



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KOOME & OKWENGU JJA)

CIVIL APPEAL NO. 355 OF 2017

BETWEEN

DOUBLE CLEAN LIMITED.....1ST APPELLANT
DAIMLER ENTERPRISES LIMITED.....2ND APPELLANT
RUORA INVESTMENTS LIMITED.....3RD APPELLANT
MARSTONS ENTERPRISES LIMITED.....4TH APPELLANT
NGINYO ROADWAYS LIMITED.....5TH APPELLANT
GUARANTY TRUST BANK (KENYA) LIMITED.....6TH APPELLANT
CHIEF LAND REGISTRAR.....7TH APPELLANT

AND

JAMBO HOLDINGS LIMITED.....1ST RESPONDENT
GUARANTY TRUST BANK (KENYA) LTD.....2ND RESPONDENT
CHIEF LAND REGISTRAR.....3RD RESPONDENT

(Being an appeal from the Ruling and order of the Environment and Land Court at Nairobi (Gacheru, J.) dated 15th April, 2016

in

ELC No 219 of 2015)

JUDGMENT OF THE COURT

1. This is an interlocutory appeal against a Ruling and orders of the Environment and Land Court delivered and issued on 15th April, 2016. The said ruling determined four (4) applications that parties consented to have heard together. The background of the dispute was centred on the ownership of a property described as **Land Reference No. 7750 Spring Valley Nairobi** (suit property).

The genesis of the dispute is also well articulated in the Ruling the subject of this appeal but we will give a brief summary so as to place this appeal in perspective.

2. **Jambo Holdings Ltd** (1st respondent, hereinafter referred to as Jambo Holdings) filed suit on 13th March, 2014 before the ELC against the seven (7) appellants. **Jambo Holdings Ltd** claimed that at the material time to the said suit, the 2nd respondent **Guaranty Trust Bank (Kenya) Ltd** was known as **Finance Institutions of Africa Ltd**, but later changed its name to **Fina Bank Ltd** and eventually to **Guaranty**

Trust Bank (Kenya) Ltd (Bank). **Jambo Holdings** claimed that on 20th December, 2004 by a sale and a simultaneous transfer by way of private treaty it purchased the suit land from the Bank who held the property under a charge. The said sale and transfer of the suit property was also financed by the same bank and a charge thereof created in favour of the bank on the same day.

3. Sometimes on 6th May, 2014 the appellants filed suit in the Environment and Land Court **ELC No. 536 of 2014** against **Jambo Holdings** alleging acts of trespass over the suit property which they claimed was registered in their names. Although they sought injunctive orders, the relief was not granted but in due course, **Jambo Holdings** filed various responses and affidavits and in the process an order maintaining the *status quo* was granted in that it was **Jambo Holdings** who were allowed to remain in physical possession of the suit property. On the 11th December, 2014 the 1st to the 5th appellants filed a request to withdraw their suit which request was granted on 3rd February, 2015 and the suit was marked as withdrawn.

4. The acts complained of by **Jambo Holdings** were said to have occurred on 15th February, 2015. It was alleged that the 1st to the 5th appellants through their respective agents, servants, and or employees caused an invasion, trespass, incursion and commotion on the suit property and thereby illegally dislodged and dispossessed **Jambo Holdings** of the suit property with the assistance of security guards which action was also a breach of the Constitution and the particulars were stated in the plaint. **Jambo Holdings** sought orders declaring that it is the registered and bona fide owner of the suit property.

5. Simultaneously with the filing of the suit, **Jambo Holdings** also filed a Notice of Motion seeking *inter alia* an order of injunction both interim and mandatory against the 1st to 5th appellants by themselves or agents, servants and or employees or any other persons from entering, remaining, interfering, selling, transferring, disposing off or in any other way dealing with **Jambo Holdings** possession of the suit land and further that the Officer Commanding Spring Valley Police Station assist in enforcing the order. The record is clear that an interim *ex parte* order of injunction was issued on the 13th March, 2015 restraining the 1st to the 5th appellants from entering, remaining, interfering, selling the suit land pending the *inter partes* hearing of the application

6. The 1st to the 5th appellants filed two motions, one on 18th March, 2015 in which they sought a discharge or variation and stay of the orders issued on the 13th March, 2015. The appellants' contention was that the said order was issued through misrepresentation of material facts in that **ELC Case No 536 of 2014** between the parties over the same suit premises was pending and therefore the suit by **Jambo Holdings** was an abuse of the court process in light of the provisions of **Section 6** of the **Civil Procedure Act**. They also alleged that orders were obtained in respect of **LR No 7750 Nairobi** while **Jambo Holdings** were executing against a totally different parcel of land in a bid to steal a march against them.

7. In the motion dated 26th March, 2015 filed by the 1st to the 5th appellants they sought to restrain the **Jambo Holdings** from executing the orders issued on 13th March, 2015 and extended on 25th March, 2015 in respect of **LR Nos. Nairobi/Block 92/225 - 230** pending the hearing of the suit *inter- parties*. The motion was supported by the affidavit sworn by one **Mugo Njeru** on the 26th March, 2015. He contended he was the director of the 1st to the 5th appellants and that **Jambo Holdings** obtained orders in respect of a property that did not exist as they were the proprietors **LR Nos. Nairobi/Block 92/225 - 230** which was originally the suit land; that the orders were issued through misrepresentation of material facts; that there was pending before the court **ELC No. 536 of 2014** between the parties and the subject matter in dispute was the same suit land. The appellants therefore termed the suit by **Jambo Holdings** an abuse of the court process which should be struck out in light of the provisions of **Section 6** of the **Civil Procedure Act**.

8. Not taking the unfolding matters lying down, **Jambo Holdings** also filed another motion on the 19th May, 2015, seeking orders of committal for contempt and disobedience of court orders issued on 13th March, 2015 against the 1st to the 5th appellants. The 1st to 5th appellants opposed the said application insisting that they were not bound to comply with the order issued on 13th March, 2015 as it was in reference to the suit property which is **LR No. 7750 Nairobi** while they claimed they were in possession of Nos. **Nairobi/Block 92/225-230**

9. After considering the rival submissions and the applicable principles in granting the orders sought, the learned trial Judge (Gacheru, J.) made the following orders which are the subject matter of the appeal before us: -

“IT IS HEREBY ORDERED

1. THAT pending the hearing and determination of this suit a temporary injunction is hereby issued restraining the 1st, 2nd, 3rd, 4th and 5th Defendants by themselves, their respective agents, servants and or employees or any other persons acting on their behalf, from entering, remaining, interfering, selling, transferring, disposing off or in any other way dealing and or disrupting the Plaintiff's possession of L.R. No. 7750 Nairobi.

2. THAT pending the hearing and determination of this suit a temporary injunction is hereby issued commanding and directing the 1st, 2nd, 3rd, 4th, and 5th defendant's by themselves their respective agents, servants, and or employees or any other persons acting on their behalf, to cease occupation from and to vacate the whole and or any portion of the Plaintiff's possession of L.R. No. 7750 Nairobi that they have occupied and in default of compliance, the Plaintiff be at liberty by itself, tis agents servants and or employees or any other persons acting on their behalf, forcefully evict the 1st, 2nd, 3rd, 4th and 5th Defendants from the Plaintiff's property L.R. No. 7750 Nairobi.

3. THAT the Officer Commanding Police Station (OCS) Spring Valley Police Station is hereby directed to assist the Plaintiff in ensuring adherence of the orders granted by the Court herein and of observance and maintenance of peace.

4. THAT the said orders will also apply and bind Nairobi/Block 92/225, Nairobi Block 92/226. Nairobi/Block 92/227, Nairobi/Block 92/228, Nairobi/Block 92/229 and Nairobi Block 92/230 respectively.

5. THAT the Applicant is also entitled to costs of this application to be borne by the 1st, - 5th defendants respectively.

FURTHER ORDERS

6. THAT summons to issue to the directors at the 1st – 5th Defendants and John Mugo Njeru to come to court for mitigations before court pronounces sentences for contempt of court.

7. THAT summons be issued by this Court and served through the Plaintiff's advocates and a return of service filed in court.

GIVEN under my Hand and Seal of this Honourable Court this 15th day of April, 2016.

ISSUED at Nairobi this 25th day of August, 2017.

(signed)

DEPUTY REGISTRAR

ENVIRONMENT AND LAND COURT MALINDI

10. In the Memorandum of Appeal, the 1st to the 5th appellants have raised a total of fourteen (14) grounds of appeal which in our view are frolic and repetitive, a matter also acknowledged by their counsel as he combined the grounds into four (4) during his submissions to us. The appellant faults the Judge for erring in law and fact by issuing an injunction against **Nairobi/Block 92/225 - 230** while the suit was against **LR No. 7750 Nairobi** as pleaded by **Jambo Holdings**; that the Judge had declined to hear the appellants' applications for injunction in respect of **Nairobi/Block 92/225 - 230** which were pending in court and predicated on a counterclaim but preferred to hear **Jambo Holdings** applications which were based on a plaint; by failing to hold the evidence given to the effect that **LR No. 7750 Nairobi** did not exist; citing the appellants for contempt of court orders and refusing to hear them until they purged the contempt. The Judge was also faulted for making conclusive findings at an interlocutory stage.

11. During the plenary hearing **Mr. Nyangáu** appeared for the appellants; he relied on his written submissions and made some oral highlights. Counsel for the appellants challenged the order holding the appellants in contempt of court. He argued that the Judge failed to uphold the cardinal principle in law that a party is bound by its own pleadings in as much as **Jambo Holdings** pleadings referred to **LR No. 7750 Nairobi** an order issued in respect thereto cannot be disobeyed by the appellants who were in occupation of **Nairobi/Block 92/225-230** which is a different parcel of land. According to counsel for the appellants **Jambo Holdings** ought to have amended the pleadings thus it was wrong for the Judge to find the appellants in contempt of court orders. Counsel cited the case of **Mutiktika vs. Baharini Farm Ltd [1985] eKLR** and **Shimmers Plaza Ltd vs. National Bank of Kenya Ltd [2015] eKLR** to bolster the argument that the threshold of proof in contempt proceedings must be higher than a balance of probabilities; that it was doubtful that the order made *ex parte* on 13th March, 2015 had not expired as it was supposed to be served within three (3) days and there was evidence that the order was served upon the appellants on 27th March, 2015 and upon the OCS on 1st April, 2015; that before punishing the appellants for contempt, the Judge ought to have ensured there was service of the order on the contemnors and that the terms of the order to be obeyed were clear and unambiguous.

12. On the same issue of contempt **Mr. Nyangáu** also submitted that the appellants were denied a hearing when the Judge declined to hear their applications until they purged the contempt. The appellant's application dated 18th March, 2015 sought stay of execution, discharge, variation or setting aside of the order of 13th March, 2015 while the application dated 26th March, 2015 sought an order of injunction to restrain **Jambo Holdings** from executing the order against **Nairobi/Block 92/225-230**. On this issue of denial of a hearing, counsel cited many authorities including an English case of **Hadkinson vs. Hadkinson [1952] 2 ALL ER 567** which has been cited with approval by this Court in numerous decisions to state that a party against whom contempt is alleged is always given a hearing unless there are justifiable grave considerations of public policy and the contempt itself impedes the cause of justice and there is no other effective means of ensuring compliance.

13. Counsel also faulted the order of injunction and a mandatory one for that matter over **LR No. 7750 Nairobi** which covers the appellants' parcel of land and the effect of which was eviction of the appellant; that **Jambo Holdings** did not establish the applicable principles; that the Judge did not consider the defence, counterclaim and replying affidavit by the appellants; that the suit property was purchased by **Mugo Njeru** and **Mary Wanjiru Bernard** through a sale agreement dated 28th June 1996 and the transfer dated 16th July 1996; that the suit land was subdivided into six parcels resulting in **Nairobi/Block 92/225-230** which were in turn bought by the respective appellants; that the original title was surrendered and the appellants hold title to their respective parcels; and that the issues of fraud and whether the suit property was subdivided procedurally or not as contained in the plaint and counterclaim should have been left for the trial court.

14. Counsel for the appellant further submitted that there were no special circumstances to warrant the grant of mandatory injunction according to the test stated in the case of **Kenya Breweries Ltd & Another vs. Washington Okeyo [2002] eKLR**. According to counsel the case by **Jambo Holdings** was not a clear one due to the conflicting claims of ownership and allegations and counter allegations; that the Judge made conclusive findings and remarks that will prejudice the appellants' case during trial. Counsel urged us to allow the appeal and set aside the order of injunction and substitute it with an injunction issued in favour of the appellants as against **Jambo Holdings** from dealing with **Nairobi/Block 92/225-230** until the hearing and determination of the suit.

15. The appeal was opposed by **Jambo Holdings** represented by **Mr. Gachoka Mwangi**. Counsel relied on his written submissions and a supplementary record of appeal. It was their case that the Judge properly determined the matter which was supported by both facts and the law. That the Judge found that the evidence produced showed **Jambo Holdings** had a *prima facie* case with a probability of success; that the Judge did not make any conclusion regarding the apparent and latent defects in the appellants' title. Counsel submitted that the appellants filed suit being **ELC No 536 of 2014 Nairobi** in which they pleaded and sought an order that **Jambo Holdings** title **LR No. 7750 Nairobi**

nullified on the grounds that it was parallel to **Nairobi/Blocc 92/225-230**. During the pendency of the said suit an order was issued on 26th May, 2014 maintaining the status quo by Jambo Holdings remaining in possession of the suit land and that the appellants withdrew the suit in order to defeat the status quo order.

16. On the ownership allegations by the appellants who purportedly purchased the suit land from **Trilok Nath Vohora** by way of an agreement of sale dated 28th June, 1996 by paying Ksh. 90 million cash to a lawyer called **Ndungu Ngunjiri** an advocate practising in Nyahuru. It was submitted that the evidence produced by the appellants was factually incorrect as the person they claim to have bought the suit property died on 20th May 1991 as per the death certificate that was adduced in evidence. Moreover, even assuming that **Trilok Nath Vohora** was alive on 7th August 1996 when the appellants allegedly became registered owners, the suit property, no longer belonged to the **Vohoras** as it had been sold and transferred to **Rajnikant Jashhai Desai** and **Nila Rajnikant Desai** (Desais') on 20th January, 1992. Counsel contended that it was not possible for a party to transact in cash in Nyahuru Town in or about June 1996 to the tune of Ksh. 90 million. In addition the Law Society confirmed that the said advocate passed away and that he did not even have a practicing certificate for the year 1996.

17. On the allegations that the appellants were not accorded a fair hearing, counsel for **Jambo Holdings** submitted that the parties agreed to canvass the various applications by way of written submissions which covered all the four (4) applications. All the submissions were extensive and the Judge analysed them in the sequence that she decided to follow in determining the dispute before her and having found the appellants were in contempt of court she declined to rule on their 2 applications which decision was well explained. On the findings that the appellant's directors were guilty of contempt of court, the Judge established that there was evidence the appellants were aware of the court order as they even filed an application to stay execution of the same; there were affidavits of service; there was evidence of the violations of court order when the appellants invaded the suit land by ploughing and occupying the same. Furthermore the appellants did not deny or dispute service of the court orders. Counsel urged us to dismiss the appeal with costs.

18. The 2nd respondent was represented by **Mr. Juma** who had not filed any written submissions. He indicated that the 2nd respondent had not participated in the matter before the High Court but as far as the appeal was concerned, he fully associated himself with the submissions by counsel for **Jambo Holdings**.

19. **Mr. Iradi** learned counsel for the 3rd respondent also did not file written submissions but made some oral highlights in regard to grounds of appeal touching on the contempt order in as far as it concerned the direction given to the police to execute the order. In that regard, counsel submitted that the police were not to blame as they took the requisite steps as directed in the order but when they went to enforce the order there was a lawyer who brandished titles insisting that they were enforcing the order on the wrong parcel of land. That is why the order was issued to extend to the parcels of land that the appellants claim ownership. The police also required the decree holder to provide a surveyor and that is why the court found the appellants were aware of the court order as they and their advocates did obstruct the execution by the police.

20. The main suit has not been heard and determined as this is an interlocutory appeal. It follows therefore that whatever we have to say in this judgement will be circumscribed so as not to prejudice or embarrass the Judge who will conduct the hearing. That said, we have considered the record of appeal, the rival submissions and the law; we discern one broad issue of whether the Judge erred in granting the above orders, and specifically whether there was proof that the appellants were served and/ or that they were aware of a court order and they wilfully disobeyed it; whether the order was unambiguous; whether **Jambo Holdings** established a *prima facie* case to warrant the granting of an interim order of injunction; whether there were special or exceptional circumstances to warrant the granting of a mandatory order of injunction and finally whether the appellants were denied a fair hearing.

21. On the issue of contempt of court, we are conscious that disobedience of a court order is core to the administration of justice and the maintenance of the rule of law. This aspect was well appreciated and articulated by the learned Judge as she reviewed several authorities on contempt of court. The case of **Hadkinson vs. Hadkinson, (1952) 2 All ER 567** was cited. The dicta cited which was well propounded in that case bears repeating as follows: -

“A party who knows of an order whether null or valid, regular or irregular cannot be permitted to disobey it. It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether it was regular or irregular. That they should come to court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular and who must be affected by it was plain. He should apply to the court that it may be discharged. As long as it exists, it must be obeyed”

We are also conscious that the power of guarding and protecting the authority and dignity of court orders, although jealously guarded is also balanced with the prospect of an applicant being subjected to a punishment that may entail loss of his or her liberty. Thus it was imperative that the appellants were given an opportunity to explain themselves on the pertinent issues surrounding disobedience of a court order.

22. It is common ground that all the parties filed their affidavits and submissions in regard to the motion seeking committal of the appellants for contempt of a court order. It was also common ground as borne by the record that the order was duly extracted and issued on the 17th March, 2015 bearing the Penal Notice. What was most telling from the appellants themselves is that on 18th March, 2015 they filed a motion seeking to set aside the order granted on 13th March, 2015. For this reason, the learned Judge stated: -

“...clearly show that they had knowledge of the existence of the said court order and they cannot be heard to complain of lack of service.”

The court further directed that the appellants be served with the court order and on the record was an affidavit of service that gave the details of service of the court order and those averments were not controverted by the appellants. This was factual evidence by the process server and the burden lay on the party questioning it to show that the return was incorrect. Moreover the Judge also found that **Mr. Nyangáu**

learned counsel for the appellants was in court on the 25th March, 2015 when the said order was further considered and extended by the court. The Judge found that the appellants had notice of the order, according to *Black's Law Dictionary, 9th Ed* which defines notice as-

“A person has notice of a fact or condition if that person-

- **Has actual knowledge of it;**
- **Has received information about it;**
- **Has reason to know about it;**
- **Knows about a related fact;**
- **Is considered as having been able to ascertain it by checking an official filing or recording.”**

23. In finding the appellants were in contempt of the court order, the Judge properly directed herself in analysing the facts regarding service and whether the order was clear and , key among them the decision in the case of **Republic vs. Commissioner of Lands & Others ex parte James Kinyua Gachura Nairobi HC Misc. No 149 of 2002** in explaining the difference between the orders sought as against the police and the appellants by stating the following:

“There is evidence of the efforts undertaken by the officers from Spring Valley Police Station. There is evidence that they met a challenge when they were confronted by the advocate for the 1st to 5th defendants with several certificates of lease showing that the land in question was Nairobi/Block 92/225-230 and not LR No. 7750 Nairobi. For the police, there was indeed lack of clarity whether the land was LR 7750 Nairobi or Nairobi/Block 92/225-230 and the applicant's director and his advocate had promised to avail the government surveyor within a period of 2 hours to clarify and point out LR No 7750 Nairobi. When that was not done they called off the exercise”

As far as the appellants were concerned, the Judge found the order was clear and unambiguous as regards what was required of them. The appellants were restrained from entering, remaining, interfering, selling, transferring or disposing **LR No 7750 Nairobi**. The appellants also knew very well that **LR No 7750 Nairobi** was the same as **Nairobi/Block 92/225 - 230** as they had filed a suit being **ELC No 536 of 2014** where they were the plaintiffs. Indeed in that suit an order maintaining status quo was issued. In light of the above, it is our conclusion that this ground of appeal challenging the order of contempt made against the appellants is without merit.

24. Did **Jambo Holdings** establish a *prima facie* case with a probability of success? We think there was enough material to that effect. Firstly, the appellants filed **ELC No. 536 of 2014** at Nairobi against **Jambo Holdings** seeking that the title in respect of **LR No 7750** be nullified; an order maintaining the status quo was issued. The appellants withdrew that suit which prompted **Jambo Holdings** to file the suit that gave rise to the present appeal. That is a valid ground on which an order of injunction can be issued to enable the court interrogate the implication of whether withdrawing a suit when there are active orders was regular at all and whether there was an abuse of the court process. The second ground in our view is to interrogate how the two sets of titles came into being. How was **LR No 7750** subdivided to give rise to **Nairobi/Block 92/225 - 230**? The Judge also addressed the balance of convenience ante and granted that **Jambo Holdings** was in possession of the suit property and also the issue of irreparable loss would be attendant such as transfer of the suit land to third parties if no order was issued. In brief and as indicated earlier in this judgement, we do not want to delve deep in these issues suffice it to say that there was sufficient justification for the Judge to issue the order of injunction pending the hearing and determination of the dispute.

25. We also think there were unique special circumstances that warranted the granting of a mandatory order of injunction. In the case of **Kenya Breweries Ltd & Another vs. Washington O. Okeya [2002] eKLR**, the Court of Appeal stated as follows on mandatory injunctions: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

The above cited case offers some of the key principles of law to be considered in an application for mandatory injunction and the condition that stands out is that the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction. In the instant case the special circumstances that stood out was the existence of **ELC No 536 of 2014** that was filed by the appellants and an order maintaining the status quo in respect of **LR No 7750** which clearly allowed **Jambo Holdings** to remain in possession and appellants knew the suit property was the same as **Nairobi/Block 92/225-230**. That notwithstanding the suit was withdrawn and it was followed thereafter by the acts of invasion of the same suit land. This in our view was akin to stealing a match and the mandatory nature of the order was meant to restore the suit property to the condition *ante*.

26. Finally on whether the appellants were denied a hearing of their applications seeking a discharge or variation and stay of execution of the order made on 13th March, 2015. It follows that after the Judge confirmed the orders of injunction and contempt, the orders sought by the applicants in the said applications were obviously overtaken by events. It was impracticable to stay or vary the same orders. It is obvious the orders are just the converse of the ones that were issued and even if the Judge did not decline to hear them the outcome would remain the same. For this we find the appellants were heard because their affidavit evidence and submissions in opposition of the two applications was

the same evidence and submissions that supported their applications. We consequently find this ground of appeal without merit. Even in the interest of saving judicial time and for expeditious disposal of matters, it would not be prudent to hear such applications that would eat into the time that the court can utilize to hear the substantive matter.

27. Accordingly, we find no merit in the entire appeal which is dismissed with costs to the respondents.

Dated and delivered at Nairobi this 7th day of February, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR