IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 18 OF 2015

BETWEEN

WOBURN ESTATE LIMITED …….…….…….APPELLANT

AND

MARGARET BASHFORTH……..……..RESPONDENT

(Being an appeal from the ruling of the Environmental and Land Court at Malindi (Angote, J.) dated 17th October, 2014

in

ELC.Civil Case No. 46 of 2011)

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JUDGMENT OF THE COURT

In the year 2005 the respondent purchased, by way of a sub-lease from the appellant, a residential property more particularly described as Apartment 2 E in Malindi situate on Plot No.10714. There were other apartments developed by the appellant but managed by Woburn Estate Management Limited on this plot. The appellant was the registered owner of an estate in fee simple of that property. The lease provided that, like all the other lessors, the respondent would pay service charge for common amenities in accordance with **clauses 2.2 (b)** and **4.9** of the lease.

In May 2011, following a disagreement regarding payment of service charge, the appellant brought an action against the respondent claiming that the latter had fallen into arrears on the payment even though she continued to enjoy all services provided by the appellant. The appellant claimed arrears of service charge in the sum of Kshs.547,736.50 for the period between January 2009 until the date of judgment or the date of repossession of the apartment, costs of the suit and interest.

The respondent in her defence explained that the failure to pay the service charge was as a result of a dispute in the calculation of the correct amount to be levied; that this notwithstanding, the appellant had refused three times to accept any payment by the respondent; that the arrears were not from January, 2009 but from August 2009 when the appellant refused to accept payment; that the appellant through its directors resorted to intimidating and harassing her, who was subsequently denied access to the apartment; that it had even refused to let her sell the apartment to a prospective buyer who had made an offer of Kshs.10,000,000 as purchase price and was also willing to settle any outstanding service charges;

that without any justification the appellant refused to give consent to her to sell as a result of which she lost the opportunity; that after the appellant refused her access to the apartment, she was forced to move out to an alternative accommodation.

The respondent counter-claimed against the appellant, praying for an order to compel the latter to allow her to sell the apartment, damages for loss of a prospective buyer, or in the alternative, and without prejudice to the first prayer, the appellant be compelled to compensate the respondent in the sum equivalent to the present value of the apartment, damages for loss of user of the apartment from April 2011 until possession is obtained or the apartment is sold.

Meoli, J in her judgment of 16th April, 2013 noted that the genesis of the dispute was a notice issued by the appellant to apartment owners in 2000 notifying them of the new service charge of Kshs. 22,000 based on a summary of income and expenditure accounts allegedly prepared by the firm of Grant Thorton for the year ending 30th April 2009. The accounts were declared by the learned Judge, a forgery as they were disowned by Grant Thornton who maintained that they were presented or prepared without their authority or knowledge. In terms of the lease agreement, there was, in the absence of genuine accounts, no justification to increase the service charge, the court held. In addition, the appellant, contrary to the lease agreement, levied double charges in management and directors' fees. On the other hand, the learned Judge found that the offer by the prospective buyer to settle the outstanding service charge was not genuine but amounted to a threat; and that the obligation on the part of the respondent to continue paying what she believed was the correct charges was not suspended by her objection to the new charges. To that extent the learned Judge equally found the respondent to be in breach of the agreement and that it was unconscionable for her to continue receiving services without paying for them. The conduct of the appellant to throw out the respondent amounted to taking the law into its own hands, hence it could not seek an equitable remedy of specific performance.

The learned Judge, on the above facts, concluded that both the appellant the respondent had not done equity even as they sought it; that both were to blame albeit on varied degrees, with the result that the appellant's claim in respect of service charge was not proved and failed. On the other hand the respondent failed to prove the nature of damage suffered following the appellant's denying her access to the apartment. Ultimately the learned Judge, in order to resolve the dispute "completely and in a just manner", ordered that-

"1. The defendant will pay service charge to the plaintiff at the rate subsisting before 23rd July 2009 vide notice dated 28th March, 2008 for the period the defendant was in occupation of the premises, namely 23rd July 2009 to 16th April 2012.

2. If the above sum remains unpaid after thirty days of today's date, it will attract interest at court rates until full payment….

3. The plaintiff will allow the defendant free access to her apartment upon receipt of payment under "1" above or in the alternative compensate her for the value thereof, as will be established by an expert from ISK or by agreement of both parties."

This decision generated new disagreement between the parties, culminating in two rulings. The first ruling rendered by Meoli, J on 31st March 2014 arose out of an application by the respondent seeking to set aside or vary and review the judgment of 16th April 2013 by including an order directing the appellant to comply with the expert report; that a proper audit be undertaken to determine the proper and correct service charge payable and the appellant be ordered to pay the cost thereof; and that the appellant be restrained by an order of (mandatory) injunction from withholding from the respondent the consent to sell the apartment or in the alternative, that the respondent be at liberty to sell the apartment, lack of the appellant's consent notwithstanding. In that application, the respondent averred that while she had complied with the decision of the court, the appellant had continued to levy the rate of service charge which the court had found to be irregular.

The appellant for its part argued that pursuant to the judgment, the Institute of Surveyors of Kenya (ISK) appointed Mr. Paul Wambuato to inspect the property in order to ascertain the correct service charge; that at the time the application was brought, the report had not been submitted to the parties; that this notwithstanding the respondent was still in arrears of service charge.

The learned Judge saw the resolution of the controversy as lying in the interpretation of her judgment of 16th April, 2013. She therefore clarified in the first ruling that the purport of the judgment was that, until the rate of the service charge was professionally determined, the appellant was precluded from demanding the service charge based on the rate that had occasioned the filing of the suit. She concluded that:

"Such a demand, in my view amounts to a negation of the judgment of this Court as delivered on 16th April, 2013. The defendant/applicant will therefore continue to pay service charge at the rate ordered in the court's judgment, …pending assessment of the proper service charge, in accordance with the lease agreement."

The next level of dispute was occasioned by the continued demand by the appellant from the respondent of the service charge based on the rate already disallowed by the court. For this reason the respondent took out a motion for orders that the directors of the appellant, namely Franco & Elly Esposito be ordered to show cause why they should not be committed to civil jail for disobedience of the court's judgment of 16th April 2013 and the subsequent (the first) ruling of 31st March 2014 (delivered on 2nd April 2014); and that the two directors be committed to a term of six (6) months in civil jail for the aforesaid disobedience of a court order. The application was premised on the ground that despite the clear terms of the judgment, the appellant continued to demand from the respondent unsubstantiated, inflated and disavowed rates even for the period when she was not in possession of the apartment.

The appellant responded that the terms of the judgment were indeed clear and that it had not violated them; that although it kept demanding the new rates, the respondent kept paying the old rates and the appellant did not insist on the new rates, hence no prejudice was suffered by the former. The appellant explained that while HCCC No.51 of 2014, in which the subject of the correct service charge was to be determined was pending, it had been issuing statements to the apartment owners reflecting how the service charges would be like if the report by Mr. Paul Wambua was to be confirmed upon presentation.

The learned Judge (**Angote, J.)** was not persuaded by this explanation and in his ruling of 17th October 2014, found that the act of the appellant of demanding from the respondent the new rates ran afoul of the terms of the judgment, which had directed that the new rates could only be demanded from the respondent upon determination by a professional. The learned Judge found that instead of demanding Kshs.17,400, the old rate, the appellant issued invoices in the sum of Kshs.29,368; that in the statements it was clear that the old rate would be credited in the respondent's account and the "balance" based on the new rate carried forward each month.

The learned Judge relied on the decisions in **Mutitika** v **Baharini Farm** (1982-88) I KAR 863, **Hadkinson** v **Hadkinson (**1952) All ER 567, **Johnson** v **Grant** (1923) SC 7890 and **Christine Wangari Gachege** v **Elizabeth Wanjiru Evans, and 11 others**, Civil Application No. 33 of 2013, to the effect that a person who knowing of the existence of an order of injunction or stay but willfully does an act that violates the terms of the injunction or stay is liable to be committed for contempt; that a party directed by an order of court to do or to refrain from doing any act must comply with the direction until it is discharged, irrespective of that party's view or opinion over the order; that contempt of court proceedings are intended not to protect personal dignity of the individual judge or the private rights of any litigant, but are meant to protect the fundamental supremacy of the law and the rule of law; and that leave to commence contempt of court proceedings is no longer required in view of the 1999 Civil Procedure Rules of England and the Civil Procedure (Amendment No.2) Rules, 2012 (of England).

The learned Judge found on the material before him that the two directors of the appellant were in contempt of a court order and ordered for their committal civil jail for a period of 30 days. He issued a warrant for their arrest which was to be executed by the Officer Commanding Police Division, (OCPD) Malindi.

The appellant has, in this appeal challenged the finding on liability and committal for contempt of an order of the court on 11 grounds whose combined effect is that the learned Judge erred in finding the two directors of the appellant to be in contempt of court; that although the learned Judge appreciated that the power to punish for contempt of court, by dint of **section 5** of the Judicature Act is, for the time being contained in Part 81 of the Civil Procedure Rule of England, he nonetheless failed to find that as a matter of fact it was the respondent who had failed to comply with the order to pay service charge based on the old rate; that for its part the appellant complied with the order to allow the respondent to access the apartment, hence the order made in the judgment and later clarified in a subsequent ruling was incapable of being breached by the appellant; that the order allegedly breached only required the respondent, and not the appellant, to pay the old rates until their proper assessment; that the respondent herself admitted paying only the old rate even though the invoices contained a different figure; that the appellant accepted payment based on the old rate and did not insist on the amount on the invoice or taken steps inconsistent with the terms of the court order; that the learned Judge failed to find that no contempt of court proceedings could be commenced against the appellant without personal service of the order and penal notice on the two directors; that **section 63** of the Civil Procedure Act and **Order 40 rule 3 (1)** of the Civil Procedure Rules were not properly invoked since there were no restraining orders against the appellant capable of being enforced or breached. These grounds were the subject of written submissions which Mr. Otara learned counsel for the appellant asked us to consider without him highlighting them.

Citing **Order 40 rule 3 (1)** aforesaid, upon which the respondent's application for contempt was premised, learned counsel submitted that under that order only disobedience or breach of an order of injunction can be punished; that from the terms of the decree and order, no injunction was issued against the appellant capable of being violated.

The respondent, who has been acting in person also did not highlight her written submissions. The respondent has urged us to dismiss this appeal because the appellant blatantly breached the orders of the court even after the terms were clarified by demanding service charge at the disavowed rate plus further compound interest; that the letter sent to the respondent by one of the appellant's entities or subsidiaries, the Worburn Residence Club, asking her to ignore the charges contained in the invoices which were beyond those permitted by the court, came after the application contempt had been filed.

For many years in the history of the Judiciary of Kenya the courts have, pursuant to **section 5 (1)** of the Judicature Act, resorted to the prevailing law of England in the exercise of the power to punish for contempt of court. That section provides that:

"5. (1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, 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 the exercise of the ordinary original criminal jurisdiction of the High Court." (*our emphasis*)

It has been held that by this provision both the High Court and this Court are enjoined to ascertain the applicable law of contempt in the High Court of Justice in England at the time an application is brought before our courts. See **Christine Wangari Gachege** (supra). Regarding that provision, this Court, in the Matter of Application by Gurbanresh Singh and Sons Ltd, Misc.Civil Case No.50 of 1983 stated that;

"The second aspect concerns the words of section 5 "for the time being", which appears to mean that this Court should endeavour to ascertain the law in England at the time of the trial, or application being made. Sometimes it is not known, or may not be known exactly, what powers the court may have. It seems clear that the Contempt of Court Act, 1981 of England is the prevailing law and that the procedure is still that set out in Order 52 of the Supreme Court Rules."

When **Christine Wangari Wachege** (supra) was decided on 14th February, 2014 the only substantive law with respect to the general power of the High Court or this Court to punish for contempt of court was

section 5 of the Judicature Act. Of course, in respect of injunctions **section 63 (e)** of the Civil Procedure Rules, makes provisions. The practice has therefore with regard to the general powers, been to ascertain both the prevailing substantive law and procedure in England at the time the application was brought. Today that position has drastically changed, starting with the establishment of the Supreme Court which was not envisaged when section 5 of the Judicature Act was enacted. By Act No.7 of 2011, **Article 163 (9)** of the Constitution was operationalised by the enactment of the Supreme Court Act (CAP 9A), which among other things, makes express provision for the power of the Supreme Court to punish for contempt.

Under **section 29** of the Environment and Land Court Act, it is an offence punishable, upon conviction to a fine of not exceeding Kshs.20,000,000 or to imprisonment for a term not exceeding two years, or to both, if any person refuses, fails or neglects to obey an order or direction of the court given under the Act. In contrast, under **section 20 (7) and (8)** of the Employment and Labour Relations Court Act, 2011 any person who without reasonable cause fails to comply with an order duly given in respect of attendance to court, furnishing of such particulars as may be required, giving of evidence before the court or producing of any relevant documents, or who when required by an order to furnish information or to make any statement or to furnish any information, knowingly gives the information or makes a statement which is false or misleading in material particular, commits an offence, and upon conviction is liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or to both.

The High Court (Organization and Administration) Act which was passed in 2015 now expressly donates to the High Court the power to punish for the disobedience of its orders. It provides-

"36. (1) A person who –

(a) assaults, threatens, intimidates or willfully insults a judge, judicial officer or a witness, involved in a case during a sitting or attendance in a court, or while the judge, judicial officer or witness is travelling to and from a court;

(b) willfully and without lawful excuse disobeys an order or directions of the court in the course of the hearing of a proceeding;

(c) within the premises in which any judicial proceeding is being heard or taken, or within the precincts of the same, shows disrespect, in speech or manner, to or with reference to such proceeding, or any person before whom such proceeding is being heard or taken;

(d) having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being heard or taken after the witnesses have been ordered to leave such room;

(e) causes an obstruction or disturbance in the course of a judicial proceeding;

(f) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority taken;

(g) publishes a report of the evidence taken in any judicial proceeding that has been directed to be held in private;

(h) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence in connection with such evidence;

(I) dismisses a servant because he or she has given evidence on behalf of a party to a judicial proceeding; or

(j) commits any other act of intentional disrespect to any judicial proceedings, or to any person

before whom such proceeding is heard or taken, commits an offence.

(2) …….

(3) A person who commits an offence under subsection (1) shall, on conviction be liable to imprisonment for a term not exceeding five days, or to a fine not exceeding one hundred thousand shillings, or to both.

(4) In exercise of its powers under this section, the Court shall observe the principles of fair administration of justice set out in Article 47 of the Constitution."(*our emphasis****)***

Section 39 (2) (g) enjoins the Chief Justice to make Rules to provide for, among other things, the procedure relating to contempt of court. Purely as a matter of interest and comparison, **section 35** of the Court of Appeal (Organization and Administration) Act, 2015, headed "Contempt of Court" stipulates that;-

"35. (1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.

(2) A person who, in the face of the Court –

(a) assaults, threatens, intimidates, or insults a judge of the Court, the Registrar of the Court, a Deputy Registrar or officer of the Court, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;

(b) interrupts or obstructs the proceedings of the Court; or

(c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence.

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.

(4) In the case of criminal proceedings, the publication, whether by words, spoken or written, by signs, visible representation, or otherwise, of any matters or the doing of any other act which –

(a) scandalizes or tends to scandalize, or lowers or tends to lower the judicial authority or dignity of the court;

(b) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(c) interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice, constitutes contempt of court.

(5) A police officer, with or without the assistance of any other person, may, by order of a judge of the Court, take into custody and detain a person who commits an offence under subsection (2) until the rising of the Court.

(6) The Court may sentence a person who commits an offence under subsection (1) to imprisonment for a period not exceeding six months, or a fine not exceeding five hundred thousand shillings, or both.

(7) A person may appeal against an order of the Court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the Court."(*our emphasis****)***

We have gone to this great length to demonstrate how, before the passage of these legislations the powers of the High Court and this Court to punish for contempt of court were dynamic and kept shifting depending on the prevailing laws in England. Today each level of court has been expressly clothed with jurisdiction to punish for contempt of court. The only missing link is the absence of the rules to be followed in commencing and prosecuting contempt of court applications. In order to completely emancipate ourselves from English law on contempt of court, the Chief Justice, as required under the aforesaid legislations ought to make rules for commencing and prosecuting applications for contempt of court.

At the time the impugned decision was made in 2014 the High Court (Organization and Administration) Act had not come into force. The applicable law, it follows was **section 5** of the Judicature Act as well **section 63(e)** of the Civil Procedure Act. The appellant has argued that since the impugned order was not an injunction neither **section 63 (e)** aforesaid nor **Order 40 rule 3 (1)** of the Civil Procedure Rules was applicable hence the court had no jurisdiction to entertain the application in the first place and to issue the orders of committal.

The jurisdiction of the High Court (or any other court for that matter) to punish for the violation of its orders cannot be in question. Apart from **section 5 (1)** of the Judicature Act that vests in the High Court the power, like those of the High Court of Justice in England, to punish any party who violates its orders, the court, by virtue only of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times. See **Refrigeration and Kitchen Utensils Ltd** v **Gulabchand Popatlal Shah & Another**, Civil Application No.39 of 1990, where it was observed.

"A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it…. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question……he should apply to the court that it might be discharged. As long as it exists it must not be disobeyed."

See also **Chuck** v **Cremer** (1) (1 Coop. Temp.Cott.342) cited with approval in this Court's judgment in **Shimmers Plaza Limited** v **National Bank of Kenya Limited**, Civil Appeal No. 33 of 2012.

The next question is whether the appellant was in disobedience of the judgment of 16th April, 2013 and the subsequent ruling of 2nd April, 2014. In the former, **Meoli, J.** directed the respondent to *"pay service charge to the (*appellant*) at the rate subsisting before 23rd July, 2009….for the period the (*respondent*) was in occupation of the premises, namely 23rd July, 2009 to 16th April, 2012."*

It is our opinion that this order was directed at the respondent to pay the appellant service charge based on the old rate for a specific period. By sending an invoice with a different rate and without insisting that the payment be based on that rate, we do not think, with respect, that the act of invoicing *per se* was in violation of that order. The respondent to whom the order was directed, herself complied with it to the extent of paying only the rate determined by the court to be payable. Those orders were reiterated in the ruling of 31st March, 2014. The second limb of the judgment was specifically directed at the appellant to;

"….allow the (respondent) free access to her apartment upon receipt of payment under (1) above, or in the alternative compensate her for the value thereof, as will be established by an expert from ISK or by agreement of both parties."

The appellant complied with the first part of the above order and allowed he respondent into her apartment. It continued accepting the old rate as paid by the respondent.

It follows, once more that the learned Judge misdirected himself by holding that there was an order directed at the appellant which was violated.

The last argument by the appellant, which is clearly now superfluous after the foregoing finding, is the

question of extraction of the decree and order and their personal service on the appellant. This Court in two recent successive decisions in **Christine Wangari Wachege** (supra) and **Shimmers Plaza Limited** (supra) explained in *extenso* the procedure in commencing and prosecuting an application for contempt of court under the English Civil Procedure Rules, 1999. Part 81.9(1) of those rules, in particular, a judgment or an order to do or not to do an act may not be enforced unless the copy of the judgment or order was previously displayed and served; that the person required to do or not to do the act in question is warned that disobedience of the judgment or order would be a contempt of court, punishable by imprisonment, a fine or sequestration of assets, but the court can dispense with service. Otherwise a judgment or order may not be enforced unless a copy of it has been served on the person required to do or not to do the act in question. Under Rule 81.6, and as a general rule, service of the judgment or order must be personal on the contemnor unless the court dispenses with that requirement. Exceptions to that rule are found in Rule 81.8 to the effect that personal service will be dispensed with if the court is satisfied that the contemnor was present when the judgment or order was given or made, if the contemnor was notified of its terms by telephone, email or otherwise or if the court thinks it is just to dispense with service. There has been little change in this requirement since the decision of this Court in **Ochino & Another** v **Okombo & others** [1989] KLR 165. The court may also make an order in respect of service by alternative method or at an alternative place.

In the matter before us, the appellant has alleged that the order was not served personally on it nor was there dispensation with such service. The respondent's answer to this was that, as a lay person she is not versed in legal procedures. It is therefore uncontroverted that the judgment of 16th April 2013 and the order of 31st March 2014 were not served on the appellant.

We reiterate that contempt proceedings being of quasi –criminal in nature and since a person may lose his right to liberty, each stage and step of the procedure must be scrupulously followed and observed. We bear in mind the often-cited passage attributed to Lord Denning In **Re Bramblevale Ltd** [1970] 1 CH 128 at page 137 that;

" A contempt of court is an offence of criminal character. A man may be sent to prison for it. It must be satisfactorily proved showing that when the man was asked about it, he told lies. There must be some further evidence to incriminate him."

In the result we find that the learned judge erred in the decision he reached holding the appellant liable in contempt and the punishment he imposed. Accordingly, this appeal succeeds. The orders of 17th October, 2014 are set side. In the circumstance of this matter we order that parties shall bear their own costs.

Dated and delivered at Mombasa this 17th day of June, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR