IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 184 OF 2010

BETWEEN

KENYA REINSURANCE CORPORATION LTD.....APPELLANT

VERSUS

EUNICE MBOGO.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Khaminwa, J.) delivered on 17th May, 2010

in

Misc. Civil Case No. 135 of 2010)

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JUDGMENT OF THE COURT

The respondent worked for British American Insurance Company Limited as the General Manager until her appointment as the Managing Director of the appellant on 12th April, 2007. The appointment was for three years from 12th April, 2007. As the engagement drew to a close, the respondent, pursuant to Clause 7 of the letter of appointment, sought in writing for the renewal of the contract. That letter was dated 6th October, 2009. When no response was forthcoming, she wrote a reminder on 10th March, 2010, just a month before the contract expired. By the time the respondent decided to engage an advocate, the appellant had neither terminated her contract nor renewed it. The indecision, according to the respondent, was not only a breach of contract but also capricious and oppressive.

On 12th April, 2010 the respondent moved the High Court by chamber summons for leave to bring judicial review application for orders of prohibition to stop the appellant from terminating her contract of employment or making any decision whose effect would be to terminate her employment. She also sought to compel, by an order of *mandamus*, the appellant to renew her contract or to compel the appellant to abide by the terms of the contract. Finally, she asked the court to direct that the orders, if granted, should operate as a stay of any decision of the appellant that would be adverse to the respondent's interest.

Though brought under certificate of urgency, the court declined to certify the chamber summons urgent. But when it was finally heard *ex parte*, Khaminwa, J., in granting leave on 12th April, 2010, directed it to operate as a stay, **"meaning that *status quo* as at 7th April, 2010 shall be maintained"**, the learned Judge clarified. She then directed the respondent to file and serve the notice of motion within 21 days. When extracted, the *ex parte* order read as follows;

> **"6. THAT leave so granted do operate as a stay of any decision of the 1st, 2nd and 3rd respondents against the applicant adverse to the applicant's rights under her agreement with the 1st respondent as stipulated in the letter of appointment of 12th April, 2007, meaning that the *status quo* as at 7th April, 2010 be maintained until the hearing and determination of the Notice of Motion."**

This is the order that was served on the appellant and the key part was **"that the status quo as at 7th April, 2010 be**

maintained until the hearing and determination of the Notice of Motion". (Our emphasis).

The appellant reacted to the order by filing a notice of motion asking the court to set aside the *ex parte* order on the grounds that the respondent concealed relevant material, that a similar application had been rejected; that by moving to court on the day the appellant had met to seal her fate, the respondent acted in bad faith; and that she failed to disclose to the court that her contract had expired by effluxion of time.

For her part, the respondent took out chamber summons under **section 5(1)** of the Judicature Act for leave to commence contempt proceedings against the appellant's Company Secretary, Habil Waswani for disobeying the orders of 12th April, 2010. Leave was accordingly granted and a motion for contempt subsequently filed. It was contended in that motion that despite service of the order of 12 th April, 2010 together with the penal notice on Habil Waswani, the respondent was barred from accessing her office; and that as a result, she was not given an opportunity to even collect her personal belongings from the office.

After hearing arguments in the application for contempt, the learned Judge was satisfied that Habil Waswani was duly served with the order in question; that it contained a penal notice; that the order was violated when the appellant barred the respondent from accessing her office at the Kenya Reinsurance Plaza; and that the appellant had committed an act of contempt of court for which the Judge imposed a fine of Kshs. 1,000,000. We have seen evidence on record that the amount was paid.

The appellant was nonetheless aggrieved by the determination and now brings this appeal on 15 grounds, condensed in the submissions into 4 grounds.

It has been argued that service upon the Corporation Secretary was improper since a company executes its function through its directors whose powers to act do not extend to the Corporation Secretary unless under specific authorization, which was not the case here; that service ought to have been upon the Directors; that the order dated 12th April, 2010 was materially defective and should not have been the basis for finding the appellant in contempt of court because the penal notice was not on the face of the order itself but was annexed to it as a separate sheet; that the High Court had no jurisdiction to grant the order of 12th April, 2010 as the matter upon which the said order was grounded was a contract dispute guised as a judicial review application; that the matter ought to have been heard in the then Industrial Court and not the High Court; that the learned Judge erred in reaching the conclusion that contempt had been proved when there was nothing to show that the appellant had acted in a manner calculated to embarrass or obstruct the administration of justice; that by the time the order was served, the respondent's term had terminated; and, finally that the order itself was ambiguous and incapable of being implemented.

The rationale for punishing for contempt of court was succinctly explained in the old English case of **Heelmore V Smith,** (2) (1886) L.R. 35 C.D 455 by Lord Bowen, LJ in the following passage;

> **"The object of the discipline enforced by the court in case of contempt of court is not to vindicate the dignity of the court or the person of the Judge, but to prevent undue interference with administration of justice."**

This dictum has been applied in Kenya in many instances. For example, in **Teachers Service Commission V. Kenya National Union of Teachers & 2 others** (2013) e KLR, it was observed that;

> **"The reasons why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of Justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding Judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguard the by rule of law."**

Essentially, to prove that a person has committed contempt of court, it must be demonstrated that;

> **"(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;**
>
> **(b) the defendant had knowledge of or proper notice of the terms of the order;**
>
> **(c) the defendant has acted in breach of the terms of the order; and**
>
> **(d) the defendant's conduct was deliberate".**

See **Cecil Miller V Jackson Njeru** (2017) e KLR.

A contemnor stands to lose personal liberty or property because contempt of court is an offence of a criminal character. **Section 5(2)** of the Judicature so provides, in stating that;

> **(2). An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court".** (Our emphasis).

It is essential, for that reason that the breach for which the alleged contemnor is cited be precisely defined. It must be proved to a standard higher than **"on a balance of probabilities, almost, but not exactly, beyond reasonable doubt".**

See **Gatharia K. Mutikika V Baharini Farm Ltd,** (1985) KLR 227**.** The Court in

that case also cautioned that;

> **"The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject".**

The final observation we want to make before applying these tests and principles to the facts in this dispute is that the provision of law governing contempt of court that was applicable in 2010, when the contempt is alleged to have been committed is provided by **section 5(1)** of the Judicature Act, which the respondent cited as the foundation of her application. It states that:

> **"5(1). The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.**
>
> **(2). An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court".**

Of course in April 2010 **sections 72** and **77** of the former Constitution respectively recognized that a person could be deprived of his personal liberty, in, *inter alia,* execution of the order of the High Court or the Court of Appeal punishing him for contempt of court; and that a person may be punished **"for contempt notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed"**.

The practice under **section 5** aforesaid with regard to the general powers to punish for contempt, has over the years been to ascertain both the prevailing substantive and procedural laws in England at the time the application for contempt was brought. In Kenya today, the law of contempt has done 360 degree turn around. Suffice, however to say that in 2015 upon the enactment of **section 36** of the High Court (Organization and Administration) Act and **section 35** of the Court of Appeal (Organization and Administration) Act, both of which expressly donate to the two courts the power to punish for the disobedience of their orders. Then came in 2016 the Contempt of Court Act, which by **sections 38, 39** and **40,** respectively repealed Sections **5** of the Judicature Act, **36** of the High Court (Organization and Administration) Act and **35** of the Court of Appeal (Organization and Administration) Act. The fate of the Contempt of Court Act itself came on 9th day of November, 2018 when the High Court (Mwita, J.) issued a declaration in **Kenya Human Rights Commission V. Attorney General & another** [2018] eKLR that;

> **"....the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the Constitution and encroaches on the independence of the Judiciary".**

What this means is that the repealed provisions of High Court (Organization and Administration) Act and the Court of Appeal (Organization and Administration) Act have been restored. For the purpose of this appeal we observe also that the High Court (Organization and Administration) Act did not delete **section 5** of the Judicature Act because under **section 39 (2) (g)** the Chief Justice is required to make Rules to provide for, among other things, the procedure relating to contempt of court. It is important to observe here that **section 36** of High Court (Organization and Administration) Act does not apply to this dispute as the dispute arose in 2010 before the enactment of that section. Likewise, the English Civil Procedure (Amendment No.2) Rules, 2012, had not been promulgated.

Though this background may not be relevant to the matter under review here, we nonetheless think it is essential for the appreciation of the confused history of the law of contempt in Kenya.

Turning to the appeal before us, we find no difficulty in reaching the conclusion that the court below issued a temporary order directing that the appellant would not make any decision that would be adverse to the respondent's rights under her contract of employment; and that **"the *status quo* as at 17th April, 2010 be maintained until the hearing and determination of the Notice of Motion".** We are equally satisfied that there was a penal notice attached to the order as required by **Rule 45(4)** of the Rules of the Supreme Court of England, which requires that;

> **"(4) There must be prominently displayed on the front of the copy of an order served under this rule a warning to the person on whom the copy is served that disobedience to the order would be a contempt of court punishable by imprisonment, or (in**

the case of an order requiring a body corporate to do or abstain from doing an act) punishable by sequestration of the assets of the body corporate and by imprisonment of any individual responsible".

The manner of displaying the penal notice is not described or defined. The submission, therefore, that the notice ought to have been contained on the face of order has no merit. What is important is that there was a penal notice accompanying the order.

It is common factor that the order and the penal notice were on 12th April, 2010 at 4pm served on Habil Waswani, who described himself as the appellant's Corporation Secretary. By **Rules 45(5), 48** and **69** of the Rule of the Supreme Court of England contained in the Civil Procedure Rules, 1998 disobedience of a court order attracts punishment which may be;

"45(5) (b) .....enforced by one or more of the following means, that is to say—

(i) with the permission of the Court, a writ of sequestration against the property of that person;

(ii) **where that person is a body corporate, with the permission of the Court, a writ of sequestration against the property of any director or other officer of the body.....**

(6) An order requiring a person to abstain from doing an act may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that pending such service, the person against whom or against whose property is sought to enforce the order has had notice thereof either—

(a) by being present when the order was made; or

(b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.

(7) The Court may dispense with service of a copy of an order under this rule if it thinks it just to do so" (Our emphasis).

Those provisions should be sufficient to answer that ground, without outlining those of **Rules 48** and **69**, to show that service upon the Corporation Secretary was proper.

We are also unable to agree with the argument that the High Court had no jurisdiction to grant the order of 12th April, 2010 merely because the dispute was industrial. Whilst the courts, in numerous cases such as the **Speaker of the National Assembly V. Karume,** (2008) 1KLR 425, have stressed that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed, the respondent was herself satisfied that she would achieve what she sought through judicial review.

Part of the consideration in an action commenced by judicial review is whether that route is more efficacious. In **Nasieku Tarayia V. Board of Directors, AFC & another**, (2012) e KLR, for example it was held that;

"... judicial review is an alternative remedy of last resort and where alternative remedy exists, the court has to be satisfied that judicial review is the more convenient, beneficial, efficacious alternative remedy available for the court to grant".

We cannot answer the question whether judicial review was the most efficacious way for the respondent because technically the notice of motion for orders of prohibition, and *mandamus* dated 3rd May, 2010 is yet to be heard. That ground must also fail.

On the final ground, we too find no substance in the arguments that there was no proof that the appellant committed contempt; that by the time the order was served, the respondent's term had terminated; and that the order itself was ambiguous and incapable of being implemented.

As we have observed earlier, Habil Waswani was served on 12th April, 2010 with the order directing the appellant to maintain *status quo* of 7th April, 2010 until the hearing and determination of the Notice of Motion.

The following day, on 13th April, 2010, she was barred from accessing her office. This was in clear violation of the terms of the temporary order of *status quo.* Although there is a notice of 9th April, 2010 on record informing the respondent that her contract was ending on 11th April, 2010 and directing her to hand over on 12th April, 2010, upon being served with the order and in deference to the court, the appellant ought to have held its hands.

We therefore, ultimately, come to the conclusion that the appellant was regularly served with orders which it disobeyed. The learned Judge properly directed herself to the questions before her and arrived at the correct decision.

The appeal is bereft of any merit. It is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 21st day of June, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR