IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 28 OF 2017

BETWEEN

FRANCIS KIHORO KIBOTHU.................... APPELLANT

AND

CATHERINE KAGENDO MBUNA.............RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Mombasa (Otieno, J.)

dated 15th July, 2016

in

H.C.C.A No. 12 of 2006)

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JUDGMENT OF THE COURT

1. The significance of disclosing material facts to the court cannot be gainsaid. It enables the court to exercise its powers and/or make determinations with the relevant facts in mind. More so where a party approaches a court for an *exparte* order such a party is under an obligation to disclose what is reasonably within his/her knowledge even if it is adverse to his/her case. Underscoring the importance of full disclosure Scrutton L.J in the case of The ***King vs. The General Commissioners for the Purposes of Income Tax Acts for the District of Kensington: Exparte Princess Edmond De Pligac (1917) 1 KB 486*** expressed that-

> ***"… and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an exparte statement he should make a full and fair disclosure of all the material facts – facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement." (Emphasis added).***

2. This is the predicament that the appellant found himself in when his appeal in the High Court being H.C.C.A No. 12 of 2016 was struck out on 15th July, 2016 for material non-disclosure among other reasons. We shall say more about this ruling which is the subject of this appeal later in this judgment.

3. First, the pertinent facts were that the respondent initially leased out a shop to the appellant wherein he sold wines and spirits which he later converted into a bar. According to the respondent, the appellant for no reason unilaterally reduced his monthly rent from Kshs.7,000 to Kshs.5,000, fell into over four months' rent arrears and also became a nuisance to the other tenants. The respondent had enough and served him with a notice to terminate the tenancy dated 10th March, 2014 under ***Section 4(2)*** of the ***Landlord & Tenant (Shops, Hotels and Catering Establishments) Act***.

4. The appellant was not happy with that notice and challenged the same at the Business Premises Rent Tribunal (BPRT) through Tribunal Case No. 68 of 2014. Similarly, the appellant sought termination of the tenancy by filing Tribunal Case No. of 2014. Both cases were heard together and by a judgment dated 19th June, 2015 the Chairman of the BPRT found that the appellant had fallen into rent arrears hence the respondent was justified in issuing the notice. Towards that end the Chairman directed:-

i. The Tenant's reference is dismissed.

ii. The landlord's notice is allowed.

iii. The Tenant shall vacate and deliver vacant possession of the suit premises on/or before 31st December, 2015 in default an eviction order to issue without further reference to the Tribunal.

iv. The Tenant shall pay the landlord costs of the reference to be agreed between the parties or assessed by the Tribunal.

5. Naturally, the appellant was aggrieved with those orders and vide High Court Misc. Application No. 344 of 2015 the appellant sought *inter alia* extension of time within which to lodge an appeal against the BPRT's decision and stay of execution of the orders dated 19th June, 2015 pending the determination of the appeal. On 8th February, 2016 he was granted leave to file the appeal and interim orders of stay of execution. He filed the High Court appeal on 12th February, 2016 and served the record on the respondent in person.

6. Subsequently, the respondent filed an application on 16th May, 2016 praying for orders that –

a) The orders dated 8th February, 2016 staying execution of the BPRT's decision be vacated forthwith.

b) The appeal be struck off.

7. The application was premised on the grounds that the appellant had obtained the *exparte* orders by concealing material facts to the court. In that, he failed to disclose to the court that the respondent was represented by counsel in the BPRT case with the aim of not serving the application for leave upon the respondent or her counsel. The appellant had failed to comply with the conditions of the *exparte* orders *to wit*, since he obtained the interim orders he had never paid his monthly rent and had refused to open the common toilet used by other tenants.

8. In his response, the appellant deposed that he had never refused to pay rent. In point of fact he had on 27th January, 2016 paid his rent through M-pesa but the respondent returned the same and asked him never to send her money again. He was ready and willing to pay the accrued rent which he had since deposited with his advocate on record. The toilet in question remained locked to prevent passers-by from accessing it without permission. The key was at all times placed on top of the door where every tenant could access it.

9. The learned Judge in the impugned ruling in his own words expressed:-

"In the matter before me when the appellant approached the court, it created the impression that the respondent could not be traced for the purpose of personal service hence it was desirable that substituted service be ordered. I have revisited the file on which the order was made and it is apparent that the impression created to *(sic)* ***court by the appellant was that respondent acted in person and could not be traced. That to this court was a deliberate attempt to mislead the court, which attempt succeeded when the substituted service was ordered and on the basis upon which the application proceeded and was heard exparte.*** *(sic)*

…

It matters not that the misrepresentation has resulted in the substituted service which the respondent ought to have come across. The misrepresentation negates everything after it in so far as it found to have been an attempt to steal a match on the respondent to avoid personal service upon an appointed advocate. *(sic)***"**

10. Ultimately he held,

"I find that the respondent's application to set (sic) exparte orders is merited, in that it seeks to enforce the appellant's obligation to assist the court meet its overriding objective. It is allowed on terms that the orders given on the 8/2/2016 are set aside. It is those orders that found the filing of the appeal, them not being there, the appeal has no substratum to stand upon and it follows it should and is hereby struck out.(sic)"

11. The appeal before us in predicate on the grounds that the learned Judge erred in law and fact by-

i. Holding that the appellant had misled the court by concealing the fact that the respondent was represented by an advocate in the BPRT yet proceedings from the BPRT were before him indicating otherwise.

ii. Finding that the advocates acting for the respondent in the BPRT were the same ones who were supposed to act for her in Misc. Application 344 of 2015.

12. Ms. Murage, learned counsel for the appellant, submitted that the appellant had presented the proceedings relating to the BPRT before the learned Judge which clearly indicated that the respondent had been represented by an advocate. Be that as it may, when the appellant filed the application for extension of time and thereafter the High Court appeal he commenced a fresh legal process which was distinct from the BPRT. As such, it was erroneous for the learned Judge to hold that the advocates who represented the respondent at the BPRT were still her advocates in the subsequent proceedings.

13. According to her, the finding by the learned Judge was tantamount to alluding that the appellant had committed fraud without the same being proved. In the end, the learned Judge overlooked the critical issue that a court of law should be slow in driving litigants from the halls of justice. There was no reason for the learned Judge to strike out the appeal even if he found fault on the part of the appellant. In any event, the respondent would not have suffered any prejudice if the appeal was saved. Ms. Murage urged us to allow the appeal on those grounds.

14. On his part, Mr. Kaburu, learned counsel for the respondent, argued that the appellant was at all material times aware that the respondent was represented by counsel. The appellant chose to conceal that fact to obtain leave to file the appeal out of time. This is evident by the fact that after filing the appeal he served the record on the appellant in person. Besides, the appellant had not complied with the conditions issued in the *exparte* orders which warranted the discharge of those orders. All in all, the learned Judge had exercised his discretion judiciously in issuing the orders he did.

15. We have considered the record, submissions by counsel and the law. The learned Judge in discharging the *exparte* orders as well as striking out the High Court appeal was exercising his judicial discretion. Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this case, it ought to be guided by the principles enunciated in ***Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR***. The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice.

16. Having perused the record, we are persuaded that the appellant through his advocate convinced the learned Judge that the respondent was not easily accessible and also concealed the fact she was represented by an advocate at the BPRT. Otherwise, why would the learned Judge accede to his request to serve the application for extension of time through substituted service? To that extent we concur with the learned Judge that such conduct by the appellant warranted the discharge of the *exparte* orders. Our positon is fortified by this Court's decision in the case of ***Tiwi Beach Hotel Ltd vs. Stamp [1991] KLR 658*** where the Court had this to say about the effect of non-disclosure:-

> ***"It matters not upon a point of this nature being taken whether the applicant was entitled to or that the Court would have granted relief sought in any event, that is to say, leaving aside the non-disclosure for it is the affront to the dignity and credulity of the Court that is in point."***

17. Equally, we concur with the learned Judge's finding that the appellant had failed to comply with the condition of granting the *exparte* orders namely, the payment of rent when it fell due. In his own affidavit the appellant admitted being in arrears as well as locking the toilet which was to be used with the other tenants. As succinctly stated by this Court in **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**

> ***We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not. For as Theodore Roosevelt, the 26th President of the United States of America once said:-***
>
> ***"No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour''.***
>
> ***The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy .***

18. For the reasons outlined herein above we find no reason to interfere with the learned Judge's discretion. Accordingly, the appeal lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 15th day of February 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR