IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE JJA)

CIVIL APPEAL NO. 50 OF 2014

BETWEEN

JACINTA NJERU KAITHA………………...APPELLANT

AND

DAVID K. KANYIRI...RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Embu (Ongudi, J.) Dated 30th May, 2014)

In

(Misc. Case No. 107 of 2013

****

JUDGMENT OF THE COURT

Introduction & Background

1. The appellant ***Jacinta Njeru Kaitha*** was a tenant of the respondent on premises described as No. BPS No. 39, a commercial business place within Embu Bus Park from where she operated a cereals shop known as Elimu Enterprise. By virtue of this, she deemed herself a lawful tenant in terms of the provisions of the LandLord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya.
2. The respondent threatened her with eviction prompting her to move to the Business Premises Rent Tribunal (BPRT) and file Tribunals case No. 38/2013- Embu. *Exparte* orders were granted in the first instance in favour of the appellant on the 15th day of April, 2013, restraining and prohibiting the Landlord either by himself, his servants and or agents from evicting the tenant pending the hearing of the complaint at Embu Rent Restriction Hall; the O.C.S. Embu police station to ensure that peace and tranquility was maintained and an attendant order to serve the landlord with the said order.
3. The orders were allegedly served on the respondent who allegedly violated them by evicting the appellant from the said premises on the 14th June, 2013. The appellant was aggrieved by that action and she moved to the High Court of Kenya at Embu and filed Misc. Application No. 107 of 2013 seeking leave of court to commence proceedings to commit the respondent to prison for alleged contempt of court orders made on 15th April, 2013 for such period as the Honourable court

would deem fit and just.

4. The order for leave was granted by the High Court on 11th July, 2013. On the 19th day of July, 2013 the appellant presented the substantive Notice of Motion seeking orders that ***David K. Kanyari*** be committed to civil jail for contempt of court; that the contemnor be ordered to purge the contempt by obeying the orders of BPRT of 15th April, 2013 namely to reinstate the appellant to the suit premises.
5. The application was supported by grounds in its body and a supporting affidavit of the appellant of the same date. The application was opposed by the replying affidavit of the respondent ***David Kabuga Kanyiri*** deposed on 25th day of December, 2013. Parties were heard on their merits resulting in the ruling of 30th day of May, 2014 (***H.I. Ongu'di, J)*** impugned herein, in which the court declined the appellant's request for the reasons given.

<u>Grounds of Appeal</u>

6. The appellant was aggrieved by that decision and preferred this appeal raising five (5) grounds of appeal namely:-

"1. That the learned Judge erred in law in directing herself on the law and facts in declining the contempt proceedings brought under the Judicature Act.

2. The learned Judge failed to appreciate the nature (jurisdiction and discretion) given by the Landlord and Tenants Business Premises Tribunal so as to recon that the order were (sic) valid and therefore contempt arose automatically, the landlord evicted the applicant from the business premises.

3. That the learned judge failed in arriving at a wrong conclusion that there was no order capable of being disobeyed.

4. That the learned Judge misapplied the law on contempt in dismissing the application before her.

5. That the learned judge despite actual admission in affidavit by the respondent misdirected herself in concluding that the eviction of the appellant from the business premises did not constitute violation of standing tribunal orders.

In consequence thereof, the appellant invited this Court to overturn the ruling delivered on 30th May, 2014 by the High Court and substitute the same with an order that the respondent was in contempt of the BPRT orders aforesaid and do proceed to punish the respondent.

<u>Appellant's submissions.</u>

7. ***Mr. D.K. Mungai,*** learned counsel for the appellant in arguing the appeal before us, submitted that it is not disputed that the appellant sought relief from the BPRT as against the respondent; restraining orders were issued under **section 4** of the Land Lord and Tenants Shops , Hotels and Catering Establishment Act cap 301 laws of Kenya in her favour; these were duly extracted for service upon the respondent; the said orders did not contain the requirement that these be served on the respondent within three days of their making; the requirement to have the extracted orders served on the respondent within three (3) days of their making was a condition attached to orders issued to a 3rd party who is not party to this appeal.
8. Turning to the service of the said orders on the respondent, ***Mr. Mungai*** argued that the content of the respondent's averment in paragraph 5 and 6 of his defence and deposition in paragraph 8 of his replying affidavit is sufficient demonstration that the respondent had been served as he gives reason as to why the appellant had been kicked out of the premises; the process server when called for cross- examination on service of the said orders on the respondent gave a candid account on how he had effected service on the respondent a matter not controverted by the respondent .

9. As for the requirement on the service of the penal notice, ***Mr. Mungai*** submitted that this is not a mandatory requirement where the alleged contemnor is aware of the issuance of the orders allegedly breached. Reliance was placed on a persuasive decision in the case of ***Teachers Service Commission versus Kenya National Union of Teachers & 2 others [2013] eKLR*** wherein the High Court drew inspiration from the decision in the case of ***Basil Criticos versus Attorney General and 8 others [2012] eKLR*** for the proposition that:

> ***"...the law has changed and as it stands today, knowledge supercedes 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."***

The court stated *inter alia* that:

> ***"in the normal scheme of things, personal service in matters of contempt is a requirement, however, if a man wereto barricade himself or go into a bunker from where he issues communication to the effect that he in fact knows about the existence of a court order and will not obey it, surely the lack of personal service would not nullify an otherwise competent application for committal for contempt of court."***

10. Lastly he submitted that the High Court fell into error when it drifted off the truck to address issues not agitated before it namely the failure to serve the substantive motion within the period stipulated by the court.

Respondent's submissions.

11. In response to the appellant's submissions, ***Mr. Joe Kathungu*** urged us to disallow the appeal on the ground that the learned trial Judge had properly interrogated the record before her, inclusive of the proceedings before the BPRT and arrived at the correct conclusion that the issue of service was fundamental to the issues in controversy as between the disputants. According to ***Mr. Kathungu,*** the learned Judge had correctly made a finding that the orders granted in favour of the appellant were supposed to have been served on the respondent within three days of their issuance; that the orders on the record had no penal notice, while those purportedly served on the respondent with the application for committal had a penal notice; and that the discrepancy in the said two sets of orders was not sufficiently explained by the appellant leaving the learned judge with no option but to suspect mischief. Further, that no affidavit of service had been annexed to the affidavit in support of the application for contempt; none has been included in the record of appeal; when the process server was called for cross-examination, it became clear from his responses that he never served the respondent; the respondent only admits being made aware of the orders granted in favour of the party who did not appeal; and lastly, that the learned trial Judge cannot be blamed for faulting the appellant for her failure to serve the application for contempt of court orders within the time stipulated by the court as these too were supposed to be obeyed.

Appellant's response to the respondent's submissions.

12. In response to the respondent's submissions, ***Mr. Mungai*** urged us to find that the learned judge's ruling was silent as to whether the penal notice was served or not and also whether personal service was crucial in the circumstances of this case or not; the appellant still maintained that service of the penal notice on the respondent was not necessary in the circumstances of this case; this court should be persuaded by the case law relied upon by the appellant on the current trend on the law of contempt of court orders; and that it was not correct to say that the respondent was only served with orders granted in favour of the party who did not appeal and maintains that both sets of orders were served on the respondent who had knowledge of them as at the time he committed the alleged breach .

Analysis

The principles

13. This is a first appeal on an application which called for the exercise of discretion of the trial court. The principles governing the exercise of judicial discretion were well set out by ***Ringera, J***. (as he then was) in the case of ***Githiaka versus Nduriri [2004] 2 KLR 67***. These are that such discretion should be exercised on sound reason, rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court that is to do justice to the parties before it. The parameters for interference with the exercise of such discretion were well put by the predecessor of this Court in the case of ***Mbogo and another versus Shah [1968] EA 93*** namely; for an appellate court to do so, it must be satisfied that the judge misdirected himself in some matter, and as a result arrived at a wrong decision, or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there had been injustice.

The decision of the trial Court

14. In making the orders it ultimately did, the trial court considered the rival arguments before it; the content of the record in the Business Premises Rent Tribunal case No. 38/2013; the relevant provision of law and case law relied upon by either side and then drew up the issues for determination namely:

i. Whether it was properly seized of the matter; (ii)whether there were orders in place capable of being breached; (iii)if issue number (ii) is answered in the affirmative, whether these had been served on the respondent as alleged; and lastly (iv) whether the notice of motion before it was competent.

15. In response to issue number (i), the trial judge drew inspiration from the provision of **section 5(1)** of the Judicature Act Cap 8 Laws of Kenya and concluded that the court was properly seized of the matter and could competently dispose of it on its merits. On issue number (ii) though we find that the court interchanged the dates on which the respective orders were made that is the orders in BPRT 38/13 with respect to the appellant herein as having been made on 22nd May, 2013 instead of 15th April, 2013 while those in BPRT 37/2013 as having been made on 15th April, 2013 instead of 22nd May, 2013, we are satisfied that the trial court had arrived at the correct conclusion that there were indeed orders made in favour of the appellant on 15th April, 2013 in BPRT 38/2013. The error in the confusion of the dates is minor and did not cause any miscarriage of justice and can safely be ignored. As observed earlier, BPRT 37/2013 related to the party who did not appeal.

16. Our concern here, therefore, is with respect to the orders made in BPRT 38/2013. The learned trial Judge had the advantage of perusing the record in respect of this cause, which we do not as its content was not included in the record of appeal. Her findings are that order No.4 therein read:-

"To serve the Landlord within three days".

On the basis of this, the learned judge took issue with the order "annexture A" to the affidavit deposed by the appellant in support of the substantive Notice of Motion. The learned judge went on to observe that no certified copy of this order had been extracted and no return of service of the said order had been exhibited by the appellant to show that she had complied with the tribunal's directive of service of the order within three days of 15th April, 2013 which fell on 18th April, 2013. The learned judge therefore concluded that "annexture A" was a questionable document.

17. To fortify the above, the learned trial Judge drew support from the responses given by the process server G. M. Kariuki cross-examination and concluded that he did not disclose when he received the said orders for service, which he had allegedly served on 29th May, 2013. Neither had he ever filed his return of service. In the result, the learned trial Judge concluded that the tribunal had a reason for giving specific directions on the service as one of the orders granted by the said tribunal; that if the parties were negotiating as claimed by the process server, then they ought to

have gone back to the tribunal for extension of time lines; and that since the order in BPRT 38 of 2013 was not served as directed by the tribunal, it ceased to be effective after three days for non service.

18. Turning to the issue of the competence of the substantive Notice of Motion before her, the learned trial Judge made observation that the order granting the appellant leave of court to file and serve the substantive motion made on 11th July, 2013 required the appellant to serve the said motion within seven (7) days of the making of the said order which date fell on 18th July, 2013; the subject Notice of Motion was however filed on 19th July, 2013 which was a day outside the seven days and without leave of the court; that the respondent had deposed at paragraph 17 of the replying affidavit that he had been served with the said notice of motion on 28th October, 2013 filed a memorandum of appearance on 30th October, 2013; that the appellant in paragraph 10 of her supplementary affidavit had not sufficiently rebutted the respondent's claim that she had served him with the notice of motion on 28th October, 2013 which they ought to have served on 18th July, 2013. Their service was therefore three (3) months late.

19. On the basis of the above reasoning, the learned trial Judge ruled that the appellant had not complied with the orders of the BPRT dated 15th April, 2013 nor with those of the High Court dated 11th July, 2013 and had therefore not come to court with clean hands and on that account found the appellant's application dated 19th July, 2013 incompetent and dismissed it with costs. These are the orders that the appellant has invited us to overturn on the one hand, and the respondent to affirm on the other hand.

Determination.

20. It is now trite that the duty to obey the law by all individuals and institutions is paramount in the maintenance of the rule of law, good order and the administration of justice. This now age old principle was ably set out *inter alia* by ***Romer L.J. in Hadkinson versus Hadkinson [1952] ALLER 567*** thus:-

> ***"It is the 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 even void. Lord Cottenhom L.C., said in Chuck Vs. Cremor (1) (1 Coup. Temp. Cott 342);***
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> ***"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. That the course of a party knowing of an order which was null or irregular who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed"***

See also the decision in the case of ***Refrigeration and Kitchen Utensils Limited versus Gulabchand and Popatlal Shah & Another; Civil Application No.39 of 1990 (UR)*** for the proposition that, it is essential for the maintenance of the rule of law and good order that the authority and dignity of our court is upheld at all times.

21. It therefore follows that transgression of a court order invites penal consequences against the transgressor. The procedure for holding such a transgressor to account is what the appellant herein set out to invoke. This is substantively set out in **Section 5** of **the Judicature Act, Cap 8, Laws of Kenya.** A perusal of this provision confirms the finding by the High court that it had jurisdiction and the same power to punish for contempt of court as for the time being possessed by the High Court of Justice in England, which extends to the upholding of the authority and dignity of subordinate courts. " Subordinate courts" are defined in **Article 169(1)** of the **Constitution** to

include "Tribunals".

22. The latest exposition of the law on contempt came from two decisions of this court namely: **Christine Wangari Gachege versus Elizabeth Wanjiru Evans and 11 others [2014] eKLR,** and **Shimmers Plaza Limited versus National Bank of Kenya Limited [2015] eKLR** a decision of this court made as recently as the 18th February, 2015. In those decisions, the current developments in the law of contempt in England were extensively explored and the decisions of the High court in the **Teachers Service Commission case** and the **Basil Criticos case** (supra) rationalised. The court found that under the English **Contempt of Court Act of 1981**, in **Part 81**(***Applications and Proceedings in relation to contempt of court),*** there were "*four different natures or forms of violations under contempt of court".* The relevant violation for purposes of the matter before us is stated under Rule 81.4 (a), that is :-

"*Contempt for breach of a judgment, order or undertaking to do or abstain from doing an act".* (emphasis added)

23. The court reaffirmed the procedures enumerated under that rule for punishment which requires service of the order and penal notice. **Rule 81.9** makes provision that all judgments or orders or undertakings to do or not to do an act may not be enforced in contempt proceedings unless a warning to the person required to do or not to do the act in question that disobedience to the order would be a contempt of court punishable by imprisonment, a fine or sequestration of assets, has been prominently displayed on the front of the copy of the judgment or order served. Consequently the court order and penal notice must be served simultaneously. **Rule 81.5** governs personal service of the judgment or order which must carry a penal notice before the expiry of the period to perform an act, unless the court dispenses with the personal service under **Rule 81.8.**

24. Dispensation of service under **Rule 81.8** is, however, circumscribed as the Rule provides:-

> **" 81.8(1) Is subject to whether the person can be said to have had notice of the terms of the judgment or order. The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone email or otherwise."**

The applicant must therefore prove notice before the respondent can bear "*the evidential burden in relation to willfulness and mala fides disobedience*" as stated in ***Justus Kariuki Mate & another versus Hon. Martin Nyaga Wambora & another Civil Appeal No. 24 of 2014*** .

25. The rationale for this limitation is not difficult to understand and we may take it from **Thesiger L.J.** in the case of ***Exparte Langley 1879, 13ch. D.110 CA***, at Pg.119:-

> ***"....The question in each case, and depending upon the particular circumstance of the case must be, was there or was there not such a notice given to the person who is charged with contempt of court that you can infer from the facts that he had notice in fact of the order which has been made? And in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt."***

26. Our task in this appeal as earlier stated, is to determine whether the discretion of the trial court was exercised judicially and in line with the principles stated above. There is no doubt that the orders granted by the BPRT in its Cause No. 38/2013 were validly granted under **section 12** of the parent Act. The orders required the respondent to refrain from evicting the appellant from the suit premises pending the *inter partes* hearing of an interim application. The life of the orders, however, was spelt out to be three days. The orders were also granted *ex parte* and there is no basis for imputing knowledge of the order by virtue of the presence of the respondent or his advocate. There was therefore need to have these brought to the attention of the respondent within the life span stipulated for them. The time stipulated unfortunately lapsed before service on the respondent. It is our finding, therefore, and we uphold the trial court, that there were no orders in place as at the time these were purportedly brought to the attention of the respondent. We reject

the ground of appeal on that aspect.

27. The trial court further found that the appellant came to court with unclean hands by filing the Notice of Motion for contempt proceedings outside the time limit given in the application for leave, and therefore the motion was itself invalid. That finding would of course be proper if it was not *per incuriam.*
28. In the **Shimmers case**(supra), the court referred to an earlier decision of the court, **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 others C. Appl. No. 233 0f 2007** where it was held that under the new Civil Procedure Rules of England (2012), leave of the court before institution of an application for contempt was not necessary. For that reason, we set aside the decision of the trial court in so far as it was based on the finding that leave was necessary and therefore the motion for contempt was filed out of time.
29. In the result and for the reasons given above, we find the appellant's appeal is without merit. The same is dismissed with costs.

Dated and delivered at Nyeri this 20th day of May 2015.

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 to the original.

DEPUTY REGISTRAR