



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 101 OF 2018

BETWEEN

THE TRUSTEES, KENYA RAILWAYS

STAFF RETIREMENT BENEFITS SCHEME.....1ST APPELLANT

SIMON NYAKUNDI.....2ND APPELLANT

CORPORATE AND PENSION

TRUST SERVICES LIMITED.....3RD APPELLANT

JAMES ISRAEL OLUBAYI.....4TH APPELLANT

AND

THE REGISTERED TRUSTEE OF

ZAYED BIN SULTAN AL NAHYAN.....1ST RESPONDENT

PELICAN ENGINEERING & CONSTRUCTION

COMPANY LIMITED.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE CHAIRMAN, NATIONAL LAND COMMISSION.....4TH RESPONDENT

THE COUNTY SECRETARY, NAIROBI COUNTY.....5TH RESPONDENT

JABAVU VILLAGE LIMITED.....6TH RESPONDENT

WHITE LOTUS PROJECTS LIMITED.....7TH RESPONDENT

LOTA EXCAVATIONS AND RENTALS LIMITED.....8TH RESPONDENT

CHINA STATE CONSTRUCTION CORPORATION.....9TH RESPONDENT

SKETCH STUDIO LIMITED.....10TH RESPONDENT

MATRIX INTEGRATED CONSULTANCY.....11TH RESPONDENT

TERRACONSULT KENYA LIMITED.....12TH RESPONDENT
BECS CONSULTANCY.....13TH RESPONDENT
GRACE WANJIRU MUNGAI
W/O ALEX IKUMU GATOTO.....14TH RESPONDENT
ABDINASIR ALI HASSAN.....15TH RESPONDENT
MOHAMED SHARIFF ABDULLAHL.....16TH RESPONDENT
AMINA ZAMZAM ALI.....17TH RESPONDENT
POOSAPATI SITA RAMACHNDRA RAJU.....18TH RESPONDENT
MOHAMUD MAHAT NOOR.....19TH RESPONDENT
(Being an appeal against the Ruling and Order of the Environment & Land Court

at Nairobi (Eboso, J) delivered on 16th February, 2018

in

Environment & Land Court Case No. 639 of 2015)

CONSOLIDATED WITH

CIVIL APPEAL NO. 128 OF 2018

BETWEEN

JABAVU VILLAGE LIMITED.....APPELLANT

AND

THE REGISTERED TRUSTEE OF

ZAYED BIN SULTAN AL NAHYAN.....1ST RESPONDENT

PELICAN ENGINEERING & CONSTRUCTION

COMPANY LIMITED.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE CHAIRMAN,

NATIONAL LAND COMMISSION.....4TH RESPONDENT

THE COUNTY SECRETARY

NAIROBI COUNTY..... 5TH RESPONDENT

THE TRUSTEES, KENYA RAILWAYS

STAFF RETIREMENT BENEFITS SCHEME.....6TH RESPONDENT

JUDGMENT OF THE COURT

1. These two consolidated appeals arise from a ruling delivered on 16th February 2018 in which the Environment and Land Court (**Eboso, J.**) found, The Trustees, Kenya Railways Staff Retirement Benefits Scheme and its chief executive officer, Simon Nyakundi (the appellants in Civil Appeal No. 101 of 2018) in contempt of court for issuing a lease by way of temporary licence over the suit property to Jabavu Village Limited (the appellant in Civil Appeal No. 128 of 2018) in breach of a preservatory order issued by the court on 21st July 2015. The Judge also found that the lease by way of temporary licence issued by The Trustees Kenya Railways Staff Retirement Benefits Scheme (the Trustees) to Jabavu Village Limited (Jabavu) in contempt of court was illegal and could not confer any legal rights on Jabavu. Accordingly, the court ordered Jabavu and any other person occupying the suit property in contravention of the preservatory order to vacate the same within two days and in default the Police Commander in Charge of Nairobi County was to assist in enforcement through forceful eviction.

2. The background, in brief, is that on 6th July 2015, The Registered Trustees of Sheikh Zayed Bin Sultan Al Nahyan (1st respondent) filed suit, ELC Case No. 639 of 2015, before the Environment and Land Court (the ELC) against Pelican Engineering & Construction Company Limited (2nd respondent), the Chief Land Registrar, the National Land Commission, and Nairobi City County seeking, among other reliefs, a declaration that it is the legal owner of the property known as L.R. No. 209/11552 Nairobi (the suit property) and that the invasion of the property by the 2nd respondent was unlawful. Also sought in the suit is a permanent prohibitory injunction to restrain the 2nd respondent from interfering with the 1st respondent's enjoyment of the suit property.

3. Contemporaneously with the suit, the 1st respondent applied to the court, by an application filed on 6th July 2015 under Order 40 of the Civil Procedure Rules, for temporary orders to restrain the 2nd respondent from dealing with or interfering with the suit property pending the hearing of the application *inter partes* and pending the hearing and determination of the suit. That application was placed before **Gacheru, J.** who on 21st July 2015 granted an order;

“That pending the filing of the relevant papers by the Defendants an Order of preservation of the suit property be and is hereby issued. No further dealings by any of the parties herein.”

4. Subsequently, the record shows that the Trustees applied by an application filed on 12th August 2015 to be joined in the suit and as early as 22nd September 2015, the advocates for the Trustees were appearing in court in that regard. By the same application of 12th August 2015, the Trustees applied to have the preservatory orders given by the court on 21st July 2015 “*vacated and/or discharged.*” In a ruling delivered on 8th November 2015 the Trustees were joined in the suit as 5th defendant. By the same ruling, the court declined the prayer by the Trustees to vacate or discharge the orders given on 21st July 2015.

5. In their statement of defence filed in court on 7th July 2017, the Trustees contend that it is the lawful owner of the suit property and that any purported transfer of the property in favour of either the 1st respondent or the 2nd respondent was fraudulent. It pleaded further that it had filed suit against the 1st respondent in ELC Case No. 302 of 2015 over the same property and prayed that the two suits should be consolidated. In its ruling of 8th November 2015, the court directed that “*both suits should be heard and be heard simultaneously so that the issue of who owns the suit property is determined once and for all.*” In effect, ownership of the suit property is claimed by three parties, namely the Trustees, the 1st respondent, and the 2nd respondent and as we understand it, both suits are yet to be heard and determined.

6. The preservatory orders of the court given on 21st July 2015 were extended from time to time with the consent of all the parties in the suit, including the advocates for the Trustees. On 4th April 2017 for instance, the parties recorded an order that:

“By consent of the parties, the preservatory order given by Judge Gacheru on 21/7/2015 shall remain in force pending further orders of the court.”

7. On 29th May 2017 the court when adjourning the matter to 20th July 2017 for mention ordered that, “*The order given by Gacheru J. on 21/7/2015 are (sic) extended till then.*”

8. Based on the foregoing, there can be no doubt that as early as 12th August 2015 when they applied to be joined in the suit and to have the preservatory orders discharged or vacated the Trustees were aware of the preservatory orders given on 21st July 2015.

9. The foregoing notwithstanding, and with full knowledge of the existence of the preservatory orders, on 22nd March 2017, the Trustees purported to grant to Jabavu, a lease over the property for “*a period of three (3) years commencing April 1, 2017 to March 31, 2020*” on the basis of a “*temporary occupation licence*” dated 22nd March 2017 on the terms and conditions therein set out. According to the 2nd respondent, Jabavu thereafter moved into the property, fenced it off and began development thereon, including deep excavation and civil works. That is what precipitated the application by the 2nd respondent filed in court on 20th July 2017 seeking a finding that the Trustees were in contempt of court and for their committal to civil jail amongst other prayers. On the basis of that application, the court delivered the impugned ruling on 16th February 2018.

10. In their respective memoranda of appeal, the appellants have challenged that ruling of 16th February 2018 on grounds that the Judge converted the application for contempt of court “*into an interpretation of previous court orders*”; that the Judge applied such interpretation retrospectively against the appellants; that the Judge wrongly found the appellants guilty of contempt of the order given on 21st July 2015 while the application for contempt related to orders given on 4th April 2017 and 29th May 2017; that the Judge did not consider the submissions and authorities cited by the appellants; and that the Judge made contradictory findings.

11. During the hearing of the appeal, **Mr. B. Millimo** appeared for the Trustees. **Mr. I. Muganda** appeared for **Jabavu** while **Mr. J. O. Oduol** appeared for the 2nd respondent. Learned counsel for the Trustees and for Jabavu (the appellants) faulted the Judge for finding the Trustees in contempt of court when the order that was allegedly breached by the appellants is ambiguous. It was submitted, on the strength of the decision of the High Court in **Wildlife Lodges Ltd vs. County Council of Narok and another [2005] 2 E. A 344**, that an ambiguous order that might require interpretation cannot form a basis for contempt; and that the 2nd respondent was required to prove wilful disobedience of the orders in order to succeed in the application for contempt. In that regard, the case of **Nyaoso Miera vs. Joseph Nyakunsi Momanyi [2011] eKLR** was cited. It was submitted that the court interpreted the orders allegedly breached without invitation to do so and thereby wrongly entered “into the arena of the battle of the parties” by commencing investigation and an inquiry on its own motion without being called upon to do so.

12. It was urged that in its application before the court, the 2nd respondent alleged breach of the court orders given on 4th April 2017 and 29th May 2017 despite which the court found the appellants in breach of an order given on 21st July 2015 when there was no charge or complaint in that regard; that in as much as the order dated 21st July 2015 was referred to in the orders of 4th April 2017 and 29th May 2017, there needed to be clarity in the application for contempt “as to the specific order that was breached and the terms of the order breached”; that consequently the Judge formulated his own charge, prosecuted the same and convicted the appellants on charges that had not been pleaded with the result that the Judge ended up being a judge in his own cause. The case of **R vs. Bowstreet Metropolitan Stipendry Magistrate and others, Ex parte Pinochet [1999] 1 All ER 577** was cited for the proposition that a man may not be a judge in his own cause. It was submitted that the Judge also breached the rules of natural justice in that he failed to consider the appellants’ submissions.

13. Furthermore, the appellants complain, the Judge fell into error in applying previous orders and rulings of the court retrospectively against the appellants; that having regard to Article 50(2)(n) of the Constitution, the law cannot be applied retrospectively. In that regard, reference was made to the decision of this Court in **W.K.G vs J. W. G Civil Appeal No. 10 of 2003** and the Supreme Court of Kenya decision in **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Ltd & 2 others [2012] eKLR**; that by interpreting the order and applying it retrospectively, the Judge created a charge that was non-existent.

14. The Judge was also faulted for wrongfully exercising his discretion in granting mandatory injunction orders in the nature of eviction in an interlocutory application; that there was no material before the Judge to demonstrate that Jabavu was unlawfully in occupation of the suit property to warrant the eviction order; that the circumstances for granting mandatory orders did not exist and the Judge failed to exercise caution in granting that relief. Reference was made to the case of **East African Fine Spinners Ltd (In receivership) & 3 others vs. Bedi Investments Ltd, C.A Nai, 72 of 1994; Kenya Breweries Ltd vs. Washington Okeyo, CA 332 of 2000** among other decisions.

15. Opposing the appeal, **Mr. J. Ochieng’ Oduol** for the 2nd respondent submitted that the appeal is devoid of merit; that on 21st July 2015, the ELC ordered that the suit property should be preserved and prohibited further dealings with the property; that the order was extended from time to time; that in breach of that order the Trustees purported to grant a license over the property to Jabavu who forcibly took possession of the property, destroyed the existing fence and erected a new fence and commenced excavation; that in its impugned ruling, the court correctly found that the Trustees were in contempt and correctly ordered Jabavu to vacate; that the actions by the appellants were undertaken when there was in place a valid court order that prohibited the actions taken; that the disobedience of the court orders by the appellants brought the authority and standing of the court into disrepute; and that the appellants were under a duty to comply with the court orders and the court properly found them to be in contempt. In that regard, counsel made reference to the decision of the Court in **Teachers Service Commission vs. Kenya National Union of Teachers & 2 others [2013] eKLR** for the proposition that the reason why courts punish for contempt is to preserve and safeguard the rule of law; **Africa Management Communication International Ltd vs. Joseph Mathenge Mugo & anor [2013] eKLR** for the proposition that obedience of court orders is fundamental to the administration of justice.

16. It was submitted that it was within the jurisdiction of the court to commit the appellants for contempt and to order the eviction of the appellant as it did, having regard to the fact that the appellant was actively undertaking construction on the site. Reference was made to **Hadkinson vs. Hadkinson [1952] 2 All ER 567** and **Econet Wireless Kenya Ltd vs. Minister of Information & Communication of Kenya & another [2005] eKLR**.

17. We have considered the appeal and the submissions by counsel. The main question in this appeal is whether the learned Judge erred in finding the Trustees and the Chief Executive Officer of the Trustees guilty of contempt of court and in ordering Jabavu to vacate the property.

18. As already noted, there can be no doubt that as early as 12th August 2015 when the Trustees applied to be joined in the suit, they were well aware of the orders preserving the suit property that had been given by the court on 21st July 2015. The Trustees could not possibly have in the same application applied to have those orders discharged or vacated if they did not know of their existence or if they did not consider the orders to be binding on the suit property. This is indeed captured by the learned Judge in the impugned ruling where he observed that in the application dated 12th August 2015, the Trustees “...sought vacation of this same preservatory order issued on 21/7/15” and went on to correctly say in the same ruling that:

“In a ruling delivered on 18/11/2015, Gacheru J allowed the joinder of the 5th defendant [the Trustees] and reaffirmed that the preservatory order would remain in force. It is not in doubt that all parties to the suit were once more, through the ruling of 18/11/15, directed not to deal with the suit property. The court reaffirmed the operativeness of that preservatory order after enjoining the 5th defendant [the Trustees] as at that date.”

19. By the time the Trustees were granting Jabavu a lease of three years over the same property in March 2017 they were aware that the orders given on 21st July 2015 had neither been vacated nor discharged. It was indeed dishonest, on the face of it, for the Trustees to consent to extension of those orders on 4th April 2017 knowing fully well that hardly a month earlier they had already violated the very order they were extending by granting the licence to Jabavu.

20. When the Trustees and the Chief Executive Officer of the Trustees, with full knowledge of the order of the court barring dealings with the suit property proceeded to deal with it by granting a lease over the same, they were clearly in contempt of the order of the court. As already noted, the orders of 4th April 2017 and 29th May 2017 extended the original preservatory order of 21st July 2015 that barred dealings with the property and the contention by the Trustees that they were convicted for breaching the order of 21st July 2015 when the application referred to breach of orders of 4th April 2017 and 29th May 2017 is irrelevant, a red herring and has no merit. As the Judge stated:

“The subject preservatory order forbade further dealings in this suit property by the parties. While that order subsisted, the 5th defendant, through its Chief Executive Officer (the 2nd respondent in the contempt motion), issued a licence to the 4th respondent, effectively purporting to handover the suit property to the 4th respondent. This led to the occupation of the suit property by some of the respondents in the contempt motion. Issuance of the license of the 4th respondent was clearly a dealing in the suit property. Put differently, it was an act which the preservatory order forbade. The court therefore finds that the 5th defendant and its Chief Executive Officer (the 2nd respondent in the contempt motion) engaged in an act that constitute contempt. That act was the issuance of the licence to the 4th respondent.”

We respectfully agree.

21. As to whether the court erred in ordering the eviction of Jabavu from the property, the court expressed that the licence issued in breach of the order of 25 July 2015 was an illegality, having been issued to Jabavu in contempt of a court order and did not confer any recognized contractual rights upon Jabavu. The judge concluded that all resultant interests and purported rights accruing from a blatant act of contempt was a nullity. The Judge found support from the dictum of the English court in the case of Clarke and others vs. Chadburn & others [1985] All ER 211 where the Privy Council expressed that the legal consequences of what is done in breach of the law through willful disobedience of an order of the court may plainly be very much affected by illegality.

22. We are unable to fault the Judge in reaching that conclusion. In Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006, this Court held that it is a fundamental tenet of the rule of law that court orders must be obeyed; that it is not open to any person to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law; and that the consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

23. In Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu Civil Appeal No. 157 of 1995 [1990-1994] EA 69 this Court stated that where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. See also Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169; Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993; and

24. In Kenya Tea Growers Association vs. Francis Atwoli & 5 Others [2012] eKLR, the court also cited Clarke and Others vs. Chadburn & Others [1985] 1 All E.R. (PC) 211, for the holding that, “An act done in willful disobedience of an injunction or Court Order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others.”

25. There is therefore ample authority for the conclusion reached by the Judge that the lease by way of a temporary licence issued by the Trustees to Jabavu in contempt of court did not confer any recognized legal right and the order of eviction of Jabavu from the suit property was therefore well founded. We have no basis for interfering with that decision.

26. The result is that these consolidated appeals are devoid of merit. They are accordingly dismissed with costs to the 2nd respondent.

Orders accordingly.

Dated and delivered at Nairobi this 25th day of October, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR