IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 51 OF 2018

BETWEEN

ABDI SATARHAJI.....1ST APPELLANT

ASHA MOHAMED.....2ND APPELLANT

AND

OMAR AHMED.....1ST RESPONDENT

ALI AHMED MOHAMED.....2ND RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Mombasa (Thande, J.) dated 29th September, 2017

in

Succession Cause No. 380 of 2008)

****

JUDGMENT OF THE COURT

[1] It is indisputable that obedience of court orders ensures that the rule of law, good order and due administration of justice is maintained. See this Court's decision in ***Shimmers Plaza Limited vs. National Bank of Kenya Limited*** **[2015] eKLR**. Laying emphasis that obedience of court orders is not optional Romer, L.J. in the *locus classicus* case of ***Hadkinson vs. Hadkinson*** **[1952] ALL ER 567** expressed himself as follows:

> ***"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 even void."***

[2] It is on that footing that the principle of contempt of court arises as espoused in the words of Lord Justice Clerk in the Scottish case of ***Robertson vs. Her Majesty's Advocate*** **[2007] HCJAC 63** :

> ***"Contempt of court is constituted by conduct that denotes willful defiance of or disrepute towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law; whether in civil or criminal proceedings."***

Therefore, contempt proceedings are a means of citing and punishing a party for disobedience of court orders.

[3] Whenever a court is faced with an application for contempt it has a duty of determining first, whether the party accused of disobedience of the court order is indeed guilty of willful disobedience of its order. See the Indian Supreme Court's decision in **Ram Kishan vs. Sir Tarun Bajah & Others – Contempt Petition No. 336 of 2013**. Thereafter, if it finds such a party is in contempt of a court order, it exercises its discretionary power to mete out a suitable punishment within the prescribed parameters. The court has a duty to uphold its own dignity as the institution that is mandated as the utmost arbiter of disputes, to uphold, promote and protect the rule of law that is central for an orderly society. This is exactly the position that the High court (**Thande, J**.) found itself in when the respondents by an application dated 21st September, 2016 sought an order citing for punishment, the appellants for contempt.

[4] The salient facts which led to the application were that Haji Mohamed Haji Adam (the deceased) who passed away on 11th February, 1996 appointed five of his children, namely, Mohamud Haji, Haji Mohamed, Fatuma Haji Mohamed, Adam Haji Mohamed, Abdifaisal Haji Mohamed and the 1st appellant as executors and trustees of his last will and testament dated 15th August, 1994. Nevertheless, a grant of probate of the written Will was issued on 18th April, 1997 in favour of four of the named executors with the exception of Fatuma Haji Mohamed.

[5] Later on, some of the deceased's children who believed that the executors were not administering the estate properly lodged an application on 9th June, 1998 which marked the beginning of a plethora of applications. They sought *inter alia:*

> ***a) Full and detailed account of the deceased's estate.***
>
> ***b) The executors be restrained from disposing or converting any of the assets of the estate for their own use.***
>
> ***c) In default of the above, the said applicants be at liberty to apply for revocation of the grant probate and/or;***
>
> ***d) The said executors be condemned to criminal action under Section 45(2) of the Law of Succession Act.***

The said prayers were against three of the executors in whose favour the grant of probate was issued. For some reason or another, the 1st appellant was left out. Etyang, J. who was seized of the said application allowed it on 7th October, 1999 as being unopposed.

[6] Afterwards, Fatuma Mohamed, who had been left out in the grant of probate made an application under ***Section 76*** of the ***Law of Succession Act (LSA)*** seeking the said grant to be revoked. Once again, Etyang, J. vide a ruling dated 12th July, 2000 allowed that application on the basis that it was unopposed. Towards that end, the learned Judge issued the following order:

> ***"For avoidance of doubt the grant of probate issued to Mohamed Haji Mohamed, Adam Haji Mohamed and Abdifaisal Haji Mohamed on 24th June, 1997 is hereby revoked and instead issued to Fatuma Mohamed and Asha Mohamed (the 2nd appellant)."***

Once more, the learned Judge issued the orders of revocation against the above named three executors and made no mention of the 1st appellant. These orders are what caused confusion with respect to the 1st appellant's status as an executor and holder of the grant of probate. We shall revert to this issue later in the judgment.

[7] That was not the end of applications, this time round, the respondents who happen to be the deceased's grandsons approached the High Court by an application dated 17th June, 2015 claiming that the 1st appellant was intermeddling with the deceased's estate and committing acts of wastage with the sanction of Fatuma and the 2nd appellant. Upon considering the rival arguments put forth by the parties, Thande, J. on 11th February, 2016 allowed the respondents application and issued the following orders:

> ***a) That Abdisatar Haji (the 1st appellant) be and is hereby restrained whether by himself, his agents , servants or representatives from in any manner intermeddling in the administration of the estate of the late Haji Mohamed Adam or in any manner interfering with the estate or properties comprised thereof.***
>
> ***b) That Abdisatar Haji is hereby ordered by himself, his agents, servants or representatives to deposit in court all title documents which he is holding in respect of property forming part of the estate of the late Haji Mohamed Adam.***
>
> ***c) That Fatuma Mohamed and Asha Mohamed do produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith from 12.7.00 up to the date of the account within 60 days of the date hereof.***

[8] The appellants were aggrieved with the said orders and lodged an appeal in this Court being **Civil Appeal No. 54 of 2016** which was dismissed with costs on 31st March, 2017. Meanwhile, the respondents had filed another application dated 21st September, 2016 praying for orders:

> ***a) That Abdisatar Haji, Fatuma Mohamed and Asha Mohamed be cited for contempt of court.***
>
> ***b) That Abdisatar Haji, Fatuma Mohamed and Asha Mohamed be punished for contempt of court by imprisonment for six months.***
>
> ***c) That Haji Plaza be placed under the management of a reputable estate management company and the said estate management company to collect and account for the rent and other income of the property.***
>
> ***d) That the grant of letters of administration to Fatuma Mohamed and Asha Mohamed be revoked and a new grant be issued to Omar Ahmed and Ali Ahmed Mohamed.***

[9] The application was predicated on grounds that despite the appellants being served with the orders in issue, they deliberately failed/ neglected to comply with the same. This is because the 1st appellant refused/neglected to deposit the title documents which were in his

custody in court and he continued to collect rent in respect of **Haji Plaza** which forms part of the deceased's estate. On the other hand, Fatuma and the 2nd appellant had failed to furnish the court with the inventory and statement of accounts regarding the estate as per the court order. The totality of their conduct was not only an affront to the rule of law and the administration of justice, but has also subjected the deceased's estate to wastage to the detriment of other beneficiaries of the deceased.

[10] In response, the appellants, through the grounds of opposition filed on their behalf, urged that the orders in question were never served personally upon them; and that they did not defy the orders but were simply incapable of complying with the same due to reasons beyond their control. In his affidavit, the 1st appellant deposed that he was unable to produce the titles as ordered by the court since they were not in his possession. Whilst denying intermeddling with the deceased's estate, the 1st appellant stated that the collection of rent over **Haji Plaza** was a matter of necessity and he was ready to account for the same. To him, failure to collect rent would amount to wasting the deceased's estate.

[11] Upon hearing the matter, Thande, J. in a ruling dated 29th September, 2017 allowed the respondents' contempt application as prayed. It is that decision that has provoked the appeal before us which is predicated on 22 grounds which are prolix and heavy on facts but can be aptly summarized: that the learned Judge erred in law and fact by-

a) Purporting to issue a direct grant to the respondents despite the fact that there were other beneficiaries entitled to be appointed as administrators of the deceased's estate in priority to the said respondents.

b) Issuing the grant to the respondents without ascertaining that the respondents had obtained the requisite consent from the beneficiaries of the deceased's estate.

c) Finding that the appellants had been served and were aware of the orders dated 11th February, 2016.

d) Finding that the appellants were in contempt of the orders dated 11th February, 2016.

e) Failing to summon the process server for cross examination on the issue of service despite the appellant intimating as much in his replying affidavit.

f) Improperly exercising her discretion and committing the appellants to civil jail without giving them an opportunity to mitigate.

g) Finding that the 1st appellant had been removed as an executor in light of the revocation of the initial grant probate.

[12] During the plenary hearing, Mr. Kurgat learned counsel for the appellants, cited the High Court case of;- ***Kothari vs. Qureshi & Another*** **[1967] E.A 564**, and went on to submit that the Judge misapprehended the fact that the 1st appellant was appointed as an executor under the deceased's Will. As such, he derived his authority to act as an executor from the date of the deceased's death and not from the grant of probate. In other words, according to counsel, the 1st appellant's title as an executor springs from the Will and not from the grant of probate; the grant of probate is merely the authentication of the Will. As far as counsel was concerned, the 1st appellant continued being an executor notwithstanding that the grant of probate in favour of his siblings had been revoked because he had a responsibility to gather and protect the estate in the face of revocation. To date, the 1st appellant has never been removed as an executor of his late father's Will.

[13] Counsel for the appellants also challenged the learned Judge for finding that the 1st appellant had intermeddled with the estate, by stating that the deceased's Will remains unchallenged and the 1st appellant's status as an executor was not revoked. Besides, the 1st appellant was administering the estate in accordance with the deceased's Will. As a result, the 1st appellant's actions could not be termed as intermeddling with the estate. To bolster that line of argument reference was made to ***Section 80*** of the ***LSA***, ***Halsbury' Law of England 4th Edition paragraph 730*** and ***Williams on Wills 7th Edition page 225***.

[14] Mr. Kurgat went on to state that in the circumstances, the appellants should not have been cited for contempt since they were managing the deceased's estate according to the Will. It would have been reckless for the 1st appellant to abandon his duties as an executor of the Will. Moreover, there was no proof that the actions taken to preserve the deceased's estate by the appellants amounted to intermeddling or wastage of the deceased's estate. The learned Judge was also faulted for elevating the respondents to be administrators of the deceased's estate contrary to the deceased's Will and the ***LSA***. Mr. Kurgat argued that the deceased's wishes as evidenced in the Will had been supplanted by the learned Judge who appointed the respondents as administrators of the estate. Counsel further submitted that the appointment of administrators contrary to the Will, became the root cause of the confusion as well as the delay in distribution of the deceased's estate. It is on those grounds that we were urged to allow the appeal.

[15] This appeal was strenuously opposed by Ms. Omondi, learned counsel for the respondents. Counsel began by stating that albeit being the deceased's grandchildren, the respondents were also entitled to a share of the deceased's estate under the Will. Therefore, they were rightfully appointed as administrators since the deceased's estate could not be left without an administrator after the grant of probate in favour of the 2nd appellant and Fatuma Mohamed were revoked. In appointing the respondents, the learned Judge properly exercised her discretion under ***Section 66*** of the ***LSA***. If any of the beneficiaries of the estate was intent on objecting to their appointment he/she was free to lodge an application to that effect which application has not been lodged to date.

[16] Counsel maintained that the appellants were at all material times aware of the orders issued on 11th February, 2018 and were also served personally with the same. Elaborating further, she stated that the appellants' advocates were present in court when the said orders were issued and the appellants even filed an appeal against the said orders in this Court. Buttressing, that knowledge of a court order as opposed to personal service of the same is sufficient to sustain contempt proceedings, counsel referred us to this Court's decision in ***Shimmers Plaza***

Limited case. Emphasizing that the appellants disregarded the said order, Ms. Omondi argued that the 1st appellant continued to intermeddle with the estate by collecting rent from **Haji Plaza**; refused to deposit the title documents in issue while the 2nd appellant failed to produce a full and accurate inventory of the deceased's estate. Consequently, according to counsel, the learned Judge was correct in citing and punishing the appellants for contempt. Moreover, at no point in time did the appellants move the High court to the effect that they were unable to comply with the said orders. A period of one year had lapsed since the orders in question were issued and the appellants are yet to comply or purge themselves of contempt.

[17] As to whether the 1st appellant was still an executor of the deceased's Will, Ms. Omondi's position was that Etyang, J.'s ruling dated 12th July, 2000 was clear that the grant of probate issued to the 1st appellant and his three siblings had been revoked. Furthermore, this Court in **Civil Appeal No. 54 of 2016** had an occasion of considering this issue and rendered that the 1st appellant was no longer an executor of the estate. Consequently, his conduct with regard to the deceased's estate amounted to intermeddling. In conclusion, the respondents had established to the required standard that the appellants were in contempt of the orders dated 11th February, 2016. She added that the appellants' conduct had made both the court and the beneficiaries unable to ascertain the assets and liabilities of the deceased's estate thus hampering the distribution of the same.

[18] We have considered the record, submission by counsel and the law. The appropriateness of the orders dated 11th February, 2016 does not fall for our consideration. Rather, what is before us is the issue of whether the learned Judge properly exercised her discretion by citing and punishing the appellants for contempt. Accordingly, before we can interfere with the exercise of her discretion we have to be satisfied that the learned Judge misdirected herself in some matter and as a result arrived at a wrong decision; or that it was manifest from the case as a whole that the Judge was clearly wrong in the exercise of her discretion and as a result there had been injustice. See the predecessor of this Court's decision in ***Mbogo & Another vs. Shah*** **[1968] EA 93**.

[19] It is not in dispute that the orders dated 11th February, 2016 were issued by the High court as against the appellants. What is in contention is whether there was willful disobedience by the appellants of the same. The answer to that question, in our view, lies with the law of contempt that pertained at the time the application for contempt was filed on 21st September, 2016. That law was enshrined under ***Section 5*** of the ***Judicature Act*** prior to its repeal by the ***Contempt of Court Act, 2016*** which came into force on 13th January, 2017. The provisions of that section were succinctly interpreted by this Court in ***Justus Kariuki Mate & another v Martin Nyaga Wambora & another*** **[2014] eKLR** to mean that:

> ***"Based on the foregoing provision, the applicable law in contempt proceedings in Kenya is the law applicable in the High Court of Justice in England at the time the application for contempt was filed."***

[20] It follows therefore, that the applicable law on contempt in England at the time the application by the respondents was filed was ***PART 81*** of the ***Civil Procedure (Amendment No. 2) Rules, 2012 (the 2012 Rules)***. Those rules have received extensive consideration by this Court as well as the High Court. They set out four instances under which contempt of court arises. Of relevance to this appeal is the application for contempt for ***"breach of a judgment, order or undertaking to do or abstain from doing an act"***. It is instructive to note that it is the only instance where an outlined procedure for service of the order/judgment in question and the penal notice thereunder is stipulated. The issue of service is integral in contempt proceedings as it connotes the knowledge and/or notice of the order in issue by the person served. Willful disobedience of a court order cannot be imputed against a party who has no knowledge of the order in question. Perhaps that is why this Court in the ***Shimmers Plaza Limited case*** rendered itself as follows:

> "***It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty."***

[21] Under ***Rule 81.6*** of the ***2012 Rules*** *cited above* and as a general rule, service of an order or judgment and the penal notice thereof must be personal. However, there are instances when a court can dispense with the requirement of personal service. These exceptions are classified into two categories and delineated under ***Rule 81.8*** of ***the 2012 Rules***. The first category relates to a judgment or order requiring a person not to do an act wherein ***Rule 81.8(1)*** stipulates:

> ***"***
>
> ***1) In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—***
>
> ***a) by being present when the judgment or order was given or made; or***
>
> ***b) by being notified of its terms by telephone, email or otherwise***.
>
> The other is ***Rule 81.8(2)*** which provides:***"***
>
> ***2) In the case of any judgment or order the court may—***
>
> ***a) dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or***
>
> ***b) make an order in respect of service by an alternative method or at an alternative place."***

[22] In this case, the respondents' position was that the appellants were not only served with the orders in issue as evidenced by affidavits of service on record but they were also aware of the said orders. Starting with the 1st appellant, he denied being served with the orders and challenged the affidavit of service deposed by Timothy Mutinda Mui, a process server. He went further to seek in his affidavit in response to the contempt application the cross examination of the said process server which never happened.

[23] Be that as it may, the respondents also relied on the knowledge and/or notice of the said orders by the 1st appellant. As set out above, a court can dispense with personal service where it is established that the contemnor had knowledge of the order in issue. Nonetheless, such exception only applies with respect with **an order requiring a person not to do an act**. Could this exception apply with respect to the 1st appellant? We think so because the first limb of the orders dated 11th February, 2016 prohibited the 1st appellant from intermeddling or interfering with the deceased's estate.

[24] The next issue that arises is whether the 1st appellant had knowledge of the said orders. Our perusal of the record reveals that during the issuance of the said orders, the 1st appellant's counsel was present. As a result, we concur with this Court's finding in the ***Shimmers Plaza Limited case*** that knowledge of orders by a party's counsel suffices as knowledge and notice of the said orders by the said party. In particular, our position is fortified by the following sentiments of the Court:

> ***"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case."***

Additionally, knowledge and/or notice can also be inferred by the fact that the 1st appellant lodged an appeal against the said orders.

[25] Having established that the 1st appellant had notice of the orders in issue, did he willfully disobey the same? In our minds, we are not convinced that the conduct of the 1st appellant could be termed as willful disobedience. Why do we say so? Firstly, on the issue of collection of rent with respect to **Haji Plaza,** we simply cannot rule out that in doing so, the 1st appellant was under the honest belief that he was properly carrying out his duties as an executor of the deceased's Will. This is in light of the confusion caused by the orders issued by Etyang, J coupled with the fact that the then administrators (Fatuma and 2nd appellant) were out of the country. Besides, by the time the contempt application was filed on 21st September, 2016 **Civil Appeal No. 54 of 2016** had not yet been determined. Thus, the finding by this Court in the said appeal that the 1st appellant had ceased to be an executor on account of the revocation of the initial grant could not be a basis of inferring willful disobedience on his part because he still had a duty to render an account as an executor and indeed, he maintains that he was willing to render accounts for the rent he had so far collected.

[26] Secondly, with regard to production of the title documents which were alleged to be in his possession, the 1st appellant deposed that since his return from Canada in the year 2009, he did not have any of the title documents. In our view, this amounted to an explanation by the 1st appellant as to why he could not comply with that limb of the orders. At the very least, the learned Judge should have given the 1st appellant and the respondents an opportunity to address the court further on the whereabouts of the title. It is not clear to us whether it was established that the titles were in the 1st appellant's custody. As matters stood, the evidence before the Judge was not sufficient to establish willful disobedience by the 1st appellant to the required standard as succinctly discussed by this Court in ***Mutitika vs. Baharini Farm Limited*** **[1985] KLR 229**:

> ***"In 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..."***

[27] Moving on to the 2nd appellant and Fatuma, the orders issued against them did not prohibit them from doing an act but directed them to furnish the court with statement of accounts of the deceased's estate. Thus, the provisions of ***Rule 81:8 (1)*** to the extent that they had notice or knowledge of the orders could not suffice to establish their alleged contempt. It is not in dispute that personal service of the orders on them could only be dispensed with as per ***Rule 81.8 (2)*** which was not the case. For that reason, the alleged service of the said orders upon their respective advocates as per the affidavit deposed by **Ben Ochieng Osinja**, a process server, could not sustain contempt proceedings against them. The sum total of the aforesaid analysis is that we find there was no basis for the learned Judge to find the appellants guilty of contempt let alone commit them to civil jail.

[28] Similarly, we find that there was no reason for the learned Judge to revoke the letters of administration which were issued to Fatuma and 2nd appellant without the alleged contempt being established to the required standard. Even if there existed sufficient reasons to warrant revocation of the said letters of administration, the deceased had left a Will which was not challenged. We think the learned Judge did not exercise her discretion properly by turning an estate that was testate into an intestate through the issuance of fresh letters of administration to the respondents who had not applied to be appointed as administrators in line with the provisions of **LSA**. In particular, the provisions of ***Section 67*** of the ***LSA*** which reads:

> ***"76***
>
> ***1. No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.***
>
> ***2. A notice under subsection (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as***

the court directs." *[Emphasis added]*

Moreover, the respondents being the deceased's grandchildren were not even ranked in priority to be issued with the letters of administration in priority to the deceased's children. See ***Section 66*** of the ***LSA***.

[29] Based on the foregoing, we think we have said enough to demonstrate that the learned Judge did not exercise her discretion properly in issuing the orders dated 29th September, 2017. Consequently, we find that the appeal has merit and is hereby allowed to the extent that we set aside the ruling dated 29th September, 2017 and the orders issued thereunder in their entirety and substitute the same with an order dismissing the application for contempt dated 21st September, 2016. Being a family matter, we make no orders as to costs.

Dated and delivered at Mombasa this 8th day of November, 2018.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR