IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WARSAME & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 219 OF 2011

VIKTAR MAINA NGUNJIRI.....APPELLANT

AND

JACK & JILL SUPERMARKETS LTD.....RESPONDENT

(An appeal against the Ruling and Order of the High Court of Kenya at Nairobi (D. K. Musinga, J.) delivered on 16th February, 2011

in

JR Misc. Application No. 185 of 2009)

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JUDGMENT OF THE COURT

The interlocutory appeal before us emanates from the ruling and order of **Musinga, J.** (as he was then) delivered on 16th February 2011. The ruling was the culmination of an application made by the respondent seeking to have the **Town Clerk, City Council of Nairobi** and **Viktar Maina Ngunjiri** "*the appellant*" cited and punished for contempt of court.

The application was premised on the grounds that would be the contemnors and in particular, the appellant had failed to comply with a valid court order that restrained him from demolishing and or interfering with the respondent's quiet possession of the premises comprised in **L.R No. 209/869** "*the suit premises*". The respondent alleged that the said order had been personally served on the appellant together with the attendant penal notice but that the appellant flagrantly and brazenly disobeyed the same by gradually demolishing the suit premises.

How did the dispute come this far?

The respondent had been a tenant in the suit premises for a period in excess of 20 years, operating a supermarket. The appellant purchased the suit premises in 2006 and the respondent continued with his tenancy, save that the appellant now became its landlord. On 30th October 2007, the appellant served upon the respondent a Notice of Intention to terminate the tenancy on the ground that he wanted to demolish the suit premises so as to put up a modern building. The notice was issued and served pursuant to section **4 (2)** of the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.** Upon receipt of the notice, the respondent contested the same by filing a reference in the **Business Premises Rent Tribunal** "*the Tribunal*".

However, during the pendency of the reference, the appellant, according to the respondent, colluded with officers from the now defunct City Council of Nairobi and caused himself to be served with notice **Nos. 5445** and **5446,** requiring him to undertake extensive repairs or alterations to the suit premises within 30 days ostensibly in the interest of public health. Thereafter, the appellant masterminded the filing of **Criminal Case No. 520A of 2008** against himself in the Principal Magistrates' Court at City Hall, Nairobi in which he was charged with failing to comply with the aforementioned notices. The court on hearing the case, ordered the appellant to comply with the notices within 45 days as from 12th January 2009. Because of the collusion aforesaid and the ensuing consequences, the respondent took matters into his own hands and initiated **Judicial Review Misc. Appl. No. 185 of 2009** in the High Court against the Principal Magistrate, the defunct City Council of Nairobi and the appellant.

In the application, the respondent sought to quash through an order of *certiorari*, the notices aforementioned as well as the Principal Magistrate's order; an order of prohibition to stop the appellant and the City Council of Nairobi from enforcing or implementing the requirements of notices, and further orders issued by the City Court Magistrate on 6th February 2009. The respondent further sought that the appellant be barred from evicting it from the suit premises under the guise of implementing the requirements of the two notices or the Magistrates Court's order; and more relevant to this appeal, the respondent successfully sought that the grant of leave do operate as a stay of

any further implementation of the notices and the magistrates orders aforesaid. Leave was duly granted as well as the order that leave so granted operate as stay.

Those orders, according to the respondent, were extracted and personally served on the appellant and an affidavit of service to that effect filed in court. However, the appellant flagrantly disobeyed the same and proceeded to demolish partially the suit premises which led the respondent to initiate the contempt proceedings that have led to this appeal. It was the case of the respondent that the disobedience resulted from gradual demolishing of the suit premises by the appellant in cahoots with the agents and or officers of City Council of Nairobi contrary to the terms of the court order of stay.

The appellant's response was to deny that the orders were served on him. He maintained that he only became aware of the orders when his advocate's court clerk managed to obtain a copy thereof from the court file. He then successfully sought leave to be allowed to cross-examine the process server on the contents of his affidavit of service. Otherwise, he denied that the partial demolition of the suit premises started on 8th April 2009 as claimed and deposed that in fact the demolition commenced on 4th April 2009.

Upon consideration of these set of facts, the learned judge found that the appellant had indeed been served with the court orders on 7th April 2009 while at the Hotel Intercontinental, Nairobi in the company of **Mr. Tom Onyancha** "*Onyancha*", the respondent's Managing Director. Further, that the process server, **Mr. Justus David Kilima,** was cross-examined by the appellant's advocate on the affidavit of service and remained emphatic that he had indeed served the appellant. In further analysis of the evidence, the judge found that the appellant had even been aware of the orders of court as at 2nd April 2009 since on that day, he made reference to them in an affidavit he filed in the Tribunal in Case No. 359 of 2009.

In considering whether there was disobedience of the said orders, the judge found that the appellant commenced demolition of the suit premises on 8th April 2009 as had been deponed to by Onyancha. The judge expressed the view that the appellant had only obtained permission to repair the suit premises and not to demolish them. He thus concluded that indeed there was disobedience of the orders by the appellant. Having adjudged the appellant a contemnor, the judge condemned him to a fine of Kshs. 200,000/- in default to serve a jail term of four months.

The appellant no doubt aggrieved, appealed against those findings and in its memorandum of appeal advanced 8 grounds of appeal. However, in his written submissions, the appellant condensed those grounds into four broad ones namely;

(I) whether the Judge misdirected himself on the issue of service and the disobedience of the orders;

(II) whether the appellant was personally served with the order;

(III) whether knowledge of the terms of the order could be imputed upon the appellant from the depositions he made in a supporting affidavit that he filed in the tribunal case No. 359 of 2009; and

(IV) Whether the appellant was accorded a fair hearing.

In canvassing the first issue, the appellant submitted that the right of a party who is likely to incur a loss of his liberty, to know the allegations levelled against him and to put forward his defence cannot be gainsaid. That the gravity of the consequences of committal proceedings cannot be taken lightly as they impact on the right to liberty. The appellant cited the case of **Re Bramlevale (1969) 3 All ER 1062** for proposition that contempt of court is an offense of a criminal character since a party may serve jail time. In the case, Lord Denning held that in the circumstances, contempt of court ought to be satisfactorily proved beyond reasonable doubt. According to the appellant, the question as to whether he was accorded a fair hearing to challenge the accusations of the alleged contempt was pertinent. The appellant pointed out that **Maraga J.** (as he was then) had on 15th October 2010 ordered the cross- examination of the process server, the town clerk and the appellant in view of the serious consequences of contempt proceedings. Following the cross-examination, the Judge further ordered the parties to file written submissions regarding service of the court orders. The appellant submitted that the parties however never filed the submissions as ordered. But the judge in his determination fallaciously stated that he had considered the said submissions. According to the appellant, the Judge erred by proceeding to determine the question of service without the benefit of the parties submissions. The appellant also faulted the Judge for failing to accord him the opportunity to make submissions or be heard in defence of the allegations against him.

In the appellant's view, it was immaterial that the Judge would have arrived at the same conclusion notwithstanding the lack of submissions on the aspect of service. The appellant cited the cases of **Onyango Oloo v Attorney General (1986-1989) EA 456** and **Pashito Holdings Ltd & Anor v Paul Nderitu Ndungu & Ors, Civil Appeal No. 138 of 1997** to buttress the need to adhere to the principles of natural justice. That a decision is unfair if its maker deprives himself of the views of the person who will likely be affected by the decision. It was also the appellants proposition that in finding him in contempt of court and imposing a fine of Kshs. 200,000/- without granting him an opportunity to be heard, then it was impossible to conclude with certainty that his right to a fair trial, pursuant to Article **50** of the Constitution, was not violated.

On the issue of whether the appellant was personally served with the order as alleged, the appellant pointed out that the judge relied heavily on the deposition by the process server in the affidavit of service. In that affidavit, the process server deposed that he had personally served the appellant with the order in the presence of Onyancha at the Hotel Intercontinental. According to the appellant however, the process server's evidence was inconsistent and lacking in credibility.

Submitting on whether he was aware of the court order, the appellant took the view that knowledge could not be imputed based on his affidavit filed in the Tribunal. In the appellants mind, the orders requiring the repair of the suit premises were still in force and he was therefore keen on complying with the same when he undertook the partial demolition. The appellant maintained that it was only on 23rd April, 2009 that he fully understood and became aware of the precise contents of the orders.

In response to those submissions, the respondent joined issue with the appellant and submitted that the appellant was duly accorded the right to a fair hearing which he exercised through entering appearance, filing his response to the application and even applying successfully to cross examine the process server. The appellant went on to file written submissions in response to the application. With regard to the directions issued by Maraga J., the respondent opined that such submissions were to be pegged on the cross-examination of the process server, the town clerk and the appellant. According to the respondent, the appellant did not deny disobedience of the court order. The thrust of his defence was that he was never served with the order.

The respondent emphasised that the appellant was personally served as deponed by the process server. Further, that he even had knowledge of the orders long before personal service as evidenced by his affidavit filed in the Tribunal. It was the respondent's submission that the only way the appellant could have been aware of the orders was because his attention had been drawn to them as the proceedings leading to those orders were *ex parte*. Finally, the respondent insisted that the appellant had knowledge of the order since they had also been personally served on him on 7th April 2009, a day prior to the commencement of the demolition on 8th April, 2009.

According to Halsbury's Laws of England, 4th ed. at paragraph 465;

> **"The power to order committal for civil contempt is a power to be exercised with great care. The court will only punish disobedience to an order of the court, or non-compliance with an undertaking, if satisfied that the terms of the order or undertaking are clear and unambiguous, that the defendant has proper notice of the terms and that a breach of the order or undertaking has been proved beyond reasonable doubt."**

Though the appellant has complained that Musinga, J. proceeded to pronounce himself on the application without the benefit of the parties written submissions as had been ordered by Maraga, J., in our view that complaint is a red-herring and masks the real issue for determination before this Court. The central issue in this appeal remains whether the appellant was served or knew of the existence of the High Court's orders of 27th March 2009 before commencing partial demolition of the suit premises occupied by the respondent. In the case **Refrigeration & Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Another, Civil Application No.39 of 1990**, quoted with approval in **Woburn Estate Limited v Margaret Bashforth [2016] eKLR**, it was observed as follows;

> "**A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question……he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed**." (Emphasis put)

Further, in the case of **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another (2005) 1 KLR 828** it was held thus:

> **"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void**".

Evidence whether the appellant knew of the orders is contained in the affidavit of service dated 4th April 2009 sworn by the process server. According to him, on 28th March 2009, he proceeded to Thika Town where the appellant operated a supermarket with the intention of serving him with the orders and the attendant penal notice but failed to find him. He found a manager, a **Mr. Njoroge** who accepted the documents on behalf of the appellant. The appellant however denied ever receiving the documents. Nowhere in the proceedings did the appellant lay blame on Mr. Njoroge for not forwarding the same to him, or disown him. Neither did he deny running a supermarket in Thika town. Further, the said Mr. Njoroge was not called by the appellant to deny or confirm ever receiving the documents. In the premises, we are satisfied, just like the learned judge, that the appellant was aware of the court order long before he breached them by virtue of this service and long before the second service upon him at Hotel Intercontinental.

The respondent's case that the appellant was personally served with the orders is further predicated not on the service aforesaid but on the process server's assertion that on 7th April 2009, he personally served the appellant with the orders while he was in the company of Onyancha. On that day, the process server explained that he was called by Mr. Onyancha who informed him about a meeting he was having with the appellant ostensibly to agree on modalities of vacating the suit premises at the Hotel Inter-Continental. According to the process server, the appellant was personally known to him having previously served him with court process. He stated that he tendered the documents to the appellant who accepted service but declined to acknowledge service by signing on a copy of the documents. Surprisingly, the following day the demolition of the part of the suit premises occupied by the respondent commenced in earnest.

It should also be noted that the appellant even applied to have the process server summoned for cross examination on the contents of his affidavit of service which was acceded to. It appears the appellant was however unsuccessful in impeaching or rebutting the process server's deposition through his cross examination. In his determination, the learned judge found no denial by the appellant that he was at the hotel or in the company of Mr. Onyancha.

Be that as it may, it is trite that a party who knows of an order must not be allowed to disobey it. In inferring knowledge of court order on the appellant's part, the judge considered that on 2nd April 2009, the appellant had sworn an affidavit that was filed with the Tribunal in which he alluded to the orders in issue. However, the appellant takes the view that though he may have been aware of the judicial review proceedings, he did not however, have direct and clear understanding of the precise contents of the terms of the order, namely that the implementation of the notices and the principal magistrate's order had all been stayed.

The appellant maintains that he came to know of the orders on 23rd April 2009. In our view, that proposition is incredible. The application seeking leave, which was also to operate as a stay was prosecuted *ex parte*. Nonetheless, the appellant made reference to the same on 2nd April 2009, meaning that he was aware of the proceedings hence the appellant must have been aware of the orders. It should also be remembered in any event that by then the orders had been received by a Mr. Njoroge, for the onward transmission to the appellant. Even if again the appellant feigns ignorance of the orders, then there was overwhelming evidence that he was duly and personally served with the orders and penal notice on 7th April 2009 a day before he commenced partial demolition of the suit premises. He conceded in his reply that indeed demolition of the suit premises began on 4th April 2009. However, demolition of the part occupied by the respondent was carried out or commenced on 8th April 2009. There is evidence that the bulldozers had been stationed next to the respondent's premises with threats of demolition for sometime before the same was eventually carried out.

A reading of the record shows that the appellant had been incensed by the respondent intransigence. He repeatedly in his pleadings stated that the respondent was the only remaining tenant as at 8th April 2006, who despite not paying rent had failed to vacate his premises.

We are satisfied that the appellant was aware of the orders but brazenly chose to ignore them.

The second issue for determination is whether there was disobedience of the court orders barring demolition of the suit premises. According to the respondent, the appellant did not deny disobedience of the court orders. The appellants defence was that he was never served with the orders. However, the suit premises were demolished while he had knowledge of the existence of orders as already demonstrated. So the disobedience was readily apparent without belabouring the point as correctly observed by the learned judge.

In his submissions, the appellant has contended that he was denied the right to a fair trial on the basis that Musinga, J pronounced himself without having considered the written submissions ordered by Maraga, J on the question of service. However, the record reflects that the appellant was ably represented in canvassing or opposing the application. The appellant filed his response to the application, successfully applied to have the process server cross-examined and filed written submissions in opposition to the application. Failure to file the submissions as ordered by Maraga, J cannot be said to have denied the appellant his right to a fair trial. The said submissions would have still been based on the cross-examination of the process server which the appellant had failed to discredit or dislodge. Again, if the submissions were not filed, we do not see the prejudice caused to the appellant by the remark by the judge that he had read the alleged submissions when in fact there were none.

The Supreme Court has in a recent decision pronounced itself on standard of proof in contempt proceedings in the case of **Republic v Ahmad Abolfathi Mohammed & Another (2018) eKLR,** as follows;

> **"We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of** Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 **the Court of Appeal held that:**
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> > ***'n our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.'***
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> **[29] The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she wilfully acted in a manner that flouted the Court Order."**

Earlier on, this Court in **Refrigerator & Kitchen Utensils Ltd v Gulabchand Popatlal Shah & Others** (supra) had stated that in cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. We have no doubt in our minds that the principles and threshold set out in the above authorities were met in the circumstances of this case by the appellants.

Accordingly, the appeal is dismissed with costs to the respondent.

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

W. OUKO, (P)

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR