] EA 194, the applicant, a degree holder moved for the committal of two directors of the defendant company for willfully disobeying a prohibitory order of the court. The material part of the court order read as follows:

> "It is hereby ordered that the interest of the judgmentdebtor in the lands comprised in the schedule on the reverse hereof attached and the judgment-debtor is prohibited from

> transferring or changing such property in any way and all persons from taking any benefit from such transfer or charge and it is also hereby further ordered that the said judgment-debtor deliver to this court immediately the duplicate certificate of title to the above-mentioned lands".

We note the precise statement by which the judgment-debtor in that case was bound. What the court there found necessary to consider was whether these had in fact been such prejudice to the interests of the decree holder and also whether the conduct of the respondents amounted to an infringement of those rights. Here the entire stated interest of the applicants was that they could not be evicted. The order of stay did not specifically tell the respondents not to interfere with any specified right of the applicants; the respondents were not ordered to plough, or not to plough, any particular part of the land.

In England matters relating to contempt are now governed by the Contempt of Court Act, 1981. The courts, nevertheless take the view that where the liberty of the subject is, or might be, involved, the breach for which the alleged contemnor is cited must be precisely defined – see for instance *Chiltern Districts Council v Keane*, [1985] Law Society's Gazette, 29th May page 1567.

In, *Re Breamblevale Ltd* [1969] 3 All ER 1062, Lord Denning MR. (as he then was), at page 1063, had this to say,

> "A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved. To use the time– honoured phrase, it must be proved beyond reasonable doubt".

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.

We agree with Mr. Khaminwa's submissions in this respect. 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. We envisage no difficulty in courts determining the suggested standard of proof. 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 offence which can be said to be quasi – criminal in nature Winn LJ on page 1064 was in our view right in saying that the guilt has to be proved

> "with such strictness of proof ... as is consistent with the gravity of the charge ..."

The principle propounded in *Re Maria Annie Davies* [1889] 21 QBD 236, and 239, that

> "Recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the later Master of the Rolls in the case of *Re Clement* seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is not other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be mode of dealing with persons brought before him.
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> On accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to be the true measure of the exercise of the jurisdiction"

must be born in mind.

Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt, we hold that it has not been shown that the respondents intended to drive out the applicants, and that their actions were only consistent with an intention that they should vacate the land when they ploughed the whole area. The evidence of Joshua that he had stock on the land was forcibly challenged by Councillor Rono and in our view it is not safe to decide this aspect against the respondents. Councillor Rono's evidence that there was no forcible eviction was not challenged, or, indeed denied.

In conclusion, the language of the order of stay was such that we cannot say that the respondent's conduct in moving in to plough, though it came close to doing so, amounted to a constructive eviction and therefore to a breach of the order. It was yet such conduct as warranted the step which Mr. Khaminwa took in filing the notice of motion.

We therefore dismiss the application and order that each party bears their own costs.

We would finally observe that this appeal is set for hearing at the end of this month; we trust that nothing will be done by either side to upset the delicate balance of the situation until then. We draw attention to the following passage from the 3rd Edition of *Oswald on Contempt at* page 16.

"The court, however, has power to restrain by injunction threatened contempts. It is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not".

Dated and delivered at Nairobi this 10th day of July , 1985.

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

J.M GACHUHI

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR