IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KIAGE & MURGOR JJA.)

CIVIL APPEAL NO. 345 OF 2013

BETWEEN

SAROJ K. SHAH ……..……..…….…….. APPELLANT

AND

NARAN MANI PATEL ……...……. 1ST RESPONDENT

KANTILAL NARAN MANJI ……. 2ND RESPONDENT

HEBROS TRADERS …….. 3RD RESPONDENT

(Being an appeal from the ruling and order of the Honourable H.P.G. Waweru, J. dated 5th July, 2013

in

H.C. ELC. NO. 309 OF 2011)

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JUDGMENT OF THE COURT

This appeal is against the ruling and order of the High Court (H.P.G. Waweru, J.) made on 5th July 2013 by which the learned judge dismissed an application by SAROJ SHAH (the appellant) seeking to commit NARAN MANI PATEL, KANTILAL NARAN MANJI and BALLON NANGALAMA t/a HEBROS

TRADERS to (the respondents) for alleged contempt of court by blatant disobedience of some three court orders. Those orders, are set out in paragraph 3 of the statement the appellant filed pursuant to **order 52 rule 2** of the rules of the Supreme Court of England 1965 as follows;

> ***"(a) order of the 12th May 2011 warning the landlord not to evict the tenant (the applicant herein) made by Mochache D. – chairperson Business Premises Tribunal.***
>
> ***(b) order of the 9th December 2011 – That status quo to hold until then, made by Hon. Mr. Justice Mwera.***

c. ***order of the 14th December 2011 – That parties must obey any previous orders made under pain of necessary sanctions, including being denied audience, made by Hon. Justice Waweru."***

The applicant had been a residential tenant of the first respondent under a one year lease commencing 1st March 2010. That lease could be renewed for a further one year subject to a rent increment but the landlord indicated that he would not renew the same as the applicant had been in arrears of rent and she was therefore required to vacate and give up vacant possession at the end of the tenancy on 28th February 2011.

Instead of giving vacant possession, the applicant filed suit before the Chief Magistrate's Court at Milimani. She also filed an application seeking to injunct her imminent eviction which, after *inter partes* hearing, was dismissed on 24th June 2011. She in the meantime filed suit before the High Court on 18th May 2011. She then sought and obtained, without any disclosure about the previously-filed suit and application, some ex-parte orders before Mwera J. on 27th June 2011.

The 1st respondent challenged the suit at the High Court on the basis that there was already a pre-existing suit before a court of competent jurisdiction. Accordingly, by an order made on 15th December 2011, the High Court (Nyamweya, J.) stayed proceedings in the suit before it, and with it the ex parte orders of Mwera, J. pending the hearing and disposal of the earlier suit in the subordinate court.

On 2nd December 2011 the 1st respondent levied distress against the applicant on account of unpaid rents amounting to Kshs. 352,000. He had previously demanded vacant possession from the applicant and it would seem that as at that date, the appellant's goods were still on the subject premises though she herself was no longer living there. She contended, however, that the 1st respondents action of seizing and carting away her household goods amounted to an eviction contrary to orders previously given by the Business Premises Rent Tribunal (BPRT) which permitted the respondent's to levy distress but warned him against evicting the appellant.

On 9th December 2011, the matter was before Mwera, J. and he ordered that the status quo to hold until 14th December 2011 when the same would be mentioned before Waweru J., who, in turn, on the day in question, ordered that parties must obey any previous orders made under pain of necessary sanctions, including being denied audience.

In determining the contempt application before him, Waweru J. disposed of the order made by the BPRT in quick order as follows;

> ***"9. The order obtained from the BPRT was clearly irregular for want of jurisdiction. It should not be permitted to found any further proceedings that would just perpetuate an illegality."***

We find and hold that the learned judge was correct in so finding. The BPRT's jurisdiction is over business premises in accordance with the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301. The subject premises having been a residential flat, a dwelling house for the appellant, the 1st respondent had no business resorting to the BPRT for leave to levy distress. The right the tribunal mandated to deal with residential tenancies was the Rent Restriction Tribunal established under the eponymous statute, Cap 296, for qualifying tenancies. The BPRT acted without jurisdiction and its orders were a nullity for all purposes. The learned judge therefore held that they could not form the foundation for any further proceedings.

The learned judge also found as a fact that the 1st respondent evicted the appellant in the course of the distress for rent that occurred on 2nd December 2011. On the basis of that finding, the learned judge also held that the direction given on 9th December 2011 for the "status quo to hold until 14th December 2011" did not require the respondents to restore the appellant to the suit premises. At any rate, her motion of 9th December 2011 was seeking, not mandatory orders for her restoration, but restraining orders, but that

which she sought to restrain had occurred a week previously. Accordingly, the respondents were not in disobedience of the court order. Finally, as regards his own order of 14th December 2011, the learned judge stated that it *"was merely a throw back to the order 9th December 2011. It did not direct anything new."*

The learned judge therefore found the appellant's contempt application to be bereft of merit and dismissed with costs.

The applicant did not take that kindly hence this appeal. She is dissatisfied because the learned judge erred by; misunderstanding and misinterpreting his own order and particularly the meaning of "*status quo* be maintained;" failing to find that the respondents were in contempt of court; and misunderstanding the facts of the case, in particular, the date and basis for the appellant's eviction.

At the hearing of the appeal, counsel for the appellant **Prof. Wangai** basically repeated and elucidated on what is set out in the memorandum of appeal and asserted that the appellant's eviction was illegal and that it happened on 8th December 2011 and not on 2nd as the learned judge found, erroneously, in counsel's view. He submitted further that "*status quo*" was that the appellant's goods were in the house as at the time the order was given and so the respondents were in contempt of that order when they evicted the appellant. He urged us to set aside the learned judge's dismissal order and instead grant the contempt application.

For the respondents, learned counsel **Mr. Echessa** opposed the appeal and first contended that contempt of court could not lie as there had been no personal service of the orders allegedly flouted on the respondents. While conceding that "*status quo*" was critical to the determination of the contempt application, at no point did the court issue orders for the restoration or preservation for the *status quo ante*. Counsel submitted that the learned judge was correct in finding that the proper *status quo* was that the appellant had already been evicted. As the respondents had not been ordered to restore the appellant into possession, they could not be in contempt of any court order. He reiterated that the orders made by the BPRT contained a gratuitous warning but as the BPRT had no jurisdiction at all, the same was a mere nullity. He also defended the respondents' refusal and return of a belated cheque issued by the appellant after the tenancy had been determined stating that to have accepted it would have amounted to a perpetuation of that which had already come to an end. Adverting to the theme of *status quo*, counsel decried what he saw as an increasing practice of courts issuing vague orders about the maintenance of the *status quo* without a clear and specific description of that status. He urged us to dismiss the appeal with costs.

As a first appellate court, we are enjoined to re-evaluate, re-assess and analyze afresh all the evidence placed before the trial court drawing our own inferences and arriving at our own independent conclusions. See **rule 29(1)** of the Court of Appeal Rules; **SELLE & ANOR Vs. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS** [1968] EA 424. As the appeal proceeds by way of rehearing based on the record, we give due deference to the court of first instance and are slow to disturb its factual findings unless based on no evidence, or a misapprehension of the evidence or that the judge acted on wrong principles or was demonstrably wrong in arriving at those findings. See **MWANASOKONI Vs. KENYA BUS SERVICES LTD** [1985] KLR 931.

Upon a thorough perusal of the record before us, it seems quite clear as we have already stated that the order by the BPRT on 12th May 2011 was made without jurisdiction. It was not given at the instance of the appellant. It was at any rate a patent nullity. The learned judge cannot be faulted for finding that it could not be the basis for citing and punishing the respondents for alleged contempt. An order made without jurisdiction cannot produce rights and is void for all purposes.

See **JOEL NYABUTO OMWENGA & 2 OTHERS Vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOR** Civil Appeal (Application) 137 of 2014; [2014] eKLR.

The order of 9th December 2011 could also not have been flouted by the respondents, because, first, it

was issued after that which the appellant says it restrained, (her eviction) had already occurred. This is the case whether she was evicted on 1st December 2011, as the respondents contend, or on 8th December 2011, as she contends. A person cannot possibly be said to flout an order that is issued *ex post facto*.

What we have said suffices to dispose of this appeal. We need to state, however, that counsel for the respondents is justified in raising concerns about the issuance of generic *status quo* orders. An order to maintain the *status quo* can mean anything, everything and nothing. Unless it is clearly spelt out in precise and unambiguous terms what the status at a particular point in time is, it is a recipe for frustration and embarrassment for the court to simply order, without more, that the *status quo* be maintained. Such vague and imprecise orders serve only to embolden individuals so-minded to do that which is intended to be prohibited or injuncted secure that they can escape because *status quo* was never spelt out clearly.

For the reasons we have set out, the appeal before us is without merit and is for dismissal. It is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 8th day of May, 2015.

E. M. GITHINJI

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JUDGE OF APPEAL

P. O. KIAGE

……..……

JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR