



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, P., NAMBUYE & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 31 OF 2018

BETWEEN

CHARITY MPANO NTIYIONE.....APPELLANT

AND

CHINA COMMUNICATIONS CONSTRUCTION COMPANY LIMITED.....1ST RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....2ND RESPONDENT

(Appeal from the ruling and order of the Environments and Land Court at Kajiado (C. Ochieng, J.) dated 11th December 2017 in ELCC. No. 253 of 2017)

JUDGMENT OF THE COURT

After obtaining an order of temporary injunction on 24th October 2016 restraining the 1st respondent, *China Communications Construction Company Ltd* from quarrying on *LR No. KJD/LOODARIAK/908 (the suit property)*, the appellant, *Charity Mpano Ntiyione*, applied on 1st February 2017 for committal to jail of three directors of the 1st respondent, for alleged contempt of court. The *Environment and Land Court* at Kajiado (*C. Ochieng, J.*) heard the application and dismissed the same vide a ruling dated 11th December 2017, thus precipitating this appeal. The learned judge held that the injunctive order was obtained *ex parte*; that there was no evidence of service of the order upon the 1st respondent's directors or knowledge on their part of its existence and that the appellant did not in any event adduce evidence to prove that the 1st respondent had violated the court order. She also held that some of the issues raised by the appellant in the suit ought to be heard by the dedicated forums provided by the law, rather than by the Environment and Land Court.

The short background to the appeal is that the appellant is the registered proprietor of the property known as *LR. No. KJD/LOODARIAK/909*, which abutts the suit property on which the 1st respondent was carrying on quarrying activities. On 24th October 2016 the appellant filed a suit against the 1st respondent and the *National Environment Management Authority (the 2nd respondent)* claiming that she was not consulted regarding the quarrying on the suit property; that the quarrying was a nuisance to her and her property; and that it was causing pollution and environmental degradation. She further averred that the 1st respondent had not obtained an Environment Impact Assessment License (EIAL) before commencing the quarrying or had obtained one unprocedurally and illegally in collusion with the 2nd respondent.

The appellant therefore prayed for a raft of reliefs, including a declaration that her right to a clean and healthy environment was violated, an environmental restoration order, cancellation of the 1st respondent's EIAL, a permanent injunction restraining the respondents from infringing her right to a clean and healthy environment, and an order compelling the 2nd respondent to demand from the 1st respondent a new environment impact assessment study. She also prayed for general damages, aggravated damages, future medical expenses, interest and costs.

On the same date the appellant took out a motion on notice seeking an injunction to restrain the 1st respondent's quarrying activities on the suit property, pending the hearing and determination of the application and the suit. *Gacheru, J.* granted an *ex parte* order that was worded as follows:

“1. That the Notice of Motion dated 24th October 2016 is considered;

2. That for 14 days a temporary injunction is and hereby (sic) issued restraining the 1st respondent either by itself, its agents, servants, officers and/or any other body or entity from engaging in any further quarrying and crushing activities on LR No. KJD/LOODARIAK/908 pending hearing and determination of this application;

3. That the applicant to serve the respondent inter partes (sic) hearing on 7th November 2016 before any ELC judge.”

The record shows that the application was not listed on 7th November 2017 as ordered, but **Okongo, J.** gave it a new date for 21st November 2017 and extended the interim orders until then. The record does not show that any of the parties was present when those orders were made. Thereafter the interim orders were extended routinely for a total of 13 times until 11th December 2017 when they were vacated. As of the date of hearing this appeal more than three years after the application for injunction was filed, the same had not been heard inter partes, a rather odd occurrence granted that it had been certified urgent.

Be that as it may, on 1st February 2017, the appellant took out the motion for contempt of court, which led to this appeal. The motion was based on the ground that the 3 directors of the 1st respondent had been served with the order issued on 24th October 2016 together with the requisite penal notice and that they had disobeyed the order and continued quarrying on the suit property. The 1st respondent resisted the application vide two affidavits sworn by **Liu Qitao**, its Managing Director, in which he averred that upon service of the court order, the 1st respondent had duly complied with it. The 1st respondent also filed a notice of preliminary objection contending that it is the **National Environment Tribunal**, which has jurisdiction to hear challenges of EIALs, and that similarly it was the **Public Complaints Committee** that had jurisdiction to hear and determine complaints of alleged violation of the right to a clean and healthy environment.

It is apt to point out that on 26th April 2017 the learned judge visited the suit property to confirm whether quarrying activities were still ongoing. As we have already noted, one of the grounds upon which she denied the application for committal was that the appellant had failed to establish violation of the court order.

The appeal is founded on 16 unnecessarily expansive and overlapping grounds of appeal, but at the hearing, common sense prevailed and the appellant’s learned counsel, **Mr. Mwangi** and **Mr. Manduku** compressed the myriad grounds into six, contending that the learned judge erred by holding that the court had only partial jurisdiction in the dispute, by failing to hold that the court had jurisdiction over environmental matters; by finding that the 1st respondent’s directors were not served with the order and notice of penal consequences; by failing to commit the said directors for contempt of court; and by being biased and influenced by extraneous matters.

Submitting in turns, learned counsel contended, as regards the first two grounds, that the learned judge erred by holding that the court had no jurisdiction to cancel the EIAL or to compel the 2nd respondent to direct the 1st respondent to submit a fresh environment impact assessment study. Though admitting that on those two issues jurisdiction reposed respectively in the National Environment Tribunal and the Public Complaints Committee, the appellant added that she was seeking enforcement of her constitutional right to a clean and healthy environment guaranteed by **Article 42** of the Constitution, which the court had jurisdiction to enforce under **Article 70** of the Constitution. She also contended that by dint of **section 13 (2)** of the **Environment and Land Court Act**, the court had power to hear and determine disputes relating to environment and land, including disputes relating to environmental planning and protection. The appellant also invoked **section 13(3)** of the same Act and **section 3** of the **Environment Management and Coordination Act** and submitted that the court had jurisdiction to protect the environment without prejudice to any other available remedy. Citing the decisions in **Seven Seas Technologies Ltd v. Eric Chege [2014] eKLR** and **Taib Investments Ltd v. Fahim Salim Said [2016] eKLR**, the appellant submitted that the court is not allowed to divide causes of action as the learned judge purported to do.

On service of the order and whether the directors of the respondent should have been committed for contempt of court, the appellant submitted that she had attached to her application various copies of the court order duly served, together with copies of notices of penal consequence. She also adverted to a letter dated 23rd November 2016 from the 1st respondent’s advocates advising the 1st respondent to abide by the court order, which in her view was knowledge on the part of the 1st respondent of the existence of the court order. The appellant relied on the judgment in **Shimmers Plaza Ltd v. National Bank of Kenya [2015] eKLR** and submitted that service of the order is sufficient if a party is notified of the terms of the order. She added that the 1st respondent had indeed conceded that it had been served with the order.

Next the appellant submitted that the learned judge was biased against her and allowed herself to be influenced by extraneous matters. The basis of these serious charges was that during the site visit the learned judge allowed participation of “a stranger” without proper introduction to the parties. The stranger’s participation, according to the appellant, took the form of showing the visiting party around the suit property, which she deems to constitute lack of transparency and openness, thus raising suspicion about the court’s impartiality. She further contends that the learned judge neither made a report on the site visit, nor adverted to the site visit in the impugned ruling. The appellant also claimed that the learned judge had relied on extraneous matters about a case filed in the National Environment Tribunal on her behalf, which was only raised from the bar.

The appellant concluded by urging us to allow her appeal and rather unusually, to grant an order of injunction to stop the 1st respondent from quarrying on the suit property pending the hearing and determination of the suit that is still pending before the trial court.

The 1st respondent, represented by **Mr. Ondego**, learned counsel, opposed the appeal contending that the trial court properly found that it had no jurisdiction to entertain matters reserved for hearing and determination by the National Environment Tribunal and the Public

Complaints Committee. Counsel relied on the decisions in **Mutanga Tea & Coffee Company Ltd v. Shikara Ltd & Another [2015] eKLR**, **Republic v. National Environmental Management Authority [2011] eKLR** and **Patrick Musimba v. National Land Commission & 4 Others [2016] eKLR** where it was held that a party aggrieved by a decision of the National Environmental Management Authority had first to seek a remedy before the National Environment Tribunal and thereafter access the Environment and Land Court by way of appeal.

As regards whether the appellant proved contempt of court on the part of the 1st respondent, it was submitted, on the basis of the decision in **Sam Nyamweya & 3 Others v. Kenya Premier League Ltd & 2 Others [2015] eKLR**, that a penal notice was a mandatory requirement and that most of the orders that the appellant had purported to serve upon the 1st respondent did not have a penal notice. The 1st respondent also contended that there was no evidence of personal service of the order on any of its directors as required in **Kariuki & 2 Others v. Minister for Gender, Sports, Culture & Social Services & 2 Others [2004] eKLR**, **Mike Maina Kamau v. Hon Frankline Bett & 6 Others [2012] eKLR** and **Payless car Hire & Tours Ltd v. Imperial Bank Ltd [2012] eKLR**. It also submitted that it had no knowledge of the court order and that the appellant had in any event failed to prove violation of the court order.

Lastly the 1st respondent submitted that there was no basis for issuing the order of injunction sought by the appellant because the application for injunction is still pending before the trial court. On the authority of *Nyangau v. Nyakwara [1985] eKLR* and *Stephen Wang'an'a Njoroge v. Stanley Ngugi Njoroge & Another [2017] eKLR*, it was submitted that this Court cannot determine issues which were not before the High Court.

Finally we heard **Mr. Gitonga**, learned counsel for the 2nd respondent, who informed us that his client, having not participated in the proceedings before the trial court, was not taking any position in this appeal.

We have carefully considered the impugned ruling, the grounds of appeal, the record of appeal, the written and oral submissions and the authorities relied upon by the parties. This is an interlocutory appeal in which both the application for injunction and the suit are still pending for hearing and determination before the trial court. We accordingly will proceed with circumspection to avoid prejudging the issues pending before the trial court. (See *Niazsons (K) Ltd v. China Road & Bridge Corporation Kenya, [2001] KLR 12*).

We shall right away dispose of the appellant's prayers for injunction because it is misconceived and does not lie. The appellant's notice of appeal dated 14th December 2017 is against the ruling of the learned judge dated 11th December 2017. That ruling disposed of an application for committal of the 1st respondent's directors for alleged contempt of court. It did not grant or deny an order of injunction. As rightly pointed out by the 1st respondent, the application for injunction is still pending before the trial court for interpartes hearing. In those circumstances, the appellant cannot ask this Court to issue an injunction pending the hearing and determination of her suit, the very issue which is pending before the trial court. This prayer is misconceived and totally bereft of merit and we reject it.

As regards the jurisdiction of the Environment and Land Court, we do not understand how or why the learned judge allowed herself to be drawn into the issue. Before her was a straightforward application for committal of the 1st respondent's directors for alleged contempt of court. The order of 24th October 2016 which the 1st respondent was alleged to have violated only prohibited quarrying on the suit property and neither addressed the issue of cancellation of the EIAL nor compelled the 2nd respondent to demand from the 1st respondent a new environment impact assessment study, which are contended to be issues, respectively, for the National Environment Tribunal and the Public Complaints Committee. From the provisions of Articles 40, 42 and 70 of the Constitution, it cannot be seriously contended that the Environment and Land Court does not have jurisdiction to issue an injunction to prohibit interference with the right to property or to enforce enjoyment of a clean and healthy environment. The 1st respondent's arguments on jurisdiction, in the circumstances of this case, were a red herring, which the learned judge should have seen and called out for what it was. She was clearly in error to hold that the court did not have jurisdiction to determine issues which it had in fact not determined, and as such, in an application for contempt of court. We have no doubt that the statement of the law as explained in *Mutanga Tea & Coffee Company Ltd v. Shikara Ltd & Another* (supra) and other decisions is correct, but inapplicable to the case before the learned judge.

Turning to the question of service of the order and the notice of penal consequences upon the 1st respondent, we again are baffled by the learned judge's approach and conclusion that there was no evidence of service even in light of the deposition by the 1st respondent's director, Liu Qitao, in the affidavit filed on 22nd February 2017. In paragraph 6 of that affidavit, he deposed that the order of 24th October 2016 was duly served upon the 1st respondent and it thereafter complied with the same. Again, in paragraphs, 7, 8 and 9, he deposed that the 1st respondent's advocates advised the 1st respondent of the existence of the court order and requested it to comply therewith, which it duly did. In light of these express depositions, it was not open to the learned judge to find that the 1st respondent was not served with the order or the notice of penal consequences or that the respondent was not aware of the court order. She was clearly in error in that respect.

The real question in this appeal, in our view, is whether the appellant satisfied the court that the 1st respondent had deliberately violated the court order. Contempt of court, being quasi-criminal requires a higher standard of proof than on a balance of probabilities. In *Mutitika v. Baharini Farm [1982-88] 1 KLR*, this Court stated thus, as regards the standard of proof of contempt of court:

"In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt."

As we have already noted, the learned judge visited the suit property to satisfy herself about the alleged breach of the court order. She was not satisfied that the 1st respondent had breached the order, and in that respect, we have no basis for disagreeing with her. She had the advantage of visiting and seeing the locus, which we do not have.

The last issue regarding the alleged bias of the learned judge has absolutely no substance. We cannot see how it can be concluded that the learned judge was biased merely because a "stranger" showed the judge and the parties, in the presence of the appellant's advocate, round the suit property. The test of bias is an objective one premised on reasonable apprehension of bias in the minds of reasonable, fair minded, and informed members of the public that the judge will not apply his or her mind impartially. (See *Attorney General of Kenya v. Prof. Anyang Nyong'o & 10 Others, EACJ App. No. 5 of 2007* and *Kalpana H. Rawal v. Judicial Service Commission & 2 Others [2015] eKLR*). The grounds set forth to demonstrate the alleged bias, are to say the least, rather flimsy and would not have justified recusal of the learned judge, had they been raised before her.

Ultimately we have come to the conclusion that this appeal must fail because the appellant did not satisfy the learned judge that the 1st respondent had violated the court order issued on 24th October 2016. The appeal is accordingly dismissed with costs to the 1st respondent. It is so ordered.

Dated and delivered at Nairobi this 22nd day of March, 2019

W. OUKO, P.

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR