REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC APPEAL NO. 11 OF 2016

KETAN MANSUKHLAL SHAH

ASHIT MANSUKHLAL SHAH

NIHAL MANSUKHLAL SHAH T/A

WATERSYS PROPERTIES.....APPELLANTS

=VERSUS=

GULF MANPOWER RECRUITING AGENCY LIMITED.....RESPONDENT

***(Being an appeal from the ruling delivered on 9th September 2015 by Hon.Maisy Chasang (Mrs) in CMCC 1710 of 2015*).**

JUDGEMENT.

1. The appellants who trade under the business name of watersys properties are the landlords of the respondent which occupies upper mezzanine 2 at watersys plaza which is erected on LR No.209/2612 . In or around December 2014, the respondent was in arrears of rent of about 2,445,000/=. On 4/12/2014, the respondents' goods were proclaimed. The advocates for the appellants and the respondent entered into a consent on 17.12.2014 in which it was agreed that the proclamation was to be lifted and the respondent was to pay the outstanding arrears in three instalments, the last one being on 31/1/2015.

2. The respondent did not make payment as per the consent. On 30/1/2015 the appellants instructed cash crop auctioneers who attached the respondents goods and sold them pursuant to the consent which had been recorded. On 1st April 2015 the respondent sued watersys properties limited. An application for injunction was also filed by the respondent seeking to restrain watersys properties limited from selling or removing the proclaimed goods from the leased premises. The trial magistrate granted the injunction.

3. When the appellants advocates were served with the application filed by the respondent, they made an application seeking to set aside the injunction orders. The appellants argued that they did not know watersys properties limited and that they were not its directors. In the meantime the appellant's advocate asked the auctioneers to go ahead with the attachment and sale. On 4/5/2015 the plaint was amended and the correct parties were named. The auctioneers went ahead with the attachment. This is what prompted the respondent to file an application for contempt. The trial court found the appellants and the auctioneers guilty of contempt of the order of 7/4/2015. This is what prompted the appellants to prefer an appeal to the High Court against the ruling of 9/9/2015 which found the appellants guilty of contempt. The appeal which was later transferred to the Environment and Land Court raised the following grounds:-

a. The learned magistrate erred in law and in fact since she failed to consider that the orders obtained on the 7th April 2015 were against a non-existent company known as WATERSYS PROPERTIES LIMITED.

b. The learned magistrate erred in law and infact in failing to consider that after filing the application to set aside the orders of 7th April 2015 which she had granted through a false affidavit of service, the respondent amended its defence and removed the non-existent defendant which implied therefore that the orders against it lapsed after it was removed from the suit.

c. The learned magistrate erred in law and in fact in that she failed to consider the fact that the subject matter of the suit were rent arrears upto February 2015 and the latter proclamation was for the rent arrears of March, April and May 2015.

d. The learned magistrate erred in law and infact in failing to appreciate the fact that the respondent does not pay rent and it should only have gone to court with clean hands for equitable reliefs.

4. The parties were directed to file written submissions. The appellants filed their submissions on 13/7/2017 . The respondent seems not to have filed any submissions and if any were filed, they are not in the file. I have considered the submissions as well as the grounds raised in the memorandum of appeal vis.a-vis the ruling of the trial magistrate. The only issue which emerges for determination is whether the trial magistrate was correct in finding the appellants guilty of contempt of court.

5. This being a first appeal to this court, I am entitled to evaluate the case as presented before the lower court and give it a fresh evaluation to determine whether the trial magistrate reached a sound finding or not. What is not in contention is that there was a court order which was given on 7/4/2015. This order restrained watersys properties limited or its agents from proceeding with the attachment. Despite this order being in force, and the appellants who were trading under the name of watersys properties being aware of it, the appellants counsel went ahead to instruct the auctioneers to go ahead with the auction on the ground that the injunction had been given against a non-existent entity which was not known to them.

6. What is not in contention is that the appellants were aware that they are the ones who were targeted by the order of 7/4/2015 but they chose to ignore it because it had been issued against Watersys properties Limited. The appellants also ignored the order which they thought was a nullity because it was addressed to a wrong party and that it had been obtained based on a false affidavit of service.

7. It is clear that the suit filed by the respondent was against Watersys Properties Limited. The Plaint was later amended to bring in the correct parties. The amended plaint was filed on 4/5/2015. There is a letter date 2/6/2015 from the counsel for the respondent which was warning the appellants advocates against proceeding with the attachment in the face of an injunction which had been given. This letter was copied to the auctioneers. In a letter dated 5/6/2015, the counsel for the appellants asked the auctioneers to proceed with the attachment allegedly on the ground that the attachment was for rent arrears of March April and May 2015 which had nothing to do with CMCC 1710 of 2015.

8. At first, the appellants proceeded with the first attachment on the ground that the order was directed at a wrong party. In the second attachment, the appellants proceeded on the ground that the attachment was in respect of arrears of rent for March April and May 2015 and that therefore the orders of 7/4/2015 did not stop the said attachment. It is my view that both reasonings were wrong. The fact that a wrong party is named in a suit does not defeat the suit. Order 1 Rule 9 of the Civil Procedure Rules provided as follows:-

> ***" Misjoinder and non-joinder. 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it".***

9. Order 1 Rule 10(1) and (2) provides as follows:-

> ***"Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.***
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> ***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.***

10. The provision of order 10 Rule (1) and (2) apply to defendant's Mutatis Mutandis. It was therefore wrong for the appellants to disobey the court order on the ground that a wrong party had been sued. The appellants were landlords of the respondents and they were aware that the suit was targeting them even though the proper parties had not been named. The plaint was subsequently amended and the proper parties named but despite this, the appellants still went on to disobey the order in the believe that the amendment rendered the orders obsolete and that as the attachment was a second one, the orders of 7/42015 did not apply to them. This was a fallacious reasoning.

11. The appellants had applied for setting aside the orders but at the time the contempt was committed the orders had not been discharged. The law relating to contempt is that the contemnor has to obey the order first even when he/she feels that the order is illegal. The appellants had to comply with the order which was still in force. It had not been set aside. The fact that the order may have been obtained through a false affidavit of service was not reason for the appellants to disobey it. They were under obligation to obey it and then move to have it set aside. I find that the trial magistrate was correct in finding the appellants guilty of contempt. I therefore find no merit in this appeal which is hereby dismissed with costs to the respondent.

Dated, Signed **and** ***delivered*** **at** ***Nairobi*** **on this** ***31st*** **day of** ***October, 2019.***

E.O.OBAGA

JUDGE

In the presence of:-

M/s Waweru for appellants and Mr Awino for Respondents

Court Clerk : Hilda

E.O.OBAGA

JUDGE