IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 131 OF 2015

BETWEEN

LUCY WAITHIRA MWANGI.....1ST APPELLANT

JULIUS KARIUKI MWANGI.....2ND APPELLANT

JOHN IRUNGU GITHINJI.....3RD APPELLANT

AND

STEPHEN MAINA KIMANGA.....1ST RESPONDENT

PATRICK GITHINJI MWANGI.....2ND RESPONDENT

FREDRICK NJORA MWANGI.....3RD RESPONDENT

HEZRON ONESMUS MAINA.....4TH RESPONDENT

FIG TREE HOTEL LIMITED.....5TH RESPONDENT

(An appeal from the ruling and order of the High Court of

Kenya at Nairobi, (Ogola, J.) dated 29th April, 2015

in

H.C.C.C. No. 183 of 2014)

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JUDGMENT OF THE COURT

By this appeal the appellants seek to overturn the ruling and order of Ogola, J. made on 29th April 2015 by which he found them guilty of contempt for disobeying the High Court's order made on 23rd September 2014 directing them to hand over documents, items, books of accounts, materials and keys as well as control of Fig Tree Hotel Limited (the company) of which they are former directors to the 1st to 4th respondents (the respondents) who are its new directors. The learned Judge sentenced them to civil jail for six months with the option of a fine of Kshs. 500,000 each, which they paid but now seek to be refunded should they succeed on this appeal.

The facts as they emerged from the application for the appellants' committal and their response thereto, are that the appellants were directors of the company until 12th March 2014 when they were removed, for among other things, allegedly stealing some Kshs. 48,817,500 during their tenure as directors involved in the day to day running of the company. Notwithstanding their ouster, however, they refused to hand over the running of the company and continued to assume the daily management of the company. This necessitated an application dated 6th May 2014 by the respondents seeking, besides injunctions, to compel the appellants to officially hand over the management of the company. This is the application that gave rise to the orders of 23rd September 2014 which the learned Judge found the appellants to have contemned.

In so finding the learned Judge rejected the appellant's response to the application and defence to the contempt charge which was along the line that they had not been personally served with the orders alleged to have been disobeyed; the Registrar of Companies had subsequently confirmed them as the bona fide directors of the company; and the respondents had failed to avail themselves for purposes of the company being handed over to them. Further, the appellants stated that they had in the meantime filed an application for the review of the order said to have been disobeyed.

Before this Court the appellants complain that the learned Judge erred in law and fact in;

- ***Hearing the contempt application without first hearing the review application.***
- ***Failing to consider affidavit evidence that third parties sabotaged the handing over process.***
- ***Failing to make a proper inquiry into the supervisory and security role of the police during the handover.***
- ***Making the ruling and order without the original court file.***
- ***Failing to consider that the appellants were willing to comply but the respondents failed to avail themselves for handing over.***

- ***Committing the appellants absent personal service.***
- ***Giving contradictory orders of imprisonment and handing over.***

Appearing for the appellants before us, their learned counsel **Mr. Ogwe** argued the grounds of appeal together. He submitted that the learned Judge ought to have given priority to the already filed application that sought to review the order for which the appellants faced the spectre of committal for contempt. He then contended that the appellants were not served with the order personally or given a notice of penal consequences. Counsel conceded, however, as he had to, that both the appellants and their advocate were in Court when the order was made, but nevertheless pressed that personal service was necessary. He also took issue with the making of the committal order on a skeleton file as the original file had gone missing.

For the respondents, learned counsel **Ms. Mwachiro** contended that the review application was essentially a red-herring calculated to delay, distract and divert attention from the committal application, which explains why it remained unprosecuted even as at the hearing of this appeal. She reiterated that the appellants were fully aware of the order to hand over the management of the company to the respondents. They were also given opportunity to comply, with the learned Judge directing such compliance on 5th October 2014 complete with a handing over date but the appellants willfully disobeyed with the result that they had to be forcefully evicted, eventually, after breaking in orders were obtained on 11th June 2015. Counsel contended that litigants are duty bound to obey court orders and, relying on the oft-cited case of ***MBOGO & ANOR vs. SHAH*** **[1968] EA 93**, urged us not to interfere with the learned Judge's exercise of discretion in punishing the appellants for contempt. She insisted that the orders given by the learned Judge were operational not having been stayed or set aside and the appellants were under a clear obligation to obey at pain of committal. She therefore urged us to dismiss the appeal as unmeritorious.

We have perused the record and given due consideration to the grounds of appeal, the submissions made by counsel and the authorities cited. There is no doubt that what the appellants seek from us is an interference with the learned Judge's exercise of discretion in making orders to punish the disobedience of the court's orders. As a matter of practice and prudence, an appellate court is always slow to interfere

with the exercise of discretion by the first instance Judge for it is in the nature of discretion to be free and unfettered so long as it is exercised in accordance with principle and not capriciously, at a whim. We think that the sentiments expressed by President Sir Charles Newbold in ***MBOGO vs. SHAH*** (supra) hold true with regard to the instances when an appellate court would be entitled to interfere;

> ***"We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice." (at p. 96)***

We need only add that this Court's interference when merited has to be guided by principle and it is not enough that it might itself have exercised the discretion differently. The discretion is of the court below, to be legitimately upset only in clearest of cases. Is this one such case?

There appears to be no dispute whatsoever that the learned Judge did issue orders on 23rd September 2014 that were in terms clear and unequivocal: the appellants had no business engaging in the day-to-day running of the company and were required to hand over to the respondents within ten days and in an orderly manner. They did not do so. In fact, they not only ignored the orders but forcefully resisted any attempts to get them to hand over the running of the company. There therefore appears on the face of the record to have been a bold, deliberate and determined disobedience and defiance of the court order.

The appellants in their defence swore, and we say quite falsely, if the record is anything to go by, that they were unaware of the order, not having been served. Other than the respondents' averment that the appellants were in fact served, it is clear that they were fully aware of the orders as were their advocates. Dealing with this aspect of the matter, the learned Judge observed, correctly in our view, as follows;

> ***"To answer the first issue, it is now trite law that where an order is issued by court in the presence of counsel for a party, a party to be bound by that order cannot deny knowledge of the same. While the necessity for service of court order cannot be gainsaid, where a party is represented by counsel, it is deemed that the party is aware of the order of the court and cannot feign ignorance. In fact, as regards this matter, the alleged contemnors were all in court together with their advocate Mr. Jengo on 23rd September 2014, and so, they cannot plead ignorance of the orders of this Court."***

Now, having been aware of the orders and making no effort to obey them, but deliberately disobeying them, thus making them of no effect, were the appellants not in flagrant contempt of court? In the eyes of the law, ***"contempt of court is constituted by conduct that denotes willful defiance of or disrepute towards the court or that willfully challenges or affronts the authority of the court or the supremacy of the law; whether in civil or criminal proceedings,"*** in the words of Lord Justice Clerk in the Scottish case of ***ROBERTSON vs. HER MAJESTY'S ADVOCATE*** **[2007] HCAC 63.**

We have no doubt that the conduct of the appellants amounted to contempt of court. They showed scant or no regard to the court and their disobedience brought the court to disrepute and struck at the very heart of the administration of justice and threatened the rule of law and good order. When it is recalled that courts derive their authority from the people and act on their behalf, and the judicial process is instituted in civilized society so as to dispassionately deal with disputes that arise between citizens, a contumelious disobedience of court orders presents a clear and present threat to the rule of law and is a step towards anarchy and chaos where citizens, unable to find help in the courts, will be left with no option but to take the law into their own hands. Disobedience of court orders is a return to the law of the jungle, a throwback to the Hobbesian world where life is nasty, brutish and short. Disobedience of court orders with impunity if allowed to continue unchecked heralds the beginning of the end of civilization as we

know it and the dawn of lawlessness and unmitigated strife.

Being of that view, we are compelled by reason and logic to agree with the learned Judge's erudite location of the appellant's contempt within the prism of the rule of law thus;

> ***"To begin with, the alleged contemnors have the right to apply for the review of the court order of 23rd September 2014. However, as long as the review has not been heard and granted, they are obligated to obey the court order. They must observe the rule of law. They were the legitimatedirectors of the 5th plaintiff company at one time pursuant to the rule of law. The court has now establish that pending the hearing of the suit, the applicants were now the legitimate directors of the 5th plaintiff company. That is also pursuant to the rule of law. If this Court will allow their review and declare the alleged contemnors the legitimate directors of the 5th plaintiff company, that will also be pursuant to the rule of law. So the deciding factor in all this is the rule of law. The orders of this Court of 23rd September 2014 are the applicable rule of law now. They have not been set aside or appealed or reviewed in favour of the alleged contemnors. Those orders must be observed forthwith without any further delay."***

Turning to the appellants' complaint that the learned Judge was wrong to deal with the contempt application before first disposing of the application for review of the order contemned, we think it lacks substance. The appellants clearly are proceeding from the shaky premise that it is open to a party who is subject to binding and valid court orders to elect to either obey them or by some legal manouvering find a way to delay, or evade compliance. True it is that such a party may move the court for review or appeal to a higher court with a view to setting the orders aside, but such moves in and of themselves do not absolve the party from the duty to comply, the obligation to obey. The filing of such applications, unless aided by orders of stay of execution or operation of the impugned orders, avail nothing and the orders continue to command obedience. The learned Judge was therefore perfectly entitled to deal with the contempt application as he was under no compulsion to first hear the application for review. Nothing in fact prevented the appellants from complying with the orders even as they sought a review of the same. Indeed, there is sufficient basis for holding as we do, that in terms of sequence the learned Judge got it right by dealing with the contempt application first and expeditiously. This has to be so in view of the grave threat to the rule of law, the authority of the court and the course of justice that contempt of court represents. We agree with and endorse the sentiments of the High Court in ***ECONET WIRELESS LTD vs. MINISTER FOR INFORMATION & ANOTHER*** [2015] eKLR;

> ***"Where an application for committal for contempt of court orders is made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt."***

The learned Judge did well to assert and exercise the authority of the court and complaints about his having dealt with the contempt application on a skeleton file the original file having been misplaced are, with respect, quite idle in the face of the larger picture. There is nothing novel or earth shaking about what the learned Judge did. To accept the appellant's argument would be to say, in essence, that all that a contemnor needs to avoid punishment is a basis for claiming that the original file cannot be traced. We think that so long as the record is complete with the order in question, the application for contempt, the affidavits in opposition and other material relevant to the determination of the application are available, the Judge is perfectly entitled, indeed required, to proceed with the hearing of the application.

We reiterate, for the avoidance of doubt, that the courts of this land must be vigilant to ensure that their orders are obeyed. Where parties are dissatisfied with orders given, they have clear avenues for challenge and redress but it is not open to them to disobey at will. We are fully aware that the power to punish for contempt is a wide and serious one not to be lightly or improperly resorted to but where, as here, it is called for, the courts must not hesitate. As an appellate court we would also be vigilant to ensure the

jurisdiction is properly and lawfully exercised but the message must be loud and clear that we shall not provide succour or refuge to any parties who deliberately, willfully and contumaciously challenge, defy and denigrate the authority of the courts below. We turn our face decidedly against such dangerous experiments with the rule of law and the administration of justice.

In this we are not propounding a new doctrine, only restating this Court's long held position as has been expressed in many decisions including ***REFRIDGIRATOR & KITCHEN UTENSILS LTD vs. GULABCHAND POPATLAL SHAH & OTHERS*** (Civil Application no. Nai 39 of 1990) where it was said;

> ***"… it is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors ….***

In ***HADKINSON vs. HADKINSON*** **[1952] 2 ALL ER 567** it was held that;

> *'it is 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.' ''*

We need not to say more.

The inevitable outcome of this appeal from the facts and circumstance of this case is that it fails in totality. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 22nd day of September, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR