IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 43 OF 2007

BETWEEN

RUSTAM HIRA ..... APPELLANT

AND

CHARLES MBAGAYA AMIRA ..... 1ST RESPONDENT

COMMERCE BANK LIMITED..... 2ND RESPONDENT

(Appeal from the decision (order) of the High Court of Kenya, Nairobi (Ojwang, J) delivered on 3rd day of June 2005

in

H.C.C.C. NO.1169 OF 1998)

****

JUDGMENT OF THE COURT

1. This is **a first appeal** against the order of the High Court (by J. B. Ojwang J, as he then was) made on 3rd June 2005 in Civil Suit No.1169 of 1998 in which the learned Judge while hearing an application cited the appellant for contempt in the face of the Court. The learned Judge made the following orders in the presence of counsel who included Mr. Ombete, for the applicant, and Mr. Hira, for the respondent –

> ***"COURT: Hearing cannot start: Mr. Hira has started with an altercation. Hearing therefore cannot take place. Mr. Hira cannot allow the Judge to speak; he wants to take over the proceedings of the Court. I hold this to be contempt, which Mr. Hira must purge.***
>
> ***"Order: 1. This matter is adjourned.***
>
> ***2. On Monday 13th June 2005, Mr. Hira shall appear before me at 9.00 a.m. to purge this contempt. Thereafter directions will be given."***
>
> ***3. This matter be listed before me on Monday 13th June 2005 at 9.00 a.m.***
>
> ***4. Applicant has leave to file supplementary affidavit***

J. B. OJWANG

JUDGE"

2. On 13th June 2005, the applicant's advocate appeared before the Honorable Judge but Mr. Rustam Hira for the respondent in the application did not appear. The learned Judge recorded the following –

> ***"COURT: I had earlier cited Mr. Rustam Hira for contempt in this matter, when he came into Court and behaved in a contemptuous manner and disrupted the proceedings of the Court."***
>
> ***"He is not allowed to be heard at all before the High Court until he has appeared before me and argued the contempt. He is not allowed to say anything before the High Court until his contempt is well and truly argued, failing which he is to be committed to jail."***
>
> ***"ORDER:***
>
> ***The file be placed before me at 9.00 a.m. tomorrow 14th June 2005."***

3. What happened after this? The appellant gave notice of appeal on 7th June 2005 pursuant to rule 75 of this Court's Rules manifesting his intention to appeal against the order of the High Court (by J. B. Ojwang J, as he then was) made on 3rd June 2005.

4. The appellant also filed an application in the High Court alleging that his fundamental rights under Section 84 of the repealed Constitution were infringed or were in the process of being infringed and seeking protection. The application was premised on rule 10(a) and (b) of the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001** (which were generally referred to as **"Chunga Rules").** It went before Mohammed Ibrahim J, (as he then was). He stayed all proceedings in the suit pending the determination of the questions raised in the application. He also referred the application to the Chief Justice for directions. The Chief Justice nominated two Judges to preside over the hearing of the application on 19th December 2005.

5. The appellant also made an application to this Court for stay in the intended appeal under rule 5(2)(b) of this Court's Rules. This Court on 28th June 2005 granted stay pending the filing, hearing and determination of the appeal. The court delivered itself thus –

> ***"this is a somewhat peculiar application for stay. We say so because the applicant already has an order of stay granted by a Judge of the superior court (Ibrahim, J). The other Judge who made the order stayed by Ibrahim, J (i.e. Ojwang, J) does not appear to agree that another Judge of the High Court with concurrent jurisdiction should have stayed his order. It appears to us as Mr. Nowrojee says, that the order of stay granted by Ibrahim J. will only last until the hearing and determination of the constitutional reference made in the superior court by the applicant. We do not know that the reference will be heard and determined after the hearing and determination of the intended appeal; it may well be that the reference will be heard and completed long before the appeal is filed and heard. If that were to be the case, the applicant, who is a senior advocate of the High Court may run the risk of going to prison if the ruling in the reference were to go against him or if he were, by some misfortune, to appear before Ojwang, J. before the appeal is heard and determined. As we have pointed out Ojwang, J. does not appear to accept the orders made by Ibrahim, J. The intended appeal is clearly arguable and if Mr. Hira were to be committed to civil jail for his alleged contempt, that would clearly render his intended appeal nugatory.***
>
> ***We accordingly allow the motion asking us for a stay and we order that the orders of contempt of court made by Ojwang, J. shall be stayed pending the filing, hearing and determination of***

his appeal*. *The costs of today shall be in the intended appeal."

6. The appeal proceeded to hearing, by way of written submissions (following an order to that effect) and highlighting of those submissions. The appellant filed written submissions but the respondents did not.

7. Senior Counsel Mr. Nowrojee appeared with **Mr. H. Ongicho** for the appellant during the highlighting of submissions. There was no representation for the respondents or for the Attorney General who, though served, did not file written submissions. The hearing of the appeal was consequently one-sided.

8. The memorandum of appeal contained ten grounds of appeal in which the appellant contended that the learned Judge had no jurisdiction to hold him in contempt; that there was no record of the altercation; that there was no contempt on the face of the court; that the learned Judge infringed on the appellant's constitutional rights by preventing him to appear in the High Court; that there was no evidence on record of the contempt; and that rules of natural justice were breached.

9. In **the written submissions**, the appellant contended that the High Court did not inform him of the alleged act of contempt and that he was condemned unheard in breach of the rules of natural justice. He cited the decision in the case of **Ndegwa v. Republic** [1985] KLR 534 @ 537 where this court held that *"no rule of natural justice, no rule of statutory protection, ... is to be sacrificed, violated or abandoned when it comes to protecting the liberty of a subject."* The decision also in **Mutitike v. Bahari Farm Ltd** [1985] KLR 227 by this court was referred to. In that decision, this court held that -

> ***"where liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited, must be precisely defined. It was contended that there was no fair hearing of the contempt charges which would result in penal consequences."***

10. It was the appellant's contention that the learned Judge erred in making orders for the appellant not be heard by any Judge of the High Court until he purged his contempt. In his written submissions, the appellant contended that the standard of proof in contempt proceedings which have penal consequences is higher than proof on a balance of probabilities and the guilt of a contemnor must be proved with such strictness as is consistent with the gravity of the charge. It was the appellant's view that the requisite standard of proof was not met in his case.

11. The prayer by the appellant is for the appeal to be allowed and the orders of the contempt and purging thereof be set aside or reversed.

12. Mr. Nowrojee referred us to paragraphs 18, 19 and 20 at page 6 of the record and contended that there was nothing on record that amounted to contempt. He also referred to pages 192 to 236 of the record. It was his submission that there was no material on record to show that the appellant committed contempt.

13. We have perused the record of appeal including the memorandum of appeal, the written submissions and the list of authorities. We have also given due consideration to the oral highlighting of submissions by Senior Counsel Mr. Nowrojee.

14. The picture painted by the record of appeal manifests the friction that sometimes ensues between the Bench and some members of the Bar when, during hearing, tempers flare and parties evince intolerance that leads to the unhappy situation such has given rise to this appeal.

15. We digress a little. We are alive to the fact that Members of the Bar and the Bench belong to one legal community borne out of the need to promote, protect and uphold the rule of law without which no democratic society would realize the benefit of protection of the law. Their relationship in this regard is symbiotic founded as it is on their commitment to the rule of law, hence the need for mutual respect. Practitioners are expected to conduct themselves with decorum and probity in court when making presentations of their clients' cases and judicial officers to be courteous and fair. It is for that reason that **Codes and Rules of Conduct** have been developed in the legal profession to regulate the conduct of the

practitioners and of judicial officers alike. Members of the Bar and of the Bench are expected to conduct themselves in a manner that promotes mutual respect and safeguards the integrity of the legal profession and ultimately enhances and sustains confidence of the public in the rule of law. Violation of rules of professional conduct invites sanctions. Judicial Oficers have been vested with power under the law to uphold the authority and dignity of the courts for the good, not of themselves, but rather, for the general populace.

16. It is precisely for that reason, among others, that Parliament enacted. The Judicature Act Chapter 8 of the Laws of Kenya *"to make provision concerning the jurisdiction of the High Court, the Court of Appeal, and subordinate courts..."* whose Section 5 vests in the High Court, and the 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, and such power shall extend to upholding the authority and dignity of the subordinate courts."* Subsection (2) of Section 5 (supra) stipulates that –

> ***"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 original criminal jurisdiction of the High Court."***

17. While judicial officers are enjoined to dispense justice fairly and dispassionately and in accordance with the law, members of the Bar, on the other hand, must conduct themselves with decorum and uprightness as officers of the court.

18. It is against this background that judicial officers in exercise of their power to commit for contempt act with great restraint and often opt, where possible, for other option such as reporting a matter to the council of the Bar. Lord Denning MR (as he then was) in **Re Breamblevale Ltd** [1969] 3 All ER 1062 @ pg 1063 pointed out that –

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

19. In **Mutitika v. Baharini Farm Ltd** (supra), this court opined that the standard of proof in contempt of court cases -

> ***"must be higher than proof on the balance of probabilities, almost but not exactly beyond reasonable doubt... the standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offences which can be said to be quasi-criminal in nature. <u>Winn LJ</u> on page 1064 was in our view right in saying that the guilt has to be proved – "with such strictness of proof as is consistent with the gravity of the charge..."***

20. The principle in **Re Mana Annie Davies** [1989] 21 QBD 236, referred to in **Mutitika's** case (supra) demonstrates the reluctance with which Judges resort to contempt of court. In **Re Maria Anne Davies**, the Court held, with regard to contempt of court, that –

> ***"recourse ought not to be had to process of contempt in aid of a civil remedy where there is any other method of doing justice."***

21. Although the above quotation related to contempt based on disobedience of a court order, the *modus operandi* by Judges is the same where the contempt involves the conduct of an advocate as an officer of the court appearing in a civil or criminal matter.

22**. In the instant appeal** the issues for our determination are two: first, whether there was material on record on the basis of which it could be said that the appellant conducted himself in a manner that amounted to contempt on the face of the court; and second, whether the appellant was afforded an opportunity to respond to the charge before being found in contempt.

23**.** We have with a lot of circumspection perused the record of appeal. It is patent that the learned Judge was angered by the behavior of the appellant who, according to the learned Judge, appears to have talked forcefully and perhaps appeared bellicose and did not give the court or the other party a chance to speak or retort. It seems to us that that is why the learned Judge remarked as he did.

24. Unfortunately, the learned Judge did not record what Mr. Hira said or how long he spoke but ostensibly, the learned Judge was flabbergasted and astounded by the behavior of Mr. Hira, a senior member of the profession, and after the latter eventually ended his outburst, the learned judge had had enough. If the learned Judge had recorded what Mr. Hira said and how he behaved, the matter might have been clearer. But the learned Judge seems to have considered the behavior of Mr. Hira's seniority far too serious not warrant the charge that is now the subject of this appeal. While we do not condone conduct that falls short of proper decorum on part of counsel, and while senior members at the Bar are expected to set good example to their juniors, we observe that the learned Judge did not record Mr. Hira's outburst which led to the contempt charge. In the end, all we are able to decipher from the record of appeal is the fact that the appellant seems to have conducted himself, in the Judge's view, in a most abhorrent manner thereby making it impossible for the Judge to hear the application before him. Without a record of what Mr. Hira did and said, it is not possible for us to make a determination as to whether contempt of court was committed and the Judge was obstructed from conducting the proceedings before him.

25. But more importantly, the court did not give the appellant an opportunity to be heard before condemning him. The right to be heard is fundamental in our laws. We hold that there was failure on the part of the court to give the appellant opportunity to be heard on a matter in which he was going to be punished as a contemnor. (see **Maharaj v. A.G. of Trinidad** [1987] 2 All ER 670). On this point alone, we are inclined to allow the appeal and it is therefore irrelevant that the appellant is said to have exhibited a bellicose attitude and highhandedness and as a result, a matter that should never have cascaded to the level it has now and consumed energy and time that could have been deployed beneficially has ended in this appeal. We allow the appeal and grant the orders sought. Each party shall bear its own costs.

Dated and delivered at Nairobi this *19th day of May 2016*.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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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