IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, G. B. M. KARIUKI & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 55 OF 2013

BETWEEN

AHMED NOORANI ……..…. APPELLANT

AND

JOYCE AKINYI OCHIENG …… RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Kimondo, J.) dated 13th November, 2012 ***in ELC No. 319 of 2008)***

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JUDGMENT OF THE COURT

1. The respondent is the registered owner of parcel described as L.R No. 3734/223. She developed the parcel by erecting villas for sale. According to the appellant, on 28th September, 2007 the respondent offered to sell to him one of the villas being villa unit no. 5 (herein after referred to as the suit premises). The salient terms of the offer were that the purchase price was Kshs.17,000,000/=; the appellant was to pay 20% of the purchase price which translated to Kshs.3,400,000/= upon acceptance of the offer; the balance was to be paid within 90 days of completion. The respondent was also required to install all fixtures and fittings on the suit premises within 90 days of acceptance.

2. The appellant accepted the offer on 1st October, 2007 and paid a sum of Kshs.4,400,000/= to the respondent through her advocate, Messrs. Onesmus Githinji &Company Advocates. In total breach of the terms of the agreement, the respondent failed to complete the transaction within the requisite time frame and to execute the sale agreement. The appellant also discovered that the respondent intended to sell the entire parcel which to him, was aimed at defeating his rights to the suit premises. Consequently, he filed suit seeking *inter alia*-

a. An order of specific performance of the sale agreement.

b. A permanent injunction prohibiting the respondent by herself, her servants, agents, assignees or any other person claiming under her from selling, disposing off and or transferring ownership of villa known as villa unit no. 5.

c. In the alternative, special damages of Kshs.4,400,000/= being the deposit paid towards the purchase of the villa.

d. General and exemplary damages for breach of contract in lieu of or in addition to specific performance.

3. In addition, the appellant vide an application dated 30th November, 2009 sought an order directing the respondent to deposit Kshs.4,400,000/= in an interest earning account. In the alternative, he sought orders for the respondent to be directed to accept the balance of the purchase price and complete the transaction. Save for admitting that the said deposit was received, the respondent opposed the said application. Upon considering the respective positions taken by the parties, the learned Judge (Mbogholi, J.) in a ruling dated 28th July, 2010 allowed the application in the following terms:-

a. The respondent be and is hereby ordered to deposit the amount totaling to Kshs.4,400,000/= in an interest earning account to be heldby Messrs Okongo Omongeni & Co. Advocates as stakeholders within 30 days of the ruling.

b. The interest accruing from the said account … form and or constitute part of the balance of the purchase premise of the suit premises.

4. However, the respondent failed to comply with the aforementioned orders. This provoked the appellant to file an application dated 9th October, 2010 praying for her committal to civil jail for contempt. In response, she deposed that she had neither been served with the orders in question nor with a penal notice. Furthermore, that she was not able to comply with the orders because of the orders issued in H.C.C.C. No. 350 of 2008 which was instituted against her by her estranged husband. By virtue of the said orders she was directed to deposit all sale proceeds in a joint account held by the parties' advocates and prohibited from disposing off any property subject of the said proceedings. The learned Judge (Koome, J. as she then was) in a ruling dated 17th February, 2012 dismissed the said application on the ground that the order and penal notice had not been personally served upon the respondent.

5. Unrelenting, the appellant served the order in question upon the respondent on 7th March, 2012. He filed another application dated 27th April, 2012 seeking yet again the committal of the respondent to civil jail for contempt. This time around, the respondent disowned any pleading filed on her behalf claiming that she had not instructed any advocate to act for her in the matter. She contended that she was never served with summons to enter appearance and only learnt about the matter when she was served with a hearing notice on 6th July, 2012. She also deposed that she had never entered into any agreement with the appellant let alone received the deposit claimed.

6. Seized with the above application, Kimondo, J. in a ruling dated 13th November, 2012 dismissed the same. The learned Judge found that not only was the respondent served with the orders in question but that she also failed to comply with the same. However, he was hesitant to order her committal for several reasons, including the fact that the respondent had denied entering into any agreement with the respect to the suit premises or instructing any advocate to act for her. There was no evidence that the amount allegedly deposited was being held by the respondent. The respondent had raised an issue that she had not been served with summons to enter appearance. More importantly, that the conduct of the respondent was not indicative of any deliberate intention to disobey the court order or pervert the course of justice. He also found that the application was *res judicata*.

7. It is that decision that has instigated the present appeal which is predicated on the grounds that the learned Judge erred in law and fact by-

a. Failing to exercise his legal mandate of enforcing compliance of a lawful order hence, emboldened the respondent in further defiance of the said order.

b. Purporting to question the validity and/or legality of the order dated 28th July, 2010.

c. Taking into account extraneous issues with a view of discharging the respondent of her obligation to comply with the court order.

d. Finding that the application dated 27th April, 2012 was res judicata.

e. Finding that the committal of the respondent to civil jail was harsh.

8. At the hearing of appeal, Mr. M. Kigotho appeared for the appellant while there was no appearance for the respondent despite service of the hearing notice. Be that as it may, Mr. Kigotho relied on written submissions filed on behalf of the appellant and also made oral highlights.

9. He submitted that the earlier application for committal was not heard on merit; that it was dismissed only on account of it not having been served personally upon the respondent; and that, therefore, the doctrine of *res judicata* was not applicable.

10. Mr. Kigotho contended that the learned Judge erred by declining to enforce the court order despite the fact that it had not been set aside or varied. He argued that the dignity and the authority of a court was at stake if the Court's orders were not obeyed. In his view, the learned Judge considered extraneous matters, thus arriving at a wrong conclusion, and urged us to allow the appeal.

11. As we said before, the respondent's counsel was not present, and did not file any written submissions.

12. We have considered the appeal, the written submissions and the law. Our role as the first appellate court is to re-evaluate the evidence tendered before the trial court and reach our own conclusion. In our considered view, the appeal turns on two issues namely,

1. Whether the application dated 27th April, 2012 was res judicata.

2. Whether the learned Judge erred in declining to allow the application for committal.

13. The doctrine of *res judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. See ***Mulla, the Code of Civil Procedure, 16th Ed. Vol. 1 – pg 161***. The doctrine is embodied under ***Section 7*** of the ***Civil Procedure Act***, which provides that:-

> ***"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."***

14. Accordingly, the said provision raises four pre-requisites to be met for a matter to be deemed *res judicata.* These were defined in the case of ***Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others [1996] eKLR*** to mean that there has to be:

i. A previous suit in which the same matter was in issue.

ii. The parties are the same or litigating under the same title.

iii. A competent court heard the matter in issue and determined the same.

iv. The issue has been raised once again in a fresh suit.

15. In this case, the first application for committal dated 9th October, 2010 was dismissed for the reason that the order in question had not been served on the respondent. In dismissing the said application, the learned Judge did not delve into the merits and did not make conclusive findings thereon. Therefore, the second application dated 27th April, 2012 was not *res judicata.* We are guided by the sentiments of this Court in ***Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others***

> ***"To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy." Emphasis added.***

16. It cannot be gainsaid that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of law, good order and the due administration of justice. As stated by Romer, L.J. in ***Hadkinson vs Hadkinson, (1952) ALL ER 567,***

> ***"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. Lord Cottenham, L.C., said in Chuck -vs- Cremer (1) (1 Coop. temp.Cott 342):***
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> ***"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. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed."***

17. It is for the above reasons that a court is granted power to impose penalties for disobedience of court orders through contempt proceedings. In this case all the learned Judge was called upon to do was to determine whether there was a valid court order in existence; whether it was served on the respondent; and whether she had failed to comply with the same.

18. The allegations by the respondent that she had not been served with the summons to enter appearance and that she had not instructed any advocate to represent her are suspect. It seems they were raised at the eleventh hour when she was faced with contempt proceedings. Even so, those were issues which could only be considered at the trial and not during the contempt proceedings. We find that the learned Judge erred in entertaining extraneous issues, and as a result arrived at a wholly erroneous decision.

19. The learned Judge found that the Order dated 28th July, 2010 was served upon the respondent and that she had failed to comply with the same. We agree with that finding. In as far the learned Judge declined to issue committal orders on the ground that it would be punitive in the circumstances, amounted to the learned Judge abdicating his responsibility of enforcing a lawful order and sanctioning the outright disobedience of the order by the respondent.

20. We reiterate 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".***

21. This Court in ***Shimmers Plaza Limited vs National Bank of Kenya Limited [2015] eKLR*** aptly observed: -

> ***"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. We think we have said enough to send this important message across."***

Consequently, the learned Judge ought to have granted the committal sought.

22. The upshot of the foregoing is that we find that the appeal has merit and is hereby allowed with costs. We hereby set aside the ruling dated 13th November, 2012 and substitute it with an order allowing the application dated 27th April, 2012. **We order that the respondent herein be committed to civil jail for a period of 30 days unless she otherwise purges her contempt.**

Dated and delivered at Nairobi this 31st day of March, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR