



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, KIAGE & GATEMBU-JJA)

CIVIL APPEAL NO. 336 OF 2013

BETWEEN

JOHN MWANGI MUHIA.....1ST APPELLANT

CHARLES MUEMA.....2ND APPELLANT

BRONX ESTATES LIMITED.....3RD APPELLANTS

AND

JUSTUS GITUMA t/a DONA SNACKS .....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Milimani) (Ogolla J) Dated 5th October, 2012

in

Milimani High Court Misc. Application No. 151 of 2012)

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**JUDGMENT OF THE COURT**

1. The subject matter of the litigation culminating in this Judgment is a property known as LR. No. 209/4490/Rahu House situate on Mfang’ano Street Nairobi. The litigation has its origin in Business Premises Rent Tribunal case No. 806 of 2011 Nairobi. The first application was between Bronx Estates Limited as the applicant/tenant and Kenya Railways & Allied Workers Union as the Respondent/landlord giving rise to the orders made on the 25th day of November, 2011 by **Muchache D.** Chairperson of Tribunal to the effect that:-

***“(2) The Landlord either by itself, its servants and/or agent, employees and/or representatives be and is hereby restrained from unlawfully evicting, harassing, intimidating, interfering in any way in whatsoever manner with the tenants quiet and lawful occupation of L.R. No.***

***209/4490/Rahu House Ground Floor Mfangano street- Nairobi pending***

*hearing of the complaint on 17th February,2012.*

*(3) O.C.P.D. Central Police Station to ensure that peace prevails.*

*(4) To serve the land lord within three (3) workingdays.*

2. The second application was between **Justus M. Gituma T/A Dona snacks** as the applicant/tenant and the Kenya Railways & Allied Workers Union as the first respondent/landlord and Bronx Estates Limited as the 2nd respondent giving rise

to the orders made on the 2nd December, 2011 to the effect that:-

*“2. The orders issued herein were obtained through misrepresentation and concealment of material facts.*

*3. Bronx Estates Limited is the same as John Mwangi Muhia (The Director) who was restrained by the ruling of the tribunal in case No. 402 of 2011 from colluding with the landlord to evict the tenant from the suit premises.*

*4. The concealment of the material facts led to the orders issued in favour of the said John Mwangi Muhia- the Director of Bronx Estates Limited on 25th November, 2011.*

*5. The orders issued on 25th November, 2011 be and are hereby rescinded under Section 12(1) (i) of Cap 301.*

*6. A copy of this order be served upon officer in charge Administration police-Kariokor who should ensure that there is no breach of peace during this Festive session (season).*

*7. The tenant is authorized to break the doors and gain access under the supervision of the officer-in charge Administration police- Kariokor who should ensure that peace prevails.*

*8. To serve the landlord for hearing on 17th February,2012.”*

3. The orders of 2nd December, 2011 gave rise to the filing of Civil Appeal No.661 of 2011 in the High Court by Kenya Railways and Allied Workers Union and Bronx Estates Limited against one **Justus M. Gituma**. An application was filed in the said appeal which gave rise to the orders made on the 5th day of January,

2012 by the **Hon. lady Justice Ngugi** to the effect that:

*“(1) There be a stay of execution of orders issued on the 2nd December, 2011 by the Business Premises Rent Tribunal in case No. 806 of 2011 pending the hearing and determination of the applicants appeal”*

4. In a bid to enforce the orders made on the 2nd day of December, 2011, the respondent presented an application by way of Notice of motion dated and filed on the 7th day of May, 2012 in Milimani HCCC Misc. Application No. 151 of 2012 seeking an order to commit

*John Mwangi Mwhia and Charles Muema to civil jail for contempt of the orders of the Business Premises Tribunal issued on 2nd December, 2011.*

5. That application was opposed by the appellants, heard on its merits resulting in a ruling delivered by the **Hon. Mr. Justice E.K. Ogolla** on the 5th day of October, 2012 wherein the learned trial Judge in a summary found that (i) the appellants had flouted the Tribunal’s orders of 2nd December, 2011; (ii) appellants had due notice of the said orders; (iii) personal service was

unnecessary since the appellants had due notice of the orders (iv) the endorsement of a notice of penal consequences on the orders allegedly served or in respect of which the appellants had notice of was unnecessary; (v) the orders made by **Mumbi J** were null and void as they were made after the orders made by the Tribunal had crystallized and vested the suit premises in favour of the respondents; (vi) appellants were in contempt of the Tribunal's orders by forcefully breaking into the suit premises and forcefully ejecting the respondents; (vii) the respondents had seven days from the date of the ruling to purge the contempt by vacating the suit premises or be committed to civil jail for a period of six months (viii) the appellants to pay costs of the contempt of court proceedings:-

6. The appellants were aggrieved by those orders. They proffered an appeal to this Court citing twelve (12) grounds of appeal. In summary, these are that the learned trial Judge erred in law and in fact by curtailing the provisions of the Constitution and the African Charter on Human and Peoples Rights enumerated in each ground of appeal by:-

(1) Allowing the Respondent's application by way of notice of motion dated the 7th day of May, 2012 as against the appellants.

(2) Failing to find that contempt of orders of court (Tribunal) being an offence of a criminal character required the Director of Public

Prosecutions or the Hon. the Attorney General to be enjoined in the 1st

Respondent's notice of motion of 7th day of May, 2012.

(3) Unprocedurally sitting on an appeal and reviewing *suo motu* the decision of a judge of parallel jurisdiction i.e the **Honourable Lady Justice Ngugi** given on the 5th January, 2012 in favour of the appellants.

(4) Nullifying without jurisdiction the orders of the learned Judge of the High Court, the **Hon. lady Justice Ngugi** in Nairobi High Court Civil Appeal No. 661 of 2011.

(5) Sentencing and committing the appellants to civil jail *ex parte* and subsequently ordering eviction of the appellants *ex parte* from suit premises notwithstanding the uncontroverted fact on record to the effect that the orders of the Business Premises Rent Tribunal which was alleged by the 1st respondent to have been disobeyed by the appellants had been stayed by the Honourable **Lady Justice Ngugi** in Nairobi High Court Civil Appeal No. 661 of 2011 and which orders of stay had not been reviewed or appealed against.

(6) Sitting on an appeal and reviewing the decision of a Judge of parallel jurisdiction without being moved by the 1st respondent in accordance with the law and reviewing the said orders in a separate file and without a record of proceedings in Nairobi High Court Civil Appeal No. 661 of

2011 and as a consequence perpetrating a culture of impunity a part from stifling the rule of law and accordingly the course of justice to the detriment of the appellants.

(7) Finding that on the 13th December, 2011 the 1st respondent herein under the supervision of the police entered and took over the possession of the business premises in issue from the appellants.

(8) Finding that **Hon. Lady Justice Ngugi** issued orders of stay on the 5th January, 2012 while the 1st respondent herein was already in possession of the Business premises in issue on the 13th December,

2011 which facts were disputed by the appellants during the hearing and were indeed not supported by evidence of probative value.

(9) Failing to consider in his ruling dated 5th October, 2012, the pleadings filed by the parties in Nairobi High Court petition No. 249 of 2012 as well as the conservatory orders of the Honourable **Mr. Justice Majanja** given therein on the 8th June, 2012 in refusing to consolidate the two files.

(10) Exposing the appellants to double criminal prosecution after the alleged sentencing and the conviction of the appellants by the **Hon. Mr. Justice Ogolla** given that the Director of Public Prosecution continues to date to prosecute the appellants at the Makadara law Courts for being in contempt of the said orders of the Business Premises tribunal

issued on the 2nd December, 2011 long after the **Hon. Mr. Justice**

**Ogolla** delivered his ruling on the 5th October, 2012 (in Makadara

Criminal Case No.2878 of 2012.)

(11) That the decision of the Honourable **Mr. Justice Ogolla** dated 5th October, 2012 and all consequential orders thereupon are arbitrary and oppressive to the appellants and are also draconian and were meant to disrupt and indeed disrupted a valid landlord/tenant relationship existing between the appellants and the Railway & Allied Workers Union and further had the effect of disrupting the appellants' business transactions in the suit premises with the third parties thereby exposing the appellants to claims by third parties for breach of contract arising out of forceful and illegal execution of eviction orders by the 1st respondent and as a consequence the appellants have suffered loss and damages for which the appellants seek monetary compensation by way of general and exemplary damages to provide legal redress on account of the appellants' social economic rights.

7. In consequence thereof, the appellants sought orders that the appeal herein be allowed with costs and that the decision of the **Honourable Mr. Justice E.K. O. Ogolla** given on the 5th October, 2012 and all consequential orders thereupon be set aside *ex debito justitiae*; that general and exemplary damages be assessed and awarded to the appellants for violation of the alleged fundamental human rights of the appellants and for loss of business occasioned to the

appellants by the Ruling dated 5th October, 2013 and all consequential orders thereupon; that Makadara Court Criminal case No.2878 of 2012 be declared null and void, terminated and quashed forthwith; that the Director Public Prosecutions be restrained from pursuing any further criminal charges against the appellants in relation to the orders of the Rent Tribunal dated 2nd December, 2011 pending the hearing and determination on merit of Nairobi High Court Civil Appeal No. 661 of

2011 filed by the appellants and lastly that the respondents be condemned to pay costs both in the Supreme (High) Court and this Court.

8. In his submission on appeal, learned counsel **Mr. O.P. Ngoge Esq** argued that the orders of **Mr. Justice Ogolla** stand faulted for the reasons that **one**, the learned Judge should not have reviewed and nullified the orders of a court of concurrent jurisdiction in the absence of an appeal having been proffered against that decision or alternatively an application for review under order 45 Civil Procedure Rules. **Two**, the orders the appellants were accused of disobeying had been stayed by a court of competent jurisdiction pending the hearing and determination of the appeal in Nairobi HCCC No. 661 of 2011. **Three**, contempt of court proceedings being criminal in nature should not have been determined without joining the Hon. the Attorney General in those proceedings. This default on the part of the respondent rendered the entire proceedings incurably defective. As such, no penal consequences could flow from such orders as against the appellants. **Five**, the said contempt of court proceedings also stood faulted as no notice of penal consequences was served on the appellants, a matter brought to the attention of the trial Judge but ignored. To **Mr. Ngoge**, failure to comply with this mandatory requirement also rendered the entire contempt of court proceedings a nullity and of no consequence. **Six**, the learned trial Judge flouted a cardinal principle of international law by denying the appellants a fair

hearing as they were condemned to civil jail without being heard. **Seven**, in upsetting the orders of stay granted in HCCA No. 661 OF 2011 in the manner done, the learned trial judge adopted a wrong procedure and in the process proceeded on a wrong footing and therefore made an illegal order. The proper procedure should have been for the respondent to have the orders granted in HCCC No.661/2011 set aside before proceeding to seek enforcement of the tribunal's orders. **Eight**, the respondents are guilty of non disclosure of material facts as they failed to disclose to the learned trial Judge that the tribunal orders had been stayed. **Nine**, the learned trial Judge also ignored the orders which had been made in Petition No. 249 of 2012 vide which prosecution of the

appellants for the alleged contempt of the tribunals orders made on 2nd

December, 2001, had been put on hold. **Ten**, the learned trial Judge's conduct exposed the appellants to double jeopardy as there were at the material time proceedings pending in Makadara Court regarding the same alleged appellants contempt of the tribunal's orders. **Eleven**, the learned trial Judge's orders were not only arbitrary but highly oppressive. **Twelve**, the learned trial Judge did not only ignore clear mandatory legal provisions governing enforcement of contempt of court orders but also disrupted the appellant's business from being carried on on the suit premises.

**9. Mr. Mugambi** opposed the appeal on the grounds that the appellants are undeserving of this Courts' indulgence as they are fugitives from the law as they have failed to attend Court at Makadara law Courts; that by the time **Mumbi J** gave stay orders in HCCA 661 of 2001 on 5th January, 2012, the respondents

had already taken possession of the suit premises on 13th December, 2011; that the appellants ignored and or failed to respect the changed *status quo*. Instead they (appellants) forcefully and without any justification evicted the respondent from the suit premises; that the stay orders issued by **Mumbi J** did not give the appellants the right to repossess the suit premises.

**10.** It was **Mr. Mugambi's** further contention that, in the absence of an order giving the appellants the right of re-entry to the premises, there was nothing to stay as at 13th December, 2011 the appellant had lost possession of the suit premises to the respondent who remained in lawful possession of the suit premises until 6th January, 2012 when he was unlawfully and forcefully ejected; that if this Court were to shield the appellants and absolve them from any wrong doing, then it will be in essence perpetrating contempt of the tribunal orders with impunity.

**11.** Turning to the orders of **Ogolla J**, sought to be impugned, **Mr. Mugambi** argued that these are faultless because: **one**, the learned trial Judge heard both

parties and rightfully arrived at the conclusion that the appellants had disobeyed the tribunal's orders with impunity; that had **Ngugi J** been made aware of the fact that the appellants were no longer in possession of the suit premises she would not have granted the orders of stay; that the orders made by **Ngugi J** were made without the appellants' disclosure of all the material particulars and **Ogolla J** arrived at the correct position when he declared them a nullity.

**12.** Turning to the procedure of the contempt proceedings, **Mr. Mugambi** conceded that the orders allegedly breached were served without an endorsement of a notice of penal consequences but this was not fatal; that **Ogolla J** properly evaluated the facts and arrived at the correct supportable conclusion, on the facts as they had been placed before him. Lastly, that there was no basis for an order for compensation for the appellants' alleged loss of business.

**13.** In response to the respondents' submissions, **Mr. Ngoge** added that the proper procedure to have been followed by the respondents should have been for them to apply to have the stay orders granted by **Mumbi J** set aside as opposed to initiating contempt of the Tribunal's orders; that respondents cannot feign lack of knowledge of the stay orders issued in HCCA No. 661 of 2011 as they were served and ought to have obeyed those orders; that provisions of the Constitution cited donate jurisdiction to this Court to grant compensation to the appellants for loss of business suffered by them.

14. This being a first appeal, the mandate of this Court is as set out in Rule 29 (1)

of this Courts Rules, namely to re-appraise the evidence and draw our own inferences of fact. In ***Sumaria and another versus Allied Industries Limited [2007] 2 KLR1***, this Court stated inter alia , that; ***“being a first appeal the court was obligated to reconsider the evidence, re-evaluate it and make its own conclusion.”***

In ***Mujere versus Mwechelesi & Another [2007] 2 KLR159***, the Court stated that:- ***“As an appellate Court, the Court had to be very slow to interfere with the trial Judge’s findings unless it was satisfied that either there was absolutely no evidence to support the finding or that the trial Judge had misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupported conclusion.”***

15. The rival arguments set out above present the following issues for our determination:-

1. Whether the contempt of Court proceedings were properly initiated.
2. Whether failure to serve the tribunal’s orders of 2nd December, 2011 with an endorsement of a notice of penal consequences was inconsequential as asserted by the respondents, or fatal to the contempt of court proceedings as initiated as asserted by the appellants?
3. Whether the orders of Ogolla J declairing the orders of Mumbi J of 6th January, 2012 as null and void hold in the circumstances of the facts herein.
4. Whether there is jurisdiction in this Court to award compensation/damages or any original orders in favour of the appellants for the loss of business allegedly suffered by the appellants at the instigation of the respondent? Or alternatively, to grant any other order sought in their original form.
5. What are the appropriate final orders to be made herein in the disposal of this appeal?

16. Orders allegedly flouted by the appellants emanate from the pronouncement of the Business Premises Rent Tribunal, a creature of statute namely the Land lord and Tenants (Shops, Hotels and Catering Establishments Act, Cap 301

Laws of Kenya). The orders of 2nd December, 2011 were made pursuant to the jurisdiction donated to the Tribunal vide the provisions of Section 12 of the same

Act.

17. The procedure of enforcing and appealing the Tribunal’s orders made pursuant to Section 12 above is donated by the provisions of Section 14 and 15 respectively of the same Act. These provide:-

***“14(1) A duly certified copy of any determination or order of a Tribunal may be filed in a competent subordinate court of the first class by any party to the proceedings before such tribunal or by the tribunal and on such copy being filed and notice thereof being served on the tribunal by the party filing the same determination or order may, subject to any right of appeal conferred by or under this Act be enforced as a decree of the Court.***

***(i) The Tribunal shall upon being served with a notice under subsection (1) of this Section and upon its own filing of such copy in the Court, transmit to the Court its record of the proceedings before it, and the same shall be filed by the Court along with the certified copy of the determination or order.***

***15(1) Any party to a reference aggrieved by any determination or order of a tribunal made therein***

*may within thirty days after the date of such determination or order appeal to the High Court.*

*Provided that the High Court may where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such condition, if any, as it may think fit.*

18. Under Sections 14 and 15 of the Landlord and Tenants (Shops, Hotels and Catering Establishments Act (Supra) orders emanating from the Tribunal may be filed in the subordinate court of the first class for purposes of adoption as a decree of the court.

19. It is not evident from the record before us that the tribunal orders of 2nd December, 2011 were filed in the subordinate court of the first class, and a decree obtained for purposes of enforcement of those orders. That notwithstanding, the application initiating the contempt of court proceedings dated 7th day of May, 2012 lodged in HCCC Misc. App. No. 151 of 2012 was predicated upon Section 5(1) of the Judicature Act (Cap 8) Laws of Kenya, Section 63 of the Civil Procedure Act Cap 21 Laws of Kenya, Order 51 of the Civil Procedure Rules 2010, Order 52 of the Supreme Court Practice Rules of the United Kingdom and all enabling provisions of the law.

22. Section 5(1) of the Judicature Act (Supra) Provides:

*“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 that power shall extend to upholding the authority and dignity of subordinate Courts.”*

The operative words in this section are:-

*“Power to punish for contempt of Court.”* The word *“Court”* has been defined by the Interpretation and General Provisions Act, Cap 2 Laws of Kenya as meaning any Court of Kenya of competent jurisdiction. The Civil Procedure Act, Cap 21 Laws of Kenya defines *“Court”* as *“Court” means the High Court or a subordinate Court, acting in the exercise of its civil jurisdiction”*

23. With regard to failure to indorse a notice of penal consequences on the extracted orders allegedly flouted by the appellants, the correct position in law has been crystallized by numerous decisions of this Court. See the case of *Ochino & another versus Okombo & 4 others [1989] KLR 165* where in this Court held *inter alia* that:-

*1. As 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.*

*2. 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.*

24. These two decisions are High Court decisions not binding on this Court, but that notwithstanding, we affirm that these state the correct position in law as we know it as regards the impact of failure or otherwise of service of the notice of penal consequence along side the order allegedly flouted. We have no hesitation in finding that the respondents admission of their failure to indorse a notice of penal consequences on the order allegedly flouted by the appellants before effecting service of these on the appellants was fatal to the subsequently initiated contempt proceedings.

25. With regard to the legal impact of the orders of *Ogolla J* in which the appellants were purportedly condemned to civil jail, it is our finding that, these orders do not hold for the reason alleged contemnor should have been personally served with the orders allegedly flouted, which orders must have been indorsed with the notice of penal consequences. In the absence of those procedural steps

having been taken by the respondents in the circumstances of our case herein, the entire contempt of court proceedings as initiated stood flawed. It is also admitted that the orders of **Mumbi J** were made in HCCA No.

661 of 2012 by a Judge of concurrent jurisdiction as **Ogolla J** and considering that the application for contempt of Court proceedings was not made in HCCA

661 of 2011 but in Misc. Application No. 151 of 2011, **Ogolla J** had no jurisdiction known to law that could have permitted him to review **Mumbi J** orders in HCCA 661 of 2011 and declare them null and void without being procedurally invited to do so either by way of an application for review in HCCA No. 661 of

2011.

**26.** Regarding the jurisdiction to award compensation and or damages to the appellants for loss of business allegedly occasioned to the appellants by the respondent as well as other orders sought in their original form such as declaring Makadara Criminal Case No. 2878 of 2012 null and void and of no consequence,

restraining the Director of Public Prosecutions from pursuing criminal charges against the appellants etc. our reaction to this request is that the same is misplaced. Our jurisdiction is donated by the Constitution and the Appellate Jurisdiction Act. Under Rule 29(1) of this Courts Rules , our duty is to revisit the record as was before the High Court and as has been placed before us, re- evaluate, re-assess and re-analyse it and arrive at our own conclusions. The path of this position is now well beaten as demonstrated by case law on our mandate assessed above. What was before the High Court was an application to

commit the appellants to civil jail for flouting the Tribunal's orders made on 2nd

December, 2011. Issues of compensation for loss of business or the other orders sought by the appellants mentioned above were never interrogated by **Ogolla J** as a component of the contempt of court proceedings. They are therefore new issues, invoking a non-existent original jurisdiction of this Court. There is no mandate for us to interrogate them. We therefore agree with the assertion of **Mr. Mugambi** that these are misplaced and we so find.

**27.** In summary, we take the view that:

(i) The respondents' failure to serve the appellants with the Tribunal's orders with an endorsement of the notice of penal consequences as required by law governing contempt of Court proceedings was fatal to the relief that Respondents had sought from **Ogolla J** of committal of the appellants to civil jail for contempt of the Tribunals' orders. The

learned trial Judge erred in holding that both personal service as well as endorsement of the notice of penal consequence was inconsequential.

(ii) **Ogolla J**, had no jurisdiction to review and declare the orders of **Mumbi**

**J** who was holding a court of concurrent jurisdiction null and void.

(iii) The request to order payment of compensation for loss of business as well as other orders mentioned is declined.

In the premises, we find merit in prayer 1 of the appellants memorandum of appeal. The decision of the Honourable **Mr. Justice E.K. O. Ogolla** given on 5th October, 2012 is set aside. Prayer 2, 3, 4 of the appellants memorandum of appeal are declined. To that extent only, the appellant's appeal is allowed with costs both on appeal and the High Court.

**Dated and delivered at Nairobi this 18th day of July, 2014.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

D/O