IN THE COURT OF APPEAL AT NAIROBI

(CORAM: WAKI, GATEMBU & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 80 OF 2013

BETWEEN

KENYA UNION OF POST PRIMARY TEACHERS......... 1ST APPELLANT

AKELO MISORI.. 2ND APPELLANT

OMBOKO MILEMBA... 3RD APPELLANT

WICK MWETHI NJENGA... 4TH APPELLANT

AND

NJERU KANYAMBA... RESPONDENT

(Appeal from the judgment and award of the Employment & Labour Relations Court at Nairobi (Nzioki wa Makau, J.) dated 11th October 2012

in

ICC. No. 1918 of 2011)

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JUDGMENT OF THE COURT

This appeal arises from the judgment of the ***Employment & Labour Relations Court (Nzioki wa Makau, J.)*** that awarded the respondent, ***Njeru Kanyamba***, as against the appellants, ***Kshs 2,338,789.00*** being his salary, allowances and expenses for a period of16 months. In making the award, the learned judge declined to hear the appellants, whom he found to have been in blatant contempt of court. In the appeal before us, the appellants contend that the learned judge erred by denying them audience in violation of the constitution and the rules of natural justice and at a time when they had not been convicted of contempt of court. The respondent opposes the appeal, accusing the appellants of deliberate non-disclosure of material facts, namely that after the judgment, they unsuccessfully applied for stay of execution in this Court, after which they went back to the learned judge and unsuccessfully applied to set aside the judgment. Thereafter they happily settled the decree and did not file any notice of appeal against the ruling refusing to set aside the judgment.

While the issues raised by the respondent are not *per se*a bar to the hearing and determination of this appeal, we take a very dim view of, and deprecate the conduct of ***Mr. Jaoko Alexander***, learned counsel for the appellants, who, when confronted with the record of appeal prepared and filed by himself and showing him arguing before the learned judge the application to set aside the judgment, opted to deliberately mislead this Court. Counsel claimed that the application was never heard, and boldly suggested that the learned judge had manufactured the proceedings and the ruling, which he feigned ignorance of and repeatedly and evasively described as "strange". We shall say more on this later in this judgment.

By way of background, the ***1st appellant, the Kenya Union of Post Primary Teachers (KUPPET)***, is a trade union duly registered under the ***Labour Relations Act, 2007***. At the time the respondent filed the claim leading to this appeal, ***the 2nd appellant, Akelo Misori*** was KUPPET's secretary general, ***the 3rd respondent, Omboko Milemba,*** its national chairman and the ***4th appellant, Wick Mwethi Njenga,*** its national treasurer.

On 29th July 2006 the respondent was elected as KUPPET's Secretary General. In his claim filed in the Employment & Labour Relations Court on 15th November 2011, the respondent averred that on 28th December 2006 the appellants colluded and entered into a fraudulent consent order in ***HCCC No. 1255 of 2002***, which had been filed four years prior to his election and had nothing to do with his election. The effect of the impugned consent order was to unlawfully replace the respondent as KUPPET's secretary general. By a ruling dated 25th

April 2008, ***Nambuye, J.*** (as she then was), struck out the suit and found the consent order pursuant to which the respondent was removed from office to be invalid. Subsequently the respondent lodged his claim seeking payment of ***Kshs 2,338,789*** as his salary, allowances, and expenses for the 16 months that he had been unlawfully removed from office.

In their memorandum of response filed on 22nd December 2011, the appellants denied the respondent's claim and averments, contending that he was not entitled to any payment for the period that he was removed from office because he did not preform any duties or render any services to KUPPET. They added that at the material time ***Wanyonyi Buteyo*** was the occupant of the office of secretary general and therefore it was not possible to pay both the respondent and Buteyo.

The respondent's claim was scheduled for hearing on 5th October 2012 when the learned judge denied the appellants' audience on the grounds that KUPPET and the ***Kenya National Union of Teachers (KNUT)*** had vowed to defy and indeed defied orders issued by ***Ongaya*** and ***Onyango, JJ.*** in a different cause, ***No. 1539 of 2012,*** which prohibited the two unions from calling a nationwide teachers strike. He held that he could not hear KUPPET until it had purged its contempt in that other cause. In the event, he heard only the respondent and entered judgment in his favour on 11th October 2012.

The appellants were aggrieved and filed a notice of appeal on 12th October 2012. In the meantime, they applied in this Court for stay of execution of the award and by a ruling dated 14th December 2012 the Court found no merit in the application and dismissed it. In paragraph 12 of the ruling, the Court observed:

> ***"The applicant having purged its contempt, may be it should go back to the trial court and set aside the ex-parte judgment so that the matter can be heard inter-partes and determined on merit."***

Taking cue from the Court, on 18th December 2012 the appellants applied before the trial court to set aside the judgment of 11th October 2012 and for an opportunity to be heard on the respondent's claim. The application was based on among other grounds, that the appellants had purged their contempt; that their defence raised substantial issues; and that they stood to suffer irreparable loss and damage if the judgment was not set aside to afford them an opportunity to be heard. As we have stated, that application, which the appellants feign ignorance of, did not succeed, after which they opted to pursue this appeal.

Prosecuting the appeal, Mr. Jaoko, the appellants' learned counsel, submitted that the learned judge erred by denying the appellants the right to be heard which isguaranteed by ***Article 50*** of ***the Constitution.*** In his perception, that right is an absolute guarantee under the Constitution. He added that by refusing to hear the appellants, the learned judge had denied them the right to natural justice, namely the right not to be condemned without a hearing.

It was counsel's further submission that disobedience of a court order is not a bar to the right to be heard and that access to a court cannot be denied because it is the last resort of the oppressed and the bewildered. He cited the deciions of this Court in ***National Hospital Insurance Fund Board of Management v Boya Rural Nursing Home Ltd [2007] eKLR*** and ***Rose Detho v. Ratilal Automobiles Ltd & 6 Others [2007] eKLR*** for the view that disobedience of a court order does not bar the party in disobedience from being heard, and the judgment of the House of Lords in ***X Ltd & Another v. Morgan Grampian (Publishers) Ltd & Others [1990] 2 All ER 3*** in support of the contention that the power torefuse to hear an alleged contemnor is exceptional and must be exercised cautiously.

Next the appellants contended that the learned judge had no basis for holding that they were in contempt of court in the absence of a conviction for contempt or even an application to cite them for contempt. As regards the apology, which they later tendered, they maintained that they did so purely as good citizens and for that reason they ought to have been heard thereafter. In the appellants' view, all the foregoing demonstrated lack of impartiality on the part of the learned judge and his bias in favour of the respondent. They accordingly urged us to allow the appeal to give them an opportunity to be heard.

The respondent, who appeared in person, opposed the appeal through his written submissions, the bulk of which were unnecessarily detailed recital of the background we have set out above. Similarly the respondent went into great and extraneous detail to demonstrate the merits of his claim as well as the weakness of the appellant's response thereto, without addressing the core issue in the appeal, namely the propriety of the refusal by the learned judge to hear the appellants on account of their alleged contempt of court.

As far as is relevant to the appeal, the respondent submitted that the appellants ultimately settled the decree pursuant to a consent executed by himself and the appellants' advocate, a fact which they had failed to disclose. He contended that the right to a fair hearing under Article 50 of the Constitution is not absolute and that the court has the right to refuse to hear, for his benefit, a party who has disobeyed a court order. In the respondent's view, in the circumstances of this appeal where the appellants had publicly declared that they would not obey orders of the court, the learned judge was justified in refusing to hear them because they were a threat to the rule of law.

It was the respondent's further contention that the appellants cannot deny to have been in contempt of court because they admitted having purged their contempt by tendering an apology to the court, a fact which is confirmed in the ruling on record by ***Nduma, J***. The respondent concluded by submitting that the appellants were endeavoring to mislead the court by failing to disclose that the learned judge had indeed granted them a hearing on their application to set aside the judgment, but found the same to have no merit.

We have carefully considered this appeal. In our estimation it raises only one question, namely whether the learned judge erred by refusing to hear the appellants on the basis that they were in contempt of court. We readily agree with the appellants that there is no hard and first rule that a party alleged to be in contempt of court cannot be granted a hearing. In ***AB & Another v. RB [2016] eKLR***, the applicants were found guilty of contempt of court by the High Court and the respondents contended that they had no right to be heard by this Court on an application for stay of execution before they purged their contempt. This Court expressed itself as follows, which we quote in extenso:

The straight forward issue before us is whether we should hear the applicants in their application for stay of execution of the order of the High Court committing them to jail for contempt of court before they have purged their contempt. We affirm that under our constitutional framework, there is no general rule that acourt cannot hear a person in contempt of court before they have purged their contempt. The importanceof the right to fair hearing which is expressly underpinned by Article 50(1) of the Constitution, and in particular the right to access the court for purposes of ventilating a grievance cannot be gainsaid. A general rule curtailing those rights in all and sundry cases of contempt of court would not easily pass constitutional muster. Way back in 1952, Lord Denning, LJ. Articulated the balancing act that is required when a court is confronted with two contending principles of great legal and constitutional moment pitting, on the one hand the need to uphold the constitutional right to fair hearing, and on the other the need to protect and uphold the rule of law without which civilized society is in peril. In Hadkinson v. Hadkinson, [1952] 2 All ER 567; the eminent Law Lord stated:

"I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is notof itself a bar to his being heard, but if his disobedience is such that, so long as it continues, itimpedes the course of justice in the cause by making it more difficult for the court to ascertainthe truth or to enforce the orders which it may make, then the court may in its discretion refuseto hear him until the impediment is removed or good reason is shown why it should not beremoved".

In this jurisdiction, this Court has emphasized the sacrosanct nature of the right to be heard in thecontext of contempt of court applications. Speaking for the majority, Githinji, JA expressed himself asfollows in Rose Detho v. Ratilal Automobiles Ltd & 6 Others, CA No. 304 of 2006 (171/2006 UR):

"Thus, there is no absolute legal bar to hear a contemnor who has not purged the contempt...andwhether the court will hear the contemnor is a matter for the discretion of the court depending onthe circumstances of each case."

The reason why, depending on the circumstances of each case, the court must retain the discretion, albeit to be exercised sparingly, to decline to hear a contemnor is because our entire constitutional edifice is predicated on respect for the rule of law. The moment a party hacks at that foundation, the entire system is threatened."

In that case the Court refused to hear the applicants after it found their contempt to be blatant and deliberately calculated to impede the cause of justice, because, in addition to refusing to restore the respondent to a matrimonial home, they had gone further and demolished part of it to thwart the court order. See also ***Fred Matiang'i v. Miguna Miguna & 4 Others [2018] eKLR***. We agree fully with the law as stated in those decisions.

In this appeal, the appellants had not been cited, let alone convicted of any contempt of court. The matter in respect of which they were alleged to be in contempt was in a different cause, which was not before the learned judge. The learned judge did not even afford the appellants the opportunity to show cause why they should be heard; he excluded them *suo motu*. In addition the learned judge totally failed to address himself to the law on the appellants' right to be heard before he denied them a hearing.

Much as we are sympathetic to the appellants and would have readily allowed this appeal, they have conducted themselves in such an unworthy and deceptive manner that we would not be aiding the cause of justice by entertaining their plea when they are prepared to deliberately mislead the Court to their benefit. To make it appear that the learned judge denied them the right to be heard, even in the application to set aside the judgment of 11th October 2012, the appellants claimed that

their application was never heard. Their counsel positively claimed that the learned judge literally threw the file back at them. The court record of course shows otherwise. The proceedings on 24th January 2013 contain

8 pages of submissions by the appellant's counsel, Mr. Jaoko and the respondent as they argued the application dated 18th December 2012 to vacate the judgment. Mr. Jaoko's submissions and response took a whole 5 of those pages and the ruling was reserved for 18th February

2013. When we drew counsel's attention to the record, he still maintained that the application was never heard and that both the proceedings and the ruling were "strange" to him, suggesting that the learned judge somehow manufactured the record well knowing that no proceedings took place as regards the application. This forced us to call for the original handwritten record, which confirmed that the proceedings, which took place on 24th January 2013, were exactly as in the typed record.

Section 3 of the ***Appellate Jurisdiction Act*** confers on this Court power to ensure that the process of the court is not abused or undermined by any of the parties. ***Section 3A*** and ***3B*** of the same Act further obliges parties and their advocates to assist the Court to attain just determination of appeals before the Court. A party who deliberately misleads the Court cannot by any stretch of imagination be said to be assisting the Court in the attainment of just determination of disputes. On the contrary such a party is an impediment to the principles and values that this Court stands for.

In the result, due to the appellants' blatant misconduct, this appeal is dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 7th day of December, 2018

P. N. WAKI

.... JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.... JUDGE OF APPEAL K. M'INOTI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR