IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 18 OF 2009

BETWEEN

SOUTH NYANZA SUGAR COMPANY LIMITED ……..……. APPELLANT

AND

PATRICK OKELLO OBILLO ……..……..RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya at Kisii

(Gacheche, J.) dated 16th May, 2008 and delivered on 7th July, 2008

in

H.C.C.C. NO. 427 OF 1991)

****

JUDGMENT OF THE COURT

On 30th October, 1992, the respondent filed suit against the appellant seeking mainly unconditional return of one sugarcane crasher, one Lister engine, one Yamaha engine, two busseries and one packet of Mitsubishi rings. The respondent did not quantify the value of those items. He also claimed general damages for trespass, illegal seizure of properties and suffering mental anguish. The statement of defence which was filed by the appellant through M/s. G.S. Okoth & Co. Advocates was struck out and the suit was heard by way of formal proof which culminated in a judgment delivered on 28th February, 2001 by Wambilyanga J (as he then was). The following decree was issued on 9th May, 2001:

> "……..

IT IS ORDERED THAT:

1. *The defendant do return all the properties of the plaintiff confiscated [in] [namely] the sugarcane crusher, one Lister engine, one Yamaha engine and one packet of Mitsubishi rings.*

2. *The defendant do pay the plaintiff the sum of Kshs.300,000/= being general damages for trespass.*

3. *Costs of the suit [to] be taxed and or agreed and same be borne by the defendant."*

It is immediately apparent that the decree did not have an alternative remedy of payment of the value of the property confiscated.

In due course it would appear that the monetary relief was settled by the appellant but there appears to have been a problem with complying with the order to return the confiscated properties. In the event, the respondent on 16th February, 2006 lodged an application for leave to commence contempt proceedings against the appellant "**more particularly the Managing Director and Company Secretary**" for disobeying the order to return the confiscated items.

On 5th April, 2006, Bauni J (as he was) allowed the application to the extent that the respondent had leave to cite the Company Secretary for contempt.

On 10th April, 2006 the respondent, by a Notice of Motion of even date, instituted the contempt proceedings pursuant to the leave obtained on 5th April, 2006. The main reliefs sought were as follows: -

> "……..
>
> *2) That the court be pleased to cite one Gabriel Otiende, the Company Secretary of the defendant/contemnor, for contempt of court for disobeying the lawful court decree and/or order dated 8th March, 2001 ordering and/or directing the defendant/contemnor to return all properties of the plaintiff/applicant confiscated by the defendant/contemnor i.e the sugarcane crusher, one Lister engine and one packet of Mitsubishi rings.*
>
> *3) Consequent to prayer (2) herein above being granted, Gabriel Otiende the Company Secretary of the defendant's company herein, be committed to jail for a duration not exceeding six (6) months and/or such other duration as the court may deem fit and expedient.*
>
> *4) In the alternative and without prejudice, the court be pleased to grant an order of sequestration, to attach the properties of the defendant/contemnor, which properties be sold to defray the damages occasioned by the disobedience of the decree and/or order dated 8th March, 2001 by the defendant/contemnor."*

The application to cite the company secretary of the appellant was heard by Gacheche J. on 25th October, 2007 and 6th November, 2007. In a ruling delivered on 16th May, 2008 the learned Judge held as follows: -

> *"I do in the circumstances, find that SONY has acted in total disregard of an order of this court and further that it has not demonstrated that it has made efforts to purge that disobedience, for which reasons I do allow this application and grant the applicant an order for sequestration, and thereby to attach SONY's properties which properties should be sold to defray the damages occasioned by the said disobedience of orders of the court. For the avoidance of doubt, the value of the applicant's goods shall be based on his uncontroverted evidence during the trial, which evidence formed the basis of the judgment in his favour, where he demonstrated that the total value of the said goods amounted to Shs.974,100/00.*
>
> *The applicant shall also have the costs of this application."*

That decision triggered the appeal before us which has been lodged by the appellant, ***South Nyanza Sugar Company Limited*** ("SONY"). The appellant has cited some thirteen (13) grounds of appeal which were argued before us by Ms. Aron, its learned counsel. The following issues however formed the crux of the appeal:

1. *That the said order went beyond the order of Bauni J of 5th April, 2006 which granted the respondent leave to cite the appellant's company secretary for contempt.*

2. *That having abandoned the prayer citing the company secretary of the appellant for contempt, nothing remained to be determined by the court and the respondent's Notice of Motion dated 10th April, 2006 should have been dismissed.*

3. *That the order quantifying the confiscated items at Kshs.974,100/= had no basis as the same had not been pleaded.*

4. *That in any event, the appellant was not in any contempt of court and that a third party; the police had possession of the confiscated items and released, to the respondent, what they had ceased and that the appellant strived to comply with the order of the court as particularized in the replying affidavit which response was not considered before making the impugned decision.*

Counsel for the appellant argued the above issues and urged that the appeal be allowed with costs.

Mr. Ochwangi, learned counsel for the respondent, opposed the appeal and contended, on the main, that the appellant was the real contemnor operating through its company secretary and was therefore fully cognizant of the proceedings against it and fully participated therein. With regard to the figure of Kshs.974,100/= given for the confiscated items in the order of the learned Judge, counsel submitted that the same emerged during the proceedings and was not plucked from the air.

We have carefully considered the record of this matter and the various applications culminating in the application to cite the appellant's company secretary for contempt of court. We have also given due consideration to the grounds of appeal and the rival submissions of counsel.

The origin of the respondent's claim is the plaint dated 29th October, 1992 which was filed on 30th October, 1992. We have already referred to the reliefs sought in that plaint. Our perusal of the record does not show that the respondent ever sought leave to amend the said plaint nor did his counsel refer us to any order granting such leave to amend. So, the respondent's claim remained one for unconditional return of the enumerated items and for general damages for trespass. If the respondent intended to claim the value of those items, he should have specifically pleaded for the same and he would have been allowed to lead evidence thereon in order to satisfy the requirement that special damages must be pleaded specifically and be proved strictly. That proposition is now hackneyed and we need not cite any authority for the same. If one is however required we would cite the case of **Mohamed Hassan Musa & Another vs. Peter M. Mailanyi & Another Civil Appeal No. 243 of 1998 (UR)** in which this Court said:-

> **"It has been held time and again by this Court that special damages must be [specifically] pleaded and of course strictly proved."**

We therefore agree with Ms. Aron, learned counsel for the appellant, that it was not open to the learned Judge (Gacheche, J) to quantify the items confiscated, as she did, in the absence of a specific pleading of the same. It is elementary that the function of pleadings is to alert the other party of the case to meet at the trial in order to avoid surprise or ambush. In this case there was no way the appellant would have reasonably and effectively responded to the figure of Kshs.974,100/= since it came out at the hearing of the proceedings and not in the pleadings of the parties.

Besides the want of pleadings for special damages, we have also perused the order which was made by Bauni J. granting leave to the respondent to commence contempt proceedings. The learned Judge granted leave in specific terms. In his own words: -

> *"I have carefully considered the application. The applicant clearly states that the decree with a Penal Notice was served upon the company secretary. There is no indication that there was service upon the company managing director.*
>
> *In the circumstances I allow the application to the extent that the applicant is granted leave to cite the company's secretary for contempt. Such application be filed within 21 days*." (emphasis supplied.)

The order was specific that leave was being granted to cite the appellant's company secretary. It was pursuant to that leave that the respondent lodged his application dated 10th April, 2006. Although the respondent, in the said application, sought an alternative relief of sequestration to attach the appellant's properties, leave for the alternative relief had neither been sought nor granted. In the alternative relief, the respondent claimed that the appellant's properties would be sold to defray the damages occasioned by disobedience of the decree and/or order dated 8th March, 2001. The respondent did not quantify the damages to be defrayed. We accordingly agree with the appellant that the learned Judge (Gacheche J) had no basis for ordering that the appellant's properties be sequestrated and sold to recover Kshs.974,100/= as that sum had neither been sought in the contempt application nor in any other pleading. Pleadings give notice of the case which has to be met, so that the opposing party may defend himself by directing his evidence to the issues disclosed in the pleadings. A party may therefore not be condemned on a ground of which no fair notice has been given and on which his evidence has been improperly excluded (See **Esso Petroleum Company -v- Southport Corporation [1956] All ER 864** and **Plotti -v-. Acasia Company Ltd [1059] EA 248**).

The respondent's application was further compounded when, on 25th October, 2007, through his counsel, he abandoned the prayers citing the appellant's company secretary for contempt of court and committing him for the contempt. Those were the reliefs for which leave had been granted on 5th April, 2006. The substratum of the Notice of Motion dated 10th April, 2006 collapsed when the two prayers were abandoned and no other relief under the Motion on Notices in favour of the respondent could be granted. In our view, an order of sequestration was a consequential order dependent on the court citing the company secretary for contempt. The order could not stand alone in the circumstances of this case.

Contempt proceedings are in the nature of criminal proceedings because the consequences, if the proceedings succeed, can be dire. The contemnor may lose his liberty and/or his property. It is for that reason that safeguards have been put in place to ensure that a party suffers the penalties of disobedience when that party is clearly in contempt of court. We do not therefore treat lightly the appellant's complaint that it was not a party to the contempt proceedings which culminated in the order attaching its property to recover Kshs.974,100/=. The appellant's complaint is not in our view an idle one. We say so because, the order of Bauni J of 5th April, 2006 granting leave for the respondent to cite the appellant's company secretary was specific. The learned Judge gave his reasons for restricting the application. In our view the learned Judge appreciated the gravity of contempt proceedings and that is why he denied leave to cite the respondent's managing director.

The record does not show that the appellant was to be cited in its capacity as a separate legal entity for it is elementary that in law the respondent's company secretary was distinct from the appellant which has a separate and distinct legal existence. As no attempt was made to make that distinction, there was no allegation that the appellant was served with the contempt application. Indeed, it could not because no leave to cite it had been sought or obtained. We cannot over-emphasize that a party should not be condemned in contempt proceedings unless the applicant satisfactorily demonstrates that the party is indeed in contempt. The respondent did not reach that threshold.

In all those premises, we have come to the conclusion that this appeal be allowed. We do so and hereby set aside the orders made by Gacheche J dated 16th May, 2008 and substitute those orders with one dismissing the respondent's Notice of Motion dated 10th April, 2006 with costs.

The appellant shall have the costs of this appeal.

Dated and delivered at Kisumu this 24th day of May, 2013.

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

……..…….

JUDGE OF APPEAL

I certify that t his is a true copy of the original.

DEPUTY REGISTRAR