



IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 69 OF 2015

BETWEEN

RAMADHAN SALIMAPPELLANT

AND

EVANS M. MAABI T/A MURHY AUCTIONEERS..1STRESPONDENT

WINFRED WANJIKU GAITHO.....2ND RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Mombasa (Kasango, J.) dated 30th July, 2015 in Misc. Appl. No. 123 of 2015)

JUDGMENT OF THE COURT

This is one of those unfortunate cases where a litigant may feel hopeless and discouraged in the pursuit of justice by being tossed from one court to another on account of alleged want of jurisdiction. **Ramadhan Salim** “*the appellant*” was the owner of motor vehicle **Reg. No. KAX 301S**, a **mini bus** commonly known and or referred to as “*matatu*”. On 24th June 2014, he obtained from Mombasa Principal Magistrate’s Court an order restraining the respondents “*either by themselves, their agents, principals or servants from transferring, selling, disposing of, offering for sale by public auction or private treaty or alienating in any manner whatsoever*” (*sic*) the *matatu* pending the hearing and determination of a motion on notice he had taken out. That motion was expressed to be brought pursuant to **Section 3A** of the Civil Procedure Act, **Order 40** of the Civil Procedure Rules and all other enabling provisions of the law.

According to an Affidavit of Service sworn on 30th June 2014, by **Peter Simiyu**, a process server, the order, duly endorsed with a Penal Notice, was served personally upon the respondents on 27th June 2014 and they acknowledged such service. In what must have been an *interpartes* hearing of the motion or perhaps another application, further orders were issued by the same court on 5th February 2015 against the respondents directing them to forthwith and unconditionally restore to the applicant the *matatu* and specifically that the 2nd respondent do personally and at her own expense re-transfer the *matatu* from herself to the appellant within 30 days of the order. This latter order was also personally served on the respondents. However, though the said orders were served on the respondents as aforesaid, the respondents willfully ignored them and failed to comply. The *matatu* was infact transferred to a third party, one **Msafiri Naphtal** on 23rd March 2015 by the 2nd respondent.

Feeling aggrieved by the turn of events, the appellant initiated contempt of court proceedings against the respondents in the magistrate's court. In support of the application, the appellant reiterated the chronology of the events aforesaid. The respondents in answer to the application raised a preliminary objection on the grounds that the court lacked jurisdiction to entertain the application; and that the respondents had already lodged an appeal in the High Court against the orders, pursuant to which they had sought stay of those findings pending the hearing and determination of the appeal.

At the hearing of the preliminary objection **Mr. Waithera**, learned counsel for the respondents in the magistrate's court, abandoned all the other grounds and only argued the ground that the court lacked jurisdiction to entertain the application. In support thereof, counsel submitted that the magistrate's court could not invoke **Order 40** of the Civil Procedure Rules in pursuit of the application as it was subsidiary to the Judicature Act. According to counsel, only the High Court and the Court of Appeal had jurisdiction to punish for contempt as provided for in **Section 5(1)** of the Judicature Act.

Counsel for the appellant on his part argued that his application was brought under **Section 63(c)** of the Civil Procedure Act and under **Order 40 Rule 3(1)(3)** of the Civil Procedure Rules which provisions both gave the court powers to punish for contempt in the event of breach of an order of temporary injunction.

In its ruling dated 9th April 2014 upholding the preliminary objection, the court rendered itself thus:-

“In issuing an order of mandatory injunction, I delivered myself in the following words:-

The Plaintiff has also established a case for the grant of Mandatory Injunction in terms of prayer 4 of the Notice of Motion application

Clearly that order as stated herein is not purely temporary injunction but rather a Mandatory Injunction. In my humble opinion, the Plaintiff cannot therefore rely purely on provision of Section 63 (e) of the Civil Procedure Act.

This court issued an order for the return of the suit Motor Vehicle herein, that order according to the Plaintiff, was disobeyed by the Defendants who have gone ahead to transfer to a third party. Disobedience of court order calls for contempt proceedings and the court that has the power to punish in case of contempt is the High Court and Court of Appeal.

The result therefore is, that the court lacks jurisdiction to entertain the orders sought in the application dated 23rd March, 2015.

In the circumstances, I allow the preliminary objection dated 25th March, 2015 to the extent that this court lacks jurisdiction with the order as to costs” (sic)

The appellant following the queue moved to the High Court and filed **Miscellaneous Civil Application No. 123 of 2015** seeking in principal that the respondents be committed to civil jail for six months for the disobedience of the same court orders. The application was expressed to have been brought under *“Section 5(1) of the Judicature Act Cap 8 Laws of Kenya, PART 81.4 of the English Civil Procedure (Amendment No.2) Rules, 2012, Section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya and all other enabling provisions of the Law”*. The appellant in support of the application advanced the same grounds as he had in the magistrate's court.

In opposing the application, the respondents through the 2nd respondent swore a replying affidavit in which she deponed that the appellant was not the owner of the matatu and that by the time the orders were issued, she had already effected the transfer of the matatu to a third party. Accordingly, the orders had been overtaken by events by the time they were issued. Finally, she deponed that there was an appeal pending in the High Court together with an application for stay of the orders that the respondents are accused of disobeying.

The application was canvassed before **Kasango, J.** who in a ruling delivered on 30th July 2015 struck out the application. The court's sole reason for taking such drastic action was that since the order of injunction was made pursuant to **Order 40** of the Civil Procedure Rules, it is the court that issued the order, i.e. the magistrate's court in this case, that was competent to entertain the application as provided in **Order 40 Rule 3(1)** of the Civil Procedure Rules. The court therefore concluded that the appellant was before the wrong forum.

The appellant is now before this Court on an appeal against the above findings on the grounds:-

“1. THAT the learned Judge erred in law and fact by holding that the appellant sought by its application dated 25th May, 2015 a finding that the respondents have failed to obey an order of injunction made by magistrate court in Mombasa SRMCC No. 1198 of 2014.

2. THAT the learned Judge failed to direct her mind to the facts of SRMCC No. 1198 of 2014 more specifically the ruling delivered on the 9th April, 2015.

3. THAT the leaned Judge erred in law and fact by striking out with costs the appellant's application dated 25th May, 2015 on the basis that the appellant is before the wrong forum.”
(sic)

During the hearing of the appeal, **Mr. Mwadzogo**, learned counsel for the appellant submitted that the appellant's application before the High Court sought to cite and punish the respondents for breach of a specific court order issued on 5th February 2015, that was in the nature of mandatory injunction. Counsel further submitted that though both courts below held that they had no jurisdiction to punish for contempt, the High Court had the requisite jurisdiction which it declined to exercise albeit erroneously. In those circumstances counsel wondered what remedy could be available to a litigant who is tossed from one court to another on mistaken assumption that the courts lacked jurisdiction. Counsel went on to submit that this Court was clothed with jurisdiction to punish for contempt under **Section 5(1)** of the Judicature Act and therefore urged us to exercise that jurisdiction and punish the respondents for contempt.

There was no appearance for the respondents during the hearing of the appeal though they were served with the hearing notice in good time. The appeal therefore proceeded as uncontested.

To our mind the issue in this appeal that call for our determination is whether the two courts below lacked jurisdiction to punish for contempt of court in the circumstances of this case.

From its ruling on the Preliminary Objection, the trial court bought the respondents' argument that it could not invoke **Section 63(3)** of the Civil Procedure Act and **Order 40** of the Civil Procedure Rules to cite the respondents for contempt since the Act and the Rules were subsidiary to the Judicature Act. Furthermore, the court reasoned that the appellant could not also invoke the same provision of the law since the order given was not in the nature of a temporary injunction for which it had powers to punish, but a mandatory injunction. That the jurisdiction to punish for breach of a mandatory injunction lay with the High Court or the Court of Appeal as per **Section 5 (1)** of the Judicature Act.

We think at this juncture it is necessary to revisit the various types of injunctions. This Court has recently in the case of **New Ocean Transport Limited & Another v Anwar Mohamed Bayusuf Limited [2014] eKLR** expounded on the different types of injunctions. We stated:-

“We appreciate that an injunction is an order of the Court directing a party to the proceedings to do something or refrain from doing a specified act. It is granted in cases in which monetary compensation does afford an inadequate remedy to an injured party. See Halsbury's Laws of England 3rd edition, vol. 21 at pg. 343. Basically there are 2 types of injunctions; positive and negative. The positive injunction would direct a party to do something whereas a negative one will restrain such a person from doing something. Among the positive injunctions will be mandatory injunction. This injunction orders some act to be done. Part of this

family is the restorative injunction being sought by the applicants in the instant application. This type of injunction requires the person against whom it is directed to undo a wrongful act, to restore the status quo ante so that the damage does not continue. Then there is the mandatory injunction per se which compels a party to carry out some positive act to remedy a wrongful omission. As for negative injunctions, these would include prohibitory, perpetual, interlocutory and Quia Timet injunctions.” [Emphasis added]

From the foregoing, it is clear that the injunctive order given by the learned magistrate on 5th February 2015 was in the nature of mandatory injunction as it required the respondents to restore to the appellant the *matatu* and the 2nd respondent in particular to re-transfer the *matatu* to the appellant at her expense. Did the learned magistrate then have jurisdiction to cite and punish the alleged contemnors for the breach?

This Court in **Kyoga Hauliers Limited v Long Distance Truck Drivers & Allied Workers Union [2015] eKLR** held as follows:-

“The power to deal with contempt of court is provided for under Section 5(1) of the Judicature Act, Section 63(c) of the Civil Procedure Act and Order 40 Rule 31 of the Civil Procedure Rules. Of importance in the determination of this issue is however Section 5(1) of the Judicature Act, since Section 63(c) of the Civil Procedure Act and Order 40 Rule 31 of the Civil Procedure Rules are concerned with disobedience of an order of temporary injunction and resultant consequences which are punishment in the form of imprisonment or attachment and sale of the contemnor’s property.” [Emphasis added]

Similarly, in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR**, this Court, constituted differently, expressed itself as follows:-

“..... the only statutory basis of contempt of court law in so far as the Court of Appeal and the High Court are concerned is Section 5 of the Judicature Act. In addition, Section 63 (c) of the Civil Procedure Act provides that a disobedience of an order of temporary injunction will attract punishment in the form of imprisonment or attachment and sale of the contemnor’s property.” [Emphasis added]

Besides the foregoing, **Section 5(1)** of the Judicature Act provides that:-

“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.” [Emphasis provided]

From the above, it does appear that the magistrate did not have jurisdiction to entertain the contempt proceedings as he correctly held. That jurisdiction belonged to the High Court or Court of Appeal. It is instructive that when the High Court and this Court exercise that jurisdiction, it extends to the contempt committed in the subordinate court. The only jurisdiction the magistrate’s court could exercise when dealing with contempt of court is, if it is committed in the face of the court. However, the **Magistrates’ Courts Act, 2015** which came into force on 2nd January 2016 now gives the magistrate’s courts unlimited jurisdiction to punish for contempt. **Section 10** of the said Act specifically provide:-

“(1) Subject to the provisions of any other law, the Court shall have power to punish for contempt.

(2) A person who, in the face of the Court-

(a) assaults, threatens, intimidates, or insults a magistrate, court administrator, judicial officer, or a witness, during a sitting or attendance in Court, or in going to or returning from the Court;

(b) interrupts or obstructs the proceedings of the Court; or

(c) without lawful excuse disobeys an order or direction of the Court in the course of the hearing of a proceeding, commits an offence

(3) In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court.”

This innovation seems to buttress the position held by the magistrate that he did not have all encompassing jurisdiction to entertain contempt proceedings then. The prevailing law at the time of the institution of the application, was that the magistrates courts had no powers to punish for contempt.

However unlike the magistrates’ court which had no powers to punish for contempt, save when it was contempt in *facie* or there was disobedience of temporary injunction, the High Court had no such limitation. That jurisdiction is expressly provided for in **Section 5(1)** of the Judicature Act.

In the **Kyoga Hauliers case** (Supra), this Court stated as follows:-

“A plain reading of this provision leaves no doubt that the power to punish for contempt by either the High Court or this Court is dependent on how such powers is exercised by the High Court of Justice in England. This Court when dealing with this aspect in the case of Christine Wangare Gachege (supra) stated:-

“...That Court (the High Court of Justice in England) draws its jurisdiction to punish for contempt of court from both statute, namely The Contempt of Court Act, 1981 and the common law. But the procedure to be followed in commencing, prosecuting and punishing contempt of court cases was until 2012...provided for by Orders 52 Rules 1 to 4 of the Rules of the Supreme Court (RSC), made under the Supreme Court of Judicature Act, 1873...”

However, this procedure would only apply where the contempt committed was not in the face of the court. Contempt committed in the face of the court would attract summary procedure and sanctions. But when the contempt is committed otherwise than in the face of Court, the procedure for initiating such proceedings in England used to be along the same lines as initiating Judicial Review Proceedings.....”

So how did the learned Judge deal with the appellant’s application seeking to cite the respondents for contempt? The Judge stated in her ruling as follows,

“Applicant seeks by that Notice of Motion a finding that the respondents have failed to obey an order of injunction made by Magistrate’s Court in Mombasa SRMCC No. 1198 of 2014. The order of injunction, as can be seen from applicant’s exhibit “RSK2”, was made under Order 40 of the Civil Procedure Rules. When an injunction is issued under Order 40 it is the court that issues that order that is competent to hear an application of contempt when there is a disobedience of the order”.

The above passage shows that the learned Judge arrived at the erroneous conclusion that the order contravened was in the nature of temporary injunction which the magistrate’s court had jurisdiction to punish as opposed to mandatory injunction which the magistrate’s court lacked jurisdiction to punish for contempt. This is splitting hairs unnecessarily. Perhaps had the Judge appreciated the true nature and import of the orders obtained by the appellant, no doubt she would have realized that one of them was an order in the nature of mandatory injunction whose breach the magistrate’s court lacked jurisdiction to punish for contempt. It was then up to her as the High Court to entertain the application. The appellant was therefore before the right forum and his application ought to have been heard on merit. As it is therefore, the learned Judge erred in striking off the appellant’s application on account of want of jurisdiction.

In the premises, we would allow the appeal, set aside the ruling and order of the High Court striking out the application and in lieu thereof direct that the file be returned to the High Court for determination of the appellant's application on merit by a Judge other than **Kasango, J.** Much as we have concurrent jurisdiction with the High Court to punish for contempt and having been invited to do so by the appellant, we nonetheless decline that invitation so as not forestall the parties' right of appeal. In the circumstances of this case, we do not deem it right to award costs to any of the parties.

Dated and delivered at Mombasa this 26th day of February, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR