Joho v Doshi & 4 others (Civil Appeal E107 of 2021)
[2024] KECA 1569 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1569 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E107 OF 2021

AK MURGOR, JW LESSIT & GV ODUNGA, JJA

NOVEMBER 8, 2024

BETWEEN

ALI HASSAN JOHO ..... APPELLANT

AND

ASHOK LABSHANKER DOSHI. ..... 1ST RESPONDENT

PRATIBHA ASHOK DOSHI ..... 2ND RESPONDENT

COUNTY GOVERNMENT OF MOMBASA ..... 3RD RESPONDENT

BENARD OCHIENG OGUTU ..... 4TH RESPONDENT

NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

(Being an Appeal against the Ruling and Orders of the Environment and Land Court at Mombasa (Hon. Munyao J.) delivered on the 22nd April 2020 in ELC Civil Suit Number 33 of 2019)

JUDGMENT

1. The background to this appeal is that vide a plaint dated 28th February 2019, the 1st and 2nd respondents sued the 3rd and 4th respondents claiming that on 25th February 2019, the 4th respondent a Member of the County Assembly for Changamwe ward in Mombasa County, in the company of the 3rd respondent's officers, employees and agents invaded the 1st and 2nd respondents' property known as Land Reference No. MBS Civil Appeal E107 of 2021 Page 1 of 26 MN/VI/3458 (the suit property) and vandalised the gate and part of the perimeter wall; that it was alleged that the 1st and 2nd respondents had grabbed the land belonging to Changamwe Secondary School; that on 26th February 2019, the 3rd respondent through the County Chief Officer of Physical Planning & Housing served an Enforcement Notice of the same date on the employees of the 1st and 2nd respondents present at the suit property; that the said Notice was not addressed to the 1st and 2nd respondents and made a reference to a different

property; and that the 3rd and 4th respondents had trespassed onto the 1st and 2nd respondents' private property and caused serious damage therein and threatened to evict the 1st and 2nd respondents and repossess the suit property.

2. The presence of the 5th respondent in the suit, albeit as an interested party, was explained on the basis that it is the constitutional body with the authority and mandate to manage public land and hence would be interested in the property if it was a public land as claimed. The claim was therefore, inter alia, for an injunction barring the 3rd and 4th respondents or persons acting for them from evicting the 1st and 2nd respondents from the suit property and trespassing thereon.

3. Together with the plaint, the 1st and 2nd respondents filed a Notice of Motion dated 28th February 2019 seeking, inter alia, a temporary injunction restraining the 3rd and 4th respondents either by themselves or their officers, agents, employees, assigns or persons acting for them from visiting, invading and trespassing upon the suit property or interfering with the 1st and 2nd respondents' quiet and peaceable use, occupation, possession, ownership and title of the suit property pending the hearing and determination of the application. Similar orders were also sought during the pendency of the suit.

4. When the application was placed before the court on 28th February 2019, it was directed that the application be served for inter partes hearing on 6th March 2019 on which date there were legal representations for the1st and 2nd respondents on one hand and the 3rd and the 5th respondents on the other hand. The matter was adjourned to 9th April 2019 to enable all the parties respond to the application. However, the court granted the interim orders as against the 3rd respondent who had been served, pending the hearing and determination of the application. On 9th April 2019 the 3rd and 4th respondents were represented when, by agreement of the parties, the interim order was extended to 27th June 2019 with a variation that it would apply to the 3rd and 4th respondents.

5. Before the matter could be heard, a Notice of Motion dated 17th May 2019 was filed by the 1st and 2nd respondents seeking that the appellant, Ali Hassan Joho, who was the then Governor of the 3rd respondent, Jaffer Suleiman Moshesh, its Chief Officer in the Department of Lands, Planning and Housing and the 4th respondent be summoned to show cause why they should not be committed to civil jail for six months for disobeying the court order made on 6th March 2019 and amended on 9th April 2019. When the matter came before the court (Yano, J.) on 17th May 2019, it was directed that the application be served on the 3rd and 4th respondents for inter partes hearing on 27th June 2019.

6. On 27th June 2019 the matter was placed before A. Omollo, J. on which day there were representations for the 1st and 2nd respondents, the 3rd respondent and the 5th respondent. Directions were given in respect of the applications dated 28th February 2019 and 17th May 2019 as well as the preliminary objection filed by the 3rd respondent. The 5th respondent was, on its oral application, discharged from the proceedings and the matter was fixed for mention on 30th July 2019 with the interim orders being extended till then. The next court appearance, based on the proceedings, was on 22nd October 2019 when the parties appeared before Munyao, J when the 1st and 2nd respondents were represented by Mr Oluga, Mr Tajbhai held brief for Ms Kuria for the 3rd respondent and Mr Chebukaka appeared for the 4th respondent. As counsel were not ready to proceed the same was stood over to 13th November 2019 with extension of the interim orders. On that date the representations were as the previous court appearance. During that hearing, Mr Tajbhai submitted that the appellant was never served with the contempt application or order and was never aware of any order and that there was no evidence in the video clip that was played in court that the appellant or the 4th respondent were inside the suit property. Mr Oluga in his rejoinder wondered why Mr Tajbhai was in court if the appellant was not aware of the day's proceedings and why he had filed submissions if the appellant was not served. We

have highlighted these submissions because of their importance in determination of this appeal which will become apparent later in this judgement.

7. After hearing, the matter was reserved for ruling on 12th February 2020. On that day two separate rulings were delivered by the court. In respect of the application dated 17th May 2019, the learned Judge (Munyao, J.), while appreciating that the appellant did not file any replying affidavit, found that:

> " there was at the very least a visitation of the property by the 1st and 3rd respondents contrary to the orders of the court... It is not therefore difficult for me to find that there was a violation of the court orders by Mr Joho and Mr Ogutu, as I have demonstrated above. The evidence on the violation is overwhelming and most importantly, is not disputed."

8. It was on that basis that the application for contempt was allowed against the 4th respondent and the appellant while the same application as against Jaffer Suleiman Moshesh was dismissed. In his ruling, the learned Judge pointed out that Mr Tajbhai was appearing for the 3rd respondent.

9. In the second ruling in respect of the application dated 28th February 2019, the learned Judge confirmed the injunction pending the hearing of the suit

10. After delivery of the ruling, the learned Judge set 3rd March 2020 as the date for mitigation. However by a Notice of Appointment of Advocate dated 19th February, 2020, the appellant appointed the firm of Balala & Abeid Advocates to act for him. The said firm filed an application dated 20th February 2020 in which the appellant sought the setting aside of the ruling delivered on 12th February 2020 and all consequential orders on the ground that the application dated 17th May 2019 was never served on the appellant personally and that the appellant was never served with any notice to show cause and was never a party to the proceedings. It was therefore contended that the appellant was never afforded an opportunity of being heard by the court in respect of the said application.

11. At the court appearance on 3rd March 2020, Mr Oluga appeared for the 1st and 2nd respondents, Mr Otwere held brief for Mr Chebukaka for the 4th respondent and Mr Mohamed appeared for the appellant. Mr Mohamed, in answer to Mr Oluga's questioning of the appellant's presence for purposes of mitigation, informed the court that Mr Tajbhai had no instructions to act for the appellant and hence the appellant was not aware of the proceedings for mitigation and the requirement for his personal attendance.

12. The appellant's application dated 20th February 2020 was heard on 11th March 2020 with Mr Oluga representing the 1st and 2nd respondents while Mr Mohamed appeared for the appellant. In his ruling of 22nd April 2020 the learned Judge dismissed the application dated 20th February 2020. While he appreciated that the County Government and the appellant were two different persons, the learned Judge found that since the 3rd respondent is not a natural person, an order directed to it applies to all its employees, agents and persons acting on its behalf and that if an application for disobedience is filed and served on the 3rd respondent that is sufficient service on its officers. In arriving at his decision, the learned Judge relied on the affidavit of one Gordon Odhiambo which, according to the learned Judge, demonstrated that the process server went to serve the appellant and was directed to the office of the County Attorney. According to the learned Judge, the appellant actively participated in the application dated 17th May 2019 through the County Attorney, an office within the County Government of Mombasa under the control of the appellant. In the view of the learned Judge, the County Attorney was acting, not only for the 3rd respondent, but also on behalf of the appellant and that the appellant was therefore well aware of the application dated 17th May 2019 and was ably represented.

13. It is this ruling that is the subject of this appeal in which the appellant contends that: he was never a party to the proceedings that culminated in the Orders issued on 12th February 2020; he was never served with the application dated 17th May 2019; he was condemned unheard during the hearing of the application dated 17th May 2019 since he had no representation; he was never served with the orders issued on 6th March 2019 and amended on 9th April 2019 thus he had no knowledge of the contempt orders; there was no evidential basis for a finding of contempt as the invasion and demolition had taken place sometimes in February 2019 before the Orders of 6th March 2019; he was treated as the 1st respondent in the proceedings when he was neither a respondent, a defendant nor an Intended Party; he was condemned to pay costs of that application unfairly; the ruling deprived him of all safeguards of a fair hearing guaranteed by the *Constitution*; the learned Judge enforced a vague order of injunction where the property details and identity were contentious and subject to verification upon a full trial on whether the same properties were being described in the plaint and the enforcement order issued by the 3rd respondent; the learned Judge erred in law and in fact by proceeding on the basis of a presumption that the appellant had ostensible knowledge by virtue of his position at the 3rd respondent; an injunction cannot be issued against the government pursuant to section 16 of the *Government Proceedings Act* in the absence of a Constitutional Petition under Article 23 of the *Constitution*; the learned Judge misdirected himself in failing to apply the provisions and procedure for enforcement of orders against the government or government officers as provided under section 21 of the *Government Proceedings Act*; that the trial court was bereft of jurisdiction; and that there was no evidence on record of service or knowledge of the orders alleged to have been breached by the appellant or the application dated 17th May 2019 on the appellant.

14. The appellant prays that the impugned orders be set aside and substituted with an order allowing the appellant's Notice of Motion dated 20th February 2020. The appellant also seeks costs of this appeal and the proceedings in the trial court against the 1st and 2nd respondents.

15. At the virtual plenary hearing on 1st July 2024, learned Counsel, Mr Paul Buti together with Ms Julu appeared for the appellant, learned counsel, Mr Willis Oluga appeared for the 1st and 2nd respondents while learned counsel, Mr Tajbhai appeared for the 3rd respondent. Despite service, the 4th and 5th respondents were not represented. Learned Counsel relied on their submissions with minimal highlights.

16. For the appellant, it was submitted that the 1st and 2nd respondents were duty bound to personally serve the appellant with the application dated 17th May 2019 before the hearing; that the affidavit of service was clear that the appellant was never served; that consequently any proceedings on the said application against the appellant were a nullity; that the decision was made in contravention of the appellant's rights to fair hearing enshrined in Article 25(c) of the *Constitution* which are non-derogable (See Evans Kidero v Rerdinard Waititu (2014 eKLR); that the court misdirected itself in imputing knowledge and in deeming that the appellant was aware of the order by virtue of the presence of the counsel for the 3rd respondent contrary to the holding in Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR; that the appellant was unaware of the court order issued on the 6th March 2019 and amended on 9th April 2019; that on the authority of the case of Abdi Satarhaji & Another v Omar Ahmed & Another [2018] eKLR, the evidence before the Judge was not sufficient to establish wilful disobedience by the appellant of the court order; that the appellant, not being a party to the proceedings and having no legal representation, was not aware of the court order and did not disobey it; that the 3rd respondent being a government as envisaged under section 16 of the *Government Proceedings Act*, execution cannot issue against it; and that on the authority of the case of Sheilla Cassat Issenberg & Another v Antony Machatha Kinyanjui [2021] eKLR the power to punish

for contempt is a discretionary one and should be used sparingly and cautiously with great restraint hence an enforcement power of last resort.

17. It was further submitted that the application before the court sought the setting aside of the entire ruling delivered on 12th February 2020 and all consequential applications, orders and warrants and therefore the court has a duty to dispense substantive justice in the best way it can without being weighed down by minor lapses that are correctable; that the Notice of Appeal referred to by the 1st and 2nd respondent was purportedly filed on behalf of the 3rd respondent and not for the appellant; therefore the appellant could not be barred from seeking review based on that Notice of Appeal; and that the objection based on the Notice of Appeal ought to have been taken within 30 days of the date of service of the Notice of Record of Appeal pursuant to rule 86 of the Rules of the Court.

18. On behalf of the 1st and 2nd respondents, it was submitted that the application dated 20th February 2020 as drafted and filed was not capable of being granted because it had no substantive prayer; that the Court cannot therefore grant the orders sought in this appeal; that due to the fact that there was already a Notice of Appeal filed by the 3rd respondent against the ruling of 12th February 2020, the appellant was disentitled from seeking review of the same decision; that since the appellant was qualified to present an appeal to this Court against the same ruling, he was disqualified and precluded from seeking review after the 3rd respondent had filed an appeal; that the appellant's application for review was improperly and irregularly before the ELC; that the contention that the appellant was not served with the order of injunction was dealt with by the ELC in the earlier ruling of 12th February, 2020 hence the issue is res judicata and could only be raised on appeal and this is not an appeal against that ruling; that there was no requirement that the appellant be served personally because the order did not bind the appellant in his personal capacity but bound the 3rd respondent's agents, officers and employees; that the order was made in the presence of counsel for the 3rd respondent hence was binding upon the appellant; that from the affidavit of service which was not challenged by the appellant, the County Attorney was served on behalf of the appellant; that although the appellant did not file a replying affidavit, he was represented by the County Attorney who urged his case; that the allegation that the appellant was not served, even if found merited, should not lead to setting aside the order of 12th February 2020 but can only lead to reopening of the said application with now full participation of the appellant; that the application dated 17th May 2019 was not an application for contempt but for an order for punishment for disobedience of an injunction order; and that an order of injunction can be issued against the County Government pursuant to decisions in Co-operative Bank of Kenya Limited v County Government of Nairobi [2019] eKLR and Kenneth Kiplagat Kimaiyo & 3 Others v County Government of Elgeyo Marakwet & 2 Others [2016] eKLR.

19. The 3rd respondent submitted that the appellant was never a party to the initial suit and was only introduced vide the Notice of Motion dated 17th May, 2019; that the 3rd respondent has never entered appearance for the appellant; that the appellant was never fully represented as there was no response by him whatsoever and there being contempt proceedings where a person's liberty is at stake, the trial court ought to have accorded the appellant an opportunity to be heard; that the trial court erred in fact and law by concluding that the appellant ought to have been aware of all orders issued against the 3rd respondent yet the appellant is constitutionally given powers to delegate his powers and functions; that no injunctive orders were extracted and served upon the appellant thus the appellant would not have been privy to the orders; that on the authority of the case of Ex parte Langley 1879, 13 Ch D. 110 (CA), proof of such notice ought to prove beyond reasonable doubt; that any updates about a case is made to the relevant department and not upon the Governor hence the appellant had no knowledge of the existence of the court order; and that the appeal should be allowed with costs to it.

20. We have considered the issues raised before us in this appeal. This being a first appeal, this Court's mandate was espoused in Peters v Sunday Post Ltd [1958] E.A 424 where it was held that:

> " An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand."

21. We are conscious of the fact that this appeal arises from an application that sought the review and setting aside of an earlier order and therefore the usual caution of taking into account that we did not see the witnesses or hear them testify does not arise. However, we are still obliged to review the evidence, if any, presented by way of affidavits in order to determine whether the trial court's conclusions should stand.

22. Before we deal with the merits of the appeal, two preliminary issues arise for determination. These are whether the application as presented before the learned Judge was incompetent for failing to seek a substantive order and whether the appellant could properly move the trial court for review in light of the Notice of Appeal filed by the 3rd respondent. We have reproduced the gist of the ruling of the learned trial Judge which is the subject of the present appeal. In arriving at his decision, the learned Judge did not make determinations on the competency of the application before him. Instead, he dealt with it on its merits. If the 1st and 2nd respondents intended that we determine this appeal based on grounds other than those which were relied upon by the learned Judge, they ought to have invoked the provisions of rule 96(1) of the Rules of this Court which provides that:

> A respondent who desires to contend on an appeal that the decision of the superior court should be affirmed on grounds other than or additional to those relied upon by that court shall give notice to that effect, specifying the grounds of the respondent's contention.

23. A respondent who does not give such a notice is taken to be satisfied with the basis upon which the decision was made. He is not permitted to raise grounds other than which the learned Judge relied upon in arriving at his decision, at the hearing of the appeal.

24. Although we were addressed on a myriad of issues, it is important to emphasise that the appeal before us is challenging the decision made by Munyao J. on the 22nd April 2020. By that ruling the learned Judge dismissed the application dated 20th February 2020. The application dated 20th February 2020 was substantially seeking the setting aside of the ruling delivered on 12th February 2020 and all consequential orders. It was based on the ground that the application dated 17th May 2019 was never served on the appellant personally and that the appellant was never served with any notice to show cause and was never a party to the proceedings hence was condemned unheard.

25. The issues that fall for our determination are therefore:

    1. Whether it was necessary to serve the appellant personally with the application dated 17th May 2019; and

    2. Whether the appellant was served with the said application.

26. A reading of the ruling of the learned judge seems to suggest that since the appellant was the Chief Executive Officer of the 3rd respondent, service on the latter was deemed as good service on the appellant. We appreciate that an order issued against a corporation binds its officers and an officer cannot be heard to contend that since he was not a party to the proceedings, the order issued against the corporation ought to have been served on him personally. Similarly, lack of personal service does not necessarily render contempt proceedings incompetent if there is evidence that the alleged contemnor

was aware of the existence of the order or that in the circumstances, he ought to have been aware of the same. See Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR and Justus Kariuki Mate & another v Martin Nyaga Wambora & Another [2014] eKLR.

27. The law is therefore that where an order is issued in the presence of counsel for the parties, its terms are deemed to have been brought to the knowledge of the parties and therefore there is no necessity for personal service on the parties of the order for contempt.

28. However, when it comes to the determination as to whether the person cited for contempt was aware or ought to have been aware of the order, that person, if he was not a party to the proceedings, must be personally served with the application seeking to cite him for contempt. This is more so as contempt proceedings are quasi-criminal in nature and such a person's liberty is at risk. See Mutitika v Baharini Farm Ltd [1985] eKLR.

29. In this case the learned Judge having rightly appreciated that the appellant and the 3rd respondent were two separate entities, it was not open to him to hold that service of the application for contempt, as opposed to the order itself, on the 3rd respondent amounted to service on the appellant. The appellant was not a party to the proceedings and since contempt proceedings are personal in nature, the two entities must be dealt with separately. As regards the application dated 17th May 2019, we find that the appellant ought to have been personally served. Such service should be actual, deliberate and not accidental. In our view, the learned Judge may have misapprehended the service of the order which need not be served personally, for the subsequent application for contempt which in our view ought to have been personally served (something missing, not clear).

30. The next question was whether the appellant was served with the application dated 17th May 2019. In arriving at his finding the learned Judge relied on the affidavit of service sworn by one Gordon Odhiambo. According to that affidavit, the deponent received "a notice of motion under certificate of urgency which was dated on 17th day of May 2019, from Oluga & Co Advocates for the 1st and 2nd plaintiffs with full instructions to effect service upon the 1st defendant". Having failed to serve the appellant on 20th May 2019 he attempted service again on 22nd May 2019 but was informed by the chief of staff, that the documents should be served on the legal officers. A perusal of the application dated 17th May 2019 reveals that it was meant to be served on the Office of the County Attorney, Chebukaka & Associates Advocates and the National Land Commission. There was no indication that it was meant to be served on the appellant. Considering the fact that the process server was not instructed to serve the appellant and that the application itself was not meant to be served on the appellant, a doubt arises as to whether the process server did serve the appellant. If the document, on the face of it did not indicate that it was meant to be served on the appellant, the appellant's chief of staff may well have been justified in directing the same to be served on the 3rd respondent's legal officers.

31. The learned Judge ought to have made inquires from counsel appearing before him, as to which one of them had been instructed to appear for the appellant as an individual, instead of assuming that counsel for the 3rd respondent was acting for the appellant. In this case the record is clear that counsel for the 3rd respondent did not state that he was also acting for the appellant.

32. The second ground for finding that the appellant was aware of the application dated 17th May 2019, according to the learned Judge, was due to the fact that:

> "Mr Joho actively participated in the application of 17th May 2019 through the County Attorney, which is an office within the County Government of Mombasa, and certainly an office under his control as Governor...It is as clear as day that the County Attorney was thus acting, not only on behalf of the 1st defendant, but also on behalf of the Governor, as an

officer of the 1st defendant. I can reach no other conclusion than to find that the applicant herein was well aware of the application dated 17t May 2019, and was ably represented by the County Attorney at the hearing of the application."

33. The learned Judge seemed to have been oblivious of the fact that during the court appearance on 13th November 2019 when the application dated 17th May 2019 was called out it was disclosed to the court that the 1st and 2nd respondents were represented by Mr Oluga, while Mr Tajbhai expressly stated that he was holding brief for Ms Kuria for the 3rd respondent and Mr Chebukaka appeared for the 4th respondent. The fact that Mr Tajbhai was appearing only for the 3rd respondent was clearly appreciated by the learned Judge when, in his ruling, he stated that much. At no point did Mr Tajbhaii disclosed that he was appearing for the appellant in his individual capacity, who had not in any event filed a replying affidavit.

34. In our view, the submissions by Mr Tajbhai that the appellant was not served, to our mind, did not necessarily mean that Mr Tajbhai had been instructed to appear for the appellant. The mode of appearance in civil matters is not by way of submissions but by way of notice of appointment of advocates or notice of change of advocates.

35. In matters of contempt, it is important for the court to be certain that the person intended to be cited for contempt was served with the application and that those purporting to represent him are properly on record for him. Such appearance ought not to be by implication. It is now trite that the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. The legal position as espoused in Abdi Satarhaji & Another v Omar Ahmed & Another (supra) in which Mutitika v Baharini Farm Ltd (supra) was cited and Republic v Ahmad Abolfathi Mohammed & Another, Cr. App. No. 2 of 2018, is that the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt. It would therefore be a travesty of justice if one was deprived of his or her liberty without being afforded an opportunity of being heard on an application seeking to cite them for contempt.

36. In this case, on our own re-evaluation of the evidence placed before the learned Judge, we find that whereas the appellant ought to have been personally served with the application citing him for contempt, the 1st and 2nd respondents failed to prove, on the legal standards required, that he was indeed served with the said application.

37. Consequently, we allow this appeal, set aside the order made on February 12, 2020 dismissing the application dated May 17, 2019 together with the consequential order and substitute therefor an order allowing the said application. Accordingly, the order citing the application for contempt together with the consequential orders are hereby set aside. We award the costs of this appeal as well as the said application to the appellant to be borne by the 1st and 2nd respondents.

38. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR