



IN THE COURT OF APPEAL

AT MALINDI

CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.

CIVIL APPEAL NO. 11 OF 2015

BETWEEN

JIHAN FREIGHTERS LIMITED.....APPELLANT

AND

HARDWARE & GENERAL STORES LIMITED.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Mombasa

(Omollo, J.) dated 17th December 2014

in

HC ELC No. 83 of 2014)

JUDGMENT OF THE COURT

This appeal is against the ruling and order of the High Court of Kenya at Mombasa (*Omollo, J.*), dated 17th December 2014. By that ruling the learned judge ordered the police to arrest *Abdalla Salim Omar Abubakar*, a director of the appellant, *Jihan Freighters Limited*, and present him before the court to show cause why the appellant's property should not be attached or why he should not be committed to jail for breach of a valid court order. At the hearing of this appeal, we were informed that the order to show cause had not been executed because the court subsequently stayed the same pending the hearing and determination of this appeal.

The genesis of the impugned order is a suit that was filed in the High Court by the respondent, *Hardware & General Stores Ltd*, against the appellant on 10th April 2014. In the plaint, the respondent pleaded that it was the lawful proprietor of the property known as *Mombasa/Block XIV/364 (the suit property)*, which it had purchased in a public auction from Standard Chartered Bank Kenya Limited pursuant to the exercise by the latter of its chargee's statutory power of sale. The respondent further pleaded that the appellant, as leasee from Kenya Railways Corporation of an adjacent property known as *Mombasa/Block XIV/363* had trespassed unto a portion of the suit property, which it was unlawfully utilizing as a container yard, garage or parking lot. Accordingly the appellant sought, as far is relevant to this appeal, reliefs which were worded as follows:

“(a) A permanent injunction to restrain the (appellant) by itself, servants, agents and or representatives from encroaching or trespassing or continuing to trespass or interfering in any other way whatsoever with the suit premises, Mombasa/Block XIV/364;

(b) An order for vacant possession issued against the (appellant), its agents or representatives of the suit property Mombasa/Block XIV/364;

(c) A mandatory injunction against the (appellant) by itself, its agents or servants to remove its containers, vehicles, items and /or any of its property lying at the (respondent’s) property Mombasa/Block XIV/364;

(d) In the alternative an order directing the Court Bailiff to enforce prayer (c) above under the supervision of the area officer commanding the nearest police station.”

Contemporaneously with the plaint the respondent took out a motion on notice principally under **Order 40** of the **Civil Procedure Rules** praying for the reliefs we have set out above, pending the hearing and determination of the suit. **Mukunya, J.** heard the application *ex parte* on the same day and issued orders worded as follows:

“1. That this application is hereby certified as urgent;

2. That a temporary injunction is hereby issued restraining the defendant Jihan Freighters Limited by itself, agents, servants, employees and /or representatives from encroaching and/or trespassing in any way whatsoever in parcel No. Mombasa/Block XIV/364 pending the hearing and determination of this application;

3. That the application be served and heard inter-partes within Fourteen (14) days.”

By a replying affidavit sworn on 15th April 2014 by its director, Abdalla Salim Omar Abubakar, the appellant opposed the application on the basis that both the suit property and Mombasa/Block XIV/363 were the properties of Kenya Railways Corporation over which the appellant had a valid lease continuously since March 2005. Accordingly the respondent denied that it was a trespasser on the suit property and prayed for dismissal of the application.

It appears from the record that the application for injunction was never heard *inter partes*. Instead, on 21st July 2014 the respondent filed another motion seeking, (1) stay of further proceedings, (2) an order maintaining the interim injunction in force until further orders of the court and, (3) detention of the appellant’s director in prison for a term not exceeding 6 months for deliberate breach of the interim orders. The acts constituting the alleged contempt of court by the appellant were given as:

i. encroaching or trespassing on the suit property;

ii. continuing with operations on the suit property despite the interim injunction; and

iii. remaining in physical possession of the suit and continuing to store containers hereon.

Again the appellant resisted this new application vide a replying affidavit sworn by the same director on 8th August 2015. The substance of the reply was that the appellant was at all material times in possession of the suit property; that the said possession was lawful; that the order issued by the court on 10th April 2015 did not order eviction of the appellant from the suit property; and that the respondent was purporting to transform a prohibitory order into a mandatory order.

Omollo, J. heard the application and issued the notice to show cause which we have already adverted to, thereby precipitating this appeal. At the request of the parties, this appeal was heard by written submissions with limited oral summation. The appeal is premised on seven grounds of appeal, but in our

assessment, the appeal turns on only two grounds, namely, whether the respondent was using restraining orders to purport to evict the appellant from the suit property and whether the respondent had demonstrated breach of the court order by the appellant.

Mr. Abed Omar, learned counsel for the appellant, assailed the ruling of the High Court on the ground that the particulars of the alleged breach of the court order by the appellant did not in fact constitute a violation of the court order; that the particulars were vague and uncertain; and that the respondent had failed to specify the date and time of the alleged violation of the court order. Counsel contended that contempt of court proceedings, being quasi-criminal require proof of violation of the order beyond reasonable doubt, which the respondent had failed to do.

It was the appellant's further submission that the orders obtained by the respondent did not require the appellant, who was in possession of the suit premises at the time the orders were issued, to deliver possession thereof to the respondent. In the appellant's view, the learned judge erred by rendering judicial support to the appellant's illegitimate use of prohibitory orders as a short cut for eviction of the appellant from the suit premises.

Lastly the ruling of the High Court was criticized for ordering the arrest by the police of the appellant's director, instead of issuing summons to him to appear before the court. It was contended that the learned judge had erred by ordering arrest of the director yet he had not been summoned and failed to appear in court.

Mr. Michael Oloo, learned counsel for the respondent, opposed the appeal, submitting that the standard of proof in contempt of court proceedings is not proof beyond reasonable doubt. Counsel further submitted that there was sufficient evidence to demonstrate that the appellant was fully aware of the court order; that it had not applied to review or to set the same aside; that the appellant had deliberately breached the court order; and that although the appellant was in possession of the suit property, its continued use of the suit property and failure to remove its containers, vehicles and property from the suit property constituted a continuing trespass, which in counsel's view was a breach of the court order. As regards the order for the arrest of the appellant's director, Mr. Oloo submitted that the same was justified to forestall anarchy and in light of the failure by the appellant's counsel to produce a director of the appellant in court as he had undertaken to do.

Relying on HADKINSON V. HADKINSON [1952] 2 All ER 567 and COMMERCIAL BANK OF AFRICA LTD V. NDIRANGU [1990-1994] EA 69, learned counsel concluded by submitting that it was the obligation of the appellant to obey the court order unless and until it was discharged and that if blatant disobedience of a court order were to be allowed judicial authority would be eroded.

We have duly considered the record of appeal, the grounds of appeal, submissions by both learned counsel, the authorities cited, and the law. We must start by disposing of the disagreement between the parties on whether contempt of court is required to be proved beyond reasonable doubt. That issue was settled by this Court in Mutitika v Baharini Farm (1982-88) 1 KAR, 863 where the Court rejected the view expressed by Lord Denning in In re Bramblevale Ltd (1970) Ch 128, at 137, that contempt of court must be proved beyond reasonable doubt. The Court stated:

“With the greatest possible respect to that eminent English judge, that proof is much too high for an offence ‘of a criminal character’ and ipso facto, not a criminal offence properly so defined...In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt.”

We would accordingly agree with counsel for the respondent on the issue of standard of proof.

Turning to the merits of the appeal, it is common ground that as of 10th April 2014 when the court order alleged to have been breached was issued, the appellant was in possession and using the contested portion of the suit property. If there was any doubt in that regard, it must be put to rest by the fact that the respondent prayed in the plaint for an order of vacant possession of the suit property and a mandatory

injunction for the appellant to remove its containers, vehicles and property therefrom. The order for a mandatory injunction to remove the appellant from the suit property was also prayed for in the respondent's application for an interim injunction.

In those circumstances, what was the nature of the injunction that the High Court granted on 10th April 2014? There is no doubt in our minds that the injunction was a prohibitory rather than a mandatory injunction. The relevant part of the court order, which we have already reproduced in this judgment, granted a temporary injunction restraining the appellant from encroaching and or trespassing on the suit property pending the inter partes application. There was an express prayer for a mandatory injunction to remove the appellant from the suit property, which the court declined to grant.

The next question then is how is a person who is in possession of property, which possession is alleged to constitute a trespass, supposed to behave when he is served with a court order that does not require him to vacate the suit property, but merely requires him to abstain from encroaching or trespassing on the same property he is already occupying, and at a time when the court had not found that the possession constitutes an encroachment or a trespass? Once more, this appeal is a vivid demonstration of why court orders must be clear and unambiguous. See ***AKHTAR BUTT & ANOTHER V. REGINE BUTT, CA NO. 31 OF 2015, (MALINDI)*** and ***LUCY WANGUI GACHARA V. MINUDI OKEMBA LORE, CA NO 4 OF 2015, (MALINDI)***. In the latter case, which raised a very similar issue to the one now before us, this Court stated as follows regarding clarity of court orders:

“Naturally whether the above order was merely a prohibitory order or a mandatory injunction for the eviction of the appellant from the suit property has taken centre stage in this appeal, underlining once again the supreme importance of a court of law to issue clear and precise orders that do not leave any doubt as to what a party is supposed to do or abstain from doing.”

The rationale of the requirement that a court order must be clear; precise and easy to understand is founded on the self-evident fact that breach of a court order may result in contempt of court proceedings as well as the severe sanctions, including loss of liberty or property, that are visited upon a contemnor. Accordingly the grave consequences that attend a violation of a court order ought not be casually visited upon a person unless and until it clear what the court order required him to do or to abstain from doing. In ***WANG'ONDU V. NAIROBI CITY COMMISSION, CA NO 95 OF 1988***, this Court emphasized that a court will only punish as a contempt of court a breach of injunction when it is satisfied that the terms of the injunction are clear and unambiguous. (See also ***OCHINO & ANOTHER V. OKOMBO & 4 OTHERS [1988] KLR 165***).

The conduct on the part of the appellant that was alleged to constitute breach of the court order was that the appellant was encroaching and trespassing on the suit premises and that it had remained on the suit property and was continuing its operations thereon in spite of the court order. There was no evidence that the appellant had occupied any other part of the suit property other than the exact same part it was occupying when the order was issued. As regards its remaining on the suit property and continuing operations thereon, we do not understand the basis of the alleged contempt because the court did not, in spite of being expressly requested to do so, direct the appellant to vacate the suit property.

In our view, the order of 10th April 2014 was very uncertain. Whether the appellant had encroached or trespassed on the suit property as of the date of the order, had not been determined and is still pending for determination by the High Court. In addition, despite being requested to do so, the court declined to order the appellant to vacate the suit property. When the court therefore issued an injunction restraining the appellant from encroaching or trespassing on the suit property, exactly what was the appellant who was in occupation expected to do? In an application for contempt of court, the court order that is alleged to have been violated must be clear in its terms regarding what is prohibited. In this appeal, we are satisfied that the order of 10th April 2014 was so uncertain as to form, in the facts of this case, the basis for committal of the director of the appellant for contempt of court. In addition the appellant's conduct that was alleged to constitute contempt of court did not disclose breach of the court order by the appellant.

We do not find it necessary to address the question whether the learned judge had erred by ordering the

arrest of the appellant's director or involving the police because that was never a ground of appeal in this appeal. The appellant introduced the issue surreptitiously in the its written submission.

Ultimately, we find merit in this appeal and allow the same. The order of the High Court issued on 17th December 2014 is hereby set aside and in lieu thereof we substitute it with an order dismissing the application dated 21st July 2014 with costs. The appellant will have costs of this appeal. It is so ordered.

Dated and delivered at Malindi this 30th day of October, 2015

ASIKE-MAKHANDIA

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