IN THE COURT OF APEAL

AT NAIROBI

CORAM: NAMBUYE, MUSINGA & M'I NOTI , JJ.A.

CIVIL APPEAL NO. 267 OF 2004

BETWEEN

AKBER ABDULLAH KASSAM ESMAIL .....…….……...… APPELLANT

AND

EQUIP AGENCIES LTD. ……...……..…….……1ST RESPONDENT

DIVYESH INDUBHAI PATEL ……..…….…….. 2ND RESPONDENT

PHOENIX PROPERTIES LTD. …..…….....3RD RESPONDENT

KAMALJEET SINGH MATHARU ……..…….…… 4TH RESPONDENT

STEPHEN KIMANI KARUU …...…….…… 5TH RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Ojwang, Ag. J) dated 22nd September, 2004

in

HCCC NO. 1227 OF 2003)

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JUDGMENT OF THE COURT

This appeal arises from a tenancy relationship gone sour, and raises the vexed question of where to draw the balance between two fundamental principles: on the one hand, the power of the court to protect the authority and supremacy of the law, and on the other, its duty to protect and uphold the right of a citizen to a fair trial.

Before us are three related appeals, all involving the same parties but arising from different orders made by *Ojwang, Ag. J. (as he then was)* on diverse dates over a fortnight in September and October, 2004. The first, Civil Appeal No. 267 of 2004, arises from an order by the learned judge dated 22nd September, 2004 by which he cited the appellant, an advocate of the High Court, and the 4th and the 5th respondents for contempt of court and directed them to appear before him on 30th September, 2004 to show cause why they should not be committed to jail for contempt of court. For convenience we shall refer to the appellant and the 4th and 5th respondents collectively as *"the alleged contemnors"*.

The second appeal, *Civil Appeal No. 268 of 2004*, relates to an order made on 30th September, 2004 by which the learned judge directed the alleged contemnors to appear before a judge in chambers on 8th October, 2004 at 2.30 p.m. to show that they had purged their contempt or in the alternative to show cause why they should not be committed to jail for contempt of Court.

The last, Civil *Appeal No. 269 of 2004*, arises from the order made on 8th October, 2004 in which the learned judge directed the appellant to, among other things, appear in person before a judge in chambers on 12th October, 2004 at 9.00 a.m. to show that he had completely purged his contempt and fully complied with the orders of the court, or to show cause why he should not be committed to jail until he had purged his contempt. By the same order, the learned judge also issued warrants of arrest against the 4th and 5th respondents and directed that they be delivered to a judge in chambers on 12th October, 2004 at 9.00 am to show why they should not immediately be committed to jail for contempt of court.

Between the three appeals, there are a whooping seventy one [71] grounds of appeal. As is to be expected, most of the grounds of appeal overlap and are repeated in each appeal since they arise from the same events. That includes the cross appeals by the 3rd and 4th Appellants, which raise issues similar to those raised by the appellant. In our view the appeals turn on only four common questions, namely:

> *(1) whether there was a valid court order which the alleged contemnors had defied;*
>
> *(2) whether there was a valid application for the committal of the alleged contemnors;*
>
> *(3) whether the learned judge had erred by denying the alleged contemnors an opportunity to be heard; and*
>
> *(4) whether, in the event, the learned judge had erred by finding the alleged contemnors in contempt of court.*

Under the four broad questions are several other subtexts which we shall address as we go along. The parties are in agreement that our decision in this appeal will dispose of the other two appeals.

The background to the appeals is as follows. By a lease dated 24th December, 2000, the 3rd respondent, *PHOENIX PROPERTIES LIMITED*, leased *L.R. NO. 209/9722, NAIROBI*, to eight [8] companies as joint tenants. Among those tenants was the 1st respondent. The lease was for a period of 6 years with effect from 1st November, 1998 and was guaranteed by three people, among them *DIVYESH INDUBHAI PATEL*, the 2nd respondent.

On 13th November, 2003, the 3rd respondent attached the 1st respondent's goods for non-payment of rent. In response, on 25th November, 2003, the 1st and 2nd respondents filed *High Court Suit No. 1227 of 2003* against the 3rd respondent, seeking a permanent injunction to restrain the sale of the attached properties. They also sought referral of the matter to arbitration in accordance with clause 7 of the lease, contending that there was a dispute regarding the rent arrears.

On 27th November, 2003 the High Court issued a temporary injunction stopping the sale of the attached goods by public auction or by private treaty. That order was extended from time to time until the application was heard *inter partes* by Aluoch, J. *(as she then was)* who, on 1st July, 2004 held that there was no dispute on the rent owing because the 1st respondent had admitted in writing owing KShs.15,021,000/-. Accordingly, the learned judge dismissed the application and discharged the injunction issued on 27th November, 2003. Thereafter, the 5th respondent, acting on instructions of the 3rd respondent attached the 1st respondent's goods and advertised the same for sale on 18th and 19th August, 2004.

On 3rd August, 2004, the 1st respondent filed *Chief Magistrate's Court Civil Suit No. 8334 of 2004* against the 5th respondent seeking a mandatory injunction for the release of the attached goods.

Contemporaneously with the plaint the 1st respondent also applied for an injunction to compel the 5th respondent to release the attached goods and a further injunction to restrain him from alienating or interfering with the goods. That application was dismissed on 17th August, 2004.

Next, the 1st respondent called in his aid the Kenya Police. By a letter dated 11th August, 2004, whose reference was *"theft of motor vehicles"*, the Divisional Criminal Investigation Officer, Embakasi, alleged that the motor vehicles among the attached goods belonged to third parties and were wrongfully attached. He therefore, directed the 5th respondent not to proceed further with the attachment until the police had completed their investigations. On 13th August, 2004, the 3rd respondent responded to the letter, insisting that the attachment was lawful, and that it would in any event, proceed.

Even before the application in the subordinate court was determined, by a Chamber Summons under certificate of urgency dated 12th August 2004, the 1st respondent moved the High Court once again for an injunction to restrain the 3rd respondent from attaching, further advertising for sale and /or selling by public auction or private treaty the attached goods. The main contention this time was that the dispute between the parties had been compromised or settled.

On 13th August, the 1st and 2nd respondents obtained an *ex parte* injunction from *Nyamu, J. (as he then was)* which, when extracted, read as follows, in the material part:

> *"2. That the defendant through itself, servants and/or auctioneers be and are hereby restrained by temporary injunction from attaching, further advertising for sale and / or sealing (sic) by public auction or print (sic)*
>
> *treaty all the goods and/or items attached by the defendant or advertised for sale for 18th August, 2004 until the 27th August 2004 at 2.30 p.m.*
>
> *3. That the application be served within 3 days for hearing inter partes on 27.8.04."*

It will be easily noted that, as extracted, the *ex parte* order was to last for a period of 14 days. That was consistent with the then *Order 39 Rule (3) (2) of the Civil Procedure Rules*, under which the 1st and 3rd respondents had made their application, which restricted the validity of an *ex parte* injunction order to a maximum period of fourteen [14] days.

The order was duly served upon the clerk of the appellant and that of the 5th respondent. The sale scheduled for 18th August, 2004, was accordingly stopped. The 1st respondent asserts that subsequently, upon perusal of the court file, it was pleasantly surprised to find that the order by Nyamu, J. issued on 13th August, 2004 was to last, not until 27th August, 2004 as required by the law, but until 27th September, 2004, some forty five [45] days later.

On 27th August, 2004, when the order of Nyamu, J. was due to lapse, the 1st respondent obtained what it calls *"an amended order"* which indicated that the injunction was now to last until 27th September, 2004. There is nothing on the record to show that the 1st respondent's advocates appeared before a judge for amendment of the order, or that a judge had directed the earlier order, which had been extracted and served, be amended. The record shows that after appearance before Nyamu, J. on 13th August, 2004, the next appearance by counsel for the 1st respondent before a judge was on 7th September, 2004.

Be that as it may, the 1st respondent asserts that the "amended order" was served upon the appellant and the 5th respondent on 30th August, 2004. Before service of the new order, the 3rd respondent had once again advertised the attached goods for sale on 28th August, 2004, believing that the orders of Nyamu, J. had lapsed. Ultimately some of the attached goods were sold by public auction on 1st September, 2004.

On 7th September, 2004 the 1st and 2nd respondents filed a Chamber Summons under the then *Order XXXIX Rule 2A, 1 and 2 of the Civil Procedure Rules* and *section 3A of the Civil Procedure Act* for the following main prayers:

"3. That the defendant herein M/s Phoenix Properties Ltd, its agents and specifically Mr Stephen Kimani Karuu t/a Kiriiyu Merchants Auctioneers be cited for contempt of the court orders issued by Hon. Mr Justice Nyamu on 13th August, 2004 and further amended on 27th August, 2004.

4. That in the foregoing premises, the defendant, the said auctioneers, their servants and agents be detained in prison for a term not exceeding six (6) months or such term as determined by this honourable court."

The affidavit deponing to the service of the *"amended order"* was sworn on 7th September by *Nicholas Mbeva*, a court process server. He annexed to his affidavit the amended order which he had served. In paragraph 3, he deponed that he had served the amended order upon the 1st respondent's legal clerk on 30th August, 2004. He did not disclose the name of the legal clerk, although he claimed to know him. In paragraph 4 of the affidavit, the process server deponed further that he had served the amended order upon the 5th respondent's clerk on the same date, 30th August, 2004. Again, though claiming to know that clerk, the process server did not disclose his name.

The amended order which the process server claimed to have served, and which was annexed to his affidavit was not endorsed with the notice that disobedience of the order would make the person upon whom it was served liable to the process of execution to compel him to obey it.

Subsequently the 1st respondent introduced in the contempt proceedings, with the leave of the court, a letter dated 30th August, 2004 from Esmail & Esmail Advocates addressed to the 5th respondent. This letter, which appears, and understandably so in our view, to have rubbed the learned judge the wrong way, stated as follows in the material part:

"Re: Nairobi HCCC Number 1227 of 2003

Equip Agencies Limited & Another vs Phoenix Properties Limited

We refer to the above matter and our letter dated 27th August 2004.

Further to our said letter, we have been served with an amended court order this morning at 10.15 am, which in effect makes the ex parte order issued on 13th August 2004 to last up until 27th September 2004, which is a total of 45 days. However, according to Order 39 Rule (3) of the Civil Procedure Rules, an ex parte order can only be issued once for not more than 14 days, in which case, this amended order is void ab initio.

In the circumstances, we advise that you proceed with the distress as instructed in our earlier letter."

It is common ground that the said letter was drafted by Mr F. N. Karanja, an associate in the firm of Esmail & Esmail Advocates who had conduct of the matter on behalf of the 3rd respondent. It was signed by Shirin Esmail, a partner in the said law firm, and not by the appellant.

The application for contempt was heard on 22nd September 2004 by Ojwang, Ag. J. The learned judge struck out the 3rd respondent's grounds of opposition dated 17th September, 2004, due to late filling and rejected the 3rd respondent's application to rely on an affidavit sworn earlier by one of its directors. The learned judge further held that the 3rd respondent's advocate had no right to be heard because he sought to speak on behalf of contemnors who were in contumacious contempt of court and who had not purged their contempt. He therefore restricted his address to matters of law only. Ultimately the learned judge allowed the application for committal for contempt in the following primary terms:

1. "That the defendant herein M/S Phoenix Properties Limited, its agents and specifically Mr. Stephen Karuu t/z Kiriiyu Merchants Auctioneers be and are hereby cited for contempt of court orders issued by the Honourbale Mr Justice Nyamu on 13th August, 2004 and further amended on 27tth August, 2004;

2. That the items belonging to the plaintiffs attached on 6th September, 2004 or there earlier be immediately and unconditionally released to the plaintiffs;

3. That the DCIO Industrial Are Police Station do supervise and guarantee compliance with the orders of this Honourable court;

4. That Kamaljeet Singh Matharu, director of the defendant company, Stephen Kimani Karuu the auctioneer and Akhbaal Ismail of Esmail & Esmail Advocates shall personally appear before the Judge in Chambers at 9.00 am on Thursday, 30th September, 2004 to show that they have already well and truly purged their contempt or in the alternative show cause why they shall not forthwith be committed to jail for contempt of Court and be held therein until their contempt is fully purged."

It is readily apparent that the 1st respondent's application for contempt was against the 3rd respondent, its agents and the 5th respondent. The agents of the 3rd respondent in respect of whom the application was made were not disclosed or named. The application was never amended to seek the committal of Kamaljeet Singh Matharu and Akhbaal Ismail. Most striking, however, is the fact that as at the date of hearing of the application, the order upon which the contempt application was based had not been served personally upon the said Kamaljeet Singh Matharu, Akhbaal Ismail and even upon the 5th respondent. Indeed, from the process server's own affidavit, that order had never been served upon any director of the 3rd respondent.

In the meantime, the appellant swore an affidavit on 29th September, 2004 which he filed in court the same day. In the affidavit, he deponed that he had not personally handled the matter and only came to know of it on 23rd September, 2003 when Mr Karanja informed him that he (the appellant) had been found to be in contempt of court. He explained that the letter of 30th August had been drafted by Mr Karanja, rather than by himself. He took issue with what he perceived to be irregularities relating to the amended order and the contempt of court application and expressed the view that from judicial authorities, the order was null and void. He concluded by tendering his unreserved apology should the court hold otherwise.

The parties appeared before the learned judge on 30th September, 2004 as directed. The 5th respondent was represented by an advocate, as he was said to be out of the country. The learned judge was not impressed by the appellant and Kamaljeet Singh Matharu both of whom he held to be in clear contempt of court. He struck out the appellant's affidavit and ordered that the same shall not form part of the court record. The learned judge however heard an advocate, Mr Ochieng Oduol, who appeared in the last minute for the appellant, to plead for more time to enable him purge his contempt. Ultimately the learned judge made an order, the material part of which provided as follows:

> *"1. I hereby create a new time span, of five days during which all the contemnors named in my orders of 22/9/2004 shall well and truly purge their contempt details of which are now quite clear to them;*
>
> *2. Kamaljeet Singh Matharu, Akbar Abdullah Kassam Esmail and Stephen Kimani Karuu shall personally appear before a judge in chambers at 2.30 p.m. on Friday 8/10/2004 to show that they have already fully purged their contempt, or in the alternative, to show cause why they shall not forthwith be committed to jail for contempt of court and be held therein until their contempt is purged."*

On 6th October, two days before the alleged contemnors were due to appear before the learned judge, they filed an application under the former Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001, seeking among others, stay of further proceedings of the contempt of court application pending the hearing and determination of their application alleging violation of their fundamental rights and freedoms. On the same day, the High Court, *(Ransley, J.)* granted the order and in particular stayed the hearing that had been scheduled on 8th October, 2004.

On 8th October, 2004, the learned judge proceeded with the application and made an order, the material part of which was in the following terms:

> *"1. That Akber Abdullah Kassam Esmail's Notice of Motion of 6th October 2004 shall not be scheduled for any hearing until Esmail will have demonstrated that he has purged his contempt of Court;*
>
> *2. That Akber Abdullah Kassam Esmail shall within the next one day file and serve affidavits showing his having purged his contempt of Court;*
>
> *3. That on Tuesday 12th October 2004 at 9.00 a.m. Esmail shall in person appear before a judge in chambers to show he has completely purged his contempt and fully complied with the orders of this Honourable Court; or to show cause why he shall not forthwith be committed to jail until his contempt is purged;*
>
> *4. That a warrant of arrest shall forthwith issue against the other two contemnors, namely Kamaljeet Singh Matharu and Stephen Kimani Karuu who shall be delivered before a judge in chambers at 9.00 am on Tuesday 12th October 2004 to show why they shall not immediately be committed to jail for contempt of Court."*

That then, is the rather murky background to this appeal. Dissatisfied with the various orders referred to above, the alleged contemnors preferred the three appeals referred to at the beginning of this judgment. Before us, Mr Ochieng Oduol, learned counsel, appeared for the appellant while Mr Obar Odera and Mr Peter King'ara, learned counsel, appeared for the 1st and 2nd respondents respectively. Mr F. N. Karanja, learned counsel, appeared for the 3rd and 4th respondents and Mr J. W. Wanjohi, learned counsel, for the 5th respondent.

Mr Oduol started by submitting that the proceedings upon which the application for contempt was based were an abuse of the process of the court, founded on fabrication of evidence and non-disclosure of material facts and were designed only to assist the 1st respondent avoid paying rents that were due and owing. After the ruling by Aluoch, J, counsel submitted, the suit in the High Court by the 1st and 2nd respondents was literally spent because the plaint had sought only a permanent injunction and referral of the matter to arbitration. In counsel's view, that suit could not form the basis for further application for injunction once Aluoch, J found that there was no dispute about rent.

Learned counsel further argued that the order issued by Nyamu, J on 13th August, 2004 was restricted to the sale scheduled on 18th August, 2004 and not on 19th August, 2004. Regarding the order itself, counsel submitted that it was irregular because by law, an *ex parte* injunction could not last beyond 14 days. He relied on the decisions of this Court in *UHURU HIGHWAY DEVELOPMENT LTD VS CENTRAL BANK OF KENYA & 2 OTHERS, CA No. 126 of 1995*, and *WANJIKU VS ESSO, (1995-88) 1 EA 332* as well as the ruling of the High Court in *UUNET KENYA LTD VS TELCOM KENYA LTD & ANOTHER, (2004) 1 EA 348* to bolster the view than an *ex parte* injunction made in disregard of the provisions of the former *Order 39 of the Civil Procedure Rules* was a nullity. For good measure, the words of lord Denning in *MACFOY VS UNITED AFRICA LTD, (1961) All ER 1169* to the effect that a void act is in law a nullity and not a mere irregularity and that it is not only bad, but also incurably bad, were cited in further support of the appellant's contention.

As for the amended order, Mr Oduol submitted that an order of the court can only be amended by another order made by a judge upon application. In this case, he contended, there was no evidence of an application to a judge or an order by a judge amending Nyamu, J's order.

On service of the order, counsel submitted that there was no personal service upon the appellant or the directors of the 3rd respondent, as is mandatorily required by law. Mr Oduol relied on *NYAMOGO & ANOTHER VS KENYA POSTS & TELECOMMUNICATIONS CORPORATION, CA NO. 264 OF 1993* and *CAMPBELL VS CANADIAN HUNGER FOUNDATION, CA NO. 56 OF 1994* for the proposition that personal service of the order upon a person is mandatory before such a person can be cited for

contempt.

Regarding the application for contempt, counsel submitted that the orders of committal were sought only against the 3rd and 5th respondents and there was therefore no basis for citing the appellant for contempt when he was not a party to the suit or application and no order for his committal had been sought. He further argued that the application for contempt was irredeemably flawed because the 1st and 2nd respondents had not applied and obtained leave to institute the contempt proceedings. *ANDALO & ANOTHER VS JAMES GLEEN RUSSEL LTD, (1990) KLR 54* was cited to support the view that an application for committal for contempt under the former *Order 39 Rule 2 of the Civil Procedure Rules* had to be preceded by an application for leave to commence committal proceedings.

Next, Mr Oduol criticized the learned judge for failure to adhere strictly to procedural requirements pertaining to contempt of court proceedings and for denying the appellant and the 3rd, 4th and 5th respondents the right to be heard. In his view, even a contemnor could not be condemned without a hearing and that a decision arrived at without a hearing was a nullity. Learned counsel relied on *CHILTERN DISTRICT COUNCIL VS KEANE, (1985) 2 All ER 118*, *MUTITIKA VS BAHARINI FARM, (1982-88) 1 KAR 864*, *Nyamogo & Another Vs Kenya Posts & Telecommunications Corporation, (supra),* as well as the learned judge's own decision in *DIMA VS ARID LANDS RESOURCES EXPLOITATION & DEVELOPMENT, HCCC NO. 1322 of 2003,* for the proposition that strict compliance with procedural rules is required in the exercise of contempt of court jurisdiction. *WANG'ONDU VS NAIROBI CITY COMMISSION, CA NO 95 OF 1988* was cited in support of the argument that a person cannot be denied an opportunity to be heard in contempt proceedings unless and until it was established that he had indeed committed contempt of court.

Lastly, relying on *Mutitika Vs Baharini Farm, (supra)* and the learned judge's own decision in *Dima Vs Arid Lands Resources Exploitation & Development, (supra)* learned counsel submitted that the courts ought not to allow recourse to the contempt of court jurisdiction in aid of a civil dispute when there are other remedies available. Mr Oduol also took issue with the fact that the learned judge heard the substantive contempt of court application on 30th September, 2004 when the same was listed for mention, rather than for hearing.

Learned counsel concluded his submissions by faulting the learned judge for ignoring the order issued by Ransley, J, on 6th October, 2004, in a constitutional application which had stayed further proceedings relating to the contempt of court application. That order, counsel submitted, had expressly stayed the hearing scheduled before the learned judge on 8th October, 2004, but nevertheless the learned judge had proceeded with the hearing.

Mr Karanja for the 3rd and 4th respondent's adopted the submissions by Mr Oduol in support of the appeals and his clients' cross appeals, which were based on the same grounds as the appeals. On Nyamu, J's order of 13th August, 2004, learned counsel emphasized that the same was a nullity for failure to comply with the former Order *39 Rule 3 of the Civil Procedure Rules* which, firstly, required the judge to record the reasons why the order had to be issued *ex parte* and secondly, limited the validity of an *ex parte* injunction to a maximum period of 14 days. Counsel submitted that on the authority of *Uhuru Highway Development Ltd Vs Central Bank Of Kenya & 2 Others, (supra), Wanjiku Vs Esso Kenya Ltd, (supra)* and *OMEGA ENTERPRISES (KENYA) LTD VS KENYA TOURIST DEVELOPMENT CORPORATION & OTHERS, CA NO. 59 OF 1993*, it was not necessary to set aside such an order and that all proceedings founded on it were also null and void.

On service of the order and the application for committal for contempt, counsel submitted that service had to be personal, on the authority of the judgments of this Court in *LOISE MARGARET WAWERU VS STEPHEN NJUGUNA GITHURI, CA No. 198 of 1998* and *Nyamogo & Another Vs Kenya Posts & Telecommunications Corporation, (supra)* and the judgment of the High Court in *KARIUKI & 2 OTHERS VS MINISTER FOR GENDER, SPORTS, CULTURE & SOCIAL SERVICES & 2 OTHERS, (2004) 1 KLR 588.*

Mr Karanja concluded by making submissions similar to those of the appellant regarding the need to

strictly comply with contempt of court procedures and the denial of the 3rd and 4th respondents of a proper opportunity to be heard.

On his part, Mr Wanjohi, for the 5th respondent submitted that the auctioneer was not a party to the *Civil Suit No. 1227 of 2003* which gave rise to the contempt of court proceedings; that he had never been joined as a party; that when the order stopping the sale on 18th August, 2003, was served upon the 5th respondent's office, the same was complied with, that the sale that had given rise to the contempt proceedings was undertaken after receipt of instructions in the letter of 30th August, 2003 from the 3rd respondent's advocates; that when subsequently instructed to release the goods he had attached, he had promptly complied; that the 5th respondent was not personally served with the court order and that to that extent, he was not in contempt of court.

For the 1st respondent, Mr Odera submitted that the contempt application was properly before the High Court because it was made under the former *Order 39, Rule 2A of the Civil Procedure Rules*, which was a special jurisdiction that did not require an applicant to first apply and obtain leave from the court. In addition, counsel submitted that the reasons why the order of 13th August 2004 had been granted *ex parte* by Nyamu, J. were apparent on the face of the order. In his view therefore, there was full compliance with the requirements of the former *Order 39.*

Regarding exactly what the order of 13th August, 2004 had restrained, learned counsel argued that the order was not restricted to the sale scheduled on 18th August, 2004 but rather, its focus was the attached goods and that there were no two attachments.

On service of the order, counsel submitted that the alleged contemnors were aware of the court order but chose to ignore the same.

On their right to be heard, Mr Odera submitted that the alleged contemnors were given an opportunity to address the court on points of law, an opportunity which they took advantage of. Relying on *HADKINSON VS HADKINSON, (1952) 2 All ER 567*, *ROSE DETHO VS RATILAL AUTOMOBILES & 6 OTHERS, CA No Nai. 304 of 2006* and *X LTD & ANOTHER VS MORGAN-GRAMPIAN (PUBLISHERS) LTD & OTHERS, (1990) 2 All ER, 1*, learned counsel contended that whether or not to hear a contemnor is in the discretion of the court and in this case, the contempt of the alleged contemnors had impeded the cause of justice so as to justify the refusal by the learned judge to hear them. *MAWANI VS MAWANI, (1977) KLR 159* was cited to illustrate an instance where the court refused to hear a contemnor.

Regarding the complaint that the learned judge had heard the application and made substantive orders on 30th September 2004 when the matter was scheduled for mention, counsel responded that the date was scheduled for the alleged contemnors to show cause why they should not be committed for contempt, and those are exactly the proceedings that took place.

Learned counsel further submitted that the alleged contemnors were properly found to have been in contempt of court. He contended that the amended order was a valid order of the court that ought to have been obeyed, until it was set aside, and it was not for the alleged contemnors to decide which order to obey and which to disregard. For the proposition that court orders must be obeyed until discharged, counsel relied on *COMMERCIAL BANK OF AFRICA LTD VS ISAAC KAMAU NDIRANGU, CA NO. 157 OF 1991, SHAH & ANOTHER T/A LENTO AGENCIES VS NATIONAL INDUSTRIAL CREDIT BANK LTD, (2005) 1 KLR, 300* and *Hadkinson Vs Hadkinson, (supra).*

The last submissions that we heard were by Mr King'ara, learned counsel for the 2nd respondent, who associated himself with Mr Odera's submissions. Leaned counsel added that the order of Nyamu, J. of 13th August, 2004 had not been appealed or set aside and it was still in subsistence. He contended that it was not open to the alleged contemnors to choose which order of the court to obey and that they were bound to obey all court orders until they are set aside.

Mr King'ara further argued that service of the order upon the alleged contemnors was proper, and that the

appellant had in particular acknowledged service upon his firm in the letter of 30th August, 2004 that advised the 5th respondent to proceed with the attachment.

Mr King'ara ended by submitting that whatever the outcome of the appeal, no costs ought to be awarded against the 2nd respondent who was protecting a court order and that this appeal was necessitated by the refusal of the alleged contemnors to comply with a valid court order.

We have carefully considered the ruling and orders of the trial court, the record of the proceedings, the submissions by learned counsel, both written and oral, as well as the authorities from different jurisdictions that were presented to us. We have considered the entire appeal with great anxiety, keeping in mind the solemn duty of the courts in our jurisdiction to uphold the cause of justice and the rule of law and the self evident obligation to afford sundry and all, including those who annoy and vex judicial officers, a fair hearing before they are condemned.

The power to punish for contempt is an important and necessary power for protecting the cause of justice and the rule of law, and for upholding the authority of the court and the supremacy of the law. In the Scottish case of *STEWART ROBERTSON VS HER MAJESTY'S ADVOCATE, 2007 HCJAC 63, Lord Justice Clerk* stated as follows on contempt of court:

"Contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings."

His Lordship further stated that the power of the court to punish contempt is inherent in a system of administration of justice and that power is held by every judge. Here in Kenya, the Supreme Court in *THE BOARD OF*

GOVERNORS, MOI HIGH SCHOOL, KABARAK VS MALCOM BELL & ANOTHER, S C Petition Nos. 6 & 7 of 2013, described the power to punish for contempt as a power of the court *"to safeguard itself against contemptuous or disruptive intrusion from elsewhere"* and identified it as one of the indisputable attributes of the Court's inherent power. Without that power, protection of citizens' rights and freedoms would be virtually impossible. Courts of law would be reduced to futile institutions spewing forth orders in vain.

That the power to punish for contempt has never been about protecting judges' feelings, egos or dignity has been recognised for a long time. Bowen, L.J., in *HELLMORE V. SMITH, (2) (1886), L. R. 35 C. D. 455* pertinently stated the rationale as follows:

"The object of the discipline enforced by the Court in case of contempt of court is not to vindicate the dignity of the Court or the person of the Judge, but to prevent undue interference with the administration of justice."

Lord President Clyde's often quoted dictum in *JOHNSON VS GRANT, 1923 SC 789 at 790* is to the same effect:

"The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged."

However, the power to punish for contempt is a drastic power that sometimes borders on the arbitrary. As the saying goes, just like fire, the contempt power can be a good servant, but a bad master. If it is not exercised cautiously and responsibly, it may undermine the very cause of justice and the rule of law that it is intended to safeguard. Arbitrary resort to the contempt power imperils the liberty and property of citizens as badly as deliberate disobedience of a court order. Lord Jessel, M.R. in his speech in *IN RE CLEMENTS, CLEMENTS V. ERLANGER, (1877), 46 L. J. Ch. 383* best exemplifies the misgivings about invocation of the contempt power:

"It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject."

It is for this reason that the exercise of the contempt jurisdiction has traditionally been circumspect and subject to well defined safeguards to keep it to the straight and narrow. In *Nyamogo & Another Vs Kenya Posts & Telecommunications Corporation, (supra),* this court expressed the importance of strict adherence to procedural safeguards in the following terms:

"The consequences of a finding of disobedience being penal, the party who calls upon the court to make such a finding must show that he has himself complied strictly with the procedural requirements and his failure to so comply cannot be answered by merely saying that the other side was aware or ought to have been aware of what the order required him to do."

The validity of the order of Nyamu, J. of 13th August, 2004 is challenged on three main grounds. The first is that it did not restrain the sale that was scheduled on 19th August, 2004 but was restricted to that on 18th August, 2004. On this issue there cannot be any debate because the order, which we have set out above, speaks for itself. It restrained the sale that was scheduled for 18th August, 2004 and was silent on that of 19th August and subsequently. Even the *„amended order?*, which we shall advert to later, was specific to the sale of 18th August, 2004. We do not need to second guess what the order intended when its terms are absolutely clear.

The second challenge of the order relates to failure to comply with the former *Order 39 Rule 3 (1)* which provided as follows:

> *"Where the court is satisfied for reasons to be recorded that the object of granting the injunction would be defeated by delay, it may hear the application ex parte."*

The record on 13th August 2004 merely states *"in view of the argument on challenge to the legality of the attachment, I grant orders…"*. With respect we are not convinced that these are the kind of reasons contemplated by *Order 39 Rule 3(1*). Those reasons must relate to the circumstances why the defendant should be denied an opportunity to be heard in the first instance as is the cardinal rule under our legal system. In *Omega Enterprises (Kenya)Ltd Vs Kenya Tourist Development Corporation & Others, (supra),* Gicheru, J.A. *(as he then was),* expressed himself as follows regarding the requirement for recording of the reasons under *Order 39 Rule 3 (1)*:

"Clearly, from the foregoing provisions, the hearing of an application for injunction ex parte can only be legitimate where the court is satisfied that the object of granting the injunction would be defeated by delay and that satisfaction must be manifested by the recorded reasons of the Court. Generally, an injunction will be granted ex parte only in cases of emergency or in cases of urgency and there is no way of knowing of the existence of any of these two factors unless the same is apparent on the record of the court…Hence the need to show that there are strong grounds to justify the application being made ex parte. Indeed, where proceedings are taken by a plaintiff in the absence of the defendant, it is most important that there should be at every stage of the proceedings a strict compliance with the rules."

The full court concluded that failure to observe the requirements of *Order 39 Rule 3 (1)* rendered the order invalid, null and void. In *Uhuru Highway Development Ltd Vs Central Bank Of Kenya & Others, (supra)* Akiwumi, J.A. expressed similar views regarding compliance with *Order 39 Rule 3(1)* when he stated:

> *"To my mind, the recording of reasons by the learned judge why he should hear the application ex parte, is mandatory and the learned judge, having failed to record his reasons as required by 039 r 3(1), could not, and should not, have gone on to hear the application ex parte and to grant the*

temporary injunction. This order was invalid, had no legal basis and is therefore of no legal effect."

We so find too in this appeal.

The last challenge directed at the order of 13th August, 2004 was that it was issued in violation of the provisions of the former *Order 39 Rule 3(2) of the Civil Procedure Rules*. That provision read as follows:

"No injunction may be granted ex-parte for longer than is shown to be necessary and in no case shall it be for more than 14 days."

The record shows that the *ex parte* injunction was issued not for the maximum 14 days, but for a whole 45 days. We do not see any justification in law for such an *ex parte* injunction in view of the mandatory provisions of Order 39 Rule 3 (2). Again, in *Omega Enterprises (Kenya) Ltd Vs Kenya Tourist Development Corporation & Others, (supra)* this Court held that an *ex parte* injunction issued contrary to *Order 39 Rule 3(2)* for more than 14 days was invalid, null and void. It is instructive to note that the order in question in that appeal had been issued for 16 days. See also *Wanjiku Vs Esso Kenya Ltd, (supra).*

Having found that the *ex parte* injunction issued without recording of reasons and for more than 14 days was null and void, we do not have to pronounce ourselves further on the amended order, which was equally invalid, null and void.

The argument advanced by the appellant and the 3rd and 4th respondents that the application for their committal for contempt of court was invalid as it was not preceded by an application for leave to take out contempt proceedings as is required under the relevant procedure pursuant to *section 5(1) of the Judicature Act* lacks merit. The application by the 1st and 2nd respondents was taken out under the former *Order 39.* There are sufficient number of decisions, both from this Court and the High Court that firmly establish that *Order 39* was a self-sufficient provision and that an application for contempt of court thereunder did not require leave before it was filed. For instance, in *JOSEPH SCHILLING BIYO (K) LTD VS STARDUST INVESTMENT LTD, CA NO 134 OF 1997*, this Court stated as follows on the issue:

"The procedure where there is disobedience of any terms of an injunction order under Order XXXIX rules 1 & 2 is by Chamber Summons as set out under rule 9. That rule does not require that leave of court be first obtained before taking out such summons."

In the High Court, the same reasoning is reflected in *ISSAC J WANJOHI & ANOTHER VS ROSELINE MACHARIA, HCCC No 450 of 1995, JOHN SACHIA NDIRANGU VS PETER NG'ANG'A NJENGA & ANOTHER , HCCC 3696 of 1995, Dima Vs Arid Lands Resources Exploitation & Development, (supra), DONHOLM RAHISI STORES VS EAST AFRICAN PORTLAND CEMENT LTD, HCCC No 18 of 2004,* and *SALIM H. SUMRA & ANOTHER VS MAINA KARIUKI & 2 OTHERS, HCCC No 58 of 2004 (Mombasa).*

It is also worth noting that in a ruling delivered on 14th February, 2014, in *CHRISTINE WANGARI GACHEGE VS ELIZABETH WANJIRU EVANS & 11 OTHERS, C.A. No Nai 233 of 2007*, this Court, after considering the new *Civil Procedure Rules of England*, reiterated that in an application for committal for breach of an order of the court, no prior leave is required.

Equally without merit is the appellant's complaint that the learned judge heard the substantive contempt of court application on 30th September, 2004 while the same was listed for mention, rather than for hearing. We would readily agree with Mr Odera that the order issued on 22nd September, 2004, whatever the objections that the alleged contemnors raise against it, was clear enough that they were to appear before a judge in Chambers for the purpose of showing that they had purged their contempt or alternatively to show cause why they should not be committed for contempt. They had notice of the purpose of the court attendance on 30th September and were not misled by the fact that the matter was listed before the learned judge as a mention. Clearly their situation is easily distinguishable from the case of *Wanjiku Vs Esso Kenya Ltd, (supra).*

Beyond the irregularities that we have noted pertaining to the order of 30th August, 2004, the contempt of court proceedings themselves were tainted by glaring irregularities. The suit in which the contempt of court proceedings were taken out, namely *HCCC No 1227 of 2003,* was filed by the 1st and 2nd respondents against the 3rd respondent.

The appellant and the 4th and 5th respondents were not parties to the suit and at no time were they joined as parties. As we have noted, the application for contempt sought the committal of the 3rd respondent, a legal personality, and the 5th respondent. It did not seek any prayers against the appellant and the fourth respondent. It appears that the appellant was brought into the proceedings because his firm was representing the 3rd respondent and the 4th respondent was brought in because he was a director. From the record, there is no reference to any application or amendment of the application filed, to join them in the contempt proceedings. All there is on record is the order of 22nd September, 2004 directing the appellant and the 4th respondent to appear before a judge on 30th September, to show that they had purged their contempt.

As of 22nd September, 2004, the learned judge had found the alleged contemnors in contempt though they had not been joined in the proceedings and had not been heard. Of greater concern to us is that as of that date, the indisputable and uncontroverted evidence placed before the court by the 1st and 2nd respondents was that the order of 13th August, 2004 had not been served personally on any of the alleged contemnors. The affidavit of service by the process server indicated that the order had been served on the clerk of the appellant and that of the 5th respondent. There was no pretence that it had been served upon the 4th respondent.

In *LOISE MARGARET WAWERU VS STEPHEN NJUGUNA GITHUI, CA NO 198 OF 1998,* this Court held that service of an order upon a houseboy rather than upon the alleged contemnor did not constitute proper service upon which contempt of court proceedings could be based. On the same terms, in *Nyamogo & Another Vs Kenya Posts & Telecommunications Corporation, (supra),* service of an order upon a firm of advocates was found not to constitute proper service upon officers of the advocates' client.

In the same judgment, this Court stated as follows regarding service of contempt process on a legal personality:

> *"Where the order is made against a company, the order may only be enforced against an officer of the company if this particular officer has been served personally with a copy of the order."*

Before the 4th respondent or any other director of the 3rd respondent could be cited for contempt, there had to be evidence before the court that they had been served with the court order which they were alleged to have violated. This was woefully lacking.

As regards the appellant, the uncontroverted evidence was that he did not have personal conduct of *Civil Suit No. 1227 of 2003* on behalf of the 3rd respondent. It was Mr Karanja who had conduct of the suit and who had authored the rather irresponsible letter of 30th August, 2004. Before us, Mr King'ara was very candide that the signature on that letter was not the appellant's but that of another partner in his firm. If any advocate deserved to be cited, of course subject to observing the prescribed procedure, it was Mr Karanja.

This Court has stated time and again that before it can visit upon a citizen the full force of the power of contempt, that citizen must have first been served personally with the order that he is alleged to have breached. In *Wang'ondu Vs Nairobi City Commission , (supra)* this court expressed the principle in the following terms:

"…a general rule, no order of Court requiring a person to do or abstain from doing any act may be enforced unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. The copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order, he is liable to the process

of execution to compel him to obey it. This requirement is important because the Court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that the breach of the injunction has been proved beyond reasonable doubt."

See also *OCHINO & ANOTHER VS OKOMBO & 4 OTHERS, (1988) KLR 165* and *Nyamogo & Another Vs Kenya Posts & Telecommunication Corporation, (supra).* The general rule therefore is that the order has to be served on the defendant personally, unless the court is completely satisfied that the defendant had proper notice of the terms of the order, and his deliberate breach is proved to the required standard.

There is an additional irregularity that is readily apparent regarding the order which was purportedly served and which was annexed to the process server's affidavit. That order was not indorsed with a notice of the consequence of disobedience, as required. In *Ochino & Another Vs Okombo & 4 Others, (supra),* this Court held that in contempt of court proceedings, a copy of the order served must be indorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey it. See also *Wang'ondu Vs Nairobi City Commission, (supra).* This Court, in *CAMPBELL & ANOTHER VS CANADIAN HUNGER FOUNDATION, C.A. No 56 of 1994* stated that non-compliance with this elementary but mandatory procedural rule renders the entire proceedings a nullity.

On whether the alleged contemnors had a right to be heard, we think that in the circumstances of this case, they were entitled to be heard for the purposes of showing cause why they should not be committed for contempt, as the learned judge had ordered. As we have noted, when the learned judge found them guilty of contempt of court, on 22nd September, 2004, the appellant and the 4th respondents, who were not parties to the suit or the contempt application, were not in court, and Mr Karanja appeared only for the 3rd respondent. When the learned judge ordered them to appear on 30th September, 2004, it was to be expected that they would be heard, otherwise how were they to show cause? Unfortunately that never happened.

The authorities show that for the purposes of showing cause why he should not be committed, a contemnor is entitled to be heard. It is noteworthy that even in *Hadkinson Vs Hadkinson, (supra),* Lord Denning was clear enough that it is unusual for a court to refuse to hear a party to a suit and that such cause should be taken only when justified by grave considerations of public policy. The fact that a party to a suit has disobeyed an order of the court is not itself a bar to his being heard; a court could exercise its discretion to refuse to hear him if the disobedience continued to impede the cause of justice.

In *Rose Detho Vs. Ratilal Automobiles & 6 Others, (supra)* Githinji J.A., speaking for the majority stated as follows on the right of a contemnor to be heard:

> *"..the general rule that a party in contempt could not be heard or take part in the proceedings in the same case until he has purged his contempt applies to proceedings voluntarily instituted by himself in which he has made some claim and not a case where all he seeks is to be heard in respect of some matter of defence or where he has appealed against an order which he alleges to be illegal having been made without jurisdiction…"*

Earlier in *Wang'ondu Vs Nairobi City Commission , (supra)* the Court has stated the same principle as follows:

> *"Even assuming for the purposes of argument only that there was a competent application [for committal for contempt] before the judge, he was in our view perfectly justified in holding that the respondent could not be driven from the seat of judgement on the bare allegations of the appellant unless and until it had been established by credible evidence that the respondent had indeed committed a contempt of court."*

In the *ROSE DETHO* case, Onyango Otieno, JA succinctly set out the principles which should guide a

court in determining whether or not to exercise its discretion to hear a contemnor as follows:

> *"Much as I have discretion to hear or not to hear the applicant, that discretion, like any other judicial discretion, must be exercised judicially and not capriciously. It must be exercised upon reasons and not on the whims of the court or on sympathy or sentimental aspects such as that the court must show that it has teeth when faced with a case such as before us. Of course courts have teeth but must only bite in appropriate circumstances. Courts act on reason and not on emotion. In the exercise of the discretion, the legal principles I have reproduced hereinabove must guide my approach."*

In this appeal, the alleged contemnors had been found to be in contempt without a hearing. They were summoned to show cause why they should not be committed. How could the court then refuse to hear them?

We are not satisfied that the proper procedure was followed in respect of the appellants before they were found to be in contempt of court. The breaches for which the appellants were being cited required to be defined precisely, and they had to be proved to a standard consistent with the gravity of the alleged contempt, which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. The validity of the order of 13th August 2004 has been severely impeached. The irregularities relating to personal service of that order and endorsement thereon of a penal notice are glaring. By denying the alleged contemnors an opportunity to be heard in the circumstances of this appeal, they were denied a fair hearing before condemnation. It was in a context like the above that *Sir John Donaldson, MR* stated that where the liberty of the subject is involved, the courts have asserted that procedural rules applicable must be strictly complied with. See *Chiltern District Council Vs Keane, (supra).*

We have come to the conclusion that this appeal must be allowed. We accordingly allow the appeal, set aside the orders dated 22nd September, 2004, 30th September, 2004 and 8th October, 2004 and substitute therefor an order dismissing the 1st and 2nd respondents' Chamber Summons dated 7th September, 2004. We would have awarded the appellants the cost of this appeal, but we take a very deem view of Mr Karanja's letter of 30th August, 2004 which precipitated the litigation that has culminated in this appeal and which letter, as a responsible officer of the courts of this country, he ought not to have written. Each party shall therefore bear its own costs. The orders herein to operate in Civil Appeal Nos. 268 and 269 of 2004.

Those are our orders.

Dated and delivered at Nairobi this 4th day of April, 2014.

R. N. NAMBUYE

JUDGE OF APPEAL

D. K. MUSINGA

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I Certify that this is a true copy of the original

DEPUTY REGISTRAR