IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 63 OF 2014

BETWEEN

KYOGA HAULIERS LIMITED…….…..APPELLANT

AND

LONG DISTANCE TRUCK DRIVERS & ALLIED WORKERS UNION …...….RESPONDENT

(Being an appeal from the Ruling and Orders of the Industrial Court of Kenya at Mombasa (Radido, J.) dated the 16th day of May, 2014

in

Industrial Cause No. 61 of 2013)

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JUDGMENT OF THE COURT

The appellant is a large scale transporter of goods whereas the respondent is a registered trade union. As a transporter the appellant has engaged several employees, among them long distance truck drivers. Some of drivers and employees chose to be members of the respondent. Indeed as at the time the respondent lodged its claim with the Industrial Court (now Employment and Labour Relations Court) at Nairobi, on 22nd February, 2013, it had 213 out of 347 unionisable employees with the appellant. However, the appellant had refused to acknowledge this state of affairs by failing to either deduct and remit to the respondent dues from the respective salaries and wages of such members, or to sign a recognition agreement with the respondent. This is the background that formed the basis of a claim as already stated, lodged with the Industrial Court aforesaid. The respondent was of the view that unless the Court intervened and directed the appellant to deduct and remit to it the union dues of its members, stop their victimization and sign with it a recognition agreement, it would not be able to improve its members' terms and conditions of employment.

Simultaneously with the filing of the claim, the respondent took out a motion on notice, in which it sought similar prayers as in the main claim. The grounds in support of the motion were that the dispute involved recognition of the respondent by the appellant, the respondent having achieved and indeed exceeded the simple majority of 51% as stipulated in **Section 54(i)** of Labour Relations Act by recruiting

61% of the appellant's unionisable employees. The appellant had however adamantly refused to abide by the law and had now resorted to dismissing, harassing and or victimizing such employees.

Through one, **Nicholas Mbugua**, the general secretary of the respondent, where pertinent deposed that the harassment and victimization of its members was meant to punish them for their membership. That the respondent had sent to the appellant check-off systems form duly signed by 213 members constituting sufficient legal authorization by the members for the appellant to deduct and remit the dues to it but the appellant had ignored and refused to comply. Because of the impasse, the respondent had reported the dispute to the Minister for Labour who appointed **Mr. J.N. Mwanzia** as a conciliator. Subsequently, Mr. Mwanzia determined that the dispute be referred to the Industrial Court, the appellant having failed to make effort towards reconciliation.

On the very day that the claim as well as the Motion on Notice was lodged, the file was placed before Maureen Onyango, J. who upon hearing the application ex-parte certified it urgent and fixed it for interpartes hearing on 7th March, 2013. Come the day Mr. Muriuki, learned counsel for the respondent informed the court that he had not served the application on the appellant. He also intimated to the court that the dispute could be effectively handled by the Industrial Court at Mombasa. Taking que from the submissions, **Maureen Onyango**, J. ordered for the transfer of the claim to the Industrial Court at Mombasa. She further directed that the claim be mentioned in the same court on 2nd April, 2013 for directions. In the meantime, the respondent was ordered to serve the appellant with the pleadings and mention notice.

On 2nd April, 2013, the matter was placed before **Radido , J.** In the absence of the appellant and its counsel, Radido, J. fixed it for further mention before him on 23rd April, 2013. On this day again in the absence of the appellant the Judge fixed the hearing of the dispute on 27th May, 2013. He further ordered that the respondent do serve the appellant with the hearing notice. On 27th May, 2013, the claim was heard in the absence of the appellant, the Judge having been satisfied with the affidavit of service on record that the appellant had indeed been duly served with the hearing notice.

In the judgment delivered on 28th June, 2013, in the absence of the appellant once again, the court decreed that the appellant do grant the respondent recognition and also deduct and remit to the respondent members' subscriptions forthwith. According to the respondent, the above decree was served on the appellant on 5th July, 2013 but it did not relent from its stance. It refused to remit the dues, refused to sign a recognition agreement and continued to threaten and victimize the respondent's members. Exasperated the respondent on 18th August, 2013, filed a motion under **Section 13** of the Industrial Court Act, **Rules 29(4)**, **31(1)** of the Industrial Court (Procedure) Rules seeking that the Directors of the appellant be committed to civil jail for six months for failure to comply with the decree. However, before the application could be heard interpartes, the appellant filed its own motion on Notice under certificate of urgency seeking the setting aside of the judgment and decree, stay of execution and grant of leave to defend the cause unconditionally. On 13th March, 2014, the two applications came up for interpartes hearing before Radido, J.

In reply to the contempt application, it was the case of the appellant that no decree had been served on it on 5th July, 2013 as claimed by the respondent. That it had not willfully refused to deduct the dues as the respondent had not met the threshold of 50% + 1 membership in order to be granted recognition. That the appellant had only become aware of the decree when it was served with the contempt application. That the contempt proceedings were against a third party who was not a party to the original claim and finally that it had not refused to grant the respondent recognition or to deduct and remit union dues.

The facts in support of the application for stay of execution and setting aside of the judgment were that the respondent had not served the appellant with summons and statement of the claim. Its draft response raised triable issues, there was no service of the hearing notice nor notice of entry of judgment on the appellant who stood to suffer irreparable lose, and finally that the respondent would not be

prejudiced and if there was such prejudice compensation by way of costs would suffice.

In opposition to this application, the respondent maintained that the appellant was served with the statement of claim that was attached to the motion on notice on 28th February, 2013. That when the claim was transferred to Mombasa, the court issued a notice to the parties requiring them to attend court on 2nd April, 2013 but the appellant did not attend. Subsequently, the claim was fixed for hearing on 27th May, 2013 and again the appellant failed to attend court though served with the hearing notice. That if the application was allowed, the respondent would be prejudiced in that the appellant would continue to dismiss its members with a view of reducing them.

In a reserved ruling dated and delivered on 16th May, 2014, **Radido, J.** determined that the contempt application should succeed and summoned a director of the appellant to personally appear before court on 30th May, 2014 to show cause why he should not be committed to civil jail. With regard to the application for stay and setting aside the judgment, he was not persuaded of its merits. Accordingly, it failed and was dismissed with costs.

These determinations triggered this appeal on nine grounds; that it was improper and injudicious exercise of discretion for the judge to have considered the respondent's application for contempt first, before proceeding to consider the appellant's application which questioned the entire foundation of the proceedings; that the contempt application was not properly founded in law; that **Section 29(4)** and **31(1)** of the Industrial Court Act pursuant to which the respondent's application was premised did not empower the court to punish for contempt; that the entire decision was erroneous in law as the question of service of the decree was never established conclusively as required by law; and that the alleged service if at all, was in violations of the Companies Act as well as the Civil Procedure Act and the rules made thereunder. That the Judge was in error when he failed to consider the submissions by the appellant on the question of service; that whereas the Judge correctly referred to **Article 41** of the Constitution of Kenya on the right of workers to belong to a union, he in the same breath failed to recognize that under **Articles 25(c)** and **50(1)** of the same Constitution, the appellant had an inalienable right to a fair hearing and finally that the Judge failed to judiciously and correctly exercise his discretion and thereby wrongly came to the erroneous decision by refusing the appellant's application.

Urging the appeal, **Mr. Buti,** learned counsel for the appellant submitted that the core of the appeal was whether there was service of any court documents regarding the claim on the appellant. To the appellant, no such documents were indeed ever served on it. That the affidavits of service filed by the respondent purporting to show that the appellant was served with the court documents were all false. That though the issue was raised its reply to the application for contempt as well as in its application for stay and setting aside the judgment, the Judge in his ruling did not make any finding as to whether the appellant was so served. Counsel further submitted that when the claim was transferred from Nairobi to Mombasa, it was fixed for mention for directions on 2nd April, 2013, yet the Judge proceeded on this date to fix the claim for hearing without addressing the fate of the application. Counsel further submitted that the provisions of the law upon which the application for contempt was anchored did not support such an application. That the Judge sidestepped the grounds upon which the application was brought and instead invoked his own provisions of the law which provisions too did not confer such jurisdiction on the court to punish for contempt. In any event, counsel argued the decree was never served on the directors and that the procedure for bringing contempt proceedings was never followed. In support of this contention, counsel referred us to the cases of **Ochino & Another v Okombo (1989) KLR 165** and **Christine Wangari Gachege v Elizabeth Wanjiru Evans & others (2014) eKLR.**

Responding, **Mr. Kimani,** learned counsel for the respondent submitted that the appellant was served on several occasions with the court documents and there were affidavits of service on record to support that contention. That the respondent availed the process server for cross examination but the appellant failed to take up the challenge. Counsel further submitted that no prejudice would be suffered as all that the appellant is required to do is to deduct and remit to the respondent the dues of its members. It was submitted further that the procedure adopted in bringing the contempt proceedings was never challenged in the lower court. Counsel considered the authorities cited by the appellant in opposition to

the contempt application irrelevant since they concerned innocent people who had been found guilty of contempt of court when they had never been served. This was not the case here since the appellant simply tried to avoid service.

We have carefully considered the record of appeal and the rival submissions made before us. We propose to deal first with the complaint regarding how the Judge dealt with or handled the contempt application. The power to deal with contempt of court is provided for under **Section 5(1)** of the Judicature Act, **Section 63(c)** of the Civil Procedure Act and **Order 40 Rule 31** of the Civil Procedure Rules. Of importance in the determination of this issue is however **Section 5(1)** of the Judicature Act, since **Section 63(c)** of the Civil Procedure Act and **Order 40 Rule 31** of the Civil Procedure Rules are concerned with disobedience of an order of temporary injunction and resultant consequences which are punishment in the form of imprisonment or attachment and sale of the contemnor's property. That is not the case here. In the instant case the appellant is accused of deliberately and willfully refusing to comply with the judgment and decree of Industrial Court dated 4th July, 2013.

Section 5(1) of the Judicature Act is these terms:

> *5. Contempt of court*
>
> *(i) 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 such power shall extend to upholding the authority and dignity of subordinate courts.*

A plain reading of this provision leaves no doubt that the power to punish for contempt by either the High Court or this Court is dependent on how such powers is exercised by the High Court of Justice in England. This Court when dealing with this aspect in the case of **Christine Wangare Gachege** (supra) stated

> *"…That Court (the High Court of Justice in England) draws its jurisdiction to punish for contempt of court from both statute, namely The Contempt of Court Act, 1981 and the common law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was until 2012…provided for by Orders 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC) , made under the Supreme Court of Judicature Act, 1873…"*

However, this procedure would only apply where the contempt committed was not in the face of the court. Contempt committed in the face of the court would attract summary procedure and sanctions. But when the contempt is committed otherwise than in the face of Court, the procedure for initiating such proceedings in England used to be along the same lines as initiating Judicial Review Proceedings to wit:

-An exparte application is made to the Judge in chambers for leave to commence contempt proceedings;

-Such application must be supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which his committal is sought and by an affidavit verifying the facts relied on;

- The application could only be filed after the applicants had given notice of such an intention not later than the preceding day to the intended respondent;

-Once leave is granted, the substantive Notice of Motion would be filed within fourteen (14) days of granting the leave failing which leave so granted would lapse and finally;

- The Notice of Motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise.

This procedure has all along been the bedrock upon which contempt applications have been anchored in Kenya, the only variance being that instead of 14 days for filing the substantive motion once leave was granted, then **Order 53** of the Civil Procedure Rules imposed 21 days.

It would appear that the respondents when initiating the contempt proceedings did not approach the court in the above fashion, hence the appellant's complaint that the procedure for bringing contempt proceedings was never followed. To some extent, the appellant might be right as we shall endeavor to demonstrate in this judgment. As already stated, we are enjoined to invoke powers to punish for contempt as "*is for the time being possessed by the High Court of Justice in England*…" It thus becomes necessary for us to determine the current state of the law of contempt in England. On 1st October, 2012, the Civil Procedure (Amendment No. 2) Rules came into force in England, the effect of which was to replace the entire **Order 52 RSC. Part 81** of those rules that deal with punishment for contempt of court introduced new procedure as regards the filing and prosecution of such application. The requirement of the notice to the crown as well as obtaining leave first before commencing the proceedings have been done away with. All that is required now is that the application is made in the proceedings in which the judgment or order that was disobeyed was made. The application must however set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. Secondly, the application and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method of service. This is now the procedure that courts in this Country should adopt in contempt proceedings.

In this case, to the extent that the application was made in the proceedings in which the decree that was allegedly disobeyed was made, no problem arises. The same goes for the grounds on which the application was made. However, did the respondent identify separately and numerically each alleged act of contempt? the answer is 'No.'. The appellant was accused of two acts of contempt; failure to deduct and remit to the respondent dues from those employees who had acknowledged membership with the respondent and secondly, failure by the appellant to grant the respondent recognition by signing a recognition agreement within 30 days. Did the respondent support each of the alleged act of contempt with affidavit(s) containing all the evidence relied upon? The answer is again 'No'. There is only one affidavit in support of the accusations. The affidavit is in general terms and lacking in clarity. It is deponed to in general terms, that the respondent was served with the decree, that it had refused to sign a recognition agreement, that it had been given notice by the respondent to comply but the appellant had continued to refuse or ignore to remit union dues to it. This is all that there is. We do not think that such scanty depositions pass the test of the evidence required in support of such an application.

Next, did the respondent serve the application personally on the directors of the appellant? The answer again is 'No.' By their own admissions, contained in the replying affidavit dated 1st October, 2013, the affidavit of service dated 5th July, 2013 and in their submissions before us, it appears that the person who was served if at all was **Hamadi Mwazito**, the appellant's legal clerk. The contempt application sought to have the directors of the appellant committed to jail for a period of 6 months. Hamazi Mwazito is not a director of the appellants nor was he cited in the contempt application. There is no evidence that the court dispensed with personal service nor did it authorize an alternative method or place of service. As a general rule, no order of court requiring a person to do or abstain from doing any act may be enforced by committing him for contempt unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. And such an order must of necessity be endorsed with a Penal Notice. See **Ochino & Another** (supra). It is quite evident that the decree herein was never served on the directors of the appellant personally nor was it endorsed with a penal notice. In the premises, Radido, J. erred in holding that the appellant's directors were served with decree, the basis upon which he proceeded to hold them in contempt.

Further, the contempt application was anchored on **Section 13** of the Industrial Court Act and **Section 29(4)**, **3(1)** of the Industrial Court (Procedure) Rules. The respondent never bothered to invoke **Section 5** of the Judicature Act which donates the power to the High Court and this Court to punish for contempt of court.

Tuning to the provisions of law cited in support of the application, we note that **Section 13** deals with enforcement of court orders, and provides that a judgment, award, order or decree of the Court shall be enforceable in accordance with the rules made under this Act. However, **Rule 31 (2)** provides that:-

> *"Rules on execution of an order and decree applicable in the High Court shall be applicable to an order and decree of the Court."*

Under **Section 38** of the Civil procedure Act and **Order 22** of the Civil Procedure Rules, there are only 5 modes of execution of the decree; by delivery of any property specifically decreed, attachment and sale, or by sale without attachment, of any property, attachment of debts, arrest and detention in prison of the judgment debtor and by appointing a receiver. Certainly contempt proceedings is not one of them.

Rule 29(4) of the Industrial Court Rules on the other hand deals with record of proceedings and decision. It is to the effect that:

> *"An award, a judgment, a ruling, an order or a decision of the court certified, signed and sealed by the Registrar shall be conclusive evidence of the existence of the award, the judgment, the ruling, the order or the decision of the Court…"*

Certainly the rule is irrelevant to a contempt application.

The last rule cited in the body of the application is **Rule 31(1)** which deals with execution and warrants. It provides that "*The Registrar shall issue an execution and a warrant of arrest*." We see no relevance of this provision to the committal application that was before Court.

Lastly on this aspect of the appeal, we wish to revert the appellant's complaint that the Judge sidestepped the provisions of law upon which the committal application was hinged and instead introduced his own. This complaint is valid. Indeed the learned Judge invoked the provisions of **Section 38** of the Civil Procedure Act as well as **Order 22 Rule 28** of the Civil Procedure Rules to condemn the appellant. However in invoking these provisions he proceeded on the premise that he was enforcing a money decree and or enforcing an order of specific performance or injunction. This was a misdirection on the part of the Judge as the application before him sought the committal of the appellant's directors to jail for contempt of court for failing to comply with a court decree. This was totally a different ballgame.

It is axiomatic that the Judge when considering the application dated 23rd September, 2013 seeking to set aside the ex-parte judgment was exercising discretion. An appellate court will not normally interfere with the exercise of such judicial discretion, unless it is demonstrated that the Judge failed to take into account a relevant factor, and as a result arrived at an erroneous conclusion; or that in all the circumstances of the case he was plainly wrong in the conclusion he came to. Simply put, the appellate court will only interfere with the exercise of the discretion if it is satisfied that it was exercised capriciously, whimsically and or idiosyncratically. See **Shah v Mbogo & Another (1967) E.A. 116** and **Pithon Waweru Maina v Thuka Mungira, Civil Appeal No. 27 of 1982**. It must also be appreciated that there is no limit to the factors or circumstances that the court will consider in exercising such discretion and there can possibly be no limit, it being unfettered discretion. See **Patel v E.A. Cargo Handling Services Ltd (1974) E.A. 75**.

What factors influenced the judge in refusing the application? He considered that the claim was placed before him on 2nd April, 2013, when he directed that the respondent serves a Mention Notice on the appellant for 23rd April, 2013. The assumption here is that the appellant was absent. On the mention date again the appellant was absent. However, there was an affidavit of service on record sworn by one, **Bernard Njoroge Mungai** who had deposed that he had served one, Abdul who had declined to sign. The judge then fixed the cause for hearing on 27th May, 2013 with a direction to the respondent to serve a hearing notice on the appellant. On 27th May, 2013, counsel for the respondent informed court that the appellant had been served with a hearing notice and the affidavit of service was on record. The Process Server deposed that he had served the respondent's legal clerk after he was summoned by a gateman. The

legal clerk had then refused to sign a copy of the hearing notice. The judge further pointed out that the court had developed a practice where the Deputy Registrar notifies parties when claims are coming up for mention or hearing when none of the parties were in attendance or where a cause had been transferred. In this regard, the record showed that the Deputy Registrar had adhered to the requirement. On the basis of all the foregoing, the Judge was satisfied that the appellant had been served and deliberately failed to turn up for the hearing of the claim.

But was this the case on ground? We have carefully combed the record of appeal and we did not come across any indication that the appellant was ever served with the Summons and the Statement of Claim. All the affidavits of service on record are in relation to the service of the decree, mention and hearing notices. In the absence of the service of the pleadings on the appellant, the alleged subsequent services on record and the affidavits in support thereof are really superfluous. What was the appellant required to respond to? Secondly, it is on record that when the application filed contemporaneously with the claim came before Onyango, J. for interpartes hearing on 7th March, 2013, counsel for the respondent was categorical that he had not served the appellant with any court papers with regard to the claim, hence the application for adjournment. Yet one, **Abelazo Mulwa**, a Process Server in his affidavit of service dated 2nd March, 2013 claims to have served the appellant with the Notice of Motion under certificate of urgency. How is this possible? Clearly, either, counsel for the respondent, the process server or both were not being candid with the court. If they are not candid on such a simple issue, what else have they been untruthful about?

Under **Rule 11 (2)** of the Industrial Court (Procedure) Rules the claimant is mandatorily required to serve the Summons together with the Statement of claim on the respondent in these terms:

> *(2) A claimant shall serve the summons issued under paragraph (1) to the respondent together with the statement of claim or the appeal.*

Rule 8 provides for service by court and is in: "*The Court may effect service on behalf on any party upon, request in writing, made by the party in Form 4 set out in the First Schedule and upon payment of a prescribed fee*." Stopping here for a moment, we have already stated that there is no evidence, of service of the summons accompanied by the claim on appellant. We have also said that in refusing to grant the application, the judge took into account the practice that the court had developed of serving the parties. Although service by court is authorized under the rules, that can only be done at the request of a party in writing and upon payment of requisite fee. There is no evidence on record that these conditions were met before the court purported to effect service. Accordingly, the judge acted on the wrong premise. The foregoing notwithstanding, the court did not bother to establish whether the mention notice actually reached the appellant. The court was content with the fact that mention notice was posted. One would have expected the court to ask for a certificate of posting and whether the document was ever returned as unclaimed. There is now uncontroverted evidence that infact the mention notice was received by the respondent on 10th April, 2013 long after the mention date.

Even if we were to accept that the appellant was indeed served, who was served? Affidavits of service on record point to service upon unnamed security guard of the appellant, unnamed legal clerk of the appellant and even unnamed gateman of the appellant. This cannot be proper service.

Finally, we may point out that when the claim was transferred from Nairobi to Mombasa, the order thereon was that it be mentioned for directions. The Mombasa Court once seized of the claim never gave directions. Instead the court proceeded to fix the hearing of the claim without as much as addressing the fate of the application. To date the fate of the application is unknown.

In our view, therefore the court did not exercise its discretion on the application to set aside the exparte judgment properly. In our judgment had the court considered all the foregoing circumstances, it would have come to the inescapable conclusion that the application was merited. The respondent has a judgment which was not obtained by consent or as a consequence of a fair trial. It also has an order to commit the directors to civil jail obtained irregularly. We are therefore entitled to interfere with the decision although discretionary.

Accordingly, the appeal is allowed. It follows that the decisions of the High Court on both applications are reversed. The order requiring the director of the appellant, **Mr. Ismail Gulam** to personally appear before court to show cause why he should not be committed to civil jail for contempt of court is set aside. Similarly, the exparte judgment entered against the appellant dated 28th June, 2013 is set aside. In lieu thereof the appellant is granted unconditional leave to defend the claim. The costs of this appeal together with those in the Industrial Court are awarded to the appellant.

Dated and Delivered at Mombasa this 15th day of May 2015.

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