



Muli & another v South Eastern Kenya University & 2 others (Civil Appeal 455 of 2018) [2024] KECA 1597 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1597 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 455 OF 2018
MSA MAKHANDIA, K M'INOTI & M NGUGI, JJA
NOVEMBER 8, 2024**

BETWEEN

STEPHEN NDAMBUKI MULI 1ST APPELLANT

ERIC MUTINDI MUTISYA 2ND APPELLANT

AND

SOUTH EASTERN KENYA UNIVERSITY 1ST RESPONDENT

UKAMBANI AGRICULTURAL INSTITUTE LIMITED 2ND RESPONDENT

NATIONAL BANK OF KENYA LIMITED 3RD RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (Thuranira-Jaden J.) dated 17th October, 2018 in Civil Appeal No. 465 of 2015)

JUDGMENT

1. In its ruling dated 17th October 2018, the High Court at Nairobi (Thuranira-Jaden J.) found the appellants, Stephen Ndambuki Muli and Eric Mutinda Mutisya, respectively the Chairman and Treasurer of the 3rd respondent, the Ukambani Agricultural Institute Limited (UAIL), guilty of contempt of court orders issued against them on 29th September 2016. Dissatisfied with the decision, the appellants filed the present appeal in which they raise five grounds of appeal in the memorandum of appeal dated 14th December, 2018.
2. They contend in these grounds that the learned judge erred in not holding that the orders of 29th September, 2016 could not be complied with for reasons that the two limbs of the order cancelled one another out and complying with one would amount to disobeying the other; failed to appreciate that the appellants could not comply with a mandatory order in absence of possession or control of documents in respect to L.R. No. 209/10350; failed to appreciate that their non-compliance could not amount to willful disobedience of the orders; and ignored the fact that the impugned orders were



not directed at the appellants. They ask this Court to allow their appeal and set aside the ruling and orders of 17th October 2018.

3. To properly appreciate the issues that arise in this appeal, it is useful to set out the background leading to the impugned ruling. The appellants are directors of the 3rd respondent, named in the pleadings as Ukambani Agricultural Institute Limited, but whose proper name, according to the appellants, should be Ukamba Agricultural Institute Limited. On 5th July 2015, the 3rd respondent filed a notice of motion application, being Misc. Civil Application No. 571 of 2015, before the Chief Magistrate's Court in Milimani, Nairobi, against the 2nd respondent, the National Bank of Kenya. The application was filed under certificate of urgency and, on the same date, the court issued an ex parte order that:

“... the Defendant/Respondent be and is hereby ordered to release the title to the property known as LR. No. 209/10350 held in a safe deposit box at the Bank, initially in Reference to Number 42/05 and later in Reference Number 43/007 at the Bank's Harambee A venue Branch or elsewhere or otherwise in the Bank's possession, to the current officers (Chairman-Stephen Ndambuki Muli and Treasurer-Eric Mutinda Mutisya) of the Plaintiff/Applicant forthwith and in any case, not later than 24 hours of this order.”

4. The said title documents to L.R.No. 209/10350 had been kept in safe custody at the 2nd respondent in favour of the 1st respondent before us, the South Eastern Kenya University. The 2nd respondent informed the 1st respondent about the order, and the 1st respondent filed an application dated 7th July 2015 seeking, inter alia, stay of execution and setting aside of the initial orders of 2nd July 2015. The court considered the application and issued an order staying its earlier order. However, by the time the stay order was issued, the 2nd respondent had released the title documents to the appellants. Upon hearing the 1st respondent's application dated 7th July 2015 inter partes, the court dismissed it on 18th September 2015.

5. The 1st respondent then filed High Court Civil Appeal No. 465 of 2015. It also filed an application dated 4th December 2015 seeking, among others, a mandatory injunction to compel the 3rd respondent and the appellants to return the title documents to the safe deposit at the 2nd respondent. Upon hearing the application, the High Court, in the ruling dated 29th September 2016, issued the following orders:

1. That pending the hearing and determination of the appeal herein the 1st respondent be and is hereby restrained by way of an injunction from in any way parting with possession of, presenting or lodging the title documents in respect of LR. No. 209/10350 from selling or transferring the said property.
2. That pending the hearing of the appeal herein, the 1st respondent be and is hereby ordered to forthwith return the title documents to M/S National Bank of Kenya for safe keeping.”

6. These orders were not complied with, and the 1st respondent filed an application dated 13th February 2017 seeking to have the appellants, in their capacity as the Chairman and Treasurer of the 3rd respondent, to whom the title documents had been released, committed to civil jail for a period of 6 months for disobedience of the court orders issued on 29th September 2016. This is the application that was the subject of the ruling of 17th October 2018 in which the court found the appellants in contempt of court.



7. At the hearing of the appeal before us on 30th April 2024, the appellants were represented by learned counsel, Mr. Onganya, while Mr. Mutua, SC, appeared for the 1st respondent. There was no appearance for the 2nd respondent.
8. In their submissions which were highlighted by Mr. Onganya, the appellants argued all their grounds of appeal together. It is to be noted that though Mr. Onganya did not indicate that he was appearing for the 3rd respondent also, the submissions before the court indicate that they are intended to cover the case of the appellants and the 3rd respondent.
9. It is submitted that the orders of the court dated 29th September 2016 were ambiguous, contradictory, and conflicting; that they created a dilemma, were confusing and even cancelling out each other; and that it was therefore impossible to comply with both limbs at the same time. According to the appellants, when a court of law gives several limbs of an order, all limbs are to be obeyed, and that disobedience of any one limb may lead to contempt of court.
10. They submit that a difficulty arises, however, when the orders contain both prohibitory and mandatory injunctions relating to the same subject matter, in this case the title documents to L.R. 209/10350. They argue that the key phrase in the orders of the court was ‘in any way’; that in their natural and ordinary meaning, the orders restrained the 3rd respondent from parting with the title documents whatever the situation and circumstances; and that it was ordered to keep physical possession of the title documents and not to part with them under any circumstances.
11. With regard to the second limb of the order, the appellants submit that the 3rd respondent was ordered to forthwith return the title documents to the 2nd respondent; that it was to part with physical possession of the title documents; that by handing the title documents to the 2nd respondent, it would be going against the first limb of the order which, they submit, commanded the 3rd respondent to keep possession of the title documents. The appellants liken their situation to that of being caught, as in Greek mythology, between Scylla and Charybdis.
12. The appellants submit further that it is not clear which limb of the court’s order the appellants were convicted of disobeying. They contend that the court erred in giving a mandatory injunction at an interlocutory stage of the proceedings as in doing so, it would have conclusively decided the case before it. Further, that the court erred in issuing a prohibitory injunction contemporaneously with a mandatory injunction. The appellants rely in support of this submission on the case of Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR. They also rely on the case of Ochino & another v Okombo & 4 others [1989] eKLR to submit that the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous. The court, they submit, should not make orders that are ambiguous or ambivalent and that leave implementation thereof subject to interpretations by the recipient of the orders.
13. The appellants submit that the trial court erred in finding them guilty of contempt as they could not be liable, not having been parties to the matter before the court. They submit that the 1st respondent should have had them enjoined as parties to the suit or have the orders expanded to cover directors’ agents, servants or employees of the party to the proceedings. It is their case that the application and the injunctive orders were against the 3rd respondent in its corporate status, and there was no application and therefore no order given or directed expressly or impliedly at the 3rd respondent’s directors or employees prior to the application for contempt of court.
14. They argue, further, that there was no penal notice issued to them in respect of the court order; that the notice should have named them and warned them that they would be personally responsible in



- the event the 3rd respondent does not obey the court orders. They submit that they were therefore ambushed as they had no prior notice of a possibility of being personally culpable in the event that the 3rd respondent did not obey the orders of the court.
15. In its submissions dated 8th June 2020, the 1st respondent observes that the appellants have not raised, as a ground of appeal, the issue of service, nor have they denied that they were served with the orders of 29th September 2019. It submits that both orders were clear, unambiguous, and not contradictory; that the orders categorically prevent the appellants from parting with the documents for purposes of sale and transfer, and also commands them to return the documents to the 2nd respondent.
 16. With respect to the appellants' argument that the orders were ambiguous and incapable of being complied with, the 1st respondent submits that even if this was the case, the appellants had never filed an application seeking clarification of the orders. The 1st respondent cites the case of *Shimmers Plaza Limited v. National Bank of Kenya Limited* [2015] eKLR for the proposition that a party alleging ambiguity in an order of the court must demonstrate such ambiguity; and such party is under an obligation, where it believes that an order is ambiguous, to move a court for interpretation of the order, as opposed to disobeying it.
 17. Regarding the appellants' contention that they did not have possession of the title documents, the 1st respondent observes that the appellants had made the same contention at the hearing of the application for contempt of court; that they had averred that the documents were released to Dubai Bank (Kenya) Limited; that in its ruling of 29th September 2016, the Court interrogated the appellants' replying affidavit and noted that the appellants had not placed before the court any documents to support their contention that the documents had been released to Dubai Bank.
 18. The 1st respondent submits further that in deciding the application for contempt of court, the trial court also considered the appellants' affidavit filed in opposition to the application and observed that it was full of bare assertions and refers to matters that had already been determined in the ruling dated 29th September 2016; and that there was no appeal or review proceedings in respect of the said ruling. It is its submission that the appellants and the 3rd respondent did not provide any evidence to show that the title documents had been released to a third party.
 19. To the appellants' argument that the court erred in finding them in contempt of court while they were not parties to the suit and the orders were not directed at them personally, the 1st respondent submits that the orders were directed at the 3rd respondent, which was the 1st respondent in the suit; that the order dated 2nd July 2015, which authorized the appellants to take custody of the title documents, directed the 2nd respondent to release the title documents to specific persons, the appellants, who are specifically named in the order; that the application for contempt of court sought orders against the appellants in their capacity as office bearers of the 3rd respondent and as the persons who retrieved the title documents from the 2nd respondent; and the appellants' argument therefore flies in the face of the facts and the law of contempt.
 20. It is the 1st respondent's submission that depending on the facts of each case, any person, including a person not a party to a court order, may be cited for disobedience of a court order; that with respect to legal entities, directors or officials thereof may be liable in contempt of a court order that is directed to the entity. The 1st respondent cites in support of this submission the case of *Kiru Tea Factory Company Limited v. Stephen Maina Githinga & 14 others* [2019] eKLR.
 21. We have considered the record of appeal, the submissions of the parties, and the authorities cited in support of the respective positions of the parties. What is not in dispute is that in the ruling dated 29th September 2016, the High Court issued orders that required compliance. The appellants argue that



- compliance was required of the 3rd respondent, while the 1st respondent argues that it was required of the 3rd respondent and the appellants, who are its directors, holding the position of Chairman and Treasurer respectively. The orders were not obeyed and the 1st respondent applied for committal of the appellants to civil jail, which orders were granted on 17th October 2017.
22. The appellants do not dispute that the orders were not complied with. They are aggrieved by the orders issued by the High Court against them for three reasons, which form the issues for determination before us. They fault the court for not finding that its orders were ambiguous, confusing and therefore incapable of being complied with; further, that the orders were contradictory and therefore incapable of being complied with as compliance with one limb would result in violation of the other; and, finally, that the appellants were not parties to the suit and the orders were directed at the 3rd respondent, not the appellants, so they could not properly be found in contempt.
23. We shall consider the first and second arguments advanced by the appellants, which are basically two sides of the same coin, together: whether the orders issued on 29th September 2017 were ambiguous, contradictory, and conflicting, and whether they canceled out each other, rendering it impossible to comply with one without disobeying the other.
24. In its ruling on 29th September 2016, the High court issued two orders. The first was:
- “1. That pending the hearing and determination of the appeal herein the 1st respondent be and is hereby restrained by way of an injunction from in any way parting with possession of, presenting or lodging the title documents in respect of LR. No. 209/10350 from selling or transferring the said property.” (Emphasis added.)
25. The appellants argue, quite disingenuously, that the operative words in the order were ‘in any way’; that the 3rd respondent was restrained from parting with the title documents whatever the circumstances; and that it was ordered to keep physical possession of the title documents. One must admire the appellants’ attempt at obfuscation. In an order the essence of which, clearly, is that the 3rd respondent was restrained from ‘lodging the title documents in respect of L.R. No. 209/10350’ and ‘from selling or transferring’ the said property, the appellants read words that prevent their compliance with the second order of the court. In this second order, the court directed:
2. That pending the hearing of the appeal herein, the 1st respondent be and is hereby ordered to forthwith return the title documents to M/S National Bank of Kenya for safe keeping.”
26. In our view, reduced to the simplest language possible, the court’s order was that: ‘before this appeal is heard, you must not lodge the title to the subject property or sell or transfer the suit property; and in the interim, you must return the title document to the 2nd respondent for safe custody.’ There is, as we see it, nothing ambiguous, confusing or contradictory about these orders.
27. Suppose, however, for the sake of argument, that the orders were confusing, ambiguous, or contradictory. What were the options open to the appellants? Both parties have referred to this Court’s decision in *Shimmers Plaza Limited v National Bank of Kenya Limited* (supra) in which this Court noted that where a party alleged that an order was ambiguous, then it behooved that party to point out that ambiguity, and to seek clarification from the court. The appellants did not seek clarification of the orders made on 29th September 2016. Not having sought clarification, it must be presumed that they fully understood the tenor and purport of the orders, but elected to ignore and disregard them until the application for their committal to civil jail for contempt of court was filed, five months later.



28. The third issue for consideration is whether the appellants were properly found in contempt of court. They argue that they were not parties to the suit, and that they were not personally served with the court order or a penal notice informing them that they would be held personally liable should the 3rd respondent fail to obey the court order. It is also their argument that they could not obey the court orders as they were not in possession of the title document.

29. We begin by reiterating the position in law that a corporate entity can only act through its directors. In *Director of Public Prosecutions v Attorney General & 12 others (Civil Appeal 206 of 2016)* [2022] KECA 397 (KLR) (Civ) (4 March 2022) (Judgment) this Court stated as follows:

“It is also settled that a company can only operate and undertake actions through its directors. The consequences of the above is that any director who is in office becomes responsible for the acts of the company both the past, the present and the future.

Gikonyo, J, in *Agricultural Development Corporation of Kenya v Nathaniel K Tum & Another* [2014] eKLR put this issue as succinctly as possible when he stated as follows:

“I find myself re-stating the celebrated legal innovation in *Salomon & Co Ltd v Salomon* [1897] AC 22 HL.; that a company is a legal entity distinct from the its shareholders and the directors, in other words, it is a juristic person-a legal person - with corporate legal personality separate from those who compose it. Except, however, a company operates through human agents- the board of directors who are appointed in accordance with the Article of Association and registered with the Registrar of Companies. Therefore, the directors assume company abides by all legal requirements; all that will preserve its juristic personality and property; and avoiding default that would attract serious legal sanctions, or affect its juristic personality and assets....” (Emphasis added).

30. It is not in dispute that the appellants are directors of the 3rd respondent, holding the elevated positions of Chairman and Treasurer respectively. They swore responses, in that capacity, to the application dated 4th December 2015, which culminated in the ruling dated 29th September 2016. More importantly, it was to them, named in person, that the title document was released pursuant to the order of the Magistrate’s Court issued on 2nd July 2015. They were also named, personally, in the application seeking to commit them to civil jail for contempt of court, and they filed an affidavit in response thereto sworn by the 2nd appellant. They cannot be heard to say that they were not served personally, or that the title document was not in their possession and they could therefore not comply with the court orders.

31. In light of the above matters, the inevitable conclusion we have come to is that the High Court properly found the appellants to be in contempt of the orders issued on 29th September 2016. This appeal is devoid of merit, and we dismiss it with costs to the 1st respondent.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

