



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & OTIENO-ODEK, J.J.A)

CIVIL APPEAL NO. 337 OF 2013

BETWEEN

JOHN MWANGI MUHIA.....1ST APPELLANT

CHARLES MUEMA.....2ND APPELLANT

BRONX ESTATES LIMITED.....3RD APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE CHIEF MAGISTRATES

MAKADARA LAW COURTS.....2ND RESPONDENT

THE COMMISSIONER OF POLICE.....3RD RESPONDENT

JUSTUS GITUMA t/a DONA SNACKS.....4TH RESPONDENT

HON. ATTORNEY GENERAL.....5TH RESPONDENT

RAILWAYS & ALLIED WORKERS UNION.....6TH RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Mumbi Ngugi, J.), dated 17th October, 2013

In

H.C. Petition No. 249 of 2012)

JUDGMENT OF THE COURT

1. The facts and the substantive ruling giving rise to this appeal are the same facts and ruling in Civil Appeal No. 339 of 2013 between the same parties in this appeal. At the hearing of this appeal, all parties adopted written and oral submissions made in Civil Appeal No. 339 of 2013. For this reason, the judgment of this Court in Civil Appeal No. 339 of 2013 in entirety is the judgment of this Court in this appeal. However, in brevity we rehash the relevant facts and principles of law applicable to this appeal as hereunder. We also consider grounds and prayers that are different in the two appeals.

2. On 4th June 2012, the 1st appellant was charged in Makadara Criminal Case No. 2878 of 2012 with the offence of Café Breaking and Committing a Felony contrary to Section 306 (a) of the Penal Code and stealing assorted goods valued at Ksh. 15,000,000. The assorted

goods were allegedly stolen from the cafeteria operated by the 4th respondent. The dispute between the appellants and the 4th and 6th respondents arose from landlord/tenant relationship and alleged distress for rent on disputed business premises and alleged contempt of court proceedings before the Rent Tribunal.

3. Subsequent to the arrest and arraignment in court, the appellants filed a Petition dated 8th June 2012 before the High Court seeking an order of Certiorari to quash all the unlawful criminal charges levelled against the 1st appellant. The appellants further sought an order of prohibition restraining the respondents or any of them from prosecuting and detaining any of the appellants in relation of any issue arising from the disputed business premises. In addition, an order of mandamus was sought to compel the respondents to unconditionally release and set free the 1st appellant.

4. Between 8th June 2012 when the Petition was filed and 3rd December 2012, the appellants took no steps to prosecute the petition. Noting the delay in prosecuting of the Petition, the trial court issued a Notice to Show Cause why the Petition should not be dismissed for want of prosecution. The Petition came up before court for directions on 5th November 2012 and 19th November 2012. On these dates, neither the appellants' counsel nor the appellants appeared in court. The matter was set for mention on 19th November 2012, but once again, the appellants did not appear. On this day, an order was made that a Notice to Show Cause why the Petition should not be dismissed be issued. A hearing date for the Notice to Show Cause was set for 3rd December 2012.

5. On 3rd December 2012, there was no appearance in court on the part of the appellants. The Petition was dismissed for want of prosecution, with costs to the respondents.

6. Aggrieved by the dismissal of the petition, the appellants by way of Notice of Motion dated 29th July 2013 made an application before the trial court to stay and set aside the orders made on 3rd December 2012.

7. The trial court heard all parties and delivered its ruling dated 17th October 2013. In its ruling, the learned judge dismissed the application to stay and set aside the order made on 3rd December 2012 dismissing the appellants Petition for want of prosecution. In dismissing the application, the trial judge *in extenso* expressed and held as follows:

“18. First, it is worthwhile considering the history of the proceedings before me. I note from the Court record that neither the petitioners nor their Counsel had appeared before Court since the last mention before me on 25th September 2012 even though the date, at least for the appearance immediately thereafter on the 15th of October 2012, was taken in the presence of their Counsel. Counsel for the petitioners was not present in Court on the 15th October 2012, 5th November 2012, 19th November 2012 and had not appeared on 3rd December 2012 when the matter was dismissed for want of prosecution.

19..... In the present case, the 1st applicant sought the assistance of this court on 8th June 2012 after he had been arrested and charged in court in relation to breaking and entering into certain premises in breach of a court order. He was granted orders securing his release on 8th June 2012.

20. Following his release, he appeared before the court through his counsel on a total of 3 occasions after which he appeared to completely lose interest in prosecuting this petition in which he was alleging violation of his constitutional rights.

21. While the orders dismissing the petition were made on 3rd December 2012, he only recalled that he had a matter pending in court 7 months later. It appears that he recalled the existence of this matter only because he had again been arrested and brought before court to answer criminal charges and was again incarcerated at the Industrial Area Prison.

22. The applicant makes 3 main arguments in support of his application for reinstatement of the petition. He argues that he was not served with the notice to show cause; that the court has no jurisdiction to dismiss his petition for want of prosecution; that if it does, it can only do so if the matter has been pending for more than a year in accordance with the provisions of Order 17 of the Civil Procedure Rules.

23. With regard to the question of service, it is true from the Court record that there is no affidavit of service by the Court process server. Does this mean, therefore, that the petitioners and their counsel were unaware that the matter was scheduled to be heard by the court with regard to failure to prosecute it on 3rd December 2012. I observe from paragraph 8 of the affidavit sworn by Mr. Justus Gituma, the 4th respondent on 7th August 2013 that counsel for the petitioners was served by counsel for the 4th respondents with a notice to show cause dated 13th November 2012, indicating that the applicant were required to appear in court on 3rd December 2012 at 9.00 am to show cause why the Petition should not be struck out with costs for want of prosecution. The notice bears the stamp of counsel for the petitions indicating that the notice was received on 30th November 2012. The notice is received under protest with remarks that “the 3rd of December 2012 date is not convenient with my diary.”

24. With regard to this notice, counsel for the applicant contends that the Counsel for the 4th Respondent had no right to serve the notice and the notice should only have been served by the Registrar. He does not contest the fact that he was served; that he duly received the notice and that he took no action with regard to the 3rd of December 2012 court appearance or any point thereafter until his client was again incarcerated on 24th July 2013.”

8. Aggrieved by the dismissal of the Petition, the appellants have lodged the instant appeal challenging the Ruling delivered on 17th October 2013 citing the following compressed grounds:

(i) The judge erred in law in dismissing the appellants application dated 29th July 2013 despite the uncontroverted facts on record that the Notice to Show Cause dated 20th November 2012 was never served upon the appellants advocate on record to attend court as required by law or at all without affidavit of service filed on record on the 3rd December 2012 or at all (sic).

(ii) After deliberately blocking the appellants advocates on record from proceeding with the hearing of the appellants petition on merit on 25th September 2012, the judge erred in law in permitting the respondents advocates to fix several *ex parte* mention dates of the petition dated 8th June 2012 before her without evidence of invitation notices or evidence of service of mention notices upon the appellants advocates on record.

(iii) The judge erred in law in prematurely issuing Notice to Show Cause on 20th November 2012 contrary to Order 17 of the Civil Procedure Rules and proceeding to hear the Notice to Show Cause without evidence of service of the same upon the appellants' advocates.

(iv) The judge erred in arbitrarily depriving the appellants their right to be heard and the right of access to justice.

(v) The judge erred in law in failing to find that Makadara Criminal Case No. 2878 of 2012 was intended to dispute a valid landlord-tenant relationship existing between the appellants and the 6th respondent.

(vi) The judge erred in law in circumventing, distorting and mischievously evading the appellants oral submissions together with the grounds found in the annexed supporting affidavit in her ruling dated 17th October 2012 (sic).

(vii) That by reason of the foregoing, the judge erred in curtailing the fundamental human rights of the appellants and the rights of the appellants' counsel on record enshrined in Articles 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 43, 48, 47 and 50 of the Constitution.

9. In the memorandum of appeal, the appellants pray for the following orders:

(a) That the ruling given on 17th October 2013 be set aside *ex debito justitiae*.

(b) The application dated 29th July 2013 be allowed and the Petition dated 8th June 2012 be allowed as prayed for.

(c) General and exemplary damages be assessed and awarded to the appellants as against the respondents.

(d) That Hon Lady Justice Mumbi Ngugi, the Director of Public Prosecution and the Hon. Attorney General be admonished by this Honourable Court for deliberately denying the appellants the fundamental human right to access justice and to be heard on the petition dated 8th June 2012 on merit as aforesaid thereby curtailing the provisions of Articles 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 43, 48, 47 and 50 of the Constitution and Articles 3, 5, 7, 14, 15, and 22 of the African Charter to the detriment of the appellants.

10. As stated above, the facts and the substance of this appeal are in tandem with the facts and substance of Civil Appeal No. 339 of 2013. However, we shall consider the grounds and prayers that are different in the two appeals. The two grounds we consider and pronounce ourselves on this appeal are: (i) that the trial judge erred in law in circumventing, distorting and mischievously evading the appellants oral submissions together with the grounds found in the annexed supporting affidavit in her ruling dated 17th October 2012 and

(ii) that the judge deliberately blocked the appellants advocates on record from proceeding with the hearing of the Petition on merit.

11. We shall also consider the prayer that the Hon Lady Justice Mumbi Ngugi, the Director of Public Prosecutions and the Hon. Attorney General be admonished by this Honourable Court for deliberately denying the appellants their fundamental human right to access justice.

12. We have agonized and conscientiously considered the two grounds of appeal and the prayer for admonishment. The allegations levelled against the trial judge of deliberately blocking the appellants from prosecuting their petition on merit or accessing justice and circumventing or distorting the court record are serious allegations that require proof above balance of probabilities. With due respect to counsel for the appellant, there is nothing on record and no affidavit has been filed to prove that the learned judge deliberately blocked counsel from proceeding with the hearing of the petition on merit. There is nothing on record to prove that the trial judge circumvented or distorted the oral submissions made by counsel for the appellants. These grounds of appeal have no merit and border on scandalizing the court.

13. On the prayer that this Court should admonish the trial judge and the 1st and 5th Respondents, with due respect to counsel for the appellant, this Court cannot admonish a judge on account of a ruling, judgment or order made in the exercise of judicial functions. Subject to very limited exceptions, a party aggrieved by any order or ruling of a court has a right of appeal. As to whether this Court should admonish the 1st and 5th respondents, as a general rule, a court of law does not admonish a litigant or party to any proceedings. Admonishment is not a substantive relief or remedy known to law. In any event, in this matter, the question whether the appellants have been denied their fundamental right of access to justice has not been determined by a competent court with original jurisdiction. Violation of the appellants' fundamental human rights is not an issue for determination in this appeal. This prayer in the memorandum of appeal fails.

14. As regards all other grounds urged in this appeal, the judgment of this Court in **Civil Appeal No. 339 of 2013** be and is hereby declared to be the judgment of this Court in this appeal. This appeal has no merit and is hereby dismissed with costs to the 2nd, 3rd and 5th respondents.

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

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this a true

Copy of the Original

Deputy Registrar