Pioneer International Schools Limited & another v Delmonte Kenya Limited & 5 others (Civil Appeal 95 & 96 of 2018 (Consolidated)) [2024] KECA 7 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 7 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 95 & 96 OF 2018 (CONSOLIDATED)

S OLE KANTAI, F TUIYOTT & PM GACHOKA, JJA

JANUARY 25, 2024

BETWEEN

PIONEER INTERNATIONAL SCHOOLS LIMITED ..... APPELLANT

AND

DELMONTE KENYA LIMITED ..... 1ST RESPONDENT

GOSHEN GARDENS LIMITED ..... 2ND RESPONDENT

DAVID KIGWE ..... 3RD RESPONDENT

PETER KAHARA MUNGA ..... 4TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 96 OF 2018

BETWEEN

PETER KAHARA MUNGA ..... APPELLANT

AND

DELMONTE KENYA LIMITED ..... 1ST RESPONDENT

GOSHEN GARDENS LIMITED ..... 2ND RESPONDENT

DAVID KIGWE ..... 3RD RESPONDENT

PIONEER INTERNATIONAL SCHOOLS LIMITED ..... 4TH RESPONDENT

(An appeal from the ruling and order of the Environment and Land Court of Kenya at Nairobi (S. Okong'o, J.) dated 8th December 2017 in ELC Case No. 1245 Of 2015)

JUDGMENT

1. On 17th October 2023, this Court ordered the consolidation of these two appeals as they relate to the same subject matter on whether there was a breach of court orders issued in respect of a property known as L.R.No.212157/2, Gatanga sub-county. For ease of reference, Pioneer International Schools Ltd will be referred to as the 1st appellant and Peter Kahara Munga as the 2nd appellant.

2. To put the appeal in context, we shall lay a background abridgment. It is common ground amongst the parties that the property known as L. R. No. 12157/2 situated in Gatanga Sub- county in Muranga is registered in the name of the 1st respondent. It is also not in dispute that on 3rd September 2013, the 1st respondent let a portion of the property measuring 75 acres to the 2nd respondent. The 2nd respondent was running a school known as Choice Imani International School. From the record, it is clear that a dispute arose due to default or non- payment of rent. The 2nd respondent negotiated with the 1st appellant to take over the premises to run a girls' school known as Pioneer Girls School. It is in dispute whether the 2nd appellant is a director of Pioneer International Schools Ltd, or is just one of the trustees of the 1st appellant and we shall deal with that issue later in this judgment.

3. When the 1st respondent learnt of the negotiations between the 1st appellant and the 2nd respondent on taking over the property, it filed ELC No. 1245 of 2015 – Delmonte Kenya Ltd. v. Goshen Gardens Ltd. & Pioneer International Schools Ltd. in the Environment and Land Court, Nairobi (hereinafter ELC). Contemporaneously, the 1st respondent filed an application seeking an order of injunction restraining the 2nd respondent from trespassing, transferring, leasing, interfering or subletting to any other persons. It also sought an order of injunction to compel the 1st appellant to remove a signboard of "Pioneer Girls School" from the property. The Court issued interim orders on 17th December 2015 and fixed the application for inter partes hearing on 20th January 2016.

4. Before the inter partes hearing, the 2nd respondent and the 1st appellant filed separate applications on 31st December 2015. In its application, the 2nd respondent sought an order that the hearing date of 1st respondent's application be brought forward and in the alternative, the orders granted on 17th December 2015 be discharged, varied or set aside. On its part, the 1st appellant sought that the orders granted on 17th December 2015 be stayed or discharged as they were likely to interfere with the opening of the school in January 2016. The affidavit in support of the application was sworn by the 2nd appellant on 30th December 2015. In it, the deponent describes himself as a director of the 2nd defendant (read 1st appellant, for purposes of this appeal). The significance of this will come later in this judgment.

5. On 12th January 2016, the 1st respondent applied for orders seeking arrest and committal to civil jail of one David Kigwe, a director of the 2nd respondent and the 2nd appellant for disobeying the orders made on 17th December 2015. On 20th January 2016, the court ordered that the contempt application be heard first. In the meantime, officials of Pioneer International Schools Ltd filed an application to be joined in the suit. On 15th January 2016, the court ordered that the joinder application be heard before the contempt application. Upon hearing the application for joinder, the court held that the parties had not established sufficient grounds to justify joinder. The application was thus dismissed.

6. This now brings us to the ruling that is the subject of the two appeals. Upon hearing the parties on the application for contempt, the court held that the only issue for determination was whether the

appellants and the 2nd respondent disobeyed the order that was made on 17th December 2015 and if so, whether they should be punished. The judge upon considering the application held as follows:

> "It is not disputed that the said orders were given in the presence of the advocates for the defendants. It is also not disputed that a formal order was extracted and personally served upon the alleged contemnors. It is also not disputed that copies of the order that was served upon the contemnors had a penal notice warning the alleged contemnors that disobedience of the order would amount to contempt of court which attracts punishment. The orders that were granted by the court in my view were clear in their terms. The 1st defendant was restrained from transferring possession of the suit property to the 2nd defendant. The 2nd defendant on the other hand was restrained by the court from among others trespassing on the suit property, interfering or otherwise dealing with the suit property including operating a school and/or any other business on the suit property or in any other manner interfering with the plaintiff's rights over the suit property.
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> It is not disputed that despite the issuance of the said court order in the presence of the advocates for the defendants who strenuously defended them in the present application and personal service of the said order upon the officers of the defendants who are sought to be committed for contempt herein, the 2nd defendant is still operating a school on the suit property in the name of Pioneer Girls School. I am convinced from the evidence on record that as at 17th December, 2015 when the court made the orders in question, the 1st defendant had already given the 2nd defendant possession of the suit property. However, the 2nd defendant had not started operating a school on the suit property. From the evidence before the court, by the time the plaintiff came to court and obtained the orders sought to be enforced, the 2nd defendant was carrying out renovation on the buildings on the suit property and enrolling students for the first term of the school calendar which was to commence in January, 2016. After being served with the said court order or being made aware of the same, the 2nd defendant had an obligation to stop all forms of activity on the suit property even if the 2nd defendant viewed the order as irregular or illegal. The application which was filed herein by the 2nd defendant on 31st December, 2015 seeking the discharge of the said order of 17th December, 2015 leaves no doubt that as at that date, the 2nd defendant was aware of the said order. The affidavit in support of that application was sworn by Peter Munga who described himself as a director of the 2nd defendant. He was similarly aware of the order. A company acts through its officers. As a director of the company or a trustee as he has referred to himself in these proceedings, he had an obligation to cause the company to obey the order of the court. In contempt of the order of this court, the 2nd defendant proceeded to admit students to Pioneer Girls School run by the 2nd defendant on the suit property. It is outrageous to note that even as at the time of arguing the present application the 2nd defendant was still operating a school on the suit property in defiance of the said court order.
>
> .....
>
> I am satisfied from the material before me that the plaintiff has proved a charge of contempt against the 2nd defendant and that Peter Munga being a principal officer of the 2nd defendant has been properly cited for punishment for the disobedience of the order of the court by the 2nd defendant. As I have stated above, as at the time when the orders of 17th December, 2015 were issued, the 1st defendant had already handed over possession of the suit property to the 2nd defendant. It is therefore my finding that the 1st defendant is not guilty of disobeying the order of this court that was made on 17th December, 2015 when it

no longer had possession of the suit property. I find no merit in the various objections that had been raised by the 2nd defendant and Peter Munga to the application before me. As was stated in the cases that I have cited above, a party served with a court order or who is aware of the order has a duty and obligation to obey the same even if in his opinion the order has been given without jurisdiction, is unconstitutional or is irregular. The 2nd defendant took the earliest opportunity to have the order set aside on various grounds. Until the application was heard and allowed, the 2nd defendant had to obey the order however distasteful the terms thereof were to the 2nd defendant."

7. Aggrieved by the said ruling, the appellants separately lodged notices of appeal dated 14th December 2017 and 20th December 2017. The 1st appellant has raised a whopping 14 grounds and we take the liberty to summarise them as follows: that the learned Judge ought to have determined the jurisdictional issues first before dealing with the application for contempt; that a person cannot be held liable for orders issued by a court without jurisdiction; the prayer for contempt was not pleaded; that the particulars of contempt were not given; that the order was extracted irregularly; that the 2nd appellant was not a director but only one of the trustees and that possession was transferred before the orders were issued on 17th December 2015.

8. On his part, the 2nd appellant raised 13 grounds which we take the liberty to condense as follows: that the Judge ought to have determined the jurisdictional issues first; that he was not a party to the suit and therefore cannot be held guilty of contempt; that the Judge ought to have heard the application for clarification or setting aside first; that he was not a director but just one of trustees and therefore, the court was wrong in finding him guilty of contempt; and that possession was transferred before the order was issued on 17th December 2015.

9. The 1st appellant also filed written submissions dated 3rd October 2022. On the ground on jurisdiction, the 1st appellant relied on cases of *Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & another* [2005] eKLR and *Albert Kigera Karume & 2 others v. Kung'u Gatabaki & 6 others* [2015] eKLR for proposition that once the issue of jurisdiction is raised, the contempt application must await its determination. The main argument on this ground is that the tenancy between the 1st and 2nd respondent was a controlled tenancy and therefore subject to provisions of the Business Premises Rent Tribunal established under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*.

10. The other issue raised in the submissions is that the order issued by the court had both prohibitory and mandatory connotations. According to the 1st appellant in its own words "preventing it from entering meant it was effectively evicted. Preventing trespassing meant the appellant had already been declared a trespasser. The order was thus a mandatory ex-parte injunction and the court had no powers to make such an order." It further argues that the order stopping the appellant from trespassing, continuing to trespass, and transferring, subletting, interfering and otherwise dealing with the property was ambiguous.

11. The 1st appellant cited *Jihan Freighters Limited v. Hardware & General Stores Limited* [2015] eKLR to support the argument that there was no determination that it was a trespasser. It was also submitted that by the time the orders were issued, the 1st appellant had already taken possession and therefore, it was not possible to be in contempt of a prohibitory order preventing a person from doing something that had already happened.

12. On its part, the 2nd appellant did not file written submissions. However, Mr. Kihara learned counsel for the 1st appellant, holding brief for Mr. Kahonge made oral submissions similar to those of the 1st appellant.

13. The respondent filed a notice of cross-appeal and written submissions both dated 4th October 2022. The cross-appeal is made on the ground that; the Judge erred in holding that the 2nd and 3rd respondents were not guilty of contempt and in holding that the 2nd respondent had already handed over possession to the 1st appellant as of 17th December 2015 when the order for injunction was issued.

14. The 1st respondent's submissions on the appeal and the cross- appeal can be summarized as follows:

    i. That the argument that the appellants were not bound to obey the order as it was invalid and flies in the face of the law. Reliance was placed on the case of *Hadkinson v. Hadkinson* [1952] 2 ALL E.R. 567 and *Woburn Estate Ltd v. Margaret Bashforth* [2016] eKLR (that affirmed the holding in *Refrigerator & Kitchen Utensils Ltd. v. Gulabchand Popatlal Shah & Other*s, Civil Application No. Nai. 39 of 1990). It submitted that every party should obey a court order made by a competent court until it is discharged. In other words, it is not for parties to determine whether an order is valid or not.

    ii. That the 1st respondent did not allow the appellant to take possession as argued by the appellants.

    iii. That the appellants were aware of the court orders but blatantly disobeyed them.

15. On the cross-appeal, it submitted that the learned Judge erred in holding that the 2nd and 3rd respondents were not in possession as of 17th December 2015, when the order was issued. It stated that:

    i. By a letter dated 27th October 2015, the 2nd respondent's advocate wrote to the 1st respondent's advocate denying that it had passed possession of the property to the 1st appellant.

    ii. The preliminary objection and grounds of opposition filed on 17th December 2015 confirmed that both the appellant and 2nd respondent were in possession of the suit property.

    iii. The letters dated 14th and 15th January 2016 between the advocates for the appellant and the 2nd respondent discussed handover of the property in January 2016. Therefore, it is not true that possession had taken place by 17th December 2015 when the order was issued.

16. This being a first appeal, this Court must analyse and re-assess the evidence on record and reach its conclusion in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v. West End Butchery Limited & 6 others* [2015] eKLR citing the case of *Selle v. Associated Motor Boat Co.* [1968] EA. p.123 that stated as follows:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270)."

17. Having examined the record of appeal and grounds on which it is founded and the rival written submissions on record, we are of the considered view that this appeal turns upon the court's finding on four main issues, namely: whether the order was a nullity for want of jurisdiction; and if so, whether a person can be guilty of contempt of court orders issued without jurisdiction; whether the orders that were issued were ambiguous or lacked clarity; whether the learned Judge exercised his discretion properly in holding the appellants in contempt; and whether the Judge was right in holding that the 2nd and 3rd respondents were not guilty of contempt.

18. As to the 1st issue, whether the order issued on 17th December 2015 was a nullity for want of jurisdiction, we note that it is common ground that there was a tenancy relationship between the 1st and 3rd respondent. From the record, it appears that the 3rd respondent had difficulties meeting its rent obligations and the 1st respondent served a notice of breach on 21st April 2015. On 29th April 2015, the 3rd respondent filed Nairobi ELC Case No. 306 of 2015, *Goshen Gardens Ltd. v Delmonte Kenya Ltd*. and on 15th July 2015, the matter was referred to arbitration. It is also clear from the record that negotiations were held by the parties including the possibility of the 1st appellant taking over the lease. The parties have different views on the exact details of those negotiations, but this is not a material issue, as it will become apparent shortly.

19. From the record, it is clear that in the course of negotiations, the 1st respondent learnt that the 2nd respondent was in the process of handing over the lease to the 1st appellant. It then filed Nairobi ELC Case No. 1245 of 2015(supra), that is the subject of these appeals. As already stated, the trial court (S. Okong'o, J.) issued an order of injunction on 15th December 2015 in the following terms:

> "That a temporary injunction be and is hereby issued restraining the 2nd defendant whether by itself or its agents and/or employees or otherwise whomsoever from trespassing, continuing to trespass, transferring, leasing, subletting, interfering and/or otherwise dealing with the plaintiff's property being a portion of the property known as L.R No. 12157/2 situated within Gatanga Sub-County of Muranga County (the suit property) including operating a school and/or any other business on the suit property or in any other manner howsoever interfering with the plaintiff's rights over suit property pending the hearing of the application on 20th January, 2016.
>
> That a temporary injunction be and is hereby issued restraining the 1st defendant whether by itself or its agents and/or employees or otherwise whomsoever from transferring possession of the plaintiff's property being a portion of the property known as L.R No. 12157/2 situated within Gatanga Sub-County to the 2nd defendant or any other third party pending the hearing of the application on 20th January, 2016."

20. }On 8th December 2017, the trial court (S. Okong'o, J.), upon hearing the application for contempt, held the 1st appellant and its director, the 2nd appellant to be in contempt. The 2nd appellant was granted 120 days to purge the contempt and thereafter attend court on 10th April 2018 for mitigation and sentence.

21. The appellants have strenuously argued that the court had no jurisdiction to issue the order and therefore, the order was a nullity and not capable of being obeyed. With respect, this argument by the appellants is without substance. As already noted, the 3rd respondent had filed ELC Case No. 306 of 2015 before the filing of ELC Case No. 1245 of 2015. Upon filing of *ELC Case No. 1245 of 2015*, the court gave orders of injunction whose terms are clear. If we understood the appellants, they are arguing that since there was another suit between the parties (ELC Case No. 306 of 2015), the court could not

issue orders in the subsequent suit that contravened the earlier orders. It is also argued that the orders were issued without jurisdiction as the tenancy in question was a controlled tenancy and therefore a preserve of the Business Premises Rent Tribunal.

22. A thorough analysis of the submissions by the appellants divulge parties who are aware of the orders of the court but have chosen to disobey the same through judicial craft. The learned Judge issued orders after hearing an ex parte application. The appellants applied to vary or set aside the said orders. Further, the officials of the Parents and Teachers Association of the 1st appellant applied to join the suit. The record shows that the appellants were active participants in the hearing of the application.

23. It is clear to us that the appellants' argument on the question of jurisdiction is hollow as the 2nd respondent was the first one to invoke the jurisdiction of the Environment and Land Court. It also borders on arrogance for the appellants to state boldly that the orders are nullity and not capable of being obeyed. The glaring question is; how can parties be the ones to decide that an order is a nullity and therefore cannot be obeyed? This would lead to anarchy and a breakdown of the rule of law. A party dissatisfied with an order has a right to apply set it aside or appeal. Until the order is set aside, it has to be obeyed. A party cannot choose to be the jury, judge and executioner as the appellants have done in this appeal. A party so acting must be ready to bear the full brunt of the law of contempt. We must deprecate in the strongest terms the worrying tread where court orders are treated with contempt on all manner of grounds. This court in *Shimmers Plaza Limited v. National Bank of Kenya Limited* [2015] eKLR, expressed itself as follows:

> "No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour."

24. In similar fashion, this court in *A.B. & Another v. R.B.*, Civil Application No. 4 of 2016 [2016] eKLR cited with approval the Constitutional Court of South Africa's decision in *Burchell v. Burchell*, Case No. 364 of 2005 where it was held:

> "Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The *Constitution* states that the rule of law and supremacy of the *Constitution* are foundational values of our society.
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> It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law."

25. The other issue is whether the orders issued on 15th December 2015 were ambiguous and therefore needed clarification. We have looked at the orders and they are clear as to what was to be done or not done. Indeed, we note that on 31st December 2015, the 2nd respondent filed an application seeking that the hearing date be moved from 20th January 2016 to a date during the Christmas vacation in 2015. In the alternative, it sought for variation or setting aside of the orders. The supporting affidavit by the 3rd respondent in support of the application only highlighted the difficulties that it would face if the orders were not set side. There is nothing to show that the order is ambiguous. It is our view that it cannot be left to parties to decide which order is easy to obey and which is difficult or ambiguous. Judicial interpretation on setting aside or variation is in the exclusive domain of a judge. It is also instructive that on 31st December 2015, the 1st appellant filed a notice of motion and it is important we set out

the prayers as framed by the appellant as this will become significant later in the judgment. The prayers were set as follows:

> "...That pending the hearing and determination of this application inter-partes, this honourable court be pleased to stay the execution of and/or the orders made on 17th December 2015;
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> ..That pending the hearing and determination of this application inter-partes, the plaintiff either by herself and/or her agents, employees, tenants or whomsoever be restrained from interfering with the 1st defendant's right of possession, use and continued possession, occupation and operations either by itself and/or the 2nd defendant over of all that property known as L. R. Number 12157 (herein referred to as the "suit property.");
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> ..That the orders made herein on 17th December 2015 be discharged;
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> .... That the proceedings herein be consolidated with Nairobi ELC Number 306 of 2015 (*Goshen Gardens Limited v. Delmonte Kenya Limited*.)"

26. In an affidavit sworn on 30th December 2015, Peter Munga describes himself as a director of the 1st appellant. He deponed on the reasons why the orders that were issued on 15th December 2015 should be discharged among other prayers. The 1st appellant goes to great length to show the financial investments that it had made and the inconveniences that the order had inflicted upon it. There is nothing in the averments to show that it did not understand the nature of the order issued on 15th December 2015. We note that the affidavit sworn on 3rd September 2016, in support of the application to vary or set aside the orders of 15th December 2015, the same Peter Munga describes himself as a trustee of the 1st appellant. So the 1st appellant is blowing hot and cold at the same time on the elucidation of the said Peter Munga. That affidavit is argumentative and a justification on why it was not possible to comply with the orders of 15th December 2015. On this issue, we have said enough to show that there was not an iota of ambiguity in the orders. The appellants simply implored a chest thumping attitude as to why it would not comply with the orders.

27. On the next issue regarding the exercise of the Judge's discretion, we note that the Judge, in a well detailed ruling has analysed all the facts, documents and submissions that were submitted at the hearing. He gave the appellants every available opportunity to purge the contempt; in fact, the appellants were given 120 days to purge the contempt. We note that the appellants did not make any efforts to comply or show remorse for their actions. We wish to remind parties that this court will not interfere with the exercise of discretion by a Judge unless it is demonstrated that the discretion was exercised injudiciously. As stated by this court in *Kenya Revenue Authority & 2 others v. Darasa Investments Limited* [2018] eKLR (Civil Appeal No. 24 of 2018):

> " The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.

28. Taking cue from the above, it is our finding, therefore, that the Judge exercised his discretion in accordance with the law and cannot be faulted.

29. The final issue is to be found in the cross-appeal. On this issue, the relevant part of the ruling of the learned Judge reads as follows:

> " As I have stated above, as at the time when the orders of 17th December, 2015 were issued, the 1st defendant had already handed over possession of the suit property to the 2nd defendant. It is therefore my finding that the 1st defendant is not guilty of disobeying the order of this court that was made on 17th December, 2015 when it no longer had possession of the suit property. I find no merit in the various objections that had been raised by the 2nd defendant and Peter Munga to the application before me. As was stated in the cases that I have cited above, a party served with a court order or who is aware of the order has a duty and obligation to obey the same even if in his opinion the order has been given without jurisdiction, is unconstitutional or is irregular. The 2nd defendant took the earliest opportunity to have the order set aside on various grounds. Until the application was heard and allowed, the 2nd defendant had to obey the order however distasteful the terms thereof were to the 2nd defendant."

30. In support of the cross-appeal, the 1st respondent deponed as follows:

> " The learned Judge erred in finding that the 2nd respondent had already handed over possession of the suit premises to the 4th respondent as at 17th December 2015. In making this finding the learned Judge failed to consider and should have considered the following documents which confirmed that both the 2nd respondent and 4th respondent had possession of the suit property as at 17th December 2015:
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> i. The 4th respondent's preliminary objection and grounds of opposition filed on 17th December 2015 which confirmed at paragraph 4 thereof, that both the 2nd respondent and 4th respondent were in possession of the suit property (page 60-61 of the record).
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> ii. Letter dated 14th January 2016 which was produced at page 1 of the exhibit HO3 annexed to Harry Odondi's further affidavit sworn on 10th February 2016 in which the 2nd respondent informed the 1st respondent that it was ready to hand over possession of the suit property to the 1st respondent (Page 199 of the record."

31. We note that in the grounds of opposition dated 17th December 2015, the 1st appellant states, "both the 1st and 2nd defendants are in possession of the suit property ...." Further, in an affidavit sworn on 30th December 2015 in support of the application to change the hearing date and for variation or setting aside of the order, the 3rd respondent only explained the difficulties of obeying the court order. It does not state which was the earliest opportunity when it surrendered possession to the 1st appellant. In his own words, Mr. Kigwe deponed as follows in paragraph 10:

> " That at the time being, I am advised by our advocates on record, and verily believe the same to be true, correct and sound advice that:
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> i. The 1st defendant has a valid and running lease, or tenancy agreement, and in the absence of any breach in the future, the lease and its terms are binding between the parties.

ii. The 1st defendant in the absence of execution of any settlement agreement to terminate the lease is entitled to enjoy a quiet and peaceful possession, which includes, as it has now done pending a further and amicable resolution, to take over the benefit of the works, repainting and tarmacking of the access road to the school undertaking by the 2nd defendant, which had been done in the course of the tripartite negotiations, more so that they already admitted students do not suffer oppression.

iii. For the court order issued on 17th December 2015 to continue to subsist with the over generous words set out in prayer 2 of the plaintiff's application, the same can be construed to be a negation, or setting aside, of the earlier existing orders issued in the ELC 306 of 2015 and hence there is need to vary, set aside or clarify, give further directions, or vary the application of the restrictive orders such that the 1st defendant is able to enjoy its contractual rights and the interlocutory orders issued in ELC 306 of 2015 pending a mutual termination of the case."

32. It is our finding that the 2nd and 3rd respondents were aware of the court order. They deliberately ignored the court order and worked in cahoots with the appellants. Accordingly, it is our finding that the learned Judge erred in holding that the 2nd and 3rd respondents were not in contempt, and it is our finding that the cross appeal is merited.

33. In view of the foregoing, the consolidated appeals have no merit, and we dismiss them in their entirety. Further, we find that the cross-appeal is merited and set aside part of the ruling that found that the 2nd and 3rd respondents are not guilty of contempt and substitute with an order that both the 2nd and 3rd respondents are also guilty of contempt. In the circumstances, we order that this file be returned to the Presiding Judge of the ELC for directions on mitigation and sentencing of the appellants, the 2nd and 3rd respondents on a date that will be set after service of the summons.

34. The costs of the appeal and the cross appeal shall be met by the appellants.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

M. GACHOKA CIARB, FCIARB

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR