REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & OKWENGU, JJA)

CIVIL APPEAL NO. 199 OF 2014

BETWEEN

JACK & JILL SUPERMARKET LIMITED .....APPELLANT

VERSUS

REPUBLIC..... 1ST RESPONDENT

THE PRINCIPAL MAGISTRATE'S COURT, CITY COURT NAIROBI

(HON. L. NYAMBURA)……..…….....…….2ND RESPONDENT

CITY COUNCIL OF NAIROBI…….……...….…….3RD RESPONDENT

VIKTAR MAINA NGUNJIRI……..…….…...……4TH RESPONDENT

(*Appeal from the Ruling/Order of the High Court of Kenya at*

Nairobi (Korir, J) Dated 21st February, 2014

in

JR. Misc. Application No. 185 of 2009)

****

JUDGMENT OF THE COURT

Jack & Jill Supermarket Limited (The appellant) who were tenants of the 4th respondent on LR 209/869 (The suit premises), filed High Court Misc. Application No. 185 of 2009, seeking leave of court to apply for orders of certiorari and prohibition to remove into the Court and quash the enforcement notices Nos.5445 and 5446, and to prohibit the respondents from enforcing the said notices.

Nyamu, J (as he was then) granted the leave sought on the 27th day of March, 2009 and directed that the leave granted was also to operate as a stay. The stay order was disobeyed by the 4th respondent,

prompting the appellants to cite him for contempt of the said Court orders. On the 6th day of February, 2011, **D. Musinga, J** (as he was then) after a merit hearing of the contempt proceeding found the 4th respondent guilty of contempt of the said Court orders, fined him Kshs. 200,000/= in default four (4) months imprisonment, which fine the 4th respondent duly paid.

On 6th August, 2012 the 4th respondent in the company of hired goons demolished the suit premises and later evicted the appellant therefrom on the 23rd May, 2013. These aforementioned activities prompted the filing of the 1st and 2nd applications seeking to cite the 4th respondent for contempt of the stay orders made on the 27th day of March, 2009. Both applications were variously resisted by the 4th respondent in replying affidavits and preliminary objections.

The joint merit disposal of the said applications is what resulted in the impugned ruling of **W.K. Korir, J** dated the 26th day of February, 2014, resulting in the appeal under review. The appellant has raised four grounds of appeal namely, that the learned Judge erred in law and fact:-

> ***(1) by finding that the 3rd respondent had not been served with the application for contempt contrary to the weight of evidence on the record.***
>
> ***(2) by assigning undue weight on procedural requirement without identifying apparent prejudice occasioned to the 3rd respondent for alleged failure by the appellant to comply with procedural requirements.***
>
> ***(3) the learned judges finding on the importance of rules of procedure in contempt proceedings clearly negates the effects of Article 159 (2) (d) of the Constitution of Kenya, 2010.***
>
> ***(4) the learned judge erred in law in assigning to the appellant obligation not required by law and shifting to the appellant the burden of proof on assertions made by the 3rd respondent.***

Learned counsel **Mr. David Michuki** submitted on behalf of the appellant that only two issues arise for the Courts' determination, namely:

> ***(a) Whether the appellant followed the correct procedure in bringing the two applications and whether the applications were competent;***
>
> ***(b) Whether the procedural lapses if any, could be ameliorated by reliance on Article 159 (2) (d) of the Kenya Constitution, 2010.***

In response to issue number (a) learned counsel **Mr. Michuki** submitted that the jurisdiction to punish for contempt of court orders vested both in the High Court and the Court of Appeal is enshrined in **section 5(1)** of the Judicature Act Cap 8 Laws of Kenya; that this provision enjoins the two courts to ascertain and apply the law on contempt of Court orders then prevailing in England at any one particular time when intending to or punishing for contempt of Court orders; that the law on contempt of Court orders then prevailing in England as at the time the impugned ruling was delivered was as was observed by Odunga, J in the **Republic versus Kenya School of Law & 2 Others exparte Wanjiru Njoroge [2015] eKLR**

(supra) namely, the Civil Procedure (Amendment No.2) Rules 2012 of England effective 1st October, 2012, introducing part 81 thereof whose Rule 81.4 thereof did away with the requirement for leave or permission before presentation of an application for contempt of Court orders. In terms of the above provision, the second violation which formed the basis for the 2nd application did not require leave and therefore met the procedural threshold and should not have been faulted by the learned Judge .

Turning to the second issue, **Mr. Michuki** submitted that, the learned Judge ought to have invoked the principle enshrined in Article 159 (2) (d) of the Kenya Constitution, 2010, to breathe life into the 1st application and then give it a merit disposal, as the 4th respondent suffered no prejudice caused by the

alleged procedural lapses as his substantive rights, were not violated. Nor was he subjected to an unfair trial as he fully exercised his right to be heard first by filing both the preliminary objection and a replying affidavit; and, second, by making representations thereon in opposition to the 1st application.

To buttress the above submissions, **Mr. Michuki** cited the Supreme Court case of **Dhanjal Investments Limited versus Kenindia Assurance Company Limited [2016] eKLR** in which it quoted with approval the case of **Telcom Kenya Limited versus John Ochanda & 996 Others [2015] eKLR** for the holding *inter alia* that:-

> ***"It is the courts position in principle that prescriptions of procedure and forms should not trump the primary object of dispensing substantive justice***."

He also cited **James Kanyita Nderitu & Another versus Marios Philotas Ghikas & Another [2016] eKLR** in which the Court quoted with approval the case of **Nicholas Salat versus IEBC & 6 Others (CA) Application No. 228 of 2013** for the holding *inter alia* that:-

> ***" It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effects. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times, create hardship and unfairness."***

Mr. K. Onyiso for the 1st and 2nd respondents and **M/s Omesa** for the 3rd respondent left the matter to court.

In response to the appellant's submissions, **Mr. Odera** learned counsel for the 4th respondent submitted that jurisdiction exists in this Court to intervene and interfere with the learned Judge's exercise of Judicial discretion in reaching the impugned orders, save that such interference, has to be exercised in compliance with clear principles as enunciated in the case of **Mbogo versus Shah [1968] EA93.** In line with the above principle, the issues that fall for interrogation by this Court in its determination of the appeal are basically two, namely:

> ***(A) Whether the appellant complied with the mandatory provisions of the law applicable to contempt of court, with regard to both the first and second application.***
>
> ***(B) Whether, the appellant's non-compliance with the mandatory procedural safeguards for committal proceedings amounts to a mere procedural technicalities as alleged or at all.***

In response to issue A, **Mr. Odera** concurred with the submissions of **Mr**. **Michuki** that the power of the High Court and the Court of Appeal to punish for contempt of Court orders is the law for the time being possessed by the High Court of justice in England as explicitly stated in **section 5 (1)** of the Judicature Act (supra) that the promulgation of Part 81 of the Civil Procedure (Amendment No.2) Rules effective the 1st day of October, 2012, the provisions of Order 52 of the Rules of the Supreme Court of England were superceded. See the case of **Justus Kariuki Mate & Another versus Martin Nyaga Wambora & another** Civil Appeal No. 24 of 2014. In this regard, it is **Mr. Odera's** view that the 1st application which was filed on the 29th day of August, 2012 before the coming into effect of the amendment ought to have complied with the Order 52 procedures and was therefore rightly faulted for non compliance.

Turning to the second application, **Mr. Odera** conceded that on the facts as they were on the record before the learned Judge, the law applicable to the 2nd violation was Part 81 of the Civil Procedure (Amendment No.2) Rules 2012, as confirmed by the Court of Appeal in the case of **Christine Wangari Gachege versus Elizabeth Wanjiru Evans & 11 Others, Civil Application Number 233 of 2007.** He submitted that the above findings notwithstanding, the second application also stands faulted for the appellant's failure to invoke the procedure laid down in Part 81 of Civil Procedure (Amendment No.2) Rules 2012, which obligated the appellant to file an application notice setting out the grounds on which it was premised and supported by an affidavit, containing all the relevant evidence.

To buttress his submissions **Mr. Odera** cited the case of **Benjamin Leonard Mc Foy versus United Africa Co. Ltd [1961] ALL ER 1169** for the observations by **Lord Denning** inter alia that:

> ***"If an act is void, then it is in law a nullity….. and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there…."***
>
> ***He also cited the case of Mbogo and Another versus Shah [1968] EA 93*** for the holding *inter alia* that ***"a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise and that as a result there had been misjustice.";***

Ochino and Another versus Okembo & 4 others [1989] eKLR wherein, the Court of Appeal faulted a contempt of Court proceedings against an appellant for non compliance with the procedural prerequisites for initiating the same;

Nyamodi Ochieng Nyamogo & Another versus Kenya Posts and Telecommunications Corporation [1994] eKLR, for the proposition that the consequences of a finding of disobedience being penal, there is need for strict compliance with the procedural requirements; **Loise Margaret Waweru versus Stephen Njuguna Githuri [1999] eKLR** where in, the Court of Appeal faulted contempt of Court proceedings on account of lack of personal service on the party cited for contempt of Court orders.

Turning to the second issue**, Mr. Odera** submitted that considering that contempt of Court proceedings connote an element of criminality, failure to strictly adhere to the procedural guidelines should not be taken to be a mere technicality, but a matter of substance that could culminate in imprisonment. In this regard, the issues raised by the 4th respondent on non conformity with the procedural requirements by the appellant in the presentation of the 2nd application are not mere technicalities that could have been ameliorated by **Article 159 (2) (d**) of the Constitution.

To buttress his submissions on the second issue, **Mr. Odera** cited the case of **Nicholas Kiptoo Arap Korir Salat versus Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** in which the Court of Appeal cited with approval the case of **Githere versus Kimungu [1976-1985] E.A 101,** for the observations *inter alia* that :

> "***the relation of rules of practice to the administration of justice is intended to be that of a hand maiden, rather than a mistress and that the Court should not be too far bound and held by the rules, which are intended as general rules of practice as to be compelled to do that which will cause injustice in a particular case."***

He cited **Abdi Rahman Muhamudi Abdi versus Safi Petroleum Products Limited & 6 Others civil Application No. Nai 173 of 2010** for the observations *inter alia* that:

> ***"Article 159 (2) (d) of the Constitution makes it abundantly clear that the Court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party….."***

This is a first appeal arising from the exercise of discretion of the trial court in dismissing both the 1st and the 2nd applications on account of being incurably incompetent. The principles governing the exercise of judicial discretion were well set out by Ringera JA (as he then was) in the case of **Githiaka versus Nduriri [2004] 2KLR 67**. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the Court, that is to do justice to the parties before it. The parameters for interference with the exercise of

such a discretion were well put by the predecessor of this Court in the decision in the case of **Mbogo and Another versus Shah** (supra), namely, for appellate Court to do so, it must be satisfied that the judge misdirected himself 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 his discretion and that as a result there had been misjustice. See also the case of **United India Insurance Co. Ltd versus East Africa**

Underwriters (Kenya) Ltd [1988] KLR 898 for the holding *inter alia* that:-

"The court of Appeal will interfere with a discretionary decision of a Judge appealed from, where it is established that the judge:-

(a) Misdirected himself in law;

(b) Misapprehended the facts.

(c) Took account of considerations of which he should not have taken account.

(d) to take account of consideration of which he should have taken account.

(e) His decision albeit a discretionary one is plainly wrong."

The approach the learned Judge took in determining the competing interests before him was both to appreciate and make observations and correctly so on the source of his jurisdiction to determine the matter namely, **section 5(1)** of the Judicature Act (supra), which enjoined him to ascertain and then apply the law applicable in respect of committal for contempt of Court proceedings in England as at the time the respective applications for contempt of Court were filed. He then drew inspiration from the decision of **W. Ouko, J (as he was then) in Republic versus County Council of Nakuru Exparte Edward Alera T/A Genesis Reliable Equipment & 2 Others [2011] eKLR and Eng. Kenya Limited versus Magnate Ventures Ltd [2009] eKLR** for the proposition that Order 52 of the Rules of the Supreme Court of England that procedures were compulsory, for the reasons given in the observations made by Lord Denning M.R, in **Re Bramble Vale Ltd [1069] 3ALLER 1062** that:

"***A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved to use the time-honoured phrase, it must be proved beyond reasonable doubt***"

The learned Judge then made observations *inter alia* that:-

"Failure to comply with the Rules applicable, will therefore lead to the collapse of an application to commit somebody for contempt of court. I do not envisage a situation where Article 159 (2) (d) can be interpreted with the consequence that an accused persons rights to a fair hearing under Article 50 of the Constitution can be over looked. One of the provisions of Article 50 is the right to be informed of the charge with sufficient details to answer it. See Article 50(2) (b). This is in tendem with the requirement that the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave to commence contempt of Court proceedings, must be served personally on the person sought to be committed."

On the basis of the above reasoning, the learned Judge made findings with regard to the first application, that the appellant had not complied with the pre requisites set by Order 52 of the Rules of the Supreme Court of England, first, for the failure to serve the requisite notice on the office of the Attorney General, not later than a day preceding the presentation of the application for leave, as no affidavit of service had been exhibited to that effect; and second, for the failure to present the substantive Notice of Motion within fourteen (14) days from the date the leave was granted. On that account the learned Judge found the first application incompetent and dismissed it.

The learned Judge had this to say before dismissing it too:

> ***"Again there is no evidence that the application for leave and the supporting documents were served on the Attorney General at least a day before the application was filed. As already explained, failure to comply with the rules for the commencement of contempt of Court proceedings is fatal. The second application is also found incompetent"***

We have given due consideration to the observations and the conclusions reached by the learned Judge in the impugned ruling, in the light of the totality of the record, the rival submissions and principles of law relied upon by either side. In our view, only one issue falls for our determination namely, whether the learned Judge exercised his judicial discretion judiciously when he dismissed both applications for lack of competence.

What the appellant sought in both applications was an order to cite the 4th respondent for contempt of Court orders. The jurisdiction of the Court to determine those applications flowed from **section 5(1)** of the Judicature Act (supra) which enjoined the learned Judge, first to establish the law then prevailing and applied by the High Court of England in similar proceedings as at the time the two applications were filed. See **Justus Kariuki Mate & Another versus Martin Nyaga Wambora & another [2014] eKLR** in which the court construed the words **" for the time being"** to mean that the court should endevour to ascertain the law in England at the time of the trial or time the application was being made.

From the assessment already set out above, we agree with the finding of the learned Judge that the application filed on the 29th August 2012 ought to have complied with the prerequisites as then prescribed in Order 52 of the Rules of the Supreme Court of England. **Mr. Michuki** who conceded that this was the correct position in law has however submitted that the said procedural lapse was curable under Article 159 (2) (d) of the Constitution, a position **Mr. Odera** totally disagrees with.

The principles that guide the invocation of Article 159 (2) (d) of the Constitution were set out in the case of **Jaldesa Tuke Dabelo versus IEBC & Another [2015] eKLR** wherein the court held inter alia that:

> ***"rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of the Constitution was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action";***

In **Raila Odinga and 5 Others versus IEBC & 3 Others [2013] eKLR** the Supreme Court stated that the essence of **Article 159** of the Constitution is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties depending on the appreciation of the relevant circumstances and the requirements of a particular case. In **Lemanken Arata versus Harum Meita Mei Lempaka & 2 Others eKLR** it was stated that the exercise of the jurisdiction under Article 159 of the Constitution is unfettered especially where procedural technicalities pose an impediment to the administration of justice. Lastly in **Patricia Cherotich Sawe versus IEBC & 4 Others [2015] eKLR** it was stated that **Article 159(2) (d)** of the Constitution is not a panacea for all procedural short falls as not all procedural deficiencies can be remedied by it.

In light of the above principles, it is our view that, there is nothing in the above principles to suggest that every procedural lapse should be discounted on account of Article 159 (2) (d) of the Constitution. We agree with **Mr. Odera** that each case must be considered on its own merit. In the instant appeal, our construction of the provisions of **Order 52 Rule 3(2)** of the Supreme Court of England Rules, is that it left no room for the exercise of any discretion on the part of the learned Judge to excuse any procedural lapse committed by the appellant. It is therefore our finding that, with regard to the presentation of the first application, the learned Judge had no option but to correctly and properly interpret and apply the law as it was then with regard to the 1st application. We find he not only interpreted it correctly but also applied it properly and rightly dismissed the 1st application, which dismissal we hereby affirm.

As for the second application, we agree with the submission of both sides that the law on contempt of

Court then prevailing in England as at the time the 2nd application was filed, was the Civil Procedure (Amendment No.2) Rules 2012, effective 1st October, 2012; that the said amendment introduced part 81 whose Rule 81.4 did away with the requirement of leave before presentation of an application for contempt. All that the appellant needed to do in compliance with the Rule 81.4 of part 81 Procedures, was simply to file an "Application Notice" together with a supporting affidavit setting out all the grounds in support of the application.

Mr. Odera has urged us to find that since the appellant invoked a wrong procedure in presenting the second application, it too, stood vitiated in terms of both the observations and the principle in **Benjamin Leonard Mc Foy versus United Africa Company Ltd** (Supra). In light of the above principle, it is not correct as submitted by **Mr. Odera** that the second application was founded on an erroneous application for leave. In our view, the second application was not founded on the vitiated application for leave, because in law the said application for leave was procedurally nonexistent. It therefore stood on its own.

The only issue that arose and which in our view the learned Judge overlooked was whether the 2nd application qualified as an "Application Notice" in terms of Part 81 of the Civil Procedure (Amendment No.2) Rules 2012, and if so whether it was meritorious. Since this issue was overlooked and therefore not interrogated by the learned Judge, we decline to make any pronouncement on it, especially after we have made findings that the second application was procedurally sound and deserved a merit disposal subject to the determination as to whether it qualified as an "Application Notice" in terms of Part 81 of the said Rules.

In the result, and for the reasons given in the assessment, we are inclined to make the following final orders:-

1. The appeal against the dismissal of the 1st application is dismissed.

2. The order dismissing the 1st application is affirmed.

3. appeal against the dismissal of the 2nd application is allowed.

4. The order dismissing the 2nd application is set aside, and substituted with an order reinstating it.

5. The matter is remitted back to the High Court for the substantive hearing of the second application on its own merits by a Judge other than W.K. Korir, J.

6. Each party to bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2017

P.N. WAKI

…….

JUDGE OF APPEAL

R.N. NAMBUYE

……..……

JUDGE OF APPEAL

H.M. OKWENGU

……..…..…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR