IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & M'INOTI, JJ.A)

CIVIL APPEAL NO. 93 OF 2011

BETWEEN

AMOS MUNGAI MUIRURI.....APPELLANT

AND

THE AGA KHAN FOUNDATION.....1ST RESPONDENT

AGA KHAN EDUCATION SERVICES KENYA.....2ND RESPONDENT

AND

ALBERT EKIRAPA.....1ST INTERESTED PARTY

AHMED SHEIKH TAKOY.....2ND INTERESTED PARTY

ROSE MUTHONI.....3RD INTERESTED PARTY

ANTHONY MORAGWA.....4TH INTERESTED PARTY

HENRY NJAGE.....5TH INTERESTED PARTY

PATRICK LUMUMBA.....6TH INTERESTED PARTY

JANE OMARI.....7TH INTERESTED PARTY

MARY APOLA.....8TH INTERESTED PARTY

JULIUS KIITI.....9TH INTERESTED PARTY

MWANGI SALIME.....10TH INTERESTED PARTY

(Suing on behalf of themselves and Parents Association (School Committee) of Aga Khan Primary School Nairobi

(Appeal from the ruling of the High Court of Kenya at Nairobi (Muchelule, J.) dated 16th December, 2010

in

ELC No. 455 of 2008)

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JUDGMENT OF THE COURT

This appeal, in what appears to be a clever ploy to gloss over a serious jurisdiction-implicating omission, is

presented by the appellant **Amos Muiruri** as being *"from the ruling of the High Court of Kenya at Nairobi before the Honourable Mr. Justice A. Muchelule dated 16th December 2010 and order dated 31st January 2011 …."* It thus appears to be an appeal against two different decisions made on two different days, which is impermissible under the Rules of this Court. Indeed the notice of appeal, the foundational document upon which this Court?s jurisdiction to entertain an appeal is anchored (See ***ABOK JAMES ODERA T/a A.J. ODERA & ASSOCIATES vs. JOHN PATRICK MACHIRA T/a MACHIRA & CO. ADVOCATES*** **[2013] eKLR);** ***ZACHARIA OKOTH OBADO vs. EDWARD OKONGO OYUKI & 2 OTHERS*** **[2014] eKLR)** is itself steeped in similar subterfuge. Dated 31st January 2011, it states;

> ***"TAKE NOTICE that Amos Mungai Muiruri, the applicant in the application dated 24th January, 2011 and the contemnor in the Ruling dated and delivered on 16th December, 2010 being dissatisfied with the Ruling and Order of the Honourable Justice Muchelule, given at High Court Nairobi on 31st January, 2011 intends to appeal to the Court of Appeal of Kenya against the whole of the said Ruling and Order."***

It is obvious that the said notice is facially incompetent. It purports to notify intent to appeal against *"the said Ruling and Order"* yet, in verity, what was intended to be under attack, as the memorandum of appeal amply shows, was the Ruling of the learned Judge made on 16th December 2010 by which the appellant was found guilty of contempt. That ruling?s formal expression was an order of even date. The order of 31st January 2011 by which the learned Judge sentenced the appellant to four months imprisonment for the said contempt, was a separate and distinct order and the attempt to cover both of them under the same notice of appeal was an artful ruse to appeal against the 16th December 2010 finding of guilt, to which the appellant never filed a notice of appeal and has not done so to date. Essentially then the memorandum of appeal, in so far as it deals with and challenges the ruling and order of 16th December 2011, is grounded on nothing and is incompetent since the only notice of appeal on record was filed way out of time as far as that ruling is concerned and is itself also incompetent.

We would be justified to determine this appeal on that point alone, which has been raised in the written and oral submissions by **M/s Njoroge Regeru & Co.** learned counsel for the **Aga Khan Education Service Kenya,** the second respondent. However, as those submissions, as well as those of counsel for the appellant and the first respondent, addressed us on the merits of the appeal, we shall deal with that as well.

At the heart of the dispute that led to the finding that the appellant was guilty of contempt is a feud pitting the first respondent Aga Khan Foundation and the 2nd respondent on the one hand, and the individuals named in this appeal as "*Interested Parties*," a term unknown under our Rules, on the other hand. The former maintain that the Aga Khan Primary School („the School") which is built, run and operated on **L.R. No. 209/3576** in Nairobi and registered in the name of the 1st respondent is a private school having been constructed by the Aga Khan on the 1st respondent?s land; while the latter, who were at all material times officials of the Parents Association of the School who contended that it was a public school partly built with Government funds and staffed with teachers from the Teachers Service Commission and labourers from the then City Council of Nairobi at Government expense, though managed by 2nd respondent.

That dispute led to the filing of suit at the High Court Nairobi by the Interested Parties in which they sought, on their own and on behalf of other parents at the School, various declaratory and other orders to the end that the School is a public school with stated legal consequences and that the respondents were to cede control and management of the same to the interested parties.

Simultaneously with the plaint, the Interested Parties filed a chamber summons application dated 26th September 2008 by which they sought a long list of prohibitory and mandatory injunction aimed at wresting control of the school from the respondents. On its part the 2nd respondent filed a chamber summons application of its own dated 21st April 2009 by which it sought to restrain the Interested Parties, their servants and or agents from doing various specified things in interference with its running and management of the School. Both applications were canvassed before Abida Ali-Aroni, J. who, by a ruling made on 29th October 2009, dismissed the Interested Parties? application and substantially allowed the one by the 2nd respondent. The ensuing substantive orders were as follows;

> ***"1. THAT a temporary injunction be and is hereby issued restraining the Plaintiffs and the Parents Association of the Aga Khan Primary School Nairobi, by themselves, jointly and /or severally, as the Parents Association of the so-called School Committee, through their agents and/or servants, from interfering with, usurping, arrogating and/or encroaching upon the 2nd defendant's role and function as the manager of the Aga Khan Primary School Nairobi pending the hearing and determination of this suit or until further orders of the Court.***
>
> ***2. THAT a temporary injunction be and is hereby issued restraining the Plaintiffs and the Parents Association of the Aga Khan Primary School Nairobi, by themselves, jointly and/or severally, as the Parents Association or the so-called School Committee through their agents and/or servants, from in any way managing and/or running the Aga Khan Primary School Nairobi pending the hearing and determination of this suit or until further orders of the Court.***

3. THAT a temporary injunction be and is hereby issued restraining the Plaintiffs and the Parents Association of the Aga Khan Primary School Nairobi, by themselves, jointly and/or severally, as the Parents Association or the so-called School Committee, through their agents and/ or servants, from holding any meetings, assemblies and/or gatherings of any kind whatsoever, where the agenda, discussions, deliberations and/ or resolutions thereof would touch upon, impact upon, or in any way affect the running and management of the Aga Khan Primary School Nairobi pending the hearing and determination of this suit or until further orders of the Court."

It is that order that Muchelule, J. found the appellant, to have disobeyed and was therefore guilty of contempt of court. That finding followed an application for his committal for contempt of court dated 6th September 2010 brought by the 2nd respondent under Order XXXIX **Rules 2A(2)** and **9** of the **Civil Procedure Rules** and **section 5** of the Judicature Act (Cap 8), among other provisions. The grounds upon which the committal of the appellant and the Chairman of the Schools? Parents Association, one **Amos Mungai Kimuri**, were targeted for citation and punishment were set out at length on the face of the application (after a recital of Abida-Ali Aron, J?s order aforesaid,) as follows;

"2. THAT the said Court Order has been defied.

3.THAT in particular, the said Plaintiffs/Respondents through the Chairman of the Parents Association, one Anthony Mungai Kimuri and the Secretary of the Parents Association one Amos Mungai Muiruri, have called for and arranged Parents Association meetings at which deliberations have been held and resolutions passed concerning the management of the Aga Khan Primary School, including the payments of the school fees and/or levies, and the disposal of school buses.

4. THAT further, Mr. Kimuri and Mr. Muiruri, having called an Annual General Meeting of the parents on March 17th 2010, incited and urged the general parent population at the Aga Khan Primary School Nairobi, to ignore and disobey the said Court Order.

5. THAT moreover, Mr. Muiruri and Mr. Kimuri, have caused grievous financial distress to the legal manager of the school (Aga Khan Education Service Kenya) by instructing parents not to pay fees to the manager, but to pay fees into a bank account controlled by themselves.

6. THAT in the meantime, Mr. Muiruri – while diverting fees away from the manager, continues to demand payment by AKESK of services and salaries for regular operations at the school.

7. THAT moreover, Mr. Muriuri has interfered with the management and operations of the School by purporting to terminate the services of the school caterer and purporting to invite bids from third parties for catering services at the school canteen.

8. THAT further, Mr. Muiruri has interfered with the management of the school facilities by renting out the swimming pool for parent public use without approval from the legal owner of the property, the Aga Khan Foundation, or from the legal manager of the school, the Aga Khan Education Service Kenya.

9. THAT furthermore, Mr. Muiruri, as changed the school uniform by introducing a tracksuit, without prior approval from the legal manager of the school.

10. THAT further, Mr. Muiruri, has interfered with the management of the assets of the school by demanding of AKESK that logbooks of school busses be turned over to himself.

11. THAT Mr. Muiruri and Mr. Kimuri, through their conduct of disobedience and defiance of the court order, have brought this honourable court into ridicule, odium and disrepute.

12. THAT this Honourable court ought to move speedily to assert its authority and dignity and to enforce obedience of its orders.

13. THAT disobedience of court orders threatens the very foundations of the administration of justice and paints our courts as weak, powerless and ineffective.

14. THAT parties who disobey court orders must be punished.

15. THAT it is in the interest of justice that the court do issues the court orders herein."

The supporting affidavit of **Mahmoud Sayani** sworn on the said 6th of September 2010 expanded and expounded on those grounds and attached various documents in proof of the facts relied on, and we need not repeat its contents. It did state, however, in addition to the acts of alleged defiance and disobedience, the significant fact that the said order (a copy of which was displayed, and on which was clearly endorsed a notice of penal consequences) was brought to the appellant?s attention in all its details and also personally served on him, as follows;

"1. THAT I am further informed by Mr. Ancut Muumbi Munyao, a licensed Court process server in the employ of Messrs Njoroge Regeru & Company that the Plaintiffs/Respondents, and specifically Mr. Muiruri and Mr. Kimuri were personally

served with the said court order. (Attached hereto and marked as "MS-2" is an Affidavit of Service)

2. THAT moreover, the said court order was also served upon the plaintiff's Advocates on record,

Messrs Kinoti & Kibe Company, as well as being advertised in the press. (Attached hereto and marked as "MS-3" is the newspaper advertisement in respect of the Court Order).

3. THAT moreover, the said Court Order was read out by our legal representatives at the Annual General meeting of the parents of the Aga Khan Primary School, held on March 27th 2010 at which approximately 200 parents, all members of the Parents Association, the area Chief, the TAC Tutor, and District Education staff were present."

The appellant did not file any affidavit in reply to the application and did not therefore deny or controvert the facts stated as the basis for his committal for contempt. Neither did the Interested Parties. All that was filed on behalf of the latter was a notice of Preliminary Objection dated 28th September 2010 that;

"1. The application is incurably defective for non-compliance with Section 5 of the Judicature Act.

2. The application seeks to commit the Plaintiffs/Respondents to civil jail for contempt of court for the performance of their statutory responsibilities.

3. The application is an abuse of Court process and should be struck out with costs."

Upon consideration of the application, the preliminary objection and the submissions made before him, the learned Judge found the contempt to have been proved to the required standard of higher than a balance of probability, but not so high as to require proof beyond reasonable doubt.

As we stated earlier, even though the appellant did not file a notice of appeal against that finding, the memorandum of appeal is almost entirely dedicated to a criticism of the same with the learned Judge said to have erred by, in summary;

- **Hearing and determining the committal application before the appellant could put in a response, for which he needed prior instructions from his employer, the Teachers Service Commission.**
- **Holding the applicant guilty of contempt whilst his employer, the Government of Kenya, was not a party to the proceedings.**
- **Punishing the appellant for contempt before first hearing his application to set aside the ruling finding him guilty thereof.**
- **Disregarding the fact that the appellant was not a party to the suit.**
- **Failing to appreciate sufficiently that the appellant's acts alleged to be contemptuous were done pursuant to his statutory duties as the head teacher of the School.**

Those grounds were elucidated upon in the written submissions filed on behalf of the appellant as well as their highlighting before us by his learned counsel **Mr. Mugo** though he purported to raise allegations of non-service of the court order; ambiguity of the order; and non-disobedience, all of which issues were not part of the grounds of appeal and were an impermissible attempt to expand the scope of the appeal as complained by **Mr. Shah** and **Mr. Thuo**, respective learned counsel for the 1st and 2nd respondents and with justification.

The appellant is bound by his memorandum (See ***Rule 104*** of our Rules) and ***TWAHER ABDULKARIM MOHAMMED vs. IEBC & 2 OTHERS [2014] eKLR*** and we accordingly disregard those additional issues which are, moreover, quite without foundation given the crystal clarity of the record.

Having considered the record, the submissions and the authorities cited, we have no difficulty determining this appeal. There is no doubt whatsoever that the appellant, though not a party to proceedings before the High Court, was the head teacher of the school at the heart of the dispute. Not only was he very much aware of the court order, he was personally served with it. Its full terms were read out at the Annual General Meeting of the Parents of the School on **27th March 2010,** which had been called by him in defiance of the court order. It was at that meeting that the appellant categorically spoke and acted in a manner wholly contemptuous of the court order. He did so with contumely, impudence and a sense of impunity in a text book case of punishable contempt. He seems to have proceeded on a high but false view of his own untouchability. Many other of his disobedient acts were deposed to in an affidavit targeting his liberty but he elected not to respond thereto and they remain uncontroverted truths. (See the High Court decision of ***REPUBLIC vs. COMMISSIONER OF LANDS &. ANOR Ex PARTE HAMMBERHEADS LTD [2013] eKLR)***.

We have no difficulty rejecting the argument that the learned Judge was wrong to proceed to find the appellant guilty of contempt of court in the absence of an affidavit from him in reply. Parties are always accorded opportunity to respond to allegations made against them but they cannot be compelled to respond. In the instant case the appellant was given ample opportunity to respond but he spurned the chance. His *post-facto* claim that the learned Judge ought to have known that the appellant needed his employer?s instructions before he could swear a

replying affidavit rings hollow and disingenuous. It is against the appellant in his personal capacity that the committal application was made in consequence of his personal disregard for and disobedience of the court order. The answer had to be personal from himself and its absence attracts a personal consequence.

We find equally unacceptable the argument that the learned Judge ought to first have heard the appellant?s application to set aside the finding of guilt before he could proceed to sentence the appellant. Why should the learned Judge have done so? We are of the view that where there is contempt of court orders, a court ought to proceed with deliberate speed to check and punish so pernicious a course of conduct so as to quickly restore the dignity of the court and assert its authority as the guardian of the judicial process, and maintain the integrity of our system of administration of justice. Far from requiring a judge to pause the punitive march of justice in the face of open and defiant contempt, good sense and reason in fact require that all contemnors be quickly required to purge their contempt or otherwise pay the price of their disobedience, which may in the first instance take the form of denial of audience. See ***HADKINSON vs. HADKINSON [1952] 2 ALL ER 562.***

We reject off hand the curious argument that the appellant ought somehow to have been excused for his contempt because it was done in performance of statutory duties. There are no duties flowing from any statute the performance of which will ever justify the disobedience of court orders. If a person finds that his duties imposed by statute are in conflict with an order of the court, the onus is on him to swiftly move the court to lay before it the conundrum that confronts him, if any there be, so that he may gain either a review, a setting aside or an excusal from the court that issued the order, or a court higher in the hierarchy and possessed of the requisite jurisdiction to do so. Mere difficulty, inconvenience or embarrassment never can be a justification for the disobedience of court orders. Neither can parties decide at their absolute whim which, when, whether or how to obey court orders. They are neither suggestions nor pleas but rather possess the full compulsive power of the law. Our freedom under the law depends in large part on the duty of all to obey court orders.

The view of this Court on this subject is that it will provide no refuge and no succour to contemnors but will instead sternly, rebuke and rebuff litigants and third parties who deem it a light and inconsequential thing to disobey court orders and to bring the administration of justice to disrepute by such disregard. See ***SIMMERS PLAZA LTD vs. NATIONAL BANK OF KENYA LTD [2015] eKLR.*** We reiterate what we recently stated in ***DR. ALFRED MATIANGI vs. MIGUNA MIGUNA & 4 OTHERS*** Nairobi **Criminal Application No. 1 of 2018 [2018] eKRL**;

> ***"Before we go into a determination of the twin principles for grant of stay, we need to make it clear that as a Court we do not take lightly allegations of contempt of court. No court should. When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities."***

We think from our consideration of the record of this appeal that the learned Judge was fully entitled to take the view, expressed in his ruling of 15th February 2011, that the appellant?s conduct was "*reprehensible to say the least*." We have no doubt at all that his was a case of deliberate and willful disobedience and nothing said on his behalf gives us reason to interfere with the decisions of the learned Judge that are assailed by this appeal.

The appeal is devoid of merit and we accordingly dismiss it with costs.

Dated and delivered at Nairobi this 9th day of November, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR