IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & G.B.M. KARIUKI, JJ.A.)

CIVIL APPEAL NO. 306 OF 2009

BETWEEN

WARDPA HOLDINGS LIMITED...1ST APPELLANT

PATRICK KANG'ETHE NJUGUNA...2ND APPELLANT

EDWARD KANG'ETHE NJUGUNA... 3RD APPELLANT

GEORGE KANG'ETHE NJUGUNA...4TH APPELLANT

AND

EMMANUEL WAWERU LIMA MATHAI....................................... 1ST RESPONDENT

HOUSING FINANCE COMPANY OF KENYA LIMITED.................2ND RESPONDENT

(Being an appeal from the entire Ruling and Order of the High Court of Kenya at Milimani Commercial Courts, Nairobi (Kimaru, J.) dated 11th December, 2009

in

H.C.C.C NO. 634 OF 2008)

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JUDGMENT OF THE COURT

[1] On 11th December 2009, Patrick Kangethe Njuguna, Edward Kangethe Njuguna and George Kangethe Njuguna 2nd, 3rd and 4th appellants respectively were held in contempt of a court order issued on 28th October, 2008, by the High Court in ***HCCC No. 634 of 2008***. The said order was an interim exparte order of injunction issued by Lesiit J., restraining the appellants either by themselves or through their agents from forcefully evicting, tenants or demolishing or damaging, leasing, renting, sub-letting, collecting rent or in any way interfering with the possession of the plaintiff(the 1st respondent) or that of the tenants who were in occupation of a property known as ***LR No. 209/2489/22 Ngara Nairobi,*** *(suit property)*, pending the hearing and determination of the application inter parties fixed for the 5th November,2008.

[2] The suit was filed by Emmanuel Waweru Lima, the 1st respondent, who was the plaintiff in the aforementioned suit in the High Court. He filed the suit that challenged the statutory power of sale by Housing Finance Co. Ltd the 2nd respondent over the suit property. The 1st respondent sought an interim *exparte* order of injunction and on being issued; it was extracted on the 28th October, 2008. The plaintiffs' advocate endorsed the same with a penal notice and caused it to be served upon the 2nd 3rd and 4th appellants. The service of the order and the penal notice was effected by a process server by the name Wafula Francis who swore an affidavit of service.

[3] By a strange occurrence which is somewhat common in our court registries, the said matter was not fixed for inter parties hearing on the 5th November, 2008, because the court file went missing. What was more disturbing was the suit property was demolished on the 6th November, 2008, to the ground by the appellants. The 1st respondent thus filed an application seeking to commit the appellants to civil jail for disobedience of a court order. The appellants did not file a replying affidavit to the said application which fell for hearing before Kimaru, J. After hearing the application, the learned judge was satisfied the appellants were duly served with the order of 28th October, 2008. He also concluded the appellants who had everything to benefit from the disappearance of the court file had a hand in its disappearance. The judge found the appellants in contempt of court orders and directed they appear in court on 21st January, 2010, to show cause why they should not be punished. They were consequently sentenced to pay a fine of Kenya Shillings One Million in default.

[4] This is the ruling that has provoked the present appeal which is predicated on some ten grounds of appeal. To avoid obvious repetition and proliferation of spelling mistakes those grounds can be summarized as thus:

That the learned Judge erred in fact and law in:

1. ***Relying on circumstantial evidence, conjecture and surmise in holding the penal notice and order were served on the 1st appellant and/ any of its directors the 2nd,3rd and 4th appellants despite there being no proof of service.***

2. ***The Judge was biased by descending into the arena of conflict in holding that the appellants colluded with registry staff and secured the disappearance of the file.***

3. ***By concluding the appellants invaded the suit premises and took forceful possession when the order of 27th October, 2008 was still in force and the appellants had no legal obligation to secure/obtain an order to secure the property.***

4. ***By shifting the burden of proof of the alleged contempt of court upon the appellants.***

5. ***Failing to appreciate when the respondent was granted leave to institute contempt proceedings, the appellants or the Attorney General were not served with the application.***

6. ***Failing to appreciate the Notice of Motion was incompetent and the order of 27th October 2008 lapsed and was never extended.***

7. ***Disregarding the authorities cited.***

[5] At the hearing of this appeal, Mr. Mwanzia, learned counsel, for the appellants submitted that the appellants were never served with the order as alleged by the 1st respondent . According to counsel for the appellants, his clients became aware of the court order on the 18th December, 2008, when they filed an application to discharge the exparte orders. The court file was incidentally available when the said application was filed and the allegation that the file could not be found on the 5th November, 2008, when the matter was meant to proceed for inter parties hearing was a theory advanced by the respondent.

[6] Mr. Mwanzia also submitted that the acts that constituted contempt of court which the appellants were found guilty of and fined Kenya shillings one million occurred on the 6th November, 2008, before the appellants were served with the court order restraining them from taking possession. The judge was faulted for making a finding that the appellants needed to seek a court order before taking possession of the suit premises which was a mere assumption not based on law. Further counsel submitted that the judge was informed by extraneous matters when deciding the application for contempt; for attributing the disappearance of the court file to the appellants when there was no evidence; the court could not find the copy of the affidavit of service to ascertain whether there was proof of service of the order regarding the 3rd appellant. Lastly, counsel submitted the authorities cited were not considered as they clearly provide that the applicable test in a case of contempt of court orders must be proved on a higher threshold than on a balance of probability which is applicable in civil matters. The Judge had a duty to establish there was personal service of the order upon each and every appellant. Counsel urged us to allow the appeal and set aside the order made on 11th December, 2009.

[7] Mr. Ogando, learned counsel, for the 1st respondent opposed this appeal; he submitted the appellants did not file any response to the application for contempt. The appellants demolished the building the subject matter of the suit and put up a new building and installed new tenants when they were aware of the court orders. According to the respondent, Patrick Kang'ethe, was served with the court order on behalf of his brothers who are directors of the 1st appellant; there was no dispute over the service during the hearing of the application as the appellants chose not to respond. Counsel maintained that although the appellants were aware of the order dated **28th October 2008,** they went ahead to demolish the original structure and built a new building. He referred us to the return of service of a court process sever, *(Francis Wafula)*, which shows that 2nd appellant was served on behalf of his son, the 4th appellants. Counsel supported the Ruling. The learned Judge who found that there was sufficient evidence of service. In the affidavit of one George Barugu, he averred that the order was served on them on the 28th October, 2008, and another pasted on the premises; all tenants confirmed that the appellants had knowledge of the order. There were no extraneous matters. In the view of the learned counsel, this appeal should be dismissed and High Court decision upheld.

[8] Based on the foregoing submissions and the record of appeal before us, we have distilled the following issues for determination and we propose to analyze them seriatim:-

1. ***Was the contempt application competently before the court?***

2. ***Was the court order of 28th October 2008, served upon the appellants?***

3. ***Did the Judge err in citing the appellants for contempt?***

[9] Competency of the Contempt application: The appellants contended that the contempt application was incompetent on the ground that the 1st respondent/applicant failed to serve the requisite notice to the Attorney General as provided under ***Order 52*** of the ***Rules of the Supreme Court of England*** that requires an applicant in such an application to give notice to the Crown Office, *(Attorney General)*, of the contempt application prior to filing. On the other hand, while admitting that notice was not issued, the 1st respondent maintained that the same was not fatal and did not render the proceedings incompetent as the law that is applicable in Kenya is what is applied in England. In England the law changed and it is no longer necessary to serve the notice upon the Crown.

[10] It is imperative in considering this issue to take into account the applicable law and the governing principles in contempt proceedings. As correctly pointed out by this Court in ***Christine Wangari Gachege -vs- Elizabeth Wanjiru Evans & 11 Others,*** ***- Civil Application No. 233 of 2007,*** the statutory basis of contempt of court in so far as the Court of Appeal and the High Court are concerned is ***Section 5*** of the ***Judicature Act*** and ***Section 63(c)*** of the ***Civil Procedure Act.*** *(It is important to state now there is there are two statutes that is Court of Appeal and High Court Administration Acts that make provisions for punishing contempt of court. However these Acts were enacted in December 2015 after these proceedings)*. Thus the relevant and applicable law in this case is ***Section 5*** of the ***Judicature Act*** which

provides:-

> ***" 5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as <u>is for the time</u> <u>being possessed by the High Court of Justice in England,</u> and that 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 exercise of the original criminal jurisdiction of the High Court."(Emphasis added)***

[11] Based on the foregoing provision, the applicable law in contempt proceedings in Kenya, is in 2008 Rules of the Supreme of court of England. In ***<u>Christine Wangari Gachege -vs- Elizabeth Wanjiru Evans & 11 Others,</u> (supra),*** this Court stated as follows:-

> ***"Following the implementation of the famous Lord Woolf's Access to Justice Report, 1996'<u>, the Rules of the Supreme Court of</u> <u>England</u> are gradually being replaced with the Civil Procedure Rule, 1999. Recently on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme <u>Court of England in its entirety</u>. Part 81 (Applications and proceedings in relation to contempt of Court) provides different procedures for four different forms of violations.***
>
> ***Rules 81.4 relates to committal for 'breach of a judgment, order or undertaking to do or abstain from doing an act.'***
>
> ***Rules 81.11 relates to committal for 'interference with the due administration of justice'. (Applicable only in criminal proceedings)***
>
> ***Rules 81.16- relates to committal for contempt 'in the face of the court.' and***
>
> ***Rules 81.17- relates to committal for 'making false statement of truth or disclosure statement".***

[12] As per ***Rule 81.1*** the amendment provides the procedure in contempt of court proceedings in the Court of Appeal, High Court and county courts in England. In this case ***Rule 81.4*** is applicable. ***Rule 81.10*** sets out the procedure for filing a contempt application is as follows:-

"(3) The application notice must—

> ***a. set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and***
>
> ***b. be supported by one or more affidavits containing all the evidence relied upon.***

4. Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.

5. The court may—

> ***a. dispense with service under paragraph (4) if it considers it just to do so; or***
>
> ***b. make an order in respect of service by an alternative method or at an alternative place.***

The aforementioned provisions omitted out the requirement of notice to the Crown Office *(read Attorney General)*, prior to filing an application for contempt as was previously required under ***Order 52***. Consequently, the contempt application was competently before the High Court.

[13] Was the order dated 28th October 2008, served upon the appellants'? ***Rule 18.6*** **of the** ***Civil Procedure (Amendment No. 2) Rules 2012*** of England provides that a copy of judgment or orders and any orders or agreements fixing or varying the time for doing an act should be served personally. The appellants contend that they were never served with the said order personally or otherwise; they only learnt about the order on 18th December, 2008, when they promptly filed an application to vacate the said orders. We have carefully read the proceedings of the High Court; the record is clear and it is common ground that on the **27th October 2008**, Lessit, J., issued an ex-parte order of temporary injunction restraining the appellants from forcefully evicting tenants, demolishing or damaging, leasing, renting, subletting, collecting rent or in any way interfering with the 1st respondent possession and that of his tenants in subject premises pending interparte hearing. The said order was extracted on the 28th October, 2008. The appellants have alleged that they were not served with the said order and that is why they went ahead to demolish the old building on the subject premises and constructed a new building. The learned judge was persuaded that the appellants were served with the said order together with the penal consequences.

[14] We have further examined this ground of appeal regarding service as it is critical in contempt proceedings. The record, especially the affidavit of service by one, Wafula Francis, an authorized process server stated that the appellants were served with the order on the ***30th October, 2008***. According to the process server he served the 2nd and 3rd appellants, with the said order and notice of penal consequences at the 1st appellant's office situated on 3rd floor, Town House along Kaunda Street, Nairobi. Further, the process server deponed that the 2nd appellant is the one who received the said order and penal notice on behalf of the 4th appellant. The 2nd appellant informed the process server that he was authorized to receive the same on behalf of the 4th appellant since he was his father. This affidavit evidence by the process server was not at all challenged during the hearing of the application for contempt and subsequently. It is clearly demonstrated in the record that the 2nd 3rd and 4th appellants are the directors of the first appellant's company. In the absence of any contrary of contradictory evidence or affidavit, we have nothing to dis-believe the said contention.

[15] Further, in the affidavit of one **George Baiko Barugu** and **Simon Kiptum Sang**, who were tenants on the suit premises, it is clear that the appellants were aware of the order dated **28th October 2008**. We say so because, both tenants confirmed that they were served with the said order together with the penal consequences on the **28th October, 2008**. They have both averred that the said order was also fixed prominently on the doors of the suit premises. Further that the 2nd appellant visited the suit premises on several occasions after the court order had been pasted on the premises claiming that he was the new owner of the suit premises and threatened the tenants verbally with dire consequence and ordered them to vacate the suit premises by **1st November, 2008**. Lastly, the 2nd appellant has not disputed the allegation that he was served with the order and penal consequences. They have only disputed service was effected upon 4th respondent.

[16] From the foregoing, it is clear that the appellants went ahead to demolish the old building on the suit premises in the face of a court order that restrained them. Although the appellants have claimed that they were never served with the order, which is not borne by the records; indeed the records demonstrate that they were well aware of the order when they demolished the suit premises. **Lenaola, J.** in the case of ***Basil Criticos - vs- Attorney General and 8 Others, [2012] eKLR,*** stated that :-

> ***"...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary".***

[17] Disobedience of court orders undermines the rule of law and lowers the dignity and authority of courts. Court orders must be strictly obeyed with utmost obedience. This court in the case of ***Shimmers Plaza Limited v National Bank of Kenya Limited, [2015] eKLR,*** stated that:-

"Government institutions, State officers, banks, and all and sundry are enjoined by law to comply with Court orders. We must deprecate in the strongest terms possible the worrying trend in this country where court orders are treated with tremendous contempt by persons and institutions which think wrongly of course, that they are above the law.

We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the Constitution. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy".

(Emphasis ours).

[18] We respectfully agree with those sound legal propositions. In the present case, it is not in dispute there was a temporary injunction against the appellants, which was to expire on the 5th November, 2008. It is also common ground that the matter was not fixed for inter parties hearing because the court file went missing and thus the order was not extended; however the order was not also vacated. To assume that the order lapsed when the file went missing is to invite impunity where interested parties may collude to ensure the file goes missing so as to declare an order invalid without a formal order of the court vacating it orders. The appellants did not file a replying affidavit in response to the 1st respondent's application the subject of this appeal and on the 6th November, 2008, they swiftly demolished the subject matter. From the foregoing, the learned judge cannot be faulted for the observation that the appellants who benefited from the lost file, must have influenced or caused its disappearance.

[19] In any case and more importantly, the appellants demolished the suit premises without giving any of the tenants sufficient notice to either vacate or look for an alternative premises. Another grave mistake, the demolition was done without seeking and obtained act order to demolish and displace the 1st respondent and his tenants. We think that a gross miscalculation on the part of the appellants and a clear testimony of immunity taking root amongst in our citizenry. As a civilized nation, the rule of law is both a shield and weapon for all of us, including the appellants who decided to unlawfully disobey act order. The consequences and blame is only attributable to them.

We cannot fault the learned judge for enforcing the Rule of Law. We think he was absolutely right in the way he appreciated the issues for a determination. In the absence of an authority and order to demolish and in the clear testimony of service, which is uncontroverted, the guilt and consequence thereof must fall on the shoulders of the appellant. We do so by upholding the decision of the trial judge.

[20] We think we have said enough to demonstrate why we have arrived at concurrent findings with the High Court Judge, that the appellants were aware of the Court orders issued on the 27th October ,2008, that notwithstanding, they acted in utter disobedience of the same. Accordingly, we find no merit in this appeal which is dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 13th day of May 2016.

M. K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

G.B.M KARIUKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR