



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KOOME & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 154 OF 2015

BETWEEN

JUAN TORRES.....1ST APPELLANT

COSIMA WETENDE.....2ND APPELLANT

AND

MICHAEL NJAI.....RESPONDENT

*(An appeal from the Ruling of The Employment and Labour Relations Court of Kenya at Nairobi
(Monica Mbaru, J.) delivered on 3rd February 2015*

in

ELC Cause No. 1927 of 2013)

JUDGMENT OF THE COURT

[1] This is an appeal from the order of the Employment and Labour Relations Court (**Court**) (**Monica Mbaru, J.**) made on 3rd February 2015. By the ruling or rather the order, the learned Judge allowed an oral application made by **Dr. Kamau Kuria SC** learned counsel for **Michael Njai**, the respondent, directing **Juan Torres** and **Cosima Wetende** (the appellants herein), to attend court for cross-examination on the respective affidavits at the hearing of the respondent’s application for committal to jail of the appellants for contempt of the Court.

[2] More specifically, by the said Ruling, the learned Judge directed that the respondent’s application for committal of the appellants dated 14th January be heard within the next 14 days and that:

“On the said date the application will be heard through affidavits and present for cross-examination shall be the claimant and both respondents.”

[3] The brief background preceding the above direction is briefly as hereunder. [3.1] On 2nd December 2013, the respondent who was an employee of **Amadeus East Africa** (Company) as a **Senior IT Manager** filed a memorandum of claim in the ELC Court alleging that the company unlawfully suspended him from work on 7th November, 2013 and on 29th November, 2013 issued a

notice to the respondent to show cause why his employment should not be terminated for misconduct. The respondent claimed that the company's action amounted to a constructive unlawful dismissal. The respondent sought various declarations and an injunction to restrain the company from interfering or hindering the respondent in the performance of his duties. The claim was accompanied by an application for interlocutory injunction which was placed before **Marete, J.** on the same day. The learned Judge granted an *ex parte* injunction restraining the company from taking part in any further action in furtherance of its process of constructive unlawful termination of the respondent's employment pending the *inter partes* hearing of the application on 9th December, 2013.

[3.2] The Company filed a replying affidavit sworn by **Juan Torres**, the Managing Director of the Company. On the scheduled date, the respondent's counsel applied for adjournment and the application was adjourned for hearing to 19th December, 2013 and the interim orders extended to that date. It transpired that the trial Judge was not sitting on the hearing date and the appellants' counsel **Cosma Wetende** (the 2nd respondent herein) appeared before **Rika, J.** who set aside the interim orders and adjourned the application generally. Following the order discharging the *ex parte* orders, the company terminated the respondent's employment on 19th December, 2013.

[3.3] On 23rd December, 2013, the respondent filed an application for setting aside the orders of Rika, J. The application was placed before **Maureen Onyango, J.** on the same day, who granted ex-parte orders vacating the orders of Rika, J. and reinstated the *ex parte* order given by Marete, J. which she extended to 18th January 2014.

[3.4] By an originating notice of motion dated 14th January 2014, and filed in the same cause, the respondent sought an order for committal of the two appellants to jail for 6 months for contempt of court orders "**to compel them to obey the law**". The basis of the application for committal is the orders obtained before Rika, J. on 19th December 2013 which resulted in the purported dismissal of the respondent.

The respondent claimed that Cosma Wetende obtained the orders by deception of court and that Juan Torres had continued to treat the respondent as already dismissed despite the orders of Maureen Onyango, J vacating the orders of Rika, J. and that the two appellants had greatly undermined the authority of the court.

The application was supported by a statement verified by a lengthy affidavit sworn by the respondent on 9th January 2014. The 1st and 2nd appellants filed replying affidavits sworn on 28th January 2014 and 15th January 2014 respectively. The respondent filed a further lengthy affidavit sworn on 16th September 2015 in reply to the replying affidavits of the respondent.

[3.5] On 10th December 2014 the originating summons were fixed for mention for direction before Monica Mbaru, J. The court, on the oral application of the respondent's counsel fixed the application for hearing on 3rd February 2015 and ordered the respondent and the two appellants to attend the hearing for cross-examination.

[3.6] Before the hearing date, the appellants' counsel filed a notice of motion dated 22nd December 2014 for orders that the hearing date be changed as the appellant's counsel and the 2nd respondent were engaged in other cases and that the order requiring cross-examination of the appellants be vacated as it was made on a mention date, without formal application and in the absence of the appellants' counsel.

The application was allowed on 3rd February 2015 mainly on the ground that the failure by the appellants' counsel to attend court was caused by the error in the cause list published by court which indicated that the matter was listed before a different court. The court (Monica Mbaru, J) set aside the previous orders and directed both parties to take fresh directions after the reading of the ruling.

[3.7] Immediately after the ruling was read on 3rd February, 2015, the respondent's counsel applied for

direction that the application for contempt be heard by way of affidavits and that the deponents of the affidavits avail themselves for cross-examination to resolve the conflicts in the affidavit of the respondent and the appellants respectively. However, **Mr. Aluvala** who appeared for the appellants applied for adjournment saying that he was only holding brief for counsel for the appellants and had no instructions to proceed with cross-examination of the deponents of the affidavits. The application for adjournment was opposed and the court proceeded to give the impugned orders, the subject matter of this appeal.

[4] The appeal is based on 10 grounds. However, the appellants in their counsel's written submissions framed three issues raised in the appeal namely:

- (i) Whether the trial court was *functus officio* at the point of giving the impugned orders.
- (ii) Whether the appellants' rights to fair hearing under Article 50 of the Constitution was violated.
- (iii) Whether the court unlawfully shifted the burden of proof to the appellants in the application for contempt.

The respondent in his counsel's submissions agree that the appeal raises the three issues but framed four other issues viz;

- (i) What was the procedure applicable in applications for committal to jail on an alleged contemnor at the time the direction were given by the ELC Court?
- (ii) What order can a court make in exercise of inherent jurisdiction to control procedure in the suit and the application before it.
- (iii) What are the requirements of a fair trial in contempt of court application?
- (iv) What principles govern the granting or declining adjournments?

Mr. Fred Ojiambo SC for the appellants and **Dr. Kamau Kuria SC** learned counsel for the respondent have made extensive written submissions respectively, which were adopted at the hearing of the appeal. Counsel have also filed respective list of authorities.

[5] As correctly appreciated by the respective counsel, this is an interlocutory appeal challenging the exercise of judicial discretion by a trial Judge. The application for committal of the appellants for contempt of court orders is still pending for hearing. The parties have filed their respective affidavits and written submissions. The application is ready for hearing. The only impediment is the controversy on whether or not the deponents of the respective affidavits should be cross-examined on the contents of the affidavits. The direction that the contempt of court application be heard by way of affidavits is not contested.

It is trite law that the power of an appellate court to interfere with the exercise of discretion by a trial court is limited and is to be exercised only when well known flaws exist in the impugned decision.

[6] The appeal is against a procedural order to regulate the procedure for receiving and obtaining evidence in civil contempt of court proceedings. The application was brought under **section 5** of the **Judicature Act** and **Order 52, Rule 3 of Supreme Court Practice of England**.

Section 5 of the Judicature Act gave the High Court and Court of Appeal power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England. That section has now been repealed by **Section 38** of the **Contempt of Court, Act No. 46 of 2016** which commenced on 13th January 2017. However, to our knowledge, the rules under the Act have not been made by the Chief Justice as stipulated. In any case, it is the English Rules which applied at the time the questioned order was made. Although the offence of contempt of court is tried summarily, that does not take away the contemnor's right to a fair trial and section 7(3) of Kenyan Act is explicit on this (see also **Maharaj v**

Attorney-General for Trinidad and Tobago [1977] 1 All ER 411)

[7] The appellants' counsel submitted that the general rule is that in an application alleging contempt of court, affidavit evidence is sufficient and that cross-examination is not warranted. On the other hand, the respondent's counsel submitted that a court has inherent power to control its own procedure and what was required was a fair procedure in view of the fact that the liberty of subjects was involved.

[8] The learned counsel for the respondent has helpfully cited an article by I. H. Jacob on 'THE INHERENT JURISDICTION OF THE COURT' – published in the CURRENT LEGAL PROBLEMS, 1970, Vol. 23 where the author says at page 23:

“what then is the meaning of summary process? It means the exercise of power of the court to punish or to terminate proceedings without a trial, i.e. without hearing the evidence of witnesses examined orally and in open court. It does not mean that the court can be capricious, arbitrary or irregular or can proceed against the offender or the party affected without his having due opportunity of being heard; but summary process does mean that the court adopts a method of procedure which is different from the ordinary normal trial procedure.”

The author continues at pages 29 and 30:

“The extent to which summary process differs from ordinary trial process may not appear, in most cases, to be as great today as when the usual mode of trial was by jury. With virtual elimination of jury trial in civil cases the contrast between the decision of a single judge given at the end of an ordinary trial by summary process has become somewhat masked and may not be all that striking. For when exercising its inherent jurisdiction by summary process, the court will, if necessary, determine all disputed questions of fact or law and for this purpose affidavit evidence will be admitted, and the court may if necessary hear full argument at an extended hearing.”

[9] We would respectfully adopt the above passages as a correct exposition of procedural law in contempt of court proceedings.

The affidavits when filed become part of the proceedings and the evidence.

The cross-examination of the deponents of affidavits in contempt of court proceedings is intended to establish the correct facts for the final determination of the disputed facts by the court.

We hold therefore, that, like in ordinary civil cases where cross-examination of deponent's of affidavits is allowed, a court which has taken cognizance of contempt of court proceedings, has a discretion in appropriate cases to allow cross-examination of a deponent of an affidavit in contempt of court proceedings. Contrary to the contention of the appellants' counsel, that does not amount to shifting of burden of proof. Cross examination is intended to help the court to reach a just decision.

[10] It is submitted by the appellant's counsel that when the court delivered a ruling on 3rd February 2015 setting aside the previous order requiring cross-examination the court became *functus officio* and the subsequent contradictory order requiring cross-examination was made without jurisdiction. On the other hand, the respondent's counsel contended that the doctrine applies only where the court has finally pronounced itself on the merits of real issues in controversy and that in this case, the suit has not been heard and determined yet.

We have perused the appellants' application dated 22nd December 2014 and the supporting affidavit by which they sought the setting aside of the previous orders. The grounds on which the orders were sought were procedural irregularity, which is making the order on a mention date and in the absence of counsel for the appellant. It was not a ground of the application that deponents of affidavits cannot lawfully be cross-examined in contempt of court proceedings. The learned Judge allowed the application solely on the grounds that the order was made *ex parte* due to institutional error and the court ordered the taking of

fresh directions after the reading of the ruling. The question whether the deponents of affidavits could in law be cross-examined in contempt of court proceedings was not before the court and was not determined. In any case, the issue of cross-examination of witnesses being procedural in nature could be altered by the court subsequently as and when the interest of justice dictated. In the premises, we make a finding that the trial Judge was not *functus officio* when she issued subsequent directions.

[11] The question of denial of fair trial was raised by the appellants' counsel in relation to the proceedings of 3rd February 2015. It was contended that the application for cross-examination of deponents of the affidavits was raised at the floor of the court without notice to the appellants' advocates and without any basis. The respondent's counsel on the other hand submitted that the trial Judge had a discretion to refuse the application for adjournment; that the order was made in the interest of justice; that he gave the reason for the need for cross-examination – that is, fundamental differences between the affidavits of the appellants and the respondent, and that there are circumstances where a contemnor should not be heard.

[12] We have given due consideration to the issue of a fair trial. The record shows that it was Mr. Ojiambo SC who was appearing for the appellants. In fact, he is the one who prosecuted the application culminating to the ruling of 3rd February 2015. The order that fresh directions would be taken immediately after the delivery of the ruling was contained in the ruling itself. Mr. Ojiambo could not have reasonably contemplated that the ruling would contain such a direction. He sent Mr. Aluvala to take the ruling who applied for adjournment so that Mr. Ojiambo could attend and address the court on the issue of cross-examination. The proceeding had already become protracted and the issue of cross-examination had become contentious and was the subject of the very ruling.

In the circumstances, it is our view that the learned Judge did not exercise the discretion judicially by rejecting the application for adjournment.

[13] Furthermore, it is clear from the authorities cited by both parties that the order for cross-examination is a discretionary order which should be exercised judiciously. A proper basis must be laid to satisfy the court that it is necessary or desirable in the interest of justice to allow cross-examination whether the order for cross-examination should or should not be made depends on judicial evaluation of the circumstances of each case.

In the instant case, the respondent had filed two lengthy affidavits and each of the appellants had filed a replying affidavit. The respondent's counsel merely intimated to the trial Judge that there were conflicts in the affidavits without identifying any. The record does not show that the learned Judge perused the affidavits and did not give any tangible reasons for the order.

It seems that the court merely exercised its general power without ascertaining whether cross-examination was justified. Apparently, there was no judicial evaluation of the need for cross-examination.

In the premises, we find that the learned judge did not exercise her discretion judicially. The grounds of denial of a fair trial and improper exercise of judicial discretion have merit and we would allow the appeal on those grounds.

[12] We have made a finding that the trial Judge had discretion to order the cross-examination of the deponents of the affidavits. The appellants' counsel submitted that the order for cross-examination was sought to assist the court in the resolution of factual disputes between the parties. The error was committed by court. If the respondent is not given an opportunity to be heard on the issue of cross-examination, he will conclude that he has not been given a fair trial. The just order in our view is remit the matter to the trial court for re-hearing on the issue of cross-examination and that the costs of this appeal be costs in the cause of the contempt of court application.

[13] For the foregoing reasons, the appeal is allowed. The order of the ELC Court dated 3rd February 2015 requiring cross-examination of the deponents of the respective affidavits is set aside. The application for cross-examination is remitted to the superior court for re-hearing *inter partes* before another Judge. The costs of this appeal shall be costs in the cause in the contempt of court application.

Dated and delivered at Nairobi this 9th day of June, 2017.

E.M. GITHINJI

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JUDGE OF APPEAL

M. K. KOOME

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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