



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, G.B.M. KARIUKI & KANTAI, J.J.A.)

CIVIL APPEAL NO. 199 OF 2016

BETWEEN

DUNSTAN MUTUKU WAMBUAAPPELLANT

AND

GLORY RENT A CAR LIMITED RESPONDENT

(Appeal from the Ruling/Order of the High Court of Kenya at Nairobi (Sergon, J.) dated 13th May, 2016 in HCCC No. 572 of 2012)

JUDGMENT OF THE COURT

A suit was filed at the Chief Magistrate's Court at Nairobi, by one **Zephania Mburuki Amuri** represented by **Messrs B. Mbai and Associates Advocates** against one **Davis Kairithia Mworira** and **Glory Rent A Car Limited**. Judgment was entered in default of appearance. **Messrs Kelvin Mogeni Advocates** for Glory Rent A Car Limited filed an application to stay and set aside the said judgment but that application was not successful. Various other applications followed but they are not relevant to this appeal.

The respondents Glory Rent A Car Limited filed an appeal to the High Court being **Civil Appeal No. 972 of 2012**. The appeal was challenging the order where the default judgment was not set aside. From the record, the appellant **Dunstan Mutuku Wambua** was at all material times an associate advocate in the law firm of B. Mbai and Associates Advocates.

In the course of the proceedings in the High Court a motion was filed where it was prayed that 3 persons – Wilson M. Kariuki t/a Wiskam Auctioneers and Advocates Dustan Mutuku Wambua (the appellant) and B. Mbai be committed to prison for contempt of court, it being alleged that they had disobeyed some court orders which were made on the 5th November, 2012 and so all the three should be committed to jail for six months or their properties sequestered.

In support of the motion it was alleged that on 7th November, 2012 the High Court recorded an order where a stay of execution of the judgment of the subordinate court was granted until 12th November, 2012. It was further stated that on the 12th of November, 2012 the matter was listed before a court that was not sitting but that the file was taken to another judge who extended orders *suo moto*. Further, that the auctioneer advertised a motor vehicle for sale during existence of the said order although there was an order that the vehicle be released to its owner.

The record shows that on 5th of November, 2012 the matter was placed before a judge who made certain orders and then ordered the matter be mentioned on the 12th November, 2012. On that date, that is 12th November, 2012, the file was placed before the Duty Judge who recorded that the matter was to be heard by Justice Ang'awa who was not sitting on that day. The judge extended the orders issued earlier in the absence of advocates or their parties.

A motor vehicle attached was sold and the respondent then moved the High Court to cite the three persons named for contempt of court. Seron, J. heard the application and in a ruling delivered on 13th May, 2016 found that the auctioneer who sold the motor vehicle had no knowledge of the court order. The learned judge also found that Mr. B. Mbai who was the principal partner in B. Mbai and Associates Advocates was also not aware of the order and was thus not guilty of contempt of court. The learned judge however found the appellant guilty of contempt of court and ordered that the appellant offers mitigation pending sentence. It is those orders that provoked this appeal which is premised on a memorandum of appeal containing seven grounds. It is urged in the said memorandum of appeal in essence that the learned judge erred in law and in fact for convicting the appellant for contempt without considering the law and principles applicable in contempt proceedings. It is also stated that the learned judge erred in law and fact in failing to find that the appellant had neither been served with nor notified of the existence of the order he was accused of disobeying.

In submissions before us when the appeal came up for hearing on 21st of March, 2017, **Mrs. W. Wambugu** learned counsel for the appellant submitted that orders were made by a judge *suo moto* in the absence of the parties or their advocates and that it was wrong for the learned judge to convict the appellant for contempt of court when it had not been shown that the appellant was aware of the orders. According to learned counsel an application for stay was withdrawn and the order for contempt could not be made when it had been made on the basis of that application for stay.

Mrs. P.K. Makori, learned counsel for the respondent opposed the appeal but admitted that orders had been extended by the court in absence of the parties or their advocates. Learned counsel did not show us any material to support her submission that the appellant was aware of the order where the court extended earlier orders.

The law on contempt of court is now governed by **The Contempt of Court Act No. 46 of 2016** which came into force on 13th January, 2017. That Act has in effect repealed **Section 5** of the **Judicature Act**.

The law in Kenya on contempt of court was at the time when the appellant was convicted found in **Section 5** of the **Judicature Act** and was the subject of a detailed discussion in a recent judgment of this Court in the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**. The Court traced the history of contempt of court proceedings in Kenya which was borrowed from England and discussed the Contempt of Court Act of 1981 (England) in detail.

Section 5 of the repealed **Judicature Act** provided that:

“5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts.

2. An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

It was recognized in the said **Shimmers Plaza (supra)** case that the applicable law in contempt proceedings in Kenya was the law applicable in the High Court of Justice in England at the time the application for contempt was filed. Four different forms of violations were identified in that case that would lead to a person being found in contempt of court. These are:

a. committal for “breach of a judgment, order or undertaking to do or abstain from doing an

act”

b. committal for “interference with the due administration of justice” (applicable only in criminal proceedings)

c. committal for contempt “in the face of the court”

d. committal for “making false statement of truth or disclosure statement”

The court considered these violations in light of **Rule 81** of the **English Act** and found that only in “contempt for breach of a judgment, order or undertaking to do or abstain from doing an act” was there an outlined procedure of service of the order and a penal notice under the said rule of the English Act.

In the Kenya case of **Justus Kariuki Mate & Another v Hon. Martin Wambora Civil Appeal No. 24 of 2014 (ur)** it was held that for a person to be held to be guilty of contempt of an order of the court it had to be proved that he had knowledge of the order. It was further held that for a person to be found to be in contempt of an order of the court the court had to be satisfied beyond a shadow of doubt that the person alleged to be in contempt had full knowledge or notice of the existence of the order of the court forbidding it and that the threshold was very high as it involved the possible deprivation of a person’s liberty.

The appellant before us is complaining that the learned judge convicted him of the offence of contempt of court without considering the principles we have enumerated here which a court must follow to found such a conviction under the said Judicature Act. In the course of the ruling appealed from the learned judge had this to say of the appellant:

“...There is no dispute that the respondents were aware of the existence of the order for stay of execution of the decree. The same was clear in its terms (sic) the execution had been stayed. What the respondents have done particularly Mr. Dunstan Mutuku Wambua is to take upon himself to interpret that there was no extension of the interim order, since the extended order of stay had not been extracted and served upon him. In my humble view that was a very dangerous presumption. A diligent counsel would first cross-check with the court file to confirm whether or not the orders were extended.”

The agreed position before the learned judge was that orders had been granted staying execution of a judgment of the subordinate court and that those orders were for a limited period. When the matter was to be heard next and a decision be made whether to extend those orders the matter was not listed. The file was instead taken to a Duty Judge who extended orders in the absence of either party. The applicant in that matter did not extract that order at all and there was no evidence of any sort to show that the appellant was notified in any way that interim orders granted earlier had been extended. An application was instead filed to cite the appellant and others for contempt of court. The learned judge, with due respect, ignored all known principles that a court must apply to find a party guilty for contempt of court. There was no evidence at all that the appellant knew of extension of interim orders which was done by court in the absence of the parties. We agree with the learned counsel for the appellant that in doing so the learned judge erred. The conviction of the appellant for contempt of court for allegedly disobeying a court order whose existence he did not know about was wrong. The appeal is merited and we allow it. The conviction of the appellant for contempt of court is quashed. The appellant will also have the costs of this appeal.

Dated and Delivered at Nairobi this 7th day of April, 2017.

W. KARANJA

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR