

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPELLATE DIVISION
CIVIL APPEAL NO. 313 OF 2019

KENYA RE-INSURANCE CORPORATION LTD.....1ST APPELLANT
STANLEY MUGACHA T/A GALAXY AUCTIONEERS..2ND APPELLANT

-VERSUS-

CROWNBIT LTD..... RESPONDENT

(Being an appeal against the Ruling of the Hon. I. Orege (SRM) delivered on 4th June, 2019 in Nairobi Milimani CMCC No. 11517 of 2018)

JUDGMENT

1. This appeal emanates from the ruling delivered on 04.06.2019 by the lower Court in **Nairobi Milimani CMCC No. 11517 of 2018** (*hereafter the lower Court suit*). The relevant history leading up to the instant appeal is that **Crownbit Ltd**, (*hereinafter the Respondent*), the plaintiff before the lower Court, filed suit by way of plaint dated 31.12.2018 alongside a motion under urgency on even date as against **Kenya Re-Insurance Corporation Ltd** and **Stanley Mugacha t/a Galaxy Auctioneers** (*hereafter the 1st & 2nd Appellant*), the 1st & 2nd defendant before the lower Court, seeking a raft of interlocutory orders.
2. On 31.12.2018 when the motion was filed, the lower Court granted the Respondent *ex parte* orders pending *inter partes* hearing. When the motion came up for hearing on 25.01.2019, counsel appearing for the Respondent informed the Court that the Appellants had not complied with the interim orders granted on 31.12.2018 whereinafter he sought leave to file contempt proceedings as against the said Appellants.

3. On 19.02.2019 the Respondent eventually filed a motion of even date expressed to the brought among others pursuant to **Section 1A, 1B, 3A** of the **Civil Procedure Act (CPA)** seeking *inter alia* that the honorable Court be pleased to adjudge the 1st Appellant's managing director Jaqueline Njui, Company Secretary and Property Manager and the 2nd Appellant in contempt of the Court's orders issued on the 31.12.2018 and extended from time to time; that the 1st Appellant acting managing director Jaqueline Njui, Company Secretary and Property Manager and the 2nd Appellant be arrested and committed to civil jail for a period of six (6) months for the disobedience of the Court orders issued on 31.12.2018 and extended from time to time; that the warrants of arrest be issued to the Officer Commanding Station (OSC) Central Police Station to effect the arrest of the 1st Appellant's managing director Jaqueline Njui, Company Secretary and Property Manager and the 2nd Appellant; and that together the above, the Court be pleased to order the 1st Appellant acting managing director Jaqueline Njui, Company Secretary and Property Manager and the 2nd Appellant each to pay a fine of Kshs. 200,000/-
4. The grounds on the face of the motion were amplified in the supporting affidavit sworn by **Christopher Mbindyo Mulwa**, whose gist was that lower Court granted the Respondent interim orders on 31.12.2018, of which, were served upon the Appellants. That despite the aforestated, the 1st Appellant through the acts and or omission of its managing director and or its servants, agents and or employees, that is the Company Secretary and Property Manager defied the Court's order and allowed a new tenant in the premises. He went on to depose the order obtained in *Nairobi Milimani CMCC Misc. Application No. 883 of 2018* was not an eviction order. That the 1st Appellant on 25.01.2019, during subsistence of the interim orders,

caused the premises to be entered and occupied by a new tenant whereas the 2nd Appellant carted away the Respondent's goods and went ahead to auction them. That as a consequence of the forestated, the 1st Appellant actions amounted to contempt, to wit, its officers ought to be punished so as to protect the dignity and authority of the Court.

5. In response to the motion, the 1st Appellant filed grounds of opposition dated 21.02.2019 while contemporaneously filing a motion of even date expressed to the brought among others pursuant to **Order 45** of the **Civil Procedure Rules (CPR)** seeking *inter alia* that the order of the lower Court issued on 31.12.2018 be reviewed, varied and or set aside.
6. The grounds on the face of the motion were amplified in the supporting affidavit sworn by **Jadiah Mwarania**, whose gist was that Respondent's application dated 31.12.2018, was filed following undue delay given that the Respondent's goods had since been proclaimed and sold by way auction on 03.11.2018 therefore the orders issued were incapable of being enforced whereas the attendant motion had been overtaken by events. It was further deposed that the continued subsistence of the said orders subjects the Appellants to untold harassment, undue intimidation, stress and frustration given inability to comply with the orders. He went on to depose that unless the Appellants motion is disposed of, it would likely condemn the Appellants into needless contempt of Court without consideration of the new material facts advanced by the Appellants which had been omitted and or concealed as at filing of the Respondent's motion.

7. The Respondent opposed the Appellants motion by way of a replying affidavit dated 27.02.2019 generally asserting that on accord of their actions as highlighted in its motion for contempt, the Appellants willfully disregarded the lower Court's orders issued on 31.12.2018, to wit, the review motion is an attempt to escape culpability. That the tenancy between the Respondent and 1st Appellant still subsists notwithstanding distress for rent having been levied by the 2nd Appellant therefore the 1st Appellant illegally regained possession of the premises. It was further deposed that the review motion was an attempt to legitimize the 1st Appellant's illegal and unlawful acts on the pretext that the Respondent's motion had been overtaken by events.
8. Both motions were disposed of by way of written submissions. By way of a ruling rendered on 04.06.2019, the lower disallowed the Appellants motion meanwhile allowed the Respondent's motion by finding Jaqueline Njui, Company Secretary, the Property Manager and the 2nd Appellant in contempt of its orders issued on 31.12.2018. The lower Court further ordered each of them to pay Kshs. 150,000/- for contempt, in default be arrested and committed to civil jail.
9. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in its memorandum of appeal as itemized hereunder: -
- “1. That the honorable Magistrate erred in law and fact by making a ruling in which he pronounced himself that the Appellants herein had disobeyed a Court order which in real and actual sense had lapsed therefore not in force.***
- 2. That the honorable Magistrate erred in law and fact when he failed to take into consideration the evidence and proof tendered by the Appellant in their replying affidavits of***

23.01.2019, grounds of opposition of 21.02.2019 and their application for review dated 21.02.2019.

3. That the honorable Magistrate erred in law and fact that by failing to find that the earlier Court orders issued on 31.12.2018 had been issued after the fact, that is to say that the orders had been overtaken by events and were/had been incapable of being complied with by the Appellant.

4. That the honorable Magistrate erred in law and fact that by failing to find that the order issued on 31.12.2018 was for all purposes a harassment and oppression as the 1st Appellant a law-abiding corporate citizen had no way whatsoever of upholding and or complying with the said order which had been overtaken by events as at the time it was issued.

5. That the honorable Magistrate erred in fact by requiring the Appellants staff that is Acting CEO Jaqueline Njui, the Company Secretary and the Property Manager and the 2nd Appellant to pay the sum of Kshs. 150,000/- each for contempt and in default be arrested and committed to civil jail for 30 days as unreasonable and unjust.” (sic)

10. Before this Court, directions were taken on disposal of the appeal by way of written submissions This Court has duly considered the same alongside the record of appeal.
11. The duty of this Court as a first appellate Court is to re-evaluate the evidence adduced in the lower Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See **Kenya Ports Authority v Kusthon (Kenya) Limited (2000) 2EA 212, Peters v Sunday Post Ltd (1958) EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123 and Abok, James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.**

12. The Respondent's motion before the lower Court constituted contempt proceedings as against 1st Appellant's managing director, its Company Secretary, its Property Manager and the 2nd Appellant on the back drop of lower Court orders issued on 31.12.2018 whereas the Appellants' motion on its part sought to review the latter orders. The trial Court in allowing the Respondent's motion and disallowing the Appellants motions stated in part that; -

"I have considered the applications and the submissions by the parties and the cites cases. The applicant had moved Court to have the defendant cited for contempt.....The reason why power is vested in Courts to punish for contempt of Court is but to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order....."

In the case before me, the plaintiff has applied to have the Defendants committed to jail for disobeying the orders of 31st December, 2018. The defendants on their part have challenged the application first on the basis that it has been wrongly brought. The plaintiff alleged that the defendants had defied the orders issued on 31st December, 2018 and extended on 15th January, 2019. The defendants have on their part opposed the application contending that the orders were obtained in ex parte. That being the case the issued that falls for determination is whether there has been breach of the order as alleged. The defendant was aware of the order but urged the Court to find that the matter had been overtaken by events. The defendants did not contest knowledge of the existence of the order.

.....

Having carefully perused the replying affidavit, I find that all the arguments by the defendant do not address the question at hand, which is, whether there was compliance with the Court order or any difficulty in compliance, if any. In my view, what the 1st defendant should have done was to

show that he did not disobey the Court orders. This he has not. He only endeavored to show that the plaintiff was not entitled to the order in the first place and to justify the non-compliance.

The standard of proof in matter of contempt of Court is well settled..... In this case I have found that the defendants have admitted they went ahead and placed new tenant in the premises. This in utter breach of the order that was issued on the 31st December, 2018.

....To my mind, if the defendants were unsatisfied with the order of 31st December, 2018, they should have attempted to get rid of the same through the proper course that is either by setting it aside or through appeal....

Taking all the circumstances of this case into consideration and for the interest of justice, I finds that the 1st and 2nd defendant knowingly and willfully disobeyed the orders of this Court of 31st December, 2018 as extended on 15th January, 2019 and I hereby find the 1st defendant to be in contempt of that order.

The Court has considered the defendants application dated 21st February 2019 was brought in bad faith and the same should fail. The defendant had not filed an application for review or stay there was no appeal that was preferred by the 1st defendant. The 1st defendant allowed the 3rd party to occupy the said house in disregard of the Court order that was in placeI find the application is without merit and the same is dismissed with costs.” (sic)

13. The gist of the pleadings before the lower Court have been set out earlier in this judgment. That said, a perfunctory interrogation of the core issues and the grounds advanced in the memorandum of appeal, to this Court’s mind, the appeal turns on the key question whether the trial Court acted on wrong principles in arriving at the finding it did in respect of the issues falling for determination before it.

14. The Respondent in presenting its motion before the lower Court relied on **Section 3A** of the **CPA** which specifically reserves “the inherent power of the court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court”” The latter provision was judiciously addressed by the Court of Appeal in **Rose Njoki Kingau & another v Shaba Trustees Limited & another [2010] KECA 87 (KLR)** and thus requires no restatement.
15. The undisputed fact in this appeal is that on 31.12.2018, the lower Court accorded the Respondent interlocutory orders, to wit, the latter contends that the Appellants willfully disobeyed thereby leading to the contempt proceedings as against them.
16. What the Appellants have vehemently disputed is that the orders issued by the lower Court on the latter date had been overtaken by events and therefore unenforceable, to wit, a finding of contempt ought not to have been issued and or sustained by the lower Court.
17. Having set out the above, arising from declaration of unconstitutionality of the **Contempt of Court Act**, ordinarily applications for contempt before the Magistrates Court are brought pursuant to **Section 10** of the **Magistrate’s Court Act**. Particularly, **Section 10(1), (3) & (6)** of the **Magistrate’s Court Act** provide that-;
- (1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.**
- (2)**
- (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.**
- (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.**

18. Meanwhile, **Black's Law Dictionary (Ninth Edition)**, defines contempt of court as *“conduct that defies the authority or dignity of a court.”* The Court of Appeal in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] KECA 840 (KLR)** held that in punishing contempt, the Court exercises ordinary criminal jurisdiction. In **Stewart Robertson v Her Majesty's Advocate, 2007 HCAC 63** it was stated that:

“Contempt of Court is constituted by conduct that denotes willful defiance of or disrespect towards the Court or that willfully challenges or affronts the authority of the Court or the supremacy of the law, whether in civil or criminal proceedings.”

19. The Supreme Court of Kenya in **Ahmad Abolfathi Mohammed** case explained that the reason why Courts punish for contempt is that contemnor demeans the integrity and authority of the Court but also deride the rule of law, which must not be countenanced. The Court went on to explain the rationale for the high standard of proof of contempt as follows-;

“[28]....We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 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.”

“[29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor’s conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.

[30] The question that begs an answer, thus, is: did the applicant willfully disobey this Court’s Orders?”

20. The two related ingredients of **willful disobedience** and **knowledge of the order** are critical in a successful contempt proceeding. In the past, it was held by superior Courts that for an applicant to succeed in contempt proceedings, he must prove personal service of the subject order and the attendant penal notice upon the alleged contemnor. See the Court of Appeal decision in **Nyamodi Ochieng Nyamogo & Another v Kenya Posts & Telecommunications Corporation [1994] KECA 114 (KLR)**. However, in recent years, superior Courts have stated that where the applicant is able to demonstrate awareness by such alleged contemnor of the subject orders and not necessarily personal service of the order upon the contemnor, such awareness is sufficient. See **Kenya Tea Growers Association v Francis Atwoli & 5 others [2012] KEHC 2747 (KLR)**.
21. Notably, the Courts emphasize the high degree of proof required and reiterating the exhortations in **Mutitika v. Baharini Farm Limited [1985] KLR 229**, that;-

“A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be proved

satisfactorily.... It must be higher than proof on a 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 criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature.

However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not to be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the party of the judge to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject... applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where contempt is alleged to or has been committed, and or an application to commit made, 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.

22. With the above legal preposition in reserve, this Court must interrogate whether the lower Court was in order to finding the Appellant in contempt of Court on account of **willful disobedience** and **knowledge of the order** of its orders issued on 31.12.2018. Firstly, at the risk of repetition it is not in dispute that the lower Court had issued *ex- parte* temporary orders in favour of the Respondent pending *inter parte* hearing of its application dated 31.12.2018 (***“Annexure CMM1”***).

23. I find it useful at this juncture to set out ad verbum the purport and scope of the interlocutory orders issued on the latter date. The gist of the aforestated order was to the effect -;

“That pending hearing and determination of this application inter partes a temporary injunction is hereby issued restraining the defendants by themselves, its servants and or employees or any other person whatsoever from locking up the shop space/premises comprising of a shop space situated on the mezzanine floor of the building comprising by measurement three hundred and thirty three (333.0) square feet of the shop space area from letting out, from interfering with the plaintiff business, from terminating the agreement, from obstructing the plaintiff from entering the premises comprising of a shop space situated on the mezzanine floor of the building comprising by measurement three hundred and thirty three (333.0) square feet of the shop space area, from advertising, from selling by public auction or otherwise the plaintiff office goods carted away on the 19.10.2018 and or in any other manner from having any dealings over the suit premises pending hearing and determination of the application and or until further orders of the Court.”

24. As to whether there was knowledge of the order, by way of (“Annexure CMM2”) attached to the Respondent’s affidavit material, the latter evinced a return of service showing that the 1st Appellant was duly served with the order in question alongside pleadings in the lower Court matter. What I garnered to be the 1st Appellant’s response to the motion through its grounds of opposition dated 21.02.2019 and motion of even date is that the purport and scope of the interlocutory orders issued 31.12.2018 had been overtaken by event. The 1st Appellant does not dispute knowledge of the order in question, a position the trial Court correctly arrived at.

25. As to whether there was willful disobedience of the said order, by way of ("**Annexure CMM3**") attached to the Respondent's affidavit material, evinces the fact that a new tenant had since occupied the premises in question. Again, by its grounds of opposition dated 21.02.2019 and motion of even date, the 1st Appellant does not dispute having entered into a contractual relationship and executed a tenancy agreement with another party as at 10.12.2018. The 1st Appellant further contends that the Respondent goods that were carted away in distress for rent had since been sold by 2nd Appellant as at 03.11.2018 therefore the orders as issued as at 31.12.2018 were moot and or inoperable. A cursory review of (**Annexure JN-3**) in the 1st Appellant motion dated 21.02.2019, it appears the latter had since offered the premises to one Lyma Fashions by way of an offer letter dated 10.12.2018, to wit, the latter accepted and executed the same on 19.12.2018.
26. At the risk of repetition, the purport and scope of the lower Court's order issued on 31.12.2018 was unambiguous. It among others retrained the Appellants from letting out, interfering with the Respondent's business, terminating the lease agreement, obstructing the Respondent from entering the premises, from advertising, from selling by public auction or otherwise the Respondent's office goods carted away on the 19.10.2018 and or in any other manner from having any dealings over the suit premises pending hearing and determination of the suit.
27. As earlier noted, firstly, the Appellants contend that as at 03.11.2018, the Respondent goods had since been sold by way of public auctions and the same was evinced in the 1st Appellant motion dated 21.02.2019 as (**Annexure JN-2a&2b**). Secondly, it is apparent that as

at 19.12.2018 (**Annexure JN-3**) the premises had since been leased out to Lyma Fashions.

28. Therefore, as at issuance of the lower Court's order on 31.12.2018, can it be stated that the Appellants actions constituted willful disobedience? I note that the lower Court did not expend much industry to analyse the semantics of the its order whereas it is since settled that contempt of Court is an offence of a criminal character wherein the contemnor's guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge.
29. The Appellants have resoundingly held fort to the position that as at 31.12.2018, the lower Court orders had been overtaken by events for reasons that-; the Appellants had already sold the Respondent's stop items; the Appellants had already issued the premises to third party; and that the Respondent was not in control of the premises as at issuance of the order given that the relationship between the 1st Appellant and Respondent had been terminated. The decision in **Abdiwahab Abdullahi Ali v Governor County Government of Garissa & another [2013] KEHC 2168 (KLR)** was called to aid.
30. Applying my mind to the facts and the eventual trial Court's determination of the issue, the learned Magistrate was in error in arriving at the determination that there was willful disobedience of its orders. It is apparent for the scope and purport of the order issued on 31.12.2018, that the actions the Appellants were being restrained from performing pending hearing and determination of Respondent application had since already taken place, to wit, I find it difficult to perceive that the Appellants were in willful disobedience of the lower Court's order.

31. As it were, the orders issued on 31.12.2018 were an academic exercise and or otiose in the circumstance given the events of 03.11.2018 and 19.12.2018 as evinced in the 1st Respondent's motion dated 21.02.2019. The two limbs of knowledge of the order and willful disobedience, in contempt proceedings, are conjunctive and successive. Both must be proved in order for a finding of contempt to be sustained. Given the above finding it would be moot to address the purport of the Appellants motion dated 21.02.2019, given this Court finding that the orders issued by the lower Court on 31.12.2018 were ineffectual.

32. In view of the foregoing, applying my mind to facts and law it would be difficult in the circumstance not to find that the trial Court did err in its finding. Thus, it is my considered deduction that the trial Court failed to properly exercise its discretion and arrived at a wrong decision by allowing the Respondent's motion seeking to cite the Appellants for contempt. For all the foregoing reasons, this Court finds the appeal meritorious and proceeds to aside the trial Court's ruling delivered on 4th June, 2019. The appeal consequently is allowed with attendant costs in favour of the Appellants.

33. Orders Accordingly!

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 18TH DAY OF DECEMBER 2025.

**HON L P KASSAN
JUDGE**

In the presence of;

Ms Koeba for Appellant

No appearance for Respondent

Carol – Court Assistant

ORIGINAL